IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03281

ANTHONY BOGAN — First Plaintiff

MICHAEL THOMAS WALTON — Second Plaintiff

v

THE ESTATE OF PETER JOHN SMEDLEY (DECEASED) & ORS (according to the attached schedule) — Defendants

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JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	22 February 2022
DATE OF JUDGMENT:	26 April 2022
CASE MAY BE CITED AS:	Bogan v The Estate of Peter John Smedley (Deceased)
MEDIUM NEUTRAL CITATION:	[2022] VSC 201

GROUP PROCEEDINGS – Costs – Application for a group costs order – Costs to be calculated as a percentage of the amount of any award or settlement recovered – Judicial discretion in open-textured legislation – Principles to be applied – Whether 'appropriate or necessary to ensure that justice is done in the proceeding' – Application granted – *Supreme Court Act 1986* s 33ZDA.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr WAD Edwards with Mr DJ Fahey	Banton Group
For the First to Fourth Defendants	Ms T Spencer Bruce	Baker & McKenzie
For the Fifth Defendant	Mr J Kirk SC with Ms J Roy and Ms C Trahanas	Ashurst
The Contradictor	Mr N De Young QC with Ms K Burke	

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HIS HONOUR:

Introduction

1 Mr Anthony Bogan and Mr Michael Walton are representative plaintiffs in this group proceeding brought under Part 4A of the *Supreme Court Act 1986* (Vic) ('**Act**'). The group members are shareholders in insolvent mining company Arrium Corporation Ltd (In Liquidation) ('**Arrium**'), who claim to have suffered loss or damage by reason of the conduct of Arrium's former directors (the first to fourth defendants) and auditor, KPMG (fifth defendant).

2 The plaintiffs seek a group costs order under s 33ZDA(1)(a) of the Act, for the legal costs payable to their solicitors, Banton Group Pty Ltd ('**Banton Group**'), to be calculated as 40% of the amount of any award or settlement obtained in the proceeding. The plaintiffs also seek, under s 33ZDA(1)(b) of the Act, that they and all group members be liable to pay the legal costs at the 40% rate.

Confidentiality

3 The plaintiffs applied for leave to file and serve on the defendants, redacted versions of various documents, including affidavits, and sought confidentiality in respect of various documents, in whole or in part, in terms of r 28A.06(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

4 The confidentiality orders sought were ultimately agreed between the parties, and a consent minute recently submitted to my chambers. I will make these orders given the nature of the confidential information, some of which may be subject to legal privilege but that would, in any event, be prejudicial to the plaintiffs and group members in the proceeding, as it contains estimates of budgets of legal costs and of potential recoveries in the event of successful settlement of the matter. The plaintiffs have also provided a frank assessment of risk in establishing the liability of the defendants and the quantum of the claims in the proceeding. However, confidentiality has not been afforded to the extent that some of this material was repeated or summarised in open submissions, not subject to confidentiality requests, or where it is necessary to refer or allude to such facts to properly express my reasons on this application.

5 These reasons accordingly avoid reference to the confidential material. Rather, a confidential annexure, setting out such material as is relevant to the court's reasoning is being published to the plaintiffs and the Contradictor.

Applicable principles

6 Section 33ZDA is a recent amendment to the Act. It is a novel addition to the statutory framework for class actions in Australia, causing departure from what was, substantially, a uniform scheme. It was judicially considered by Nichols J in *Fox v Westpac* (***'Fox'***)[1] and in *Allen v G8 Education Ltd (**'Allen'**)*[2] and no party took issue with her Honour's analysis of the interpretation and operation of the section in those cases.

7 Section 33ZDA provides as follows:

> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> (2) If a group costs order is made—
>
> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
>
> (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.
>
> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).
>
> (4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).
>
> (5) In this section—

[1] [2021] VSC 573 (***'Fox'***).
[2] [2022] VSC 32 (***'Allen'***).

> ***group costs order*** means an order made under subsection (1);
>
> ***legal costs*** has the same meaning as in the Legal Profession Uniform Law (Victoria).

8 I will use the term 'resolution sum' to compendiously refer to either the amount of any award or any settlement that may be recovered in the proceeding, exclusive of costs.

9 Section 33ZDA is a law regulating, for the purpose of group proceedings, the liability to pay, and manner of calculation of, legal costs by the plaintiff and group members to the law practice representing them and the liability to pay adverse costs orders or to post security for adverse costs. Noting that a group costs order permits the calculation of legal costs in a way that requires that liability for payment of legal costs be shared by all group members (sub-s 1), such an order is, in effect, a statutory common fund order for the benefit of a law practice. There are four key features:

(a) recoverability of legal costs by the legal practice representing the plaintiff is contingent on recovery of a resolution sum (sub-s 1(a));

(b) the quantum of such costs is calculated as a percentage of that resolution sum (sub-s 1(a));

(c) the liability for the payment of legal costs is shared amongst all group members (sub-s 1(b));

(d) the plaintiff is relieved of the risk of adverse costs orders payable to a defendant and of any requirement to give security for a defendant's costs, each of which is imposed on the law practice (sub-s (2)).

10 The section introduces novel concepts. First, the financial risk incurred in a group proceeding to win a resolution sum is transferred from the representative plaintiff to the law practice. Secondly, all group members share in the liability for the legal costs incurred in winning the resolution sum. Thirdly, legal costs are calculated as a

percentage of the resolution sum recovered in the proceeding, as specified in the court's order.

11 Prior to the enactment of the section, common fund orders were invariably sought by litigation funders when seeking court approval of a settlement under s 33V of the Act and increasingly, until *BMW Australia Ltd v Brewster* ('***Brewster***'),[3] at an earlier stage of the proceeding, following the decision of the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*.[4] The status of common fund orders is a matter of some controversy, but I need not enter into that debate.[5] Alternatively, law practices could, and did, fund group proceedings by 'no win no fee' agreements ('**NWNF agreements**').

12 I have distilled the applicable principles governing the nature of an application under s 33ZDA that I will apply from Nichols J's scholarly analysis in *Fox* and in *Allen,* with which I respectfully agree.[6]

(a) The provision regulates the calculation of, and liability to pay, legal costs. A group costs order regulates the liability of the plaintiff and group members for legal costs *vis-à-vis* the law practice representing them, adopting the definition of legal costs set out in the *Legal Profession Uniform Law* (Vic).[7]

(b) The courts have the widest possible power to do what is appropriate to achieve justice in the circumstances; there is no presumptive caution in exercising the discretion to make a group costs order. Further, it is inappropriate to read down the scope of the section by implications or limitations that are not found in the express words.

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3 *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574 ('***Brewster***').

4 (2016) 245 FCR 191.

5 Ibid.

6 *Fox* (n 1) [9]–[38]; *Allen* (n 2) [15]–[31].

7 Legal costs means (a) amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services; or (b) without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person; including disbursements but not including interest.

(c) Unlike s 33ZF, s 33ZDA is not a supplementary or gap-filling power. Section 33ZF uses some of the same language but in a different context. The two provisions are distinct and serve very different purposes.

(d) A group costs order may (but not must) be put in place early in the life of a proceeding.

(e) Making a group costs order will usually effect a fundamental change in the arrangements from the initial (or present) funding model. Whether a proposed group costs order is more advantageous to group members than a present funding arrangement is not a proxy for the statutory test. The section does not necessarily require that the group costs order yield a better outcome than a counterfactual funding arrangement.

(f) Section 33ZDA permits, to the extent possible at the time of the application or on any review, that when assessing the rate for a group costs order, risk and reward are to be linked in the calculation of a group costs order. That is, the calculation of an appropriate or necessary percentage of a resolution sum to be allocated to legal costs may properly take into account not only the value of legal services performed but the value of a reasonable return to the law practice for the financial risk assumed by it. So much is evident from the contingent nature of the recovery of a resolution sum, the need for the law practice to finance its own operations, and the statutory obligation on the law practice to assume the plaintiff's risk of paying adverse costs orders and any requirement to give security for the defendant's costs.[8]

(g) Although permitting legal fees to be calculated as a percentage of a resolution sum is novel, the regulation by courts of charges made by lawyers for legal work done is not. Group costs orders are an exception to the general prohibition upon a law practice purporting to calculate legal costs by reference to the

[8] See also Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018), 63 [3.67] ('**VLRC Report**'); Explanatory Memorandum, Justice Legislation Miscellaneous Amendments Bill 2019 (Vic), clause note 5.

amount of any award or settlement or the value of any property that may be recovered.[9] Contingency fees can be contrasted with conditional billing or NWNF agreements, when legal costs only become payable to the law practice if a successful outcome is achieved in the proceeding, and such costs may include additional fees such as uplift fees.

(h) Any assessment of outcomes and whether group members will be 'better off' must be founded on predictive modelling that will be riven with significant uncertainty. In *Allen*, Nichols J observed:

> [O]utcomes-focused analysis which employs predictive modelling to demonstrate that a Group Costs Order can be expected to provide a better financial outcome to group members than another funding model may not be a particularly apposite touchstone for the question whether a Group Costs Order is appropriate or necessary to ensure that justice is done in the proceeding, particularly when the question is asked at an early stage in the proceeding. It is significant in this context that s 33ZDA is intended to be capable of operation at an early stage in the proceeding. That is not to say that an outcomes based analysis may not inform the statutory question.[10]

I will say a little more about the conceptual basis of predictive modelling and its relationship to issues of access to justice in due course.

(i) The phrase 'award or settlement' is properly construed as a reference to any principal monetary sum awarded or recovered, whether by judgment or by settlement, not inclusive of any costs awarded against the defendant in favour of the plaintiff. Nichols J observed, *obiter*, that neither the text nor the legislative context suggested that s 33ZDA was intended to displace existing laws or principles relevant to the assessment of, or taxation of, costs to be paid by an unsuccessful defendant.[11] That point does not arise in the present case either. Nevertheless, I agree with her Honour's observation.

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9 *Legal Profession Uniform Law* (Vic) s 183.

10 *Allen* (n 2) [26] (citations omitted).

11 *Fox* (n 1) [16].

(j) The purpose of ensuring 'that justice is done in the proceeding' sits in a specific context. As Nichols J explained:

> The reference in the VLRC Report to *disincentives* to a person becoming a plaintiff is a particular manifestation of the broader purpose of s 33ZDA, which was described in the second reading of the Bill introducing the provision, as enhancing access to justice in Victoria 'by reducing potential barriers to commencing class actions in the Supreme Court'. Section 33ZDA sits within Part 4A of the *Supreme Court Act* which permits and governs the conduct of group proceedings in this Court. The principal object of that part of the Act is enhancing group members' access to justice. Section 33ZDA then, builds on the existing provisions of Part 4A of the Act by conferring on the Court the power, in an appropriate case, to facilitate access to justice for group members by making a GCO, subject to the statutory pre-conditions to the exercise of the discretion being met.[12]

(k) Section 33ZDA(3) provides that a group costs order may be amended during the course of the proceedings, including by amending the percentage fixed under sub-s 1. This power of review, which is not presently relevant, is important because the context in which the terms and rate for a group costs order are appropriate or necessary may change during the life of the proceeding thereby affecting the proper consideration of where the interests of justice *vis-à-vis* the plaintiff, group members and the law practice properly lie. Throughout the course of the proceeding, particularly after achievement of a settlement, several critical integers become certain or capable of ascertainment with relative precision, notably the resolution sum, any recovery of costs from the defendant, and the quantum of the investment by the law practice in the proceeding and the extent of the risk undertaken in making that investment.

13 In *Fox* and *Allen,* Nichols J observed that the statutory language for the exercise of the discretion by the court, requires a broad, evaluative assessment:

(a) The statutory criterion for making a group costs order is open-textured. It is that the court be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding;

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12 *Fox* (n 1) [21] (emphasis in original) (citations omitted).

(b) The court is to determine what is 'appropriate or necessary to ensure', not by an idiosyncratic assessment, but in order to achieve what is 'just' in a proceeding. The words appropriate and necessary have separate work to do. 'Appropriate' means suitable, fitting or proper in the circumstances. To 'ensure' is to make certain of something, and depends on context. Likewise, 'necessary' depends on context for its precise meaning and identifies a connection between the group costs order and the purpose of ensuring that justice is done in the proceeding in the sense already described. In particular, regard is to be had to what is appropriate or necessary to enhance access to justice for group members by reducing disincentives or barriers – in respect of the fees payable to the law practice representing the group and other liabilities and obligations – that may restrict accessing justice by commencing or maintaining group proceedings;

(c) A group costs order must be construed in the factual context of the particular application, but the following general principles apply:

(i) The statutory criterion permits of a range of meanings and is capable of satisfaction in myriad ways;

(ii) The court should carry out a broad, evaluative assessment of whether a group costs order is appropriate or necessary to ensure that justice is done in the proceeding and is in terms that are reasonably adapted to that purpose;

(iii) In making that evaluative assessment the interests of group members are a primary consideration. The court must be astute to protect the interests of group members;

(iv) Price, or the costs that group members are likely to pay, is a relevant consideration, but not the only consideration; and

(v) Although the phrase 'justice is done in the proceeding' has been construed in the context of s 33ZF to require that any order made pursuant to that power must be fair and equitable, ordinarily involving a consideration of the position of all parties, because the subject matter of s 33ZDA concerns, *inter alia*, the liability of group members to pay the legal costs of the representative plaintiff, the context for other parties in the proceeding to participate in the application is narrow such that the legitimate interest of a defendant in an application for a group costs order will be confined. Defendants have put submissions to the court on each application for a group costs order so far determined and have been permitted to do so on the basis that whether a defendant has a legitimate interest in the application is a question to be decided on a case by case basis.

14 To her Honour's list I would add that the financial viability of both the existing funding agreements and the proposed funding arrangement by a group costs order are relevant considerations. In some circumstances, and this application is an example, both the existing and the proposed financial arrangements need to be considered. The prospect of termination of the existing funding arrangement directly affects the viability of the proceeding, while the arrangements by which the law practice proposes to bear or share the financial risk are critical to the financial viability of the proposed group costs order and, thus, a relevant consideration.

15 Considerations of proportionality and reasonableness will assist in answering the statutory question when it comes to setting a percentage rate. In this context, it is, I think, desirable to make some observations about the proper conceptual basis for identifying a proportionate and reasonable return to an investor (a law practice) in litigation because, self-evidently, access to justice by the mechanism of a group costs order will not be on offer if funds cannot be attracted to this form of investment, but rather flow to alternate investments offering an appropriate return for risk undertaken. Necessarily, as I noted, any assessment of outcomes becomes an exercise

in predictive modelling, but that is not to say that careful modelling that makes allowance for uncertainty will always prove inapposite. To the contrary, it lies at the heart of prudent investment decisions in respect of high risk activities.

16 Although a body of case law has developed in the context of settlement approval applications under s 33V to which resort has been had for want of a better alternative, there are generally accepted investment and insurance principles ('**investment evaluation principles**') that enable a prudent investor to identify whether a fair and reasonable return can be earned from a prospective investment, in this case an investment in financing litigation. There is a sound approach to adopt when determining the fair and reasonable return to an investor in litigation, in this case the law practice, and the opportunity to earn that return is a relevant consideration when assessing whether justice is being done in a proceeding in the context of a group costs order, that is, as between the law practice and group members. Conversely, it is proportionate and reasonable for the fair cost of realising the resolution sum to be borne by those entitled to that sum.

17 The process of setting a group costs order in the first place and of review of it under s 33 ZDA(3) would be significantly assisted if the basis on which a group costs order is initially sought is understood by reference to a record of a rational and principled assessment process.

18 That did not occur in this case, or the earlier cases. I accept that the power is novel and the statute does not offer the applicant detailed assistance, which may explain why neither the law practice nor the funder revealed the workings of an investment evaluation analysis. Notwithstanding that an analysis on evidence is not open on this application, I propose to briefly traverse investment evaluation principles in the expectation that in future cases such an analysis will be presented to the court – plainly it will be confidential – or its absence explained.[13]

[13] Nichols J has similarly identified the utility of such an analysis: see *Fox* (n 1) [145]–[148]; *Allen* (n 2) [91].

19 The prudent law practice seeks the return of the capital it invests together with a fair and reasonable return for its use. Some of this capital will be committed by being invested or expended, for example the opportunity cost of the legal professionals engaged, disbursements paid, including any insurance premiums or the costs of bank guarantees or similar. The relevant factors underpinning the level of return include whether the capital is invested, held (notionally or physically) for amounts potentially at risk, or is depleted to cover costs and expenses specifically attributable to the investment.

20 At the first level, the investor seeks the return of the capital invested, which, for a law practice, will be investment of the type I have described. At the next level, an investor seeks a fair and reasonable return for the use of the capital invested. An investment decision also requires assessment of the time horizon over which the capital is invested or is subject to risk, as well as the level of the risk undertaken over that period. The potential rate of return grows with an increase in risk, and the investor makes an assessment about the suitability or desirability of a particular investment at the time it is entered into, notwithstanding that subsequent events will determine the actual investment returns.

21 The concept of insurance is relevant to contingencies, such as the obligation to indemnify against adverse costs orders should such orders ultimately be made. An entity may pay a premium to an insurer to take the risk of the occurrence of a particular event causing loss. The insurer determines a premium based upon a calculation of the risk of loss, the 'expected' amount of any loss, the insurer's expenses and its reasonable profit. Again, the higher the level of risk and loss, the greater the premium, assessed prospectively at the time an insurance contract is made. Subsequent events will determine the actual level of any insurance payout.

22 A law practice may identify an investment return commensurate with the risk taken of exposure to a loss (or potential loss) beyond the capital invested. That risk might be insured against, in which case the insurance premium is effectively a reduction in capital or a negative cashflow, reducing the return on capital. Alternatively, if self-

insuring, the law practice puts its notional capital at risk and accordingly should allow for an appropriate investment return, equivalent to that insurance premium.

23 The best estimate of loss must be established to then identify risk and profit margin.

24 The core principle is that the greater the risk the capital is subject to, the greater the return required by an investor over the time horizon. Risk is the level of uncertainty of outcome. For a law practice, the core risks are:

(a) no settlement can be reached and the plaintiff's claims fail at trial;

(b) the law practice is required to bear the legal costs and disbursements without compensation;

(c) a proportion of legal costs and disbursements may not be paid by any other party but remain the obligation of the law practice;

(d) the law practice may lose capital applied to its obligation to post security for costs;

(e) the law practice may be liable for the legal costs and disbursements of the defendants;

(f) disappointed expectations as to the income or capital return actually received by the resolution sum; and

(g) variability in anticipated timing of the receipt of the resolution sum.

25 These risks may be mitigated (for example, by insurance), or capped (where the law practice is undercapitalised). A law practice will decide to invest capital in litigation funding based on their risk appetite, which is determined by their investment objectives. It is both fair and reasonable for a law practice to seek a risk premium, which is the expected return on investment in excess of the risk-free rate of return (government bonds). Investments with greater volatility of returns indicate risk and require higher risk premiums. The risk premium has two components:

(a) a pure risk premium, arising from the risk of failure in the litigation and loss of the investment made in it and also the risk arising from the uncertainty of the future level of profits after recovery of capital, (i.e. judgment for the defendant, insolvency, inadequate insurance cover, etc); and

(b) the illiquidity premium, arising from the lack or inability to withdraw capital invested in the litigation at the time of one's choosing.

26 An appropriate rate of return for a particular investment by a law practice can be assessed by expert evidence as to the rate of return obtainable in the market by insurers, private equity, and venture capital. Two principled methods for decision making in respect of such investment decisions may be noted:

(a) the internal rate of return: the average compound annual rate of return on an investment, allowing for all cashflows invested and received by the investor, and the exact timing of those cashflows; or

(b) return on investment: the calculation of the total amount of money received as net positive cash flows over the life of the investment, e.g. profits after expenses, and/or the capital growth in value (the growth only), divided by the total amount of capital invested, both at the start and during the investment period.

Because complex litigation has an extended investment time frame, the internal rate of return may be a preferred methodology.

27 Different aspects of the modelling require different levels of return, which will depend on the risk factors and applicable time line for the particular litigation in question. This is likely to be a matter for evidence. But to illustrate the concept, the notional insurance premium may be in the range of 16–26% of capital at risk for legal fees and disbursements and 5–15% of capital at risk for adverse costs and related security. It is the uncertainty in the predictive modelling in respect of complex litigation that will usually result in such an investment being equated with a venture capital investment

where higher returns by way of profit margin, 20–30%, are required in order to attract capital. Again, evidence of returns in the market place is likely to identify appropriate percentages.

28 The approach of investors to assessing the potential of investments differs markedly from the statutory approach of fixing a percentage of an undetermined resolution sum. That approach for determining a reasonable rate of return for a law practice is inconsistent with investment evaluation principles. Assessing risk versus return on capital invested and at risk over a time frame can rise above speculation when careful assessments of future expectations are made. It is the final step of converting the law practice's reasonable and proportionate expectation of a return of and on its investment into a percentage of an unknown sum that is most fraught. This exposes the conceptual difficulty with the statutory task. Conversely, given that it is both reasonable and necessary that group members pay a reasonable return to a funder for generating the resolution sum in which they will share, such an analysis ought to be, and if, available will be a significant consideration in exercising the broad evaluative assessment to ensure that justice is done in the proceeding.

29 In approval of settlements under s 33V of the Act, assessment of the proportionality and reasonableness of a litigation funder's return on investment is a different task, because at settlement many factors in the assessment become certain. An *ex ante* assessment in the context of a group costs order by reference to these principles replicates the process of assessment that drives the key initial investment decision of private equity or of venture capitalists. It is principled, not speculative. The return being sought from group members should be based on some principled assessment that can be recorded and, if it be in the interests of justice to do so, later adjusted as factors in the assessment that were estimated become certain events.

30 Before turning to the present circumstances, one further observation that I made in a different context can be noted. In *Bolitho v Banksia Securities Ltd (No 18) (remitter)*, I said:

> It is fundamental that the assessment by a court of a fair and reasonable return for a litigation funder more naturally emerges from the inputs specific to the litigation funder — primarily the level of funding, and promise of funding, that it provides and the period of exposure to risk — than a denominator applied to the settlement or judgment sum. A necessary consequence of accepting this relationship between the court's role in the proper administration of justice, when assessing what is fair and reasonable, and a fair commercial return for a funder, is that real difficulties are presented for the proper administration of justice by the ex-ante assessment of a percentage of an unknown sum to be received at an undetermined future time. The settlement sum, gross or net of costs, is uncertain until case completion, and can vary enormously. This can result in extremely wide and potentially excessive and inequitable returns on what the litigation funder actually invested or put at risk. The litigation funder and the lead plaintiff owe an overarching obligation under s 24 of the *Civil Procedure Act* to ensure that legal costs and all other costs incurred in connection with a group proceeding are reasonable and proportionate.[14]

In time, these considerations will be properly raised before a court for determination.

Plaintiffs' application

31 The plaintiffs submitted that it is appropriate and/or necessary to make a group costs order at a rate of 40% (GST inclusive). Such an order would ensure justice is done in this proceeding because it would be in the best interests of group members. This is because:

(a) It will provide certainty to the plaintiffs and group members that the proceeding will continue;

(b) It will ensure that the costs of prosecuting the proceeding are fairly distributed among all group members, while giving certainty to the percentage net return to group members;

(c) It provides group members with simplicity and transparency;

(d) The order is sought in a wholly different context to that considered (and rejected) by the court in *Fox*;[15] and

(e) The proposed rate of 40% of any award or settlement sum is appropriate at this point in time having regard to the particular circumstances of this case.

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14 [2021] VSC 666, [1966].

15 (n 1).

32 The plaintiffs maintained that this application sought to change the existing funding arrangements for this proceeding. The existing arrangements were put in place many years ago, when the litigation funder contemplated building a book sufficient to render an equalisation order economic, which did not happen, or to seek a common fund order, which has now become legally uncertain after the High Court's decision in *Brewster*.[16] Given the complex and expensive nature of the case, the funder will not continue funding on the current arrangements, but would agree to co-funding it with the plaintiffs' solicitors if a group costs order at the proposed rate is obtained.

33 The rate sought, 40%, is lower than the existing agreed funding commission rate. This would allow the proceeding to continue with a certain and stable funding base, allowing for an outcome that is better than any reasonably available alternative.

34 The application was principally supported by three affidavits affirmed by Ms Amanda Banton and an affidavit from Mr Paul Lindholm.

35 Amanda Banton is a director of Banton Group, and solicitor of record for the plaintiffs. She has 18 years of experience as a legal practitioner, with significant experience in insolvency, restructuring, commercial litigation and large representative legal proceedings, including complex class actions. She is the founder of Banton Group, a law firm primarily specialising in, among other things, large commercial dispute resolution and group proceedings. Ms Banton has acted in many matters where the client has obtained third party litigation funding to pay the costs of the proceedings and indemnify for adverse costs order. This includes cases where the client has obtained 'After the Event' insurance to protect them against risk of an averse costs order with the premium paid by the funder.

36 Prior to founding Banton Group in March 2020, Ms Banton was a partner at Squire Patton Boggs (AU) ('**SPB**').

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[16] (n 3).

Relevant circumstances

37 This proceeding arises out of the collapse of Arrium Limited ('**Arrium**'), a company listed on the Australian Stock Exchange ('**ASX**') until 2019. Arrium carried on business as a mining, mining consumables, and steel company, with recycling operations. It was placed into voluntary administration in April 2016 and liquidation in June 2019.

38 The group members are the shareholders of Arrium who acquired an interest in Arrium shares between 19 August 2014 and 4 April 2016, and who suffered loss or damage by reason of the alleged misconduct of the defendants. The defendants fall into two categories, four former directors of Arrium, and Arrium's former auditor, KPMG.

39 In December 2017, SPB was retained by the plaintiffs to investigate a potential claim against the former directors and auditors of Arrium. In March 2018, a notice to shareholders was posted on the SPB website and the firm received many enquiries from shareholders, who were in turn sent a funding pack with further information and a copy of the funding agreement.

40 The representative plaintiffs, while desiring to obtain redress in respect of any claims they may have arising out of the collapse of Arrium, were unable or unwilling to commence proceedings in respect of any such claims in the absence of litigation funding, and would be unwilling to act as lead plaintiffs in a class action absent an indemnity against adverse costs exposure. They did not have either the means to finance the legal costs that are likely to be incurred in prosecuting such claims, or the means to satisfy, let alone the willingness to be exposed to, the risk of adverse costs orders of the magnitude that would be likely if claims brought on their behalf arising out of the collapse of Arrium were unsuccessful.

41 Initially Ms Banton proposed that examinations be conducted under the *Corporations Act 2001* (Cth) ('***Corporations Act***') to determine any claim that might be brought. In late 2017, she contacted Paul Lindholm at Atrax Pty Ltd ('**Atrax**') seeking litigation funding. Mr Lindholm also has extensive litigation funding experience, being involved in the management of over 50 funded cases internationally, over 20 years.

Mr Lindholm was unable to secure an agreement by either a joint venture or a syndicated funding arrangement with other potential litigation funders.

42 In May 2018, the plaintiffs entered into a litigation funding agreement with Equite Capital No. 1 Pty Ltd ('**Funder**'), a litigation funder based in Singapore. Atrax is the Funder's agent.

43 The funding agreement provided, relevantly, that:

(a) The Funder, in consultation with any representative or litigation committee, shall give the day-to-day instructions to the lawyers for the conduct of the proceedings, and for any amendment, discontinuance, settlement or appeal.

(b) The Funder will pay all legal costs and disbursements of the plaintiffs reasonably incurred by and payable to Banton Group in accordance with the retainer, including in respect of counsel, including any preliminary costs prior to the date of the agreement, and regardless of whether approved by the court; the costs of any expert engaged in connection with the preparation and prosecution of the proceedings; and any costs order the court makes in the proceedings against any funded person in favour of the defendants and other parties, insofar as the costs were incurred during the term of the agreement.

(c) The lawyers will be paid directly by the Funder on behalf of the plaintiffs upon tax invoices being rendered by the lawyers to the Funder.

(d) In addition to funding assistance, the Funder will provide management services during the term of the agreement, including considering the advice of Banton Group and providing day-to-day instructions, creating and seeking compliance with legal budgets and the budgets provided under terms of the retainer, and providing investigative or other assistance to Banton Group as and when needed.

(e) Upon resolution, the plaintiffs will pay to the Funder from the resolution sum the plaintiffs' common costs share, being the plaintiffs' pro rata share of the

legal costs incurred in respect of the common benefit work; the plaintiffs' individual costs, being legal costs incurred in respect of individual benefit work in respect of the plaintiffs' claim; the plaintiffs' appeal costs share, being the plaintiffs' pro rata share of the appeal costs; and a funder's commission, being the plaintiffs' pro rata share of the Funder's commission.

(f) Clause 13 is presently relevant. The Funder can terminate the agreement at any time at its absolute discretion on the provision of 7 days' written notice to the claimant. If terminated, the Funder will not be obliged to pay any future costs but termination will not affect any accrued obligation in respect of costs incurred prior to the date of termination and the Funder will still be allowed to recover any payments made from any resolution sum. The plaintiffs may also terminate, subject to an acknowledgment that the Funder should be fairly remunerated for any continuing benefit owed under the agreement, and in certain specified circumstances (e.g. a serious breach by the Funder, if the claimant gives written notice to the Funder, opts out of the class action, fails to register, makes an individual settlement, or refuses to accept the group settlement).

(g) Costs under the agreement means legal costs and includes disbursements, professional fees and disbursements incurred by the lawyers prior to the claimant's execution of the agreement but in contemplation of possible proceedings of the kind or class including the claimant's claims, regardless of whether approved by the court.

(h) The Funder's commission is 25% of the resolution sum, if the resolution is within 6 months with spend less than $500,000; 30% if resolution is in 12 months with spend less than $1,500,000; 35% if within 18 months with spend less than $2,000,000; or 45% for all other outcomes.

44 Presently under this funding agreement, the Funder has accrued an entitlement to receive from the gross resolution sum reimbursement of legal costs and a funder's

commission of 45% (calculated as a percentage of the gross resolution sum), which burden is to be shared by all funded members according to their pro rata share.

45 The funding agreement contemplates funding being used for investigations prior to the issue of proceedings, which included *Corporations Act* examinations as Ms Banton intended. This approach was warranted by the complexity of the claims to be made in the proceeding, and resulted in a substantial spend on legal costs and disbursements prior to the issue of proceedings, notwithstanding that examinations are yet to be conducted.

46 In January 2020, conduct of the proposed proceeding transferred from SPB to Banton Group. By that time, 272 group members had entered into the funding agreement (whether directly or through an institutional investor service) with the Funder ('**funded group members**').

47 The retainer with Banton Group provides that Banton Group's interim invoices are to be addressed to the plaintiffs, care of the Funder, and will be paid by the Funder. The lead plaintiffs will be charged professional fees on a time basis at specified hourly rates, which rates may change during the course of the matter, as well as for disbursements. Costs retainers were issued in accordance with the cost disclosure obligations in New South Wales in anticipation of the proceeding being commenced there, and then revised once the plaintiffs determined to issue the proceeding out of this court.

48 Mr Lindholm deposed that when the Funder entered into the funding agreement, it did not contemplate that the funding agreement would be determinative of the funding commission because it contemplated seeking a common fund order or a costs equalisation order, preferring a common fund order because, based on his previous experience in other similar insolvency cases, the class book build would be poor.

49 The writ was issued on 14 August 2020, almost six years after the first events that are the subject of the proceeding, preserving the rights of the plaintiffs and group members from limitation, although it was not served until November 2020. The

plaintiffs filed a funding information summary statement and a class action summary statement alerting potential group members to the funding agreement and the fact that the Supreme Court of Victoria had recently been given the power to make a group costs order that would fix a percentage of the amount of any award or settlement to be paid to Banton Group.

50 The plaintiffs alleged that the director defendants contravened ss 1041E and/or 1041H of the *Corporations Act,* s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('***ASIC Act***'), and/or s 18 of the *Australian Consumer Law*, by making, maintaining and/or failing to qualify opinions and representations made in announcements and documents lodged by Arrium on the ASX. In particular, that Arrium failed to properly impair the value of certain assets in the 2014 and 2015 financial years in accordance with AASB136, despite the existence of certain impairment indicators, resulting in a material overstatement of the value of Arrium's assets in statements made to the ASX in those financial years. As a result of this failure, the defendants misrepresented to the ASX that Arrium's financial statements were prepared in compliance with Australian Accounting Standards and/or the *Corporations Act* and gave a true and fair view of Arrium's financial position and financial performance during the relevant period in various respects.

51 Pleadings have closed but discovery is substantially uncompleted.

52 The plaintiffs submitted that the Funder's intention to seek a common fund order was now infected with uncertainty. Notwithstanding the High Court's judgment in *Brewster*, there was judicial support for common fund orders sought at the end of proceedings.[17] However, there were also decisions to the contrary.[18]

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17 For example, on 17 January 2020, Murphy J left in place at settlement the early common fund order he had made in *Pearson v State of Queensland (No 2)* [2020] FCA 619. On 4 May 2020, in *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579, Moshinsky J said that the High Court's judgment is to be read as favouring the making of funding equalisation orders over common fund orders at the end of proceedings, although his Honour did not reach a concluded view: at [72]. On 13 May 2020, Murphy J made a settlement common fund order in *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647.

18 On 1 April 2020, in *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637, Foster J rejected an application for a settlement common fund order, finding that the views expressed by the majority of justices of the

53 During October to November 2020, the Funder recommended to the plaintiffs that service of the claim should await the outcome of two decisions in the NSW Court of Appeal and Full Court of the Federal Court,[19] on the basis that these decisions may provide clarity about the court's power to make a common fund order and thus support the Funder's preference, but the decisions ultimately did not do so. Banton Group then effected service of the writ.

54 The plaintiffs submitted that the obvious inference is that the Funder was looking for some comfort as to the availability of a common fund order at or before the end of proceedings. While it was prepared to advance funding for a period, it was reserving its position concerning the overall commerciality of the proceedings. Under cl 13 of the funding agreement it is entitled to do so.

55 On the basis of affidavits from Ms Banton affirmed 21 February 2022 and Mr Lindholm affirmed 18 February 2022, I am satisfied that the Funder undertakes a process of assessing the viability of the proceeding that is ongoing. The Funder's viability assessment includes reference to the following criteria (amongst others):

(a) the Funder's assessment of the prospects of the claim;

(b) the value of funds that will flow to the Funder if the claim is successful;

(c) the costs that will be borne by the Funder if the claim is unsuccessful;

(d) the likely recoverability of any settlement or judgment award; and

(e) the risk that otherwise exists to the Funder in funding the proceedings.

These assessments are made on the basis of the available information at any given time and are not necessarily always formally recorded.

High Court in *Brewster* were consistent with the proposition that courts do not have the power to make a common fund order at any time in a proceeding, including at the end.

19 *Brewster v BMW Australia Ltd* [2020] NSWCA 272; *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2021) 281 FCR 501.

56 Other developments relevant to risk assessment may be noted. Between around April 2018 and late 2019 three other proceedings against various directors of Arrium were commenced.

(a) First, proceedings were commenced by a number of original lenders, and assignees of lenders, to the Arrium group in the Supreme Court of New South Wales ('**Anchorage proceedings**');

(b) Proceedings commenced by the liquidators of Arrium in the Supreme Court of New South Wales seeking financial compensation against various directors of Arrium for insolvent trading ('**Liquidators' proceedings**'); and

(c) Proceedings by some further lenders against the Arrium group, also in the Supreme Court of New South Wales ('**BoC proceedings**').

57 In or around mid-2021, the Liquidators' proceedings settled and the Anchorage proceedings and the BoC proceedings were dismissed by the Supreme Court of New South Wales. Counsel informed me during the hearing of the application that indemnity costs may have been awarded. The impact of these proceedings on the group proceeding, particularly in respect of recovery risks, is presently uncertain, although inroads into the available insurance cover seem likely.

58 In mid-2019, the plaintiffs applied for examination summonses and orders for production against some directors of Arrium and KPMG. Arrium contested the applications which, while initially successful, were denied by the New South Wales Court of Appeal in July 2020. An application to the High Court of Australia for special leave to appeal succeeded. The appeal was allowed and the orders for the examination and production reinstated in January 2022. That process remains ongoing.

59 For the reasons set out in the confidential annexure, I am satisfied that the Funder is acting commercially and responsibly in assessing the continued viability of funding the proceeding and the prospect of exercising its right to terminate the funding agreement in the light of these events.

60 Mr Lindholm supported the plaintiffs' instructions to Banton Group to file an application for a group costs order because, if granted, a group costs order will provide a greater degree of certainty as to the return available to the Funder than the alternative which is affected by the uncertainty surrounding the availability of a common fund order. I was not persuaded that the true purpose of the group costs order application is for the Funder to obtain a group costs order to which it is not otherwise entitled.

61 In early 2021, the plaintiffs instructed Banton Group to make an application for a group costs order to attempt to secure a more certain funding outcome for the proceeding. On 1 February 2021, Banton Group offered to enter into a conditional cost agreement with the plaintiffs, subject to obtaining a group costs order. The offer provided:

(a) Banton Group's legal costs and disbursements will be calculated in terms of the group costs order at 40% of the resolution sum;

(b) Banton Group will be liable for any costs payable to the defendants;

(c) Banton Group will give any security for the defendants' costs;

(d) The application for the group costs order will be at a rate up to 45% of any resolution sum recovered in the proceedings;

(e) If the group costs order is made, Banton Group intends to finance its participation in the proceeding by an agreement with the Funder. Banton Group will be responsible for any amounts due under any financing agreement and will make such payments from the amount it receives pursuant to the group costs order.

62 In the present application, the plaintiffs seek a group costs order at a rate of 40% of any resolution sum recovered in these proceedings. If successful, Banton Group intends to enter into a costs sharing agreement with the Funder. The key terms proposed are:

(a) The Funder will pay 50% of Banton Group's costs calculated at their usual hourly rates and 100% of disbursements;

(b) Banton Group will pay 50% of any payment it receives pursuant to the group costs order to the Funder, after deducting the costs paid by the Funder, and after Banton Group is paid the outstanding 50% of its fees;

(c) The parties acknowledge that after a group costs order is obtained, Banton Group will be required to indemnify the representative plaintiffs or provide an undertaking to pay any adverse costs orders against them;

(d) The Funder will pay any adverse costs that Banton Group has to pay on behalf of the representative plaintiffs, pursuant to Banton Group's indemnity or undertaking;

(e) If security for costs is ordered, the Funder will provide 100% of the total amount of security ordered by way of an after-the-event insurance policy;

(f) The proceedings are to be conducted in accordance with the Project Costs Budget, with the ability to vary the budget by agreement or a pre-determined mechanism.

63 Ms Banton confirmed that Banton Group will enter into the proposed costs sharing agreement if the court approves a 40% group costs order rate, and only in that case, and that this will supersede the retainer. The Funder has notified Banton Group that it will also enter into the agreement and, on this basis, will not seek to enforce its rights under the original funding agreement. Initially the Funder did not state whether it will agree to the new arrangement if an order for less than 40% is made and the Contradictor was rightly critical of this prevarication. I am persuaded on the basis of the further affidavits filed that are discussed in the confidential annexure that there is a significant risk that if the group costs order rate is less than 40%, the plaintiffs will lose the benefit of any funding for the proceeding

64 Mr Lindholm has confirmed that this is the Funder's intention that should a group costs order be granted at the rate sought, the Funder will enter into the proposed costs sharing agreement with Banton Group containing the key commercial terms that are described in his affidavit 'and will not seek to enforce any rights it has or may have pursuant to the funding agreement with funding group members, or otherwise at law or in equity in respect of the funding of the proceeding (and will give an undertaking to that effect).' Accordingly, it will follow that the group costs order will govern all costs and litigation funding charges in respect of the proceeding in substitution for the rights and obligations that presently exist under the funding agreement. Although the matters stated in this paragraph are drawn from a confidential affidavit, this issue is central to my reasoning and will be reflected in the final order. As such, what I have just stated must be excepted from continuing confidentiality.

65 The plaintiffs submitted that what Banton Group effectively seeks to do, is negotiate a new funding arrangement to which the existing Funder will commit, that would put the proceeding on a stable base of funding, and avoid the risk of the Funder entirely abandoning the proceeding, and the delay and uncertainty associated with looking for an alternative funder in those circumstances. The availability of this new arrangement depends on the court being satisfied that the 40% group costs order rate is appropriate.

66 Ms Banton's evidence drew a comparison between the group costs order the plaintiffs seek in this application and alternative types of orders that required unfunded group members to contribute to the costs of the proceedings. The major comparator is a common fund order. The evidence in respect of this comparison is set out in the confidential annexure.

67 Ms Banton submitted that where courts have made common fund orders in the past, they have not necessarily made such orders at the rate specified by the funder in its funding agreement, but rather assessed what rate provided a reasonable remuneration to a funder having regard to the costs incurred, and risk assumed, by

the funder in the circumstances of the actual case, taking into account actual and putative market rates at the time the risk was assumed and other comparative data.

68 The other comparative type of contribution order is an equalisation order. This would spread the amount the funded group members have agreed to bear over all group members.

69 Anthony Bogan, the first plaintiff, deposed in an affidavit that it is important to him that the significant uncertainty as to the continuation of the proceeding be removed and that group members are given greater certainty as to any deductions from the resolution sum.

70 The plaintiffs relied on an affidavit of economist Gregory John Houston. Mr Houston summarised the combined historical litigation funding commissions and approved legal costs and disbursements as a proportion of settlement or award, in both class actions generally and then in shareholder class actions in particular. He concluded that the median combined costs proportion in class actions was 47% and the mean 46%, with a range of 15 to 72%. Shareholder class actions similarly had a median of 46%, mean of 44%, and ranged between 15 to 69%.

71 Given the limited sample size for this analysis – he drew data from publicly available judgments and reports – I would not regard this as expert evidence as it did not require specialised knowledge. This information could have been compiled as a schedule to submissions put together by a smart junior from decided cases.

72 An 'aide memoir' the plaintiffs supplied prior to hearing set out the most relevant data points from Mr Houston's evidence. There were 10 pertinent class actions, being those involving shareholders of an insolvent company, one of which was only a partial settlement. The average proportion of award/settlement that went to approved legal costs and funding commission combined was 55%, with a range of 47 to 67% (the partial settlement figure was 37%). The wide ranging values and small sample size severely restricts the relevance of this data when determining the appropriate rate to be approved in this proceeding. At its highest, the range or mean figure provides, in

some broad sense, a check on the figure otherwise being assessed or claimed. During the hearing, counsel for the plaintiffs accepted the limited value of this evidence.

The Contradictor's position

73 The Contradictor opposed the group costs order on the basis of a 40% rate, indicating that they might support a group costs order at a lower rate, and were critical of the quality of the plaintiffs' evidence.

74 The Contradictor contended in its written submission that the evidence adduced by the plaintiffs did not provide a sufficient basis for the court's discretion under s 33ZDA to make the group costs order sought. The plaintiffs had not identified the circumstances which led to the proceeding, having been commenced under Part 4A of the Act, becoming unviable without a group costs order. The Contradictor contended that there were a number of shortcomings in the plaintiffs' evidence that there is a real and significant risk the Funder will terminate the existing funding agreement without a group costs order. There was no direct evidence from the Funder, only hearsay and non-specific explanations from Ms Banton; the evidence was only that is 'is possible' the Funder would terminate; and there was no evidence of the Funder's actual assessment of the viability of the action.

75 The Contradictor questioned the chronology of events, submitting that the Funder's assessment of the viability of the proceeding was undertaken based on the existing funding agreements, including the risk of not obtaining a common fund order and the un-commerciality of a funding equalisation order. The viability risks relied on by the plaintiffs existed two years ago, in a different jurisdiction where no group costs order regime existed and before the Victorian provisions were enacted.

76 There was no evidence as to what changed in the assessment. Although the Funder contemplated building a book sufficient to render an equalisation order economic and that there was a high volume of enquiries from shareholders, only 272 have entered into the funding agreement. There is insufficient evidence about the book building efforts. There is also no evidence about what the Funder considers makes a proceeding

commercial or economically viable, nor is there evidence of attempts to seek alternative funding.

77 I pause here to observe that were the Funder to terminate the funding agreement pursuant to cl 13, the Funder retains the right to recover the legal fees and disbursements it has already paid. In circumstances where the interests of any alternate funder would be deferred until the Funder had recovered its expenses, it is unlikely that an alternate funder would be attracted to the investment. As the risk profile for any further funder is exacerbated in the circumstances, it is likely that alternate funder would expect a higher return.

78 The Contradictor also maintained that the plaintiffs' preliminary estimate of damages was unsatisfactory, being from an unidentified damages consultant. The nature and extent of work undertaken was also absent. Stating the case is complex, difficult and expensive does not assist the court because that could be said of any group proceeding – it is conclusionary and based on speculative assumptions and would need to be much more detailed to be given substantial weight.

79 These submissions were meritorious when made. Had the plaintiffs not filed further affidavits there would have been much force in these submissions. But they motivated the plaintiffs to address the quality of their supporting evidence and to file and rely on further affidavits.

80 Most of the content of these further affidavits, which included direct evidence from a representative of the Funder through Mr Lindholm's affidavit, is confidential and is set out in the confidential annexure to these reasons. Nevertheless, I can point out that:

(a) Mr Paul Lindholm, in his capacity as director of Atrax, the agent for the Funder in Australia, provided detailed evidence about the basis on which the Funder agreed to fund the proceedings and why it would not commit to the continuation of funding on current arrangements but would commit to providing finance via a costs sharing agreement with Banton Group should the group costs order be granted.

(b) The crux of Mr Lindholm's evidence for this application was that there has always been some doubt on the part of the Funder since its commencement as to the commerciality of funding the proceeding, which remained under constant review. The claim was issued to address limitation periods before *Corporations Act* examinations were conducted or significant access to documents obtained; it was served several months later due to the plaintiffs' wishes, while reserving the Funder's ability to terminate the funding agreement if the proceeding failed a viability assessment. Several events since commencement have heightened the Funder's sensitivity to risk associated with the common fund orders.

(c) Mr Lindholm's affidavit explained the criteria considered by the Funder as part of the viability assessment performed for the ongoing funding of the proceeding and the relevance of the 40% figure.

(d) Mr Lindholm confirmed that if the group costs order is not ordered at the rate sought there is a significant risk that the Funder will terminate the funding arrangement and that alternative funding will not be available.

81 The plaintiffs submitted that the evidence is sufficient to satisfy the court that the risk to the viability of the funding of the proceeding is substantial.

82 Ms Banton provided further evidence of her attempts to secure alternative funding, why this Funder in particular may be most appropriate for this proceeding, a more detailed account of her assessment of the risk of the litigation and of work performed thus far, a more in-depth assessment of anticipated damages in the proceeding, and an explanation of book building efforts.

83 The plaintiffs contended that the Contradictor's submissions that the group costs order rate should be assessed against a common fund rate of 30% was an inapt comparison. It ignored the fact that with a common fund order the plaintiffs' costs incurred in prosecuting the proceeding will be borne by the group members in addition to any funder's commission or fee, by an assessment usually made when

there is much greater certainty about the constituent components in the assessment. The reasonable costs incurred in prosecuting the proceeding will be deducted from any resolution sum on top of any common fund order should such an order be made, if the usual approach of courts to assessing the question, prior to *Brewster*, is to serve as a guide. As I have noted, on the one hand the expenses of the legal costs and disbursements are an essential integer in a principled assessment of the reasonable return on investment for a litigation funder and thus a consideration in exercising the statutory power, while on the other hand, how that expenditure is reimbursed as between the parties to the proceeding will vary between an all-in settlement sum and assessable costs orders.

The plaintiffs' submissions for the proposed group costs order

84 The plaintiffs submitted that the group costs order was appropriate and/or necessary for the following reasons:

(a) It would ensure the continuation of the proceeding.

(i) There is a real and significant risk the Funder will cease funding the proceeding without the group costs order.

(ii) Section 33ZDA was designed to enhance access to justice for group members by reducing potential barriers to commencing class actions.[20]

(b) Costs would be fairly distributed among all group members, while giving certainty to the percentage net return for group members.

(c) Common fund orders were historically made to avoid the unfairness and injustice of free riders in the group proceeding,[21] but whether the court has the

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20 Citing *Fox* (n 1) [21], quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4586, 4590. See also the VLRC Report (n 8), in response to which s 33ZDA was introduced:

> Class actions are an appropriate forum for lawyers to absorb the risks of litigation and be rewarded for this, because the representative plaintiff has a disproportionate exposure to the financial risk of an unfavourable outcome, compared to both the value of their own claim and the exposure of other class members. The risk is a significant disincentive to taking on the role and is only partly mitigated when lawyers act on a 'no win, no fee' basis.

21 *Botsman v Bolitho* (2018) 57 VR 68, 113–14 [216].

power to make such an order is not settled. If it did have the power, it would consider the assessment of litigation risk, the quantum of adverse costs exposure assumed by the funder, the legal costs expended, a comparison of the funding commission against what is available or common in the market, and the amount of any settlement or judgment.[22] In doing so, the court would need to separately consider whether the commission sought should be subject to the common fund, and whether the legal costs were appropriately incurred and benefitted group members. The Funder would, in that case, be incentivised to apply for the highest possible funding rate justifiable, especially given that the funding agreement contemplated a 45% rate (a contemporaneous market price for the risk), not including legal costs. If the court also concluded that the legal costs were appropriately incurred, then the fact that the two together consume a large proportion of any resolution sum, would not provide a basis for reducing either amount. A group costs order provides certainty as to both the maximum percentage deduction from the resolution sum of legal costs and funding commission — and that those funds will be fairly distributed.

(d) The combined total of legal costs and funding commission on a common fund basis at the rate of 30% of the gross resolution sum or above (as suggested by the Contradictor) would result in a materially worse outcome to group members than the group costs order being sought. Given the anticipated costs of the proceeding, it is only if either an unrealistically high award were achieved, or a very low common fund order percentage allowed, that this would not be the case.

(e) There are scenarios in which the Funder applying for a common fund order at the end of the proceedings could be better for group members than the group costs order, including that an equalisation order might be made instead. However, the chance of a materially better outcome must be weighed against the risk of a materially worse outcome. If those were equally weighed, the

[22] Ibid 114–15 [218]. See the continued application of these principles in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, 630–1 [21]–[22].

certainty achieved in granting this order and removing any risk is in the interests of the plaintiffs and group members. The risk of a materially worse outcome follows on the Funder's anticipated decision to withdraw from funding the proceeding on the basis that it is not economically viable to continue to do so by the existing funding agreement well before the Funder could seek a common fund order.

(f) The group costs order would provide transparency and simplicity.

(i) It removes the contractual relationship between the Funder and plaintiffs in favour of court control. It also introduces a direct contract with only Banton Group and not with the Funder, with only one gross percentage rate for any costs. Banton Group will assume any risk of an adverse costs order and security for costs, as far as the plaintiffs and group members are concerned. The Funder then does not have a right to direct the conduct of the proceedings. The group costs order would align the interests of Banton Group with the plaintiffs, minimising inefficiencies and delays.

(ii) The calculation and quantum of the deduction is certain.

(iii) There is no risk or uncertainty as to a later common fund order.

85 The plaintiffs submitted that the application may be distinguished from *Fox* on the basis that:

(a) The plaintiffs in this case do not have a NWNF agreement;

(b) This is a shareholder class action which is funded by a third party litigation funder – the predominant funding model for these types of actions in Australia;

(c) The predictive modelling relied on by the plaintiffs in *Fox* to show that group members would be better off under the proposed group costs order was

uncertain and unsatisfactory.[23] In this case, the plaintiffs do not seek to prove that they and the group members would be better off by reason of the group costs order. Instead, the focus of the modelling is worst-case outcomes and the plaintiffs submitted that the court can be satisfied on the basis of that modelling that the certainty the group costs order provides is itself a significant benefit, including because it avoids a large number of worse outcomes.

The 40% rate

86 The plaintiffs also argued that the 40% rate was appropriate because it is reasonable and proportionate to the risks assumed by Banton Group in funding the proceeding. Ms Banton's evidence showed that Banton Group is exposed to significant risks in conducting and funding the proceeding, including significant disbursements (experts and counsel) and the risk of an adverse costs order. The Funder's assessment of risk, as recorded in the original funding agreement, was that it warranted a 45% funding commission.

87 They also contended that the proposed rate is reasonable and proportionate when compared to the market for third party funding commissions in shareholder class actions. In *Fox*, submitted the plaintiffs, Nichols J accepted that a comparative analysis against third party funding commissions provided a meaningful indicator of the reasonableness of the proposed rate.[24] Mr Houston found that the median commission rate in shareholder class actions was 24%, without legal costs. When those were included, the median net return to group members was 54%, which is lower than the 60% return achieved by the proposed group costs order.

88 Ms Banton's evidence, and that of Mr Lindholm, was that a group costs order rate of less than 40% would not be commercially viable. Only a 40% rate can ensure the continued funding of the proceeding.

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23 *Fox* (n 1) [8(e)].

24 Ibid [165].

89 Finally, the plaintiffs note that there is a safeguard in that the court does retain the power to re-consider the appropriateness of the rate at a later stage if necessary under s 33ZDA(3) of the Act.

Contradictor's submissions

90 The Contradictor submitted the court 'will have regard to what is appropriate or necessary to ensure justice in the proceeding in respect of the fees payable to the law practice representing the group' and must necessarily consider whether a 40% commission rate is proportionate to the risk assumed by the legal practice in funding the proceeding, noting that the court has the power to amend the commission rate throughout the life of the group costs order. Relevant to this issue is the assessment of risk by the practitioners involved and of the funding commission rates offered in the market. I have already dealt with the latter part of this submission.

91 The Contradictor submitted that the thrust of the plaintiffs' application, that a group costs order would enable the continued viability of the proceeding, is not necessarily a relevant consideration under ss 33ZDA, a question not decided in *Fox*.[25]

92 I reject this submission. As *Fox* made clear, and as is set out earlier in these reasons, while s 33ZDA might be similarly worded to s 33ZF of the cognate Part IVA of the *Federal Court of Australia Act 1976* (Cth), the language is deployed in a very different context. The two sections are plainly distinct and serve very different purposes.[26] The extrinsic material referred to supports the fact that the legislature recognised continuation of an existing proceeding, much like the commencement of a new one, as enhancing access to justice. I consider that the magnitude of the risk that a proceeding may be terminated or discontinued for want of funding without any adjudication on its merits to be a highly relevant consideration to whether a group costs order is appropriate or necessary to ensure that justice is done in the proceeding.

93 As I have noted, the purpose of s 33ZDA is to confer on the court the power to affect the manner in which legal costs in the proceeding are calculated and funded. This is

25 *Fox* (n 1) [27].
26 Ibid.

central to the question of whether a proceeding can and will viably provide the opportunity for group members to seek vindication of their rights. Enabling a law practice to charge contingency fees in representative proceedings, can promote access to justice by removing the disincentive to representative plaintiffs of disproportionate exposure to financial risk compared to the value of their own claim, to reduce costs to group members by having a single fee, and to provide transparency and simplicity.[27]

94 Although the Contradictor accepted that the group costs order would provide greater certainty to group members about their return and the fair distribution of any resolution sum, they submitted that the court is not in a position to form a view about the prospects of a common fund order in the future. The Contradictor submitted there is no evidence as to why there is a benefit in having such certainty now, and that there will be scenarios in which a common fund order would result in a better net return for group members.

95 This is not a relevant consideration. Whether a group costs order is appropriate or necessary to ensure that justice is done in the proceeding must be determined on the basis of the information before the court on the application. Speculation about uncertain future events is both unnecessary and undesirable, particularly in light of the court's power under s 33ZDA(3). Moreover, there is evidence that there is a benefit in having such certainty now. It will avoid the risk that the plaintiffs will lose all funding of the proceeding that will eventuate if the Funder exercises its rights under cl 13 of the funding agreement.

96 Finally, the Contradictor challenged whether the 40% commission rate sought was appropriate, submitting that while the plaintiffs' solicitors will be exposed to significant costs risks, this factor does not show the particular rate is appropriate. In addition, the proposed group costs order rate of 40% should also be assessed against a funding commission range between 30–45%, not just the 45% agreed rate, because if the Funder does not terminate the funding agreement, it will seek a common fund

[27] See Explanatory Memorandum, Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) 2, confirming these reasons. See also the second reading speech for the Bill: Victoria *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4589.

order at the time of settlement of at least 30%. Mr Houston's report, while a convenient way of collecting historical information, is not admissible as a matter of expert opinion. In *Fox*, the same evidence was used to justify a group costs order rate of 25% and so it is not probative on the question of the appropriateness of the proposed rate, which will turn on the facts of this case.

97 Most of the problems raised by the Contradictor about the evidentiary basis of the group costs order application, including the appropriateness of the 40% figure, were addressed by further affidavits filed by the plaintiffs, as set out above.

Defendants' objections

98 KPMG acknowledged its limited role in respect of the group costs order, but nevertheless submitted that the group costs order being sought was more a common fund order than a group costs order and should be assessed in that light. That this was so was evident, it submitted, from the continued involvement of the Funder through the costs sharing agreement.

99 I do not accept that submission. Banton Group's arrangement with the Funder to split the risk of funding the proceeding, while broadly relevant to the exercise of the discretion in respect of whether to make a group costs order and what percentage to fix,[28] does not transform the application into a funder's application for a common fund order, contrary to *Brewster*.

100 It is not correct, as KPMG contended, that Banton Group is accepting very little actual risk. There is no support in the statute for KPMG's proposition that 'a proposal which directs the *majority* of the risk away from the solicitor, and allows the litigation funders backdoor access to early CFOs, does not conform to the intentions of the legislation'. The arrangement in this case is not one where the law practice is acting as a 'mere front' for a third party funder.[29]

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28 *Fox* (n 1) [83].

29 Ibid.

101 The statutory language does not invoke any inquiry into the means by which the law practice chooses to fund its obligations. A group costs order would result in the Funder having no direct agreement with the plaintiffs and group members and Banton Group would be liable for the costs of the proceeding. Whatever further funding arrangement Banton Group enters into does not change the fundamental inquiry for the court. KPMG conceded that a solicitor is permitted to enter into other transactions to defray its risk. This is a commonplace commercial practice. The broad relevance of the arrangements between the law practice and another entity participating in funding the litigation in some way, is that by reference to the costs sharing arrangement, the plaintiffs demonstrate that in circumstances where the initial funding agreement may not prove viable, a group costs order can be regarded as a viable option for the continued financial support for the plaintiffs in the proceeding. It is also relevant for the funding law practice to show the court that funding the proceeding by a group costs order is viable.

102 KPMG also doubted, based on the evidence available to it, that sufficient steps had been taken to secure alternative funding and therefore whether any arrangements between the solicitor and the Funder could represent a reliable insight into market conditions for litigation funding. I reject this contention for the reasons already identified.

103 KPMG supported the Contradictor's submission, already rejected, which it reframed as follows: there is no inherent virtue in the continued prosecution of the proceedings and that this should not weigh in favour of granting a group costs order. It submitted it is inappropriate for the solicitor and Funder to hold the threat of the Funder's withdrawal *in terrorem* over the court if they are not each assured of equally sharing the fruits of a group costs order. I do not accept this characterisation of the circumstances.

104 Finally KPMG argued strongly for an inference that the proceeding was commenced in Victoria only for the purpose of securing a group costs order. The natural forum for the matter is New South Wales. It is inappropriate to order a group costs order in such

circumstances as it would then be used as an anchor to resist KPMG's application to transfer the proceeding to New South Wales.

Analysis

105 Having duly considered the parties' submissions and the matters set out in the confidential annexure, I have reached the following conclusions on the evidence.

(a) If a group costs order is not made at all, there is a considerable risk, indeed a probability, that the Funder will conclude that the funding agreement is not financially viable for it and it will not continue to fund the proceeding, exercising its rights under cl 13. This is, in my view, a critical consideration.

(b) Likewise, if a group costs order is made but at a lesser rate than 40%, there is also a considerable risk that the Funder will not enter into the proposed costs sharing agreement with Banton Group. The proposed costs agreement between Banton Group and the plaintiffs is conditional on a successful application for a group costs order at a 40% rate to replace the existing agreement. It is also conditional on financial support for Banton Group from the Funder by the mechanism of the proposed costs sharing agreement. I am not persuaded that Banton Group will consider it to be commercially viable to continue acting for the plaintiffs on the basis of the group costs order at a lesser rate or without the Funder's cost sharing support.

(c) I am persuaded that there are significant impediments to engaging an alternate funder at this stage and I am satisfied that an alternate funder is not a realistic prospect should the Funder terminate the funding agreement.

(d) If the proceeding is not viably funded, the representative plaintiffs will be unable to continue with the proceeding and it is probable that it will terminate without adjudication or other resolution on the merits.

(e) Justice cannot be done in the proceeding if the plaintiffs and group members are not able to pursue their claims through the proceeding and must abandon them.

(f) I accept that should a group costs order be granted at the rate sought, Banton Group will be bound to conduct the proceeding for the representative plaintiffs and group members in accordance with the terms of the conditional costs agreement and the group costs order.

(g) I accept the Funder's statement through Mr Lindholm that should a group costs order be granted at the rate sought, the Funder will enter into the proposed costs sharing agreement containing the key commercial terms that are described in his affidavit with Banton Group 'and will not seek to enforce any rights it has or may have pursuant to the funding agreement with funding group members, or otherwise at law or in equity in respect of the funding of the proceeding (and will give an undertaking to that effect)'. I will require that the undertaking be given to the court.

(h) Accordingly, it will follow that the group costs order will govern all costs and litigation funding charges in respect of the proceeding in substitution for the rights and obligations that presently exist under the funding agreement.

(i) I am satisfied that the proceeding is complex and difficult and is likely to consume time and resources. A successful outcome for the plaintiffs and group members is attended by risk, not just in terms of establishing liability and proving losses but also in terms of recovery of any judgment that might be won, the nature and extent of which is further discussed in the confidential annexure. It will be necessary for Banton Group to invest considerable resources in the litigation over an extended period. Those resources will be at risk. It is reasonable and proportionate in these circumstances that the share of any resolution sum payable to the law practice is commensurate with the risk profile that is more particularly identified in the confidential annexure. The court must be mindful that funding for complex litigation competes with funding for other sorts of ventures and that the returns expected for undertaking these risks are determined by market forces. Likewise, group members must appreciate that the costs and risks involved in winning

compensation for their claims in such cases are unavoidable and they must accept responsibility for a reasonable and proportionate share of those costs and risks.

(j) I accept that the rate claimed of 40% is, taking all considerations into account as best I can for the purposes of a broad evaluative judgment, within the range that might be identified by a principled feasibility assessment, which the court cannot properly complete on the material before it.

(k) The group costs order appears commercially viable because the law practice will be supported by the proposed costs sharing agreement with the Funder. There was no evidence of the financial strength of the law practice, although I can infer from what it is not prepared to accept, that the financial position of Banton Group is not such as will enable it to fully fund the litigation from its own resources. Each of the law practice and the Funder has stated to the court that at the rate sought, that viability is reasonably anticipated.

(l) I also take account of the benefits that group members will receive although the effect of the group costs order will be to limit their collective return to 60% of a resolution sum. Those benefits include:

(i) Transparency and simplicity;

(ii) A certain funding structure for the preparation and prosecution of their claims to mediation or to trial;

(iii) The opportunity to present their claims for resolution on their merits, avoiding a substantial risk that under the present arrangements consideration of their claims on their merits is, at the least, uncertain, but in all likelihood may be thwarted;

(iv) An equal sharing of the costs and burden of the preparation and prosecution of their claims across all group members;

(v) From the perspective of group members costs are capped at a set share of any resolution sum, meaning the representative plaintiffs need not be concerned to monitor costs and disbursements to avoid unexpected blow-outs;

(vi) Relief from the obligation to provide any security for costs that may be ordered;

(vii) Relief from exposure to the contingent liability to pay adverse costs orders in favour of the defendants; and

(viii) The opportunity, should circumstances change, to seek review of the group costs order, which review will be governed by the overriding interest of the court to ensure the proper administration of justice through the proceeding.

Conclusion

106 The group costs order sought by the plaintiffs is suitable or fitting in the circumstances of this proceeding and in that sense it is appropriate to do justice in the proceeding. It is also necessary to do justice in the proceeding between group members *inter se* and between group members and the law practice by reducing disincentives or barriers in the form of the legal costs and disbursement payable to the law practice representing the group and other liabilities and obligations arising out of the proceeding that may restrict access to justice compromising the capacity of the representative plaintiffs to maintain the proceeding. However, the group costs order will be subject to a condition precedent, that the Funder forgo any accrued rights under the funding agreement.

107 I will invite the plaintiffs' counsel to submit a minute of an order reflecting my reasons. I will hear counsel on the question of costs, but subject to any submissions that any party may wish to make, I will order that the plaintiffs pay the Contradictor's costs of the application.

SCHEDULE OF PARTIES

S ECI 2020 03281

BETWEEN:

ANTHONY BOGAN	First Plaintiff
MICHAEL THOMAS WALTON	Second Plaintiff
-and-	
THE ESTATE OF PETER JOHN SMEDLEY DECEASED	First Defendant
ANDREW GERARD ROBERTS	Second Defendant
PETER GRAEME NANKERVIS	Third Defendant
JEREMY CHARLES ROY MAYCOCK	Fourth Defendant
KPMG (A FIRM) ABN 51 194 660 183	Fifth Defendant