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

Not Restricted

S ECI 2020 04339

PAUL ALLEN — First Plaintiff

MONIKA ALLEN — Second Plaintiff

v

G8 EDUCATION LIMITED (ACN 115 832 963) — Defendant

JUDGE:	NICHOLS J
WHERE HELD:	Melbourne
DATE OF RULING:	6 June 2022 (on the papers)
CASE MAY BE CITED AS:	Allen v G8 Education Ltd (no 3)
MEDIUM NEUTRAL CITATION:	[2022] VSC 302

COSTS – Group proceedings – Successful application for a Group Costs Order under s 33ZDA of the *Supreme Court Act 1986* – Indemnity principle considered – Identification of the "event" which costs are to follow on an application for a Group Costs Order – Where defendant made only confined submissions and otherwise neutral to the application – Fairness considerations in according costs – Plaintiff to bear own costs and defendant's costs reserved.

WRITTEN SUBMISSIONS:	Counsel	Solicitors
For the Plaintiffs		Slater and Gordon
For the Defendant	RG Craig QC with HC Whitwell	MinterEllison

HER HONOUR:

1 This is a group proceeding issued under Part 4A of the *Supreme Court Act 1986* (Vic) (the **Act**). On the plaintiffs' application heard on 26 November 2021 I made a Group Costs Order (**GCO**) pursuant to s 33ZDA of the Act, in the following terms:

> 1. The legal costs payable to the solicitors for the plaintiff and group members, Slater and Gordon Lawyers, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, that percentage being 27.5% inclusive of GST (subject to further order); and
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> 2. Liability for payment of the legal costs pursuant to paragraph 1 be shared among the plaintiff and all group members.[1]

2 This Ruling concerns the costs of the application.

3 The plaintiffs submitted that the parties' costs of the plaintiffs' application should be costs in the proceeding for these reasons:

(a) They have succeeded in their application for a Group Costs Order. In describing their success they said that "the contradictor, who opposed the application, was unsuccessful", and while the defendant did not formally indicate a position on the application, it was heard on the application and made submissions in opposition to the arguments advanced by the plaintiffs.

(b) However, the outcome of the application should not *determine* the appropriate costs order (from which submission I infer that the outcome of the application should, however, *inform* the appropriate costs disposition). In respect of this application, which was interlocutory, the Court is not in a position to know where the justice lies between the parties in respect of the Group Costs Order.[2] The result is that the parties' costs of the GCO application should be costs in the proceeding which will have the effect that those costs will follow the event.

(c) The "event" will be the disposition of the proceeding itself. The resolution of the method by which the costs of the plaintiffs and group members are to be calculated and how liability in respect of those costs will arise, was resolved by

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1 See *Allen v G8 Education Ltd* [2022] VSC 32 (7 February 2022) (**Principal Reasons**).

2 See *Dale v Clayton Utz (No 3)* [2013] VSC 593, [13] (***Dale***); *Setka v Abbott (No 2)* [2013] VSCA 376, [27].

the making of the Group Costs Order. The gravamen of the submission was that those matters are not discrete from the proceeding but are fundamental to it. In support of that proposition the plaintiffs submitted that:

(i) The making of an application for a Group Costs Order is an "ordinary step in the proceeding" – it is a step towards securing the plaintiffs' desired mechanism for funding and allocating risk in the proceeding.

(ii) It is a step which may only be taken by an interlocutory application pursuant to s 33ZDA, meaning that costs can only be calculated in the manner permitted by s 33ZDA if the court makes such an order, having been satisfied the order is appropriate or necessary to ensure that justice is done in the proceeding.

(iii) To make an application for a Group Costs Order is to take a step "on behalf of group members and for their benefit".

(iv) In numerous instances the Federal Court has ordered in representative proceedings that costs of interlocutory applications concerning common fund orders or multiple overlapping proceedings be costs in the cause. By equivalent reasoning the costs expended in connection with an application for a Group Costs Order should be regarded as an incident of the proceeding itself.

(d) The costs of a Contradictor are a necessary incident of the application, which should follow the "event" of the proceeding. I have previously ordered that the plaintiffs' lawyers bear the costs of the Contradictor (whom I appointed to appear and make submissions on the application) in the first instance, with the result that no further order is required *at this time*.

4 The defendant submits that the plaintiffs should bear their own costs of and incidental to the application, that the defendant's costs of and incidental to the application should be reserved, and that the plaintiffs' solicitors should pay the costs of the

Contractor. The defendant said that:

(a) The Group Costs Order was made in circumstances in which the plaintiffs' lawyers had already committed to funding the proceeding on a "no win no fee" basis and the crux of the application was to seek to amend the funding arrangement in a statutorily permissible way.

(b) The defendant made only very brief submissions on the application. It sought to supplement two discrete issues that had already arisen between the plaintiffs and the Contradictor and in respect of which G8 had a direct interest (the question of a stay of proceedings and the termination of the costs agreement). There is nothing to suggest that any of the costs the plaintiffs incurred in responding to G8's brief supplementary submissions were more than a very small proportion of the plaintiffs' overall costs of and incidental to the application. It would not be just, in those circumstances, to order that G8 pay the plaintiffs' costs of and incidental to the GCO application – either now or should the plaintiffs ultimately succeed in the proceeding.

(c) Requiring G8 to pay the plaintiffs' costs if the plaintiffs ultimately succeed in the proceeding would be the effect of an order that the parties' costs of and incidental to the GCO application be costs in the proceeding. That would not be just because G8 would be paying costs in circumstances in which it properly confined its contribution to those costs and took positions consistent with its obligations under the *Civil Procedure Act 2010* (Vic).

(d) The defendant did not press for a contradictor and it is not just in the circumstances that the defendant should have to pay the Contradictor's costs.

(e) The defendants' costs should be reserved so that if it successfully defends the proceeding it is awarded costs of and incidental to the application by operation of rule 63.22 of the *Supreme Court (General Civil Procedure) Rules 2015* because, in that scenario, they are costs that G8 ought never to have incurred.

5 Although the ordinary principles governing the award of costs are well understood, it is helpful to set them out briefly:

(a) The power to award costs is in the Court's discretion, which must be exercised judicially and in accordance with principle.[3]

(b) The ordinary rule is that costs follow the event. That rule is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. It recognises that if the litigation had not been brought or defended by the unsuccessful party, the successful party would not have incurred the expense which it did.[4] In this way the indemnity principle is compensatory in nature: costs are awarded to indemnify the successful party against the expense to which they have been put by reason of the legal proceedings.[5]

(c) Where one party has clearly succeeded the discretion will ordinarily be exercised in accordance with the guiding principle that cost follow the event.[6] Conduct on the part of a successful party in relation to the litigation may provide a reason to depart from the ordinary rule.

(d) Rule 63.20 of the *Supreme Court (General Civil Procedure) Rules 2015* sets out the default position that costs of an interlocutory application are costs in the proceeding unless the Court otherwise orders. That rule reflects the fact that interlocutory applications do not usually result in the final determination of the proceeding, with the result that the Court will not be in a position to assess where the justice lies between the parties until the conclusion of the proceeding.[7] Section 24 of the Act confirms that the Court retains a broad discretion concerning costs and may depart from the default position in an appropriate case.

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3 *Northern Territory v Sangare* (2019) 265 CLR 164, [24]-[25] (***Sangare***).
4 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 96-97 [66]-[67].
5 *Latoudis v Casey* (1990) 170 CLR 534, 543 (Mason CJ).
6 *Sangare*, [24]-[25].
7 *Dale* [13]; *Sangare*, [24]-[25].

(e) The "event" may be contestable, and the contest usually arises where there is a multiplicity of issues upon which the parties have enjoyed mixed success.[8] In the present case (costs following a Group Costs Order), the identification of the "event" requires interrogation. In *Australian Receivables v Tekitu* (a case requiring the resolution of multiple issues) Ward J set out the principles that guide the determination of the event in this way:[9]

> The first question, therefore, is as to what (for the purposes of that general rule) is the "event". The need carefully to determine the relevant "event" in a case involving multiple issues was recognised in *Owners Strata Plan No 64970 v Austruc Constructions Ltd (in liq) (No 5)* [2010] NSWSC 568, by Bergin CJ in Eq.
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> The English Court of Appeal in *Roache v News Group Newspapers* [1992] TLR 551, as cited by the Queensland Court of Appeal in *Timms v Clift* [1998] 2 Qd R 100, usefully posed the question as to who is to be seen as the successful party "in the event" as being a question as to:
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>> … who, as a matter of substance and reality, had won? **Had the plaintiff won anything of value or anything he could not have won without fighting the action through to a finish? Had the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win**?…
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> **The exercise of the court's discretion as to costs ultimately requires an assessment of what is fair in all the circumstances**. In *Bowen Investments Pty Ltd v TAB Corp Holdings Ltd (No 2)* [2008] FCAFC 107 Finkelstein and Gordon JJ said (at [5]):
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>> Costs are in the court's discretion. Fairness should dictate how that discretion is to be exercised. So, if an issue by issue approach will produce a result that is fairer than the traditional rule, it should be applied.

(f) The analysis in *Australian Receivables* illuminates two propositions: first, that inherent in a compensatory award of costs is recognition of the fact that the successful party has had to engage in a contest against the opposing party in order to obtain what has been won. Secondly, the question is ultimately one of fairness.

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8 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs & Citizenship* (2013) 251 CLR 322, [241] (Kiefel and Keane JJ).

9 *Australia Receivables Ltd v Tekitu Pty Ltd (Subject to Deed of Company Arrangement) (Deed Administrators Appointed)* [2011] NSWSC 1425 at [24]–[26], [60], emphasis added.

(g) The "fairness" inquiry also permits of consideration of responsibility for the incurring of costs. In *Commonwealth of Australia v Gretton*[10] Beazley JA said:

> One question which arose was whether the determination as to who should pay the costs was dependent upon which party should be seen as being responsible for the ongoing legal costs in the matter. **This was part of a consideration of the larger question as to the underlying juridical basis of the Court's powers to award costs. I agree with Hodgson JA that the exercise of the discretion must be based on fairness and that underlying that concept itself involves a consideration of the responsibility of parties in incurring the costs**. As the cases also illustrate, a wide variety of circumstances fall for consideration where costs orders (other than costs follow the event) are sought. Those circumstances are not confined to cases involving *Calderbank* offers and include cases where the costs of a particular issue is in question. However, the concern in this case is with *Calderbank* offers and it is that upon which attention needs to be focussed.

Similarly, Hodgson JA said, concurring:[11]

> In my opinion, underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs. **Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant's responsibility because the plaintiff was caused to incur costs by the defendant's failure otherwise to accord to the plaintiff that to which the plaintiff was entitled**; while if a defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the plaintiff was not entitled: cf *Ohn v Walton* (1995) 36 NSWLR 77 at 79 per Gleeson CJ. Departures from the general rule that costs follow the event are broadly based on a similar approach.

6 Both parties' submissions implicitly recognised that applying otherwise well-established principle to the novel context presented by the application for a Group Costs Order is less than straightforward. The plaintiffs acknowledged the limitation of the win/loss paradigm, fastening instead on the proposition that the application ought be regarded as an inherent part of the proceeding, so much so that the "event" for costs purposes will be the outcome of the proceeding itself. The defendant focused on the lack of fairness inherent in an order that may see it ultimately responsible for the incurring of costs that they played no appreciable part in causing.

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10 [2008] NSWCA 117, [85], emphasis added.

11 Ibid [121], emphasis added.

7 I consider that, in this case, the appropriate disposition is that the plaintiffs bear their own costs of and incidental to their application for a Group Costs Order. I have taken that view for the following reasons.

8 It is correct and indeed obvious to say that there is an essential connection between the making of a Group Costs Order and the proceeding in which it is made. The statutory criterion for the exercise of power to make a Group Costs Order is that the Court is satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding. The purpose of s 33ZDA[12] may be broadly described in the terms expressed in the second reading of the Bill introducing the provision, namely, to enhance access to justice by reducing potential barriers to commencing class actions in the Supreme Court of Victoria.[13] Section 33ZDA sits within Part 4A of the Act, which permits and governs the conduct of group proceedings in this Court. The principal object of that Part is enhancing group members' access to justice.[14] The plaintiffs correctly said that a Group Costs Order cannot be obtained unless it is sought by the plaintiff bringing an application in the proceeding. At a high level it might be

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12 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 cost 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 –
Group Costs Order means an order made under subsection (1);
legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

13 Victoria, Parliamentary Debates, Legislative Assembly, 28 November 2019 at 4586, 4590.

14 *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 [21] (***Fox/Crawford***), as cited by John Dixon J in *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, [12]-[13] (***Bogan***).

said that but for the proceeding, by which the plaintiffs seek to vindicate their rights and those of group members, the making of an application for a Group Costs Order would have been unnecessary. Again, this is an obvious point.

9 However, that is not the only relevant consideration informing the question of costs. It will be recalled that, as discussed in *Fox/Crawford*, s 33ZDA is a law regulating the calculation of, and liability to pay, legal costs; more specifically, it is concerned with the liability of the plaintiff and group members to pay the law practice representing them. It addresses and links three things, namely, how legal costs may be calculated when a proceeding is funded as contemplated by s 33ZDA (as a percentage of the award or settlement recovered in the proceeding, as specified in the Court's order); who shares in the liability for the costs of having brought the proceeding, when a recovery is made (the plaintiff and all group members); and who bears the financial risks of bringing a group proceeding (the law practice representing the plaintiff and group members).[15] As I said in *Fox/Crawford*, s 33ZDA is concerned only with the liability of the plaintiff and group members to pay the law practice representing them. One implication of that fact is that the provision does not directly or on its face concern the defendants; it is *prima facie* a law directed to matters on the plaintiff's side of the record as it were, subject to the provision that if in particular circumstances a Group Costs Order were likely to unjustly affect the interests of the defendant, it could not be said to be an Order the making of which was "appropriate or necessary to ensure that justice is done in the proceeding".[16]

10 The plaintiffs sought the Group Costs Order in this case in order, as they put it, *to secure the plaintiffs' desired mechanism for funding and allocating risk in this proceeding*. In that sense, the resolution of the application for a GCO was undoubtedly connected with the proceeding. However, the costs that the plaintiffs expended in order to obtain the GCO were not, in any real sense, expended in a contest with the defendant.

11 In different circumstances the contest might have taken on the complexion of an *inter-*

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[15] *Fox/Crawford*, [12]-[15], and as cited in *Bogan*, [12].
[16] *Fox/Crawford*, [15]; Principal Reasons [11].

partes dispute, notwithstanding the essential character of s 33ZDA as concerning the manner in which the plaintiff funds its action. It is not uncommon in class actions for parties to take tactical positions. This was not a case, for example, in which the defendant sought to oppose the plaintiffs' chosen funding mechanism with a view to stymying the proceeding.

12 As set out in the Principal Reasons, the defendant did not oppose the application, but took issue with two aspects of the plaintiffs' submissions.[17] I appointed a Contradictor who submitted that I should refuse the application.[18] The defendant contested the proposition that in the event a GCO were refused the plaintiff might obtain a stay of the proceedings while alternative funding was put in place, submitting that there would be no principled basis for the grant of a stay on that basis. It also disputed the contention that Slater and Gordon would be at liberty to terminate its existing retainer agreement in the event that a GCO were not made and third party funding not obtained. It did not submit that the resolution of those questions should determine the outcome of this application. As I said in the Principal Reasons, the defendant's targeted approach to the issues informing the application was constructive and helpful. Although it was unnecessary to decide the issues raised by the defendant, they were not without merit. They were issues in respect of which the defendant had a legitimate, direct interest. The defendant was directly interested in the prospect, raised by the plaintiffs, that the proceeding as a whole might be adjourned for a lengthy period were a GCO not made, and in the prospect that the existing costs agreement between the plaintiffs and group members might be terminated. It had an interest in the latter question as the beneficiary of an arrangement in the security for the plaintiffs' costs that had been negotiated in respect of the existing arrangements.

13 Accepting that the identification of the "event" must be context-specific, the better definition of the "event" in this case is not the proceeding itself, but the application for a Group Costs Order. While that application is, in the ways discussed, necessarily connected with the proceeding, it is, for the purposes of assessing the justice of the

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17 Principal Reasons, [11]-[13].

18 Ibid [14].

costs questions, relevantly distinct. In contrast to the plaintiffs' proceeding to vindicate the substantive rights of the plaintiffs and group members, the application in this case was wholly connected with the organisation of the plaintiffs' and group members' own affairs. It is true that the plaintiffs had to come to court to obtain their Group Costs Order and had to expend costs in so doing, but those costs were not, in any appreciable sense, caused by the defendant. All the defendant could do in respect of this application was to minimise costs by appropriately confining its submissions which, as I have said, were not in this instance made in opposition to the making of a Group Costs Order. Accordingly, I do not consider that it would be fair to require the defendant to pay the costs of the application in the event that the proceeding succeeds against it, which would be the ultimate effect of the plaintiffs' proposed costs order. That is where the justice lies.

14 I would add for completeness that the cases in the Federal Court upon which the plaintiffs relied were not of assistance. Most of the references were to orders made by consent or without published reasons, and none stood for the proposition that they were said to support by analogous reasoning.

15 The costs of the Contradictor should fall the same way, in the sense that the defendant should not have to bear the costs of the Contradictor. Although I did not ultimately accept all of the submissions of the Contradictor, it is misdirected to say that the Contradictor was *unsuccessful* (as the plaintiffs submitted). The Contradictor assisted the Court in the manner discussed in the Principal Reasons, including on matters which potentially raised different interests between the plaintiffs and their solicitors.[19] As the plaintiffs recognised, the costs of the Contradictor were a necessary incident of the application.

16 The appropriate disposition, then, is that the plaintiffs should bear their own costs of and incidental to the application, including the costs of the Contradictor.

17 As to the defendant's costs, it follows that they should be reserved, so that if the

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19 Principal Reasons, [52]-[57].

defendant ultimately succeeds in defending the proceeding it will be awarded its costs of and incidental to the application, consistently with rule 63.22. It is just that the defendant have its costs in this way if it succeeds in defending the proceeding because, in that circumstance, they will have been costs that the defendant ought never to have incurred, as that proposition is understood by reference to the indemnity principle.

18 The parties are directed to bring in orders reflecting these Reasons.

CERTIFICATE

I certify that this and the eleven preceding pages are a true copy of the reasons for Judgment of Nichols J of the Supreme Court of Victoria delivered on 6 June 2022.

DATED this sixth day of June 2022.

Associate