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

Not Restricted

S ECI 2021 04440

EDWARD JOHN NELSON

GAIL CHRISTINE NELSON — Plaintiffs

v

BEACH ENERGY LTD (ACN 007 617 969) — Defendant

S ECI 2022 00256

MARK RICHARD SANDERS — Plaintiff

v

BEACH ENERGY LTD (ACN 007 617 969) — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	1 April 2022; 19 May 2022
DATE OF RULING:	1 August 2022
CASE MAY BE CITED AS:	Nelson v Beach Energy; Sanders v Beach Energy
MEDIUM NEUTRAL CITATION:	[2022] VSC 424

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 — Where one proposed GCO incorporates a "ratchet" or sliding scale — Whether proper evidentiary basis to make the proposed ratchet GCO — Judicial discretion in open-textured legislation — Principles to be applied — *Supreme Court Act 1986* (Vic) s 33ZDA — *Allen v G8 Education Ltd* [2022] VSC 32, *Fox v Westpac; Crawford v ANZ* [2021] VSC 573, *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, applied — Application granted in one proceeding.

PRACTICE AND PROCEDURE — Group proceedings — Multiplicity — Representative proceedings commenced against same defendant in relation to same controversy — Overlap between claims — Plaintiffs in each proceeding seeks permanent stay of the other — *Wigmans v AMP Ltd* (2021) 270 CLR 623, *Perera v GetSwift Ltd* (2018) 263 FCR 92, *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2019) 369 ALR 583 — Application granted in one proceeding.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs in the Nelson Proceeding	Mr A Pound SC with Ms K Dovey	Slater and Gordon Lawyers
For the Plaintiff in the Sanders Proceeding	Mr D Sulan SC with Ms W Liu	Shine Lawyers
For the Defendant	Mr R Craig QC with Ms J Findlay	Herbert Smith Freehills

HER HONOUR:

Part I: Introduction and background

1 Edward John Nelson and Gail Christine **Nelson** and Mark Richard **Sanders** have each commenced overlapping representative proceedings in this Court under Part 4A of the *Supreme Court Act 1986* (Vic) against **Beach** Energy Limited. The proceedings concern substantially the same claims arising out of the same factual substratum and were commenced on the same day, as representing essentially the same open class of shareholders in Beach.[1]

2 The defendant, **Beach**, a company listed on the Australian Stock Exchange, carries on a business of gas and oil exploration and production in Australia and New Zealand. Beach is alleged to have made certain representations about its oil and gas reserves and production forecasts in a geographical area known as the Western Flank, on the western side of the Cooper Basin. Beach's forecasts were adjusted downwards in subsequent corrective disclosures. It is alleged that, by making the representations, Beach engaged in misleading or deceptive conduct in contravention of s 1041H of the *Corporations Act 2001* (Cth) and breached its obligations to make continuous disclosure of price-sensitive matters in contravention of s 674(2) of the *Corporations Act 2001* (Cth).

3 The Nelson proceeding was commenced in this Court and the Sanders proceeding in the Federal Court of Australia. Subsequently, and by consent, the Sanders proceeding was transferred to this Court with a view to this Court resolving the multiplicity issue. The Sanders plaintiff is represented by **Shine** Lawyers and the Nelson plaintiffs are represented by Slater and Gordon Lawyers (**S&G**). Both proceedings are at an early stage, with a defence yet to be filed in either proceeding.

4 Sanders and Nelson each seek to have the other proceeding stayed.

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[1] The Nelson plaintiffs foreshadowed minor amendments to their group definition to bring their represented class into conformity to with the slightly wider group covered by the Sanders proceeding. Each class includes persons who acquired ordinary shares during the relevant period. The Sanders proceeding also includes persons who acquired a long exposure in respect of Beach shares by entering into equity swap confirmations. The Sanders claim period is one day longer than the Nelson claim period. No party suggested that this minor difference in claim periods was a material consideration on this application.

5 Sanders, in the alternative, sought consolidation of the proceedings with the appointment of all three plaintiffs jointly, and their respective solicitors as joint solicitors on the record. Nelson and the defendant opposed consolidation. The consolidation alternative was not pressed in absence of an agreement between Sanders and Nelson and their solicitors, although it was not formally withdrawn. The defendant submitted that one proceeding ought be stayed, and was agnostic as to which. No party sought any other form of resolution to the multiplicity issue.

6 It has been recognised in the context of contemporary representative proceedings that while there is power to consolidate even without the parties' consent, consolidation, as a solution to multiplicity, will usually only be employed where there is agreement between the parties, solicitors and any funders, and, in the absence of agreement, substantive practical difficulties can arise.[2] There was no reason to force a consolidation on the parties in this case. There was also no reason to adopt a solution involving the continued advancement of two proceedings in parallel, even on a "wait and see" basis, and no party submitted that that should occur.

7 In determining which party among competing parties will have carriage of the continuing proceeding, the Court undertakes a comparative evaluation in which one factor that will require examination is the basis on which the parties propose to fund the proceedings. In this case, each party indicated that they intended to seek from this Court a Group Costs Order (or **GCO**) under s 33ZDA of the *Supreme Court Act*. Where it is made, a GCO governs the calculation of the legal costs payable to the law practice representing the plaintiff and group members in a group proceeding, stipulating that legal costs be calculated as a percentage of the amount of any award or settlement that may be recovered. Costs may not be calculated in that manner unless the court is satisfied that it is appropriate or necessary to make a GCO to ensure that justice is done in the proceeding. I directed that each party file its application for a GCO with a view to determining the multiplicity issue and the applications for Group Costs

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[2] See *Perera v GetSwift Ltd* (2018) 263 FCR 92, 106–8 [48]–[59] (***GetSwift***); *Southernwood v Brambles Ltd* (2019) 137 ACSR 540, 544 [13] and the authorities summarised there at 549–50 [40]–[42]; *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 2)* [2019] FCA 1061. Cf *Pallas v Lendlease Corporation Ltd* [2019] NSWSC 1631, [8].

Orders together. I considered it necessary to direct that the GCO applications be made, rather than merely foreshadowed, in order to avoid a purely hypothetical comparison exercise for the purposes of the multiplicity contest.

8 Some of the parties' evidence was subject to claims for confidentiality and was filed in redacted form.[3] A **confidential schedule** to these Reasons (provided to the plaintiff parties but not the defendant[4]) describes some of that evidence. The need to proceed in this way arises from the nature of the material and the issues in contest, as is apparent from the analysis below. Despite claims for confidentiality, in order to sufficiently set out my reasoning it has been necessary to refer to some parts of the confidential evidence in these Reasons.

9 For the reasons set out below:

(a) I will make a Group Costs Order in the terms sought by the Nelson plaintiffs and will accept an undertaking by them to the effect that they will not make an application to amend the percentage fixed by that Group Costs Order so as to increase it.[5]

(a) Nelson's stay application is granted, such that the Sanders proceeding is to be permanently stayed.[6] I will hear the parties on the form of orders, including whether the stay should be expressed to continue until the determination of the common questions.

Part II: Group Costs Orders

10 Both Sanders and Nelson sought Group Costs Orders under s 33ZDA(1)(a) of the *Supreme Court Act*. Nelson sought an order setting out a percentage at 24.5% and Sanders sought an order incorporating a "ratchet" mechanism intended to reduce the quantum of costs calculated by reference to that portion of the recovered amount over $100m and again over $150m and, in the alternative, a single or flat percentage rate set

3 Pursuant to orders made under *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rule 28A.06.
4 The schedule itself only makes such reference to confidential material as I have considered strictly necessary, noting that the solicitors for Nelson and Sanders are, in effect, competitors in this context.
5 My reasons for doing so are summarised at paragraph [113].
6 My reasons for making that order are summarised at paragraphs [181]–[195].

at 24.5%. Consistent with the defendant's narrow interest in the GCO application, it made only confined submissions. The defendant did not oppose the making of a Group Costs Order in whichever proceeding was selected to proceed; although, it did make submissions in relation to the Sanders' preferred form of order, as discussed below.

A Governing principles — Group Costs Orders

11 The statutory criterion for the exercise of the power to make a Group Costs Order under s 33ZDA is that *the court be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding* to make such an order. The principles generally governing the application of s 33ZDA were not in dispute. I refer to what is said in *Allen v G8 Education Ltd*[7] and in *Bogan v The Estate of Peter John Smedley (Deceased)*,[8] without setting out those passages in full here. I discuss relevant aspects of the principles, where necessary, below.

B The parties' submissions

12 Sanders and Nelson founded their applications on the same propositions, and broadly the same kind of evidence, with some differences in their evidence which each relied upon to distinguish their proceeding from the other, for the purposes of the multiplicity dispute.

13 Both plaintiffs submitted that it would be a suitable, fitting and proper way to ensure that justice is done in their respective proceedings[9] to make a Group Costs Order, in substance because:

(a) it would provide certainty to the plaintiff and group members in that they would be guaranteed to receive not less than 75.5% of any recovered amount;

(b) it would provide transparency to group members in respect of funding and costs arrangements;

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7 [2022] VSC 32, [15]–[31] (***Allen***). Those paragraphs distil the principles articulated in *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).

8 [2022] VSC 201, [6]–[14] (***Bogan***).

9 Referring to the tests set out in *Allen* [2022] VSC 32, [19] and *Fox/Crawford* [2021] VSC 573, [31].

(c) it would fairly distribute the burden of legal costs incurred in pursuit of common questions across all group members;

(d) it would preserve the indemnities against adverse costs which are currently in place for the plaintiffs under their respective cost agreements;

(e) by comparison with the most likely funding arrangement that would prevail if a Group Costs Order were not made (in each case, third-party litigation funding), the available evidence demonstrates that a GCO is likely to provide a substantially better outcome than if such alternative were required;

(f) the proposed rate is at least prima facie reasonable and proportionate.

14 Nelson also submitted that a Group Costs Order would better ensure the alignment of interests between the plaintiffs and their solicitors.

15 The Sanders' primary application was for a GCO with a "ratchet mechanism" and, in the alternative, at a fixed rate of 24.5%. It is convenient to consider those aspects of the application that do not concern the ratchet form of order first and then to return to that issue. It is also convenient to consider most aspects of the Sanders and Nelson applications together, before considering those aspects of the applications in relation to which the evidence was relevantly different, noting that the differences are relied upon by each plaintiff for the purposes of the multiplicity dispute.

C Existing contractual arrangements

16 The Nelson plaintiffs and the Sanders plaintiff have each entered into legal costs agreements with their respective solicitors pursuant to which the plaintiffs instruct the solicitors to undertake legal work on their behalf in the proceeding, which agreements govern the liability for, and the manner of calculation of, the solicitors' costs. Each agreement expressly contemplates that the plaintiff will seek a Group Costs Order and, in the alternative, third-party litigation funding. Each provides, in effect, that in the meantime their solicitors will act on a "no win no fee" or conditional basis.

17 The agreement between Sanders and Shine provides relevantly in substance that:

(a) Shine will commence the proceeding and take steps to advance the proceeding on Sanders' behalf on a "no win no fee" basis and insofar as it acts on this basis it will only be paid if there is a successful outcome;

(b) Shine may apply for a Group Costs Order on Sanders' behalf. If a GCO is made, legal costs will be payable in accordance with the GCO, and the GCO will prevail over the retainer to the extent of any inconsistency;

(c) If a GCO is made, Shine may arrange its own finance for the cost of advancing the proceeding subject to any such arrangement not altering the percentage of any recovery amount that would otherwise be received by group members, and relevant disclosure of that arrangement;

(d) If no GCO is made, Shine may seek and obtain third-party funding, in which case the plaintiff will enter into an agreement with the funder, in which case, subject to Court approval and the third-party funding agreement, the plaintiff will be liable to pay Shine's legal costs and third-party funding commission in the event of a successful outcome;

(e) Shine shall be entitled to terminate the agreement and cease acting as Sanders' solicitors in the event that Shine does not procure a third-party funder offer within 90 days of rejection of the plaintiff's application for a GCO, or Sanders fails to accept a third-party funder offer within 14 days of that offer being made;

(f) Shine indemnifies the plaintiff against any adverse costs order made in favour of the defendant in respect of any costs incurred by the defendant from the commencement of the proceeding until the court determines whether to allow a Group Costs Order;

(g) Shine has in fact entered a costs sharing agreement with the litigation funder Woodsford that will take effect if a GCO is made in the Sanders proceeding. The agreement is considered below.

18 The retainer agreement between S&G and the Nelson plaintiffs is to similar effect and

provides relevantly and in substance that:

(a) The plaintiffs instruct S&G to undertake legal work for the purposes of the proceeding;

(b) The plaintiffs will instruct S&G to seek a Group Costs Order at 28% or at a lower rate as agreed (and in fact a lower rate was agreed, namely 24.5%);

(c) In the event that a GCO is not sought or granted, the plaintiff will instruct S&G to seek third-party litigation funding to fund legal costs and the risk of adverse costs orders and the provision of security for costs, and will enter into an appropriate litigation funding agreement at S&G's recommendation, in which case, subject to the funding agreement, a litigation funding fee would be payable in addition to legal costs, in the event of a successful outcome;

(d) The plaintiffs will have no personal liability to meet legal costs from their own resources (subject to compliance with the agreement). Such costs that are not funded by a GCO or third-party funding will be carried by S&G on a "no win, no fee" basis, subject to an uplift fee of 25% recoverable in the event of a successful outcome;

(e) S&G agree to indemnify the plaintiff against adverse costs orders (subject to the conditions set out), but the indemnity does not apply with respect to costs incurred more than 90 days after a decision by the Court declining to make a Group Costs Order;

(f) S&G may terminate the agreement in the event that it "does not enjoy sufficient financial support", having "made appropriate efforts". Financial support is defined as a GCO or a litigation funding agreement between the plaintiff and a litigation funder.

19 The solicitors in each case are acting on a deferred fee basis with the contractual right to terminate the agreement in the event that funding is obtained in the form of a GCO or the provision of third-party litigation funding. Neither agreement operates to

terminate automatically in the event that the such funding is not obtained. Any attempted exercise by the solicitors of termination rights in the event that the parties' designated preferred funding mechanisms were unobtainable would have to be mindful of the solicitors' professional obligations to the plaintiff and their obligations, and those of the plaintiff, to group members. Matthew Chuk of S&G gave evidence that, at this stage, S&G had not made a decision that it would be willing to conduct the Nelson proceeding on "no win no fee" time-costed basis. Sanders' solicitor, Craig Allsopp, gave evidence that Shine had not committed to conduct the Sanders proceeding on a "no win no fee" basis beyond the hearing and determination of the GCO application. Mr Allsopp said that the most likely outcome if no GCO was made and third-party litigation funding could not be obtained was that the Sanders proceeding would be stayed. However, he did not say that Shine would seek to terminate their retainer, and did not explain on what basis a stay would be granted.

20 It is neither necessary nor appropriate to form any concluded view about whether or not, in the event that third-party funding were not obtained, the plaintiffs or either of them would be left without representation. That circumstance is hypothetical. What is clear in each case is that the parties contemplated from the outset that a Group Costs Order was the preferred form of funding, with third-party funding the next preferred alternative. What is also clear is that in each case the plaintiff has the benefit of a limited indemnity, which has been provided for the purposes of underwriting the plaintiff's risk in each case, in progressing the pleadings to the point at which funding in the parties' preferred form can be obtained.

21 I am satisfied that in neither case is the plaintiff the beneficiary of a contractual arrangement that is more beneficial to the plaintiff than the proposed Group Costs Order, including by reference to the conclusions reached in respect of third-party funding below.

D Certainty — a guaranteed proportion of any recovery amount

22 As was observed in *Allen v G8 Education*, when a Group Costs Order is made it guarantees that the plaintiff and group members will receive a fixed proportion of any

award or settlement that is offered, subject only to variation by Court order. It does so by stipulating that the legal costs payable to the law practice representing the group be calculated as a percentage of the amount of any award or settlement recovered. A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred. By fixing the calculation of costs in this way it allows a plaintiff and group members to mitigate any risk that their compensation, if recovered, will be eroded by costs calculated at a percentage greater than that specified in the GCO.[10]

23 In both the Nelson and Sanders proceedings, the making of a Group Costs Order would provide the plaintiff and group members with the certainty that they will recover no less than 75.5% of any resolution sum. This is a real and substantive benefit that is specifically sought by the plaintiffs in each proceeding and is protective of group members' interests.

24 Each of Mr Sanders and Mr Nelson gave affidavit evidence as to his understanding of the benefits that would be provided by a Group Costs Order. It is unnecessary to set out the evidence in detail, but in substance each said (in different language) that:

(a) He has instructed his solicitors to seek a Group Costs Order, fixed at a maximum rate of 24.5%, from which no additional deductions would be made for legal costs or commission. As Mr Sanders put it, the proposed GCO would eliminate or greatly reduce the risk that legal and funding costs may blow out and consume a large part of any recovery sum.

(b) He has formed the view that because it contains legal costs and provides a guaranteed return of any recovery amount, the making of a GCO would be in group members' interests. It would also be in group members' interests to provide clarity and transparency as to the legal costs to be incurred in the proceeding. As Mr Nelson put it, a GCO is attractive because it is a simpler arrangement than a litigation funding arrangement that mixes a percentage-

10 *Allen* [2022] VSC 32, [33].

based fee with time-based legal costs, and will guarantee that legal costs would be shared equally among all group members.

(c) He understands that if a GCO is not made, his solicitors will seek third-party litigation funding in accordance with the existing retainer agreement between the plaintiffs and their solicitors. Mr Nelson said that he has been informed that third-party funding would be available (but with no guarantee that it will be obtained) and that it would entail a commission rate in addition to legal costs, somewhere in the range of 24% – 28%. On that assumption, the proposed GCO rate of 24.5% would provide the plaintiffs and group members with a much better outcome when compared to the likely costs of third-party litigation funding. Mr Sanders referred to published data on funding rates as discussed in *Allen v G8 Education*, indicating average net returns to group members in the vicinity of 54%.

(d) Each plaintiff emphasised the importance to him of being indemnified against adverse costs, without which they would not have agreed to assume the role of plaintiff.

25 The evidence of each plaintiff rationally and coherently expresses his reason for seeking a Group Costs Order.

26 By design, GCOs offer simplicity and transparency in relation to funding arrangements, designating a simple and readily understandable method for calculating costs by a deduction from the plaintiff's recovered sum. That feature of a Group Costs Order is a structural advantage over some other forms of funding which are relatively more complex, noting that with any form of funding, Court-approved processes will be employed to ensure that funding arrangements are adequately explained to group members.

E Comparison with alternative forms of funding

27 It is implicit in the foregoing that both Nelson and Sanders are seeking the proposed Group Costs Orders at least in part because they consider that the orders proposed

will deliver a better financial outcome to group members. As has been discussed in earlier cases, whether or not a proposed GCO is more beneficial to group members than an alternative funding model is not a proxy for the statutory test, and s 33ZDA does not, as a matter of construction, necessarily require that a GCO yield a better outcome than a counter-factual funding arrangement.[11] A price comparison between the proposed GCO and the most likely alternative funding model is certainly a relevant consideration but must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA.[12]

28 It is accepted that, in many cases, predictive modelling of expected returns undertaken at an early stage of proceedings will be fraught with uncertainty. In this case, in respect of both the Nelson and Sanders proceedings, I am satisfied that there is a real prospect of group members obtaining a better financial outcome should a GCO at 24.5% be fixed, than would be achievable should they obtain third-party funding. The evidence supporting that conclusion, generally described, was as follows:

29 In respect of the Nelson proceeding, Mr Chuk's evidence was that the general practice of S&G was to obtain third-party funding for class actions. He has had frequent engagement with funders in the course of his role, including seven different funders (named in his evidence) with whom he has worked. Having regard to that experience, his analysis of the characteristics and prospects of the proceeding and the costs likely to be incurred (set out in parts of his evidence to which I consider confidentiality was properly claimed), the expectation is that there would be sufficient interest to obtain at least one suitable and reasonable offer of funding for the Nelson proceeding. He considers that the likely available funding terms obtainable in respect of this matter would entail a funding commission excluding legal costs toward the middle of a range between 22% and 29% of the recovered compensation amount.

30 Mr Chuk's reasons for reaching that view were set out in his evidence which traversed his assessment of the risks in the proceeding and assessments of quantum, such as can

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11 *Fox/Crawford* [2021] VSC 573, [51], [135]–[136]; *Allen* [2022] VSC 32, [25]; *Bogan* [2022] VSC 201, [12(e)].

12 See *Allen* [2022] VSC 32, [93].

be given at this stage. Mr Chuk also made reference to publicly available data on litigation funding fees and returns to group members as discussed in earlier cases,[13] but without producing a similar analysis on this application. His evidence was that he did not consider there to be any reasonable prospect of obtaining a proposed set of hypothetical terms from a litigation funder for this proceeding in the context of Nelson seeking a Group Costs Order as the preferred funding mechanism. On the basis of the assumptions he had made, for which I consider a reasonable and articulated basis was given, having regard to the early stage of the proceeding, Mr Chuk modelled a number of scenarios with varying recovery amounts and costs expenditure, comparing the proposed GCO with third-party funding at commission rates of 24% and 28%. The evidence sufficiently supported the overarching proposition for which Nelson contended.

31 As to the Sanders proceeding, Mr Allsopp's evidence was that it is Shine's usual practice to fund securities class actions through third-party litigation funding, unless a GCO is sought. Before the transfer of the Sanders proceeding to this Court, Woodsford Group Limited and Woodsford Litigation Funding 20 LLP (**Woodsford**) had offered to fund the proceeding and had registered a Managed Investment Scheme for that purpose, pursuant to which Woodsford was seeking a 28% funding commission in addition to the repayment of legal costs, which it would partly fund (together with the provision of indemnities and security), in the event of a successful outcome.[14] That arrangement is an appropriate benchmark against which to evaluate the proposed Group Costs Order. Mr Allsopp, like Mr Chuk, also made reference to the published data on returns in third-party-funded group proceedings.

32 Regardless of the funding model adopted, the costs payable by the plaintiff to its solicitors (and ultimately borne by group members) are subject to the Court's discretion, whether in approving any settlement under s 33V of the *Supreme Court Act* or consequent upon an award of costs in the plaintiff's favour. The terms of costs

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13 *Allen* [2022] VSC 32, [67]–[76]; *Bogan* [2022] VSC 201,[70]–[72].

14 It is unnecessary for present purposes to set out the terms of the then-extant Woodsford–Shine funding agreement, which have been described here generally.

agreements and funding arrangements put in place at the outset of a proceeding are obviously very relevant considerations when parties are seeking an approval of a settlement or quantification of costs by the Court. The modelling of returns and costs estimates and the agreements to which reference has been made must be regarded in that light. Nevertheless, I am satisfied, as I have said, that there is a real prospect that the proposed Group Costs Orders, at a maximum rate of 24.5%, will deliver a better financial outcome for group members than the most likely alternative form of funding.

33 It should be added that each of Nelson and Sanders offered undertakings to the effect that they would not make an application in their proceeding for an order for costs calculated at any higher rate than what is now sought under s 33ZDA. Undertakings of this kind proceed on the basis that the making of a Group Costs Order at an early stage of the proceedings operates to fix a maximum percentage rate for the calculation of costs, which might be reduced at a later point in proceedings, having regard to the Court's power under s 33ZDA(3). As was observed in *Allen v G8 Education*, it might reasonably be expected that a court making an order under s 33ZDA(3) would take into account, among other things, the basis on which the percentage rate was originally fixed for the Group Costs Order, and that minds might differ as to whether an undertaking of the kind proffered here is necessary.[15] Nevertheless, I consider that the acceptance of the proffered undertakings ensures against the prospect that the plaintiff (advised by his solicitors) might in the future seek to vary the GCO rate upwards in the future, thereby eroding the certainty of returns said to be an important foundation for the application made under s 33ZDA(1).

F The proposed Percentage Rate

34 Both Sanders and Nelson submitted, and I accept, that estimated costs and corresponding returns to group members, in the event that the proceedings were funded by a third-party litigation funder, provide a meaningful comparator for gauging the prima facie reasonableness of the proposed GCO rate.[16] As discussed, there is a real prospect that the minimum return to group members under the

15 *Allen* [2022] VSC 32, [37]–[38].
16 Ibid [67]–[76]; *Fox/Crawford* [2021] VSC 573, [165].

proposed GCO (75.5%) will be greater than it would be were third-party funding employed. It must be observed that that comparison has its limits. It does not assist in assessing the proportionality of the likely returns in relation to the risks assumed, the work undertaken or the amount in dispute.[17]

35 Two issues require consideration. They are distinct, but each concerns the proposed GCO percentage rate. The first is the evidence on which Sanders relied, which set out a calculation of the rate of return that Shine could expect to receive were a GCO made setting a percentage of 24.5. Sanders relied heavily upon the fact of his having obtained that evidence in submitting that his proceeding should be preferred to that of Nelson. The second is whether the form of order proposed by Shine may be made under s 33ZDA and whether there is a basis for making an order in that form on the evidence in this case. Both require reference to the broader context informing the making of a Group Costs Order.

Statutory context — setting a GCO rate

36 Although s 33ZDA is a relatively recent provision, in the cases considering it to date, a number of relevant propositions have been articulated, as follows:

37 First, considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform the setting of an appropriate percentage under s 33ZDA.[18] One of the questions (but not the only question) that s 33ZDA invites in this respect is whether the costs to be allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceedings. Proportionality and reasonableness of costs in this context might be evaluated against numerous measures.[19]

38 Secondly, while that may be so, the statutory criterion for the exercise of the power is not whether the proposed percentage rate to be set by the GCO will produce a return to the plaintiff's solicitors that is proportionate to the risk undertaken by the

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17 See *Fox/Crawford* [2021] VSC 573, [145]–[155].
18 See ibid [140]–[155]; *Bogan* [2022] VSC 201, [15].
19 *Fox/Crawford* [2021] VSC 573, [145]–[148]; *Allen* [2022] VSC 32, [90].

assumption of the obligations imposed by s 33ZDA; it is broader than that. The statutory criterion — *that the court be satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding* — is open-textured and provides the Court with a large measure of significantly unguided discretion.[20] For the reasons discussed in *Fox/Crawford*, a court should be satisfied, in order to make a Group Costs Order, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding.[21] For that purpose, a broad, evaluative assessment is required, and the statutory criterion permits a range of meanings and is capable of satisfaction in myriad ways.[22]

39 Thirdly, although the amount recovered will likely be a significant integer in any proportionality assessment, it must be recalled that the statutory funding scheme created by s 33ZDA is intended to be capable of taking effect early in the life of proceedings[23] where the assessment of potential recovery sums is likely to be fraught with uncertainty.[24] As was observed in *Fox/Crawford*, the question of whether the return to the law practice under a Group Costs Order is or is likely to be reasonable, and whether it bears a proportionate relationship to the assumption of risk or to any other relevant measure, may be considered prospectively, but there may be real limitations on the Court's ability to make an informed assessment of that question.[25]

40 Fourthly, that is where s 33ZDA(3) assumes significance. Once information informing questions of proportionality becomes available, a review under sub-s (3) of a percentage fixed at an earlier time will allow the Court to ensure that the percentage to which the law practice is ultimately entitled remains appropriate.[26] Subsections (1) and (3), then, operate in a complementary way. The Court may make a Group Costs Order having been satisfied that the statutory criterion has been met, including early in the life of a proceeding where critical integers in the ultimate evaluation of whether

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20 *Fox/Crawford* [2021] VSC 573, [24]; *Bogan* [2022] VSC 201, [13(a)].
21 *Fox/Crawford* [2021] VSC 573, [31].
22 Ibid [30], [33]; *Allen* [2022] VSC 32, [18], [20]; *Bogan*, [13], [19].
23 *Fox/Crawford,* [2021] VSC 573, [22].
24 *Allen* [2022] VSC 32, [93].
25 *Fox/Crawford* [2021] VSC 573, [148]
26 Ibid.

the rate set out in the order (as required by sub-s (1)) is likely to produce a reasonable and proportionate outcome, cannot be reliably known or estimated. Where that is the case, once factors informing the result had been made certain (or less uncertain) including the return to group members and the scale of the fees that will in fact result in a GCO fixed at a particular percentage, the rate may be adjusted under s 33ZDA(3).

41 Unlike s 33ZDA(1), sub-s (3) does not specify that an application to vary an order made under sub-s (1) be made on application by a plaintiff, so the occasion for re-visiting a rate set at an earlier time could not be circumvented by a plaintiff's refusal to make an application under s 33ZDA(3). In that way, the Court retains control of the rate fixed by a GCO. Any variation of a rate set under sub-s (1) would, of course, have to be made on evidence and on notice to affected persons. In the ordinary course it can be expected that the appropriateness of a rate set on the making of the GCO would arise for consideration on the resolution of the proceeding, including on an application by a plaintiff for approval of a settlement under s 33V. That s 33ZDA makes provision for the amendment of a percentage in this way is consistent with its broader statutory context within which it sits, including the requirement in s 33V that no group proceeding may be settled without the Court's approval. The prospect that a percentage fixed upon the making of a GCO may be later amended *by the Court* does not detract from the relative certainty that is achieved by the making of a GCO.

42 Fifthly, that is not to exclude the possibility that some conclusions might be drawn early in the life of a proceeding about the prospect of the proposed rate resulting in a reasonable and proportionate quantification of legal costs. Whether that can be sensibly achieved will depend in large measure on the quality of the evidence directed to that question. In *Bogan*, John Dixon J made some observations to the effect that principles employed in other contexts to analyse returns on investment might inform a principled approach to the fixing of a percentage rate for a Group Costs Order. As discussed further below, where evidence of that kind is available it might indeed be significant, but the return on the funder's investment is far from the only relevant consideration. In the few decided cases considering s 33ZDA, including *Bogan,* it has

been emphasised that keeping costs proportional to the complexity of the issues and the amount in dispute will be an important consideration.[27]

43 In this case, Sanders says that he has produced evidence of the kind that John Dixon J described in *Bogan* and that his application for carriage of the proceeding should be favourably assessed as a result.

44 In *Bogan*, this Court considered s 33ZDA for the third time. Because the provision is relatively new, on each occasion the Court has made observations (in *obiter*) about how the question of the reasonableness of the rate set by a GCO might be assessed and about the legal context in which that question arises.[28]

45 In *Bogan*, John Dixon J granted the plaintiff's application for a Group Costs Order. There, taking up the proposition that s 33ZDA permits reward for risk because it requires the assumption of risk, his Honour said that the legislation presents the necessity of considering how reward for risk should be assessed in a principled way in this context.[29] His Honour went on to describe generally accepted investment and insurance principles that enable investors to identify whether a fair and reasonable return might be earned from a prospective investment and how, at a general level, those principles (including the calculation of an internal rate of return) might be applied to assess the appropriate rate of return for a particular investment by a law practice by funding a proceeding. His Honour said that an appropriate rate of return for a particular investment could be assessed by expert evidence as to the rate obtainable in the market by insurers, private equity and venture capital,[30] and that where such an analysis is available, it would be a significant consideration in exercising the evaluative assessment required under s 33ZDA.[31]

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27 Ibid [145]–[146], [149]–[155]; *Bogan* [2022] VSC 201, [30].

28 See *Fox/Crawford* [2021] VSC 573, [145]–[155]. It was there observed, among other things, that legal costs calculated as permitted by s 33ZDA may reward the legal practice not only for the effort it contributes in legal work but also for the risk that it assumes in funding the proceeding and in respect of adverse costs; the section therefore invites the question whether the reward proposed is (among other things) proportional to the risks to be undertaken.

29 *Bogan* [2022] VSC 201, [15]–[30].

30 Ibid [26], [29].

31 Ibid [28].

46 In the course of that discussion, John Dixon J observed that assessing the return on invested capital at risk can rise above speculation when *careful assessments of future expectations are made*, and also that converting the law practice's reasonable and proportionate expectation of a return on its investment into a proportion of an unknown sum (in order to employ that kind of analysis in making a GCO) is fraught and exposes a conceptual difficulty with the statutory task.[32] His Honour concluded that discussion by remarking[33] 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 unknown future time, which can result in potentially excessive and inequitable returns, and emphasising the obligations owed by plaintiffs and funders under s 24 of the *Civil Procedure Act 2010* (Vic) to ensure that costs incurred in connection with a group proceeding are reasonable and proportionate.[34] In *Bogan*, John Dixon J decided that the making of the GCO at the rate specified was appropriate for reasons particular to that case. Evidence of the kind discussed, employing investment analysis principles, was not adduced on that application.

47 What can be taken from the observations of John Dixon J in *Bogan* is that the application of established investment evaluation principles (with the assistance of expert opinion) is likely to assist in providing a rational and principled basis from which to evaluate what is a reasonable and proportionate return to the law firm funding the proceeding. However, for that purpose, particular attention must be paid to careful assessments of the case at hand, and the application of those principles in this context will not necessarily be straightforward.

48 I would add the obvious point, which is implicit in the discussion in *Bogan*, that whether or not such an analysis is informative will depend upon the quality of the evidence relied upon to support it. An analysis of the kind discussed might be absent in a given case because, for example, the circumstances do not permit the making of

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32 Ibid.

33 By reference to an earlier decision in a different context (*Bolitho v Banksia Securities Limited (No 18)* [2021] VSC 666) (***Bolitho***).

34 *Bogan* [2022] VSC 201, [30]. See also *Fox/Crawford* [2021] VSC 573, [146].

sufficiently informed assumptions.

49 A final point to be drawn from the excursus above is that the relationship between the assumption of financial risk and return on that investment is far from the only consideration that will inform the appropriateness of a percentage rate ultimately fixed, including by amendment under s 33ZDA. Assessment of evidence of the kind that Sanders proffered on this application should not distract from the essential proposition that making a Group Costs Order serves to fix the method of calculation of legal costs in which, among other things, consideration of the legal work that has been done will be a relevant integer. The assumption of risk by a law firm who conducts the proceeding is but one element of the equation. Investment analysis tools might assist to measure *that element* in a principled way. Justice John Dixon did not, in *Bogan*, say otherwise. How those considerations fall to be weighed in any given case remains to be seen, and can only be assessed meaningfully in the context of the facts of a particular case.

The IRR calculation and the evidence of Mr Mullins

50 Sanders procured the opinion of an expert, Wynand Mullins, who calculated the internal rate of return (**IRR**) that would accrue to Shine were a GCO made at 24.5%. Sanders relied upon the report to submit that a GCO fixed at that rate would deliver a reasonable return to Shine (meaning, I infer, a not disproportionate return having regard to the investment of costs and assumption of risk by Shine) and said that the fact of his having procured it was a strong factor in his favour in the carriage contest. For the reasons set out below, I have concluded that there are significant difficulties with the Mullins evidence. Evidence of that general kind might prove informative for the reasons outlined above; however, the quality of the instructions and the reasoning in the report in this case mean that it is not of real assistance.

51 Mr Mullins is a chartered accountant and senior managing director in the Forensic Litigation Consulting segment of the firm FTI Consulting and in that role he provides forensic accounting, valuation and financial investigation services. He has broad experience, including in respect of the provision of opinions for use in litigation.

Mullins instructions

52 Mr Mullins was briefed by the provision of letters from Shine dated 6 and 12 May 2022. He was asked to first calculate Shine's IRR in respect of the proposed GCO, assuming given parameters, to explain the function of an "internal rate of return" and how he had undertaken the calculation. Secondly, he was asked what factors might cause the IRR he had calculated to be understated or overstated, given the early stage of the proceeding and the nature of the investment. He was also instructed as follows:

> To the extent you think it is relevant in answering question one, please have regard to the approach adopted by Sean McGing in his submission to the Parliamentary Joint Committee on Corporations and Financial Services and the report in response by PWC.

53 The submissions by Mr McGing and PWC to the Parliamentary Committee were not described further.[35] Shine provided a very brief description of these proceedings, extending to one paragraph, and set out some rudimentary assumptions. They addressed the possible quantum of a settlement or judgment amount expressed in three different rounded amounts (given as alternatives) assumed to be received at a nominated point in time, and the quantum of legal costs assumed to be incurred over the period in four different scenarios with nominated percentages of the budget being allocated to different timeframes. Mr Mullins was provided with a copy of the proposed summons seeking the Group Costs Order, the costs agreement between Sanders and Shine, an after the event (**ATE**) insurance policy between Woodsford and **AmTrust** Europe Limited, a copy of the submissions by Mr McGing and PWC mentioned above and a copy of the judgments of this Court in *Allen v G8 Education*, *Bogan* and *Bolitho v Banksia Securities*. He was also given a copy of the expert code of conduct and order 44 of the Court's Rules.

Mullins Report

54 In his report dated 16 May 2022, Mr Mullins explained the purpose and utility of an IRR calculation in the following terms, in substance. An IRR is a financial measure

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35 Mr McGing had given evidence in *Bolitho*, which is set out at [1939]–[1973] of that judgment, about determining a fair and reasonable return for a litigation funder. While his evidence was not provided in the context of an application for a GCO, Mr McGing concluded that "the approach of fixing a percentage of a settlement amount was inappropriate for determining a reasonable rate of return for a litigation funder": at [1963].

used to calculate the profitability of potential or historical investments.[36] It is calculated as the discount rate that makes the net present value of all cash flows equal to zero in a net present value analysis and represents the interest rate at which the total present value of costs (negative cash flows) equals the total present value of the benefits (positive cash flows). An IRR can be calculated as an estimate of future annual rates of return using projected cost outflows and inflows, or in respect of an historical investment by reference to actual historical performance. The calculated return is "internal" because it excludes external factors such as the risk-free rate, the cost of capital, financial risk or liquidity risk. An IRR may be calculated for a specific investment or an entire portfolio, and may be compared with the investing entity's weighted average cost of capital, which can inform a decision to proceed or not to proceed with the proposed investment.

55 Mr Mullins calculated Shine's projected IRR on the scenarios provided to him by creating a simple discounted cash flow model for a period of four years. The model, which for each scenario was presented in a table set out over half a page of the report, identified the total amount of budgeted costs in each of the time periods, the assumed judgment or settlement amount, assumed insurance premiums and a payout to group members at 75.5% (the static GCO rate assumed for all scenarios). On that basis, the rate of return was calculated by plotting the outflows (legal costs and insurance premiums) and inflows (judgment or settlement) over the period of time. That calculation, evidently a simple one, was, as Mr Mullins stated, performed by using the "IRR" function in Microsoft Excel.[37]

56 Mr Mullins was asked to identify the factors that might lead to the calculated IRR being understated or overstated. He identified four factors.

57 The first was that the calculation does not capture cash inflows and outflows relating to Shine's entire portfolio (meaning its investment in other proceedings). It was said that that might mean the IRR calculation may be overstated because it does not include

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36 An IRR then can be calculated after the event (ex post).

37 See the confidential schedule.

other cash outflows, or understated because it does not account for other inflows.

58 The second factor was described as uncertainty of cash flows. Mr Mullins states that he has calculated the IRR under the scenarios and assumptions provided to him. He observes that because the proceeding is at an early stage, there is uncertainty as to the quantum of the cash flows, including the settlement amount and budgeted legal costs (so much must be accepted); the probability that the cash flows will come to fruition and the timing of the cash flows. He says the IRR calculation does not take into account those additional risks, as a result of which his calculation may be understated if there are additional risks beyond those captured in the calculation for which an investor would require a higher return.

59 The third factor is said to be "capturing appropriate risk", which refers to the fact that an IRR calculation does not take into account additional risks relating to the nature of the investment itself, such as illiquidity risk or unlisted investment risk. The fourth is described as "reinvestment of cash flows", which refers to the fact that an IRR calculation implicitly assumes that each year the cash flows are re-invested at the same rate. Mr Mullins says that that assumption might not be appropriate, as a result of which his calculation may be either understated or overstated.

60 Having made a calculation of the projected IRR as instructed, Mr Mullins goes on to make some "comments" on "the McGing submissions and PWC's submissions". Those materials were not incorporated in Shine's materials before the Court on this application. They were not explained in the instructions to Mr Mullins, at least as those instructions were recorded in his letters of instructions or his report. The relevant part of the report consisted of references to extracts from those submissions, with which, in part, Mr Mullins expressed his agreement. To the extent that that part of the report was intended to set out Mr Mullins' opinion in a comprehensible way with reasoning, it was of little assistance. He did not seek to lay out propositions from the documents he was provided as a basis for explaining his own opinion, and little context was provided for the apparent incorporation of aspects of submissions made in a different forum.

61 The exercise undertaken by Mr Mullins was, in one sense, unsurprising given the nature of the direction given to him by Shine, which was to "have regard to the approach adopted by Mr McGing in his submissions to the Parliamentary Joint Committee and the report in response by PWC". If the context for this material was provided to Mr Mullins, it was not set out in his report or in the letter of instructions. In the event that Shine sought to elicit Mr Mullins' opinion on matters that happened to have been addressed in the submissions, they might have formulated those propositions, asked him for his opinion and requested that he set out the basis for that opinion and his qualifications for doing so. They did none of those things.

62 The report does not set out Mr Mullins' qualifications to comment on those matters to the extent that they are disclosed in the report. Mr Mullins' qualifications are discussed further below.

63 Mr Mullins was not asked to provide any opinion about the reasonableness or appropriateness of the rates of return he was asked to calculate. Nevertheless, the report sets out an analysis by which he compares the calculated returns with returns from investments in other asset classes. By way of introduction, Mr Mullins states: "For illustrative purposes, similar to the McGing submission, I considered the returns of other asset classes as a point of comparison for my calculations of Shine Lawyers' IRR."

64 It is not explained what is meant by "illustrative purposes", and nor is the reference to the McGing submission in this context explained. Evidently, Mr Mullins obtained guidance or perhaps inspiration from the McGing submission, but the content of that document was not exposed. Mr Mullins goes on to set out the "Vanguard Index Chart" as at 30 June 2021, which he explains "shows the long-term performance of various asset classes, capturing 30 years of Australian and global investment market history". He sets out five and ten year returns on various asset classes, including Australian shares, bonds and listed property and cash. He observes that the table shows lower returns than the calculated mean and median IRR for Shine's investment in the proceeding (as calculated by Mr Mullins). He provides the opinion that the

asset classes such as shares and property are less risky, including because they are publicly traded, returns on portfolios are not individual investments and they have lower liquidity risk.

65 Mr Mullins does not set out what information he has taken into account in assessing the degree of risk for Shine in investing in the proceeding, or his qualifications to make that assessment. He does not explain why the investment in the present proceeding should be calculated as a single investment, rather than in respect of Shine's practice overall or a part of that practice comprising a portfolio.

66 Mr Mullins goes on to compare the calculated return to Shine with returns in "venture capital assets classes" and says that in his opinion they provide a more comparable rate of return because the rates take into account the early stage of development in a company's life cycle, "which is akin to the early stage in proceedings"; there is limited cash generated by a start-up company, similar to litigation proceedings where the cash inflow occurs at the tail end of the life cycle, and *there is a comparable level of risk inherent in the achievability of cash flows*. Mr Mullins does not set out any further reasoning in respect of those matters, apart from stating those points. He does not analyse the "level of risk inherent in the achievability of projected cash flows". It does not appear that any instructions were given to him in order to permit him to calculate or assess or evaluate that factor.

67 Mr Mullins goes on to state that, "*for illustrative purposes I have sourced the indicative rates of return for venture capital investments*", which he sets out in a short table as follows:

Table 5. Venture capital indicative rates of return[32]

Investment Stage	Min IRR	Max IRR	Mean IRR
Seed	30%	400%	105%
Start-up	12%	200%	67%
Early expansion	20%	100%	47%
Expansion or development	25%	80%	35%
Mezzanine debt	15%	40%	23%
Management buy-out/buy-in	15%	50%	29%
Turnaround	15%	40%	26%
Replacement	10%	25%	21%
Overall	**25%**	**60%**	**34%**

68 A simple definition of each investment stage is provided. For example, "start-up" is defined as "funding to commence commercial business operations".

69 The indicative rates of return and definitions for investment stages are both sourced to a single reference, namely the Benchmarking Australian Institutional Investment in Domestic Venture Capital Study. Mr Mullins does not describe that study or his familiarity with it.

70 On that basis, Mr Mullins provides the opinion that

> In my view, the proceeding is between the start-up and early expansion stage based on my understanding of the nature of the proceeding (acknowledging that investment stage for venture capital projects may not be an identical comparator to litigation funding projects).[38]

Consideration of the Mullins Report

71 Mr Mullins is evidently qualified to calculate an internal rate of return on the basis of the assumptions provided to him and by constructing a simple cashflow model. His explanation of the nature of an IRR calculation is unexceptional, and the calculation itself is simple (as he explains, it is the application of a Microsoft Excel formula to a simple discounted cash flow model). Beyond that, there are significant problems with Mr Mullins' report and the manner in which Shine sought to employ it.

72 First, as to the IRR calculation itself:

(a) First, Mr Mullins emphasises the relevance of the uncertainty of cash flows, including the probability that they will come to fruition and their timing. The instructions provided to Mr Mullins did not engage with this issue. In this context, the finance agreement between Shine and Woodsford is relevant. Shine produced a copy of the funding agreement (confidentially) on this application. The agreement was not provided to Mr Mullins, nor its existence disclosed to him.

(b) Under the agreement, in return for a proportion of the recovered sum, Woodsford has agreed to fund lawyers' fees and third-party costs, including

[38] Mullins Report [4.6.9].

counsel's fees and insurance premiums, each up to a stated limit. Described in the broad, certain proportions of third-party fees and lawyers' fees are to be paid or reimbursed to Shine during particular phases of the litigation.[39] Payment, then, is to be made in the life of the proceeding in those phases as defined in the agreement on provision of "funding notices" by Shine setting out the fees or costs incurred. Mr Mullins makes the point that timing of cash flows is an important element of the IRR calculations. The relevance of the finance agreement is that its effect is to produce cash inflows to Shine throughout the life of the proceeding, subject to compliance with the terms of the agreement. The discounted cash flow models produced by Mr Mullins on the basis of his rudimentary instructions assume that costs will be expended in a certain proportion of the budget in years one, two and three of the proceeding and that a judgment or settlement amount will be received at a certain point. That model does not account for the inflow of payment by way of legal costs or reimbursement for outlays for third-party costs. The model only incorporates outflows for legal costs over the period of time given in the assumptions. The model therefore appears to be created on a hypothetical basis that does not take account of the financial reality of the funding model in fact intended to be adopted by Shine. None of these matters were addressed in submissions.

(c) Secondly, legal costs as budgeted (that is, costs that would notionally be incurred by the plaintiff and borne by group members) were treated as cash outflows for Shine, but the instructions given to Mr Mullins did not permit any recognition of the profit component of the legal costs budget. Nelson submitted that that was not an appropriate treatment of those fees for the purpose of estimating the IRR because professional fees ordinarily include a profit margin for the firm. Mr Mullins was not briefed with any assumptions as to allow him to assess labour costs and overheads. In that way, the calculations are likely to understate the IRR.

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[39] See the confidential schedule.

(d) Sanders' response to that submission was that Nelson's proposition was speculative and without any evidentiary foundation. The fact was, however, that Mr Mullins' instructions did not permit him even to consider that issue. Shine went on to say that Shine's professional fees do include a profit component, but that because the profit was "part of project costs" it should not be excluded, and that "Shine's professional fees (including the profit margin) [are] a cost of conducting the case". That submission left much unexplained. The submission went on to say that "the profit margin is included in the WIP [work in progress] carried by the firm, which is able to be paid to the firm on successful settlement or judgment", and it is possible that the profit margin component of the fees *should be recognised* in the IRR calculation in a later period (i.e., at the time of settlement or judgment when the profit component would be paid), but it cannot be excluded from the calculation altogether; doing so would understate the IRR. It is apparent that this issue was not explored with Mr Mullins and he was not put in a position to understand or address the profit component which is admitted to have been relevant. There was no evidence provided by Shine to explain this point.

(e) Furthermore, it was not explained how the proposition that the work in progress is carried by the firm until settlement or judgment was consistent with the costs sharing agreement with Woodsford, under which Shine is to be paid for a proportion of its legal fees which, on Shine's submission, would include a profit component. No attempt was made to engage with these matters to assist the Court to understand how this was put, either in the instructions to Mr Mullins, the report itself, or in submissions.

(f) Thirdly, Shine did not provide any instructions to permit Mr Mullins to engage with the factors he identified as potentially causing the calculation to be understated or overstated. In respect of these factors, it appears that Mr Mullins has done his best with the assumptions provided to him, with the result that the general propositions set out were not applied to the facts. None

of those factors were addressed in submissions.

73 Importantly, in the present context a rate of return is calculated for the purposes of evaluating *whether it might represent a reasonable return by reference to relevant comparators*. As to that aspect of Mr Mullins' report:

(a) No questions or assumptions were provided to Mr Mullins for the purposes of this comparative exercise.

(b) Mr Mullins offers the opinion that "indicative" returns in the venture capital investments that he identifies are more relevantly comparable than returns in other classes of assets, and that the investment made by Shine in funding this proceeding is properly to be compared with particular stages of venture capital investments. It must be recalled that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed unless the evidence falls within that exclusionary rule.[40] The exclusionary *opinion rule* does not apply to evidence of the opinion of a person who has specialised knowledge based on that person's training, study or experience, where that evidence is based wholly or substantially on that knowledge.[41] In order to establish that evidence of an opinion is admissible, it must be shown that the witness has specialised knowledge of a relevant kind, and that the opinion is based wholly or substantially on that knowledge. An expert whose opinion is sought should differentiate between assumed facts upon which the opinion is based and the opinion in question. The opinion must be presented in a form that makes it possible to determine whether the opinion is so founded, and the reasoning process leading to the formation of the opinion must be set out so as to reveal that the opinion is so founded.[42]

(c) Nowhere does Mr Mullins explain why he is qualified to analyse the level of risk inherent in the funding of a legal proceeding (at all, or of the kind in

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40 *Evidence Act* 2008 (Vic) s 76.

41 Ibid s 79.

42 See, eg, *HG v The Queen* (1999) 197 CLR 414, [39]–[44]; *Dasreef v Hawchar* (2011) 243 CLR 588, [42].

question), and how they compare with venture capital investment. Mr Mullins is a chartered accountant specialising in forensic accounting and business valuation. His curriculum vitae sets out lengthy lists of reports that he has undertaken, described as loss and damage assessments, reports on company solvency, valuations, contract and payment investigations, "financial and other investigations", "independent and consulting roles", "engagement experience/consulting expert", and "examples of further significant assignments assisting with report preparation". It may be that Mr Mullins has qualifications in respect of venture capital investments, but it is not possible to tell by picking through the individual items in his curriculum vitae. No assumptions were given to permit Mr Mullins to sensibly address the level of risk inherent in the funding of this litigation.

(d) The path of reasoning set out for the critical point, which is the basis of the comparison between certain returns in certain other kinds of investments (in this case, venture capital) is not sufficiently set out. It is possible that there might be a basis for comparing investment in a securities class action with investment by a venture capitalist in a start-up company or in a business in its "early expansion" phase, but the basis for making that comparison and why it would be a valid comparison is not explained, other than in a most rudimentary fashion, and certainly not in a manner which I consider would provide a basis for the Court to draw such a conclusion.

(e) Mr Mullins relies on a single data source to identify what he describes as indicative rates of return for venture capital investments set out "for illustrative purposes". As Nelson submitted, the study identified in the report (by a footnote reference) is a publicly available work which was conducted in 2000. Nelson submitted that, given its age, it is not apparent that that data can be of any use in assessing a reasonable rate of return for a group proceeding in the year 2022. As noted, Mr Mullins does not discuss that report or its relevance, but rather extracts some data from it. Sanders' submissions did not engage

with this limitation in any meaningful way.

74 Sanders did not seek to address the admissibility of Mr Mullins' opinion by reference to the rules of evidence. The emphasis in Sanders' submissions was on having obtained the report and on the conclusions they sought to draw from it.

75 As to the comparison itself, there is no explanation as to how one should properly employ the indicative rates of return for venture capital which are set out as minimum, maximum and mean for certain investment stages, with the calculated returns for Shine's investment. There may be a basis for adopting the mean returns, for example, but it was not explained.

76 In response to Nelson's submissions criticising the Mullins Report, Sanders' submission was to the effect that it was "procedurally unfair" for the Nelson plaintiffs criticise Mr Mullins without calling their own evidence or putting matters to him in cross-examination. That submission failed to grapple with the implications of the limitations of the report for its utility. In the circumstances, the criticisms were directed to the use to which Sanders sought to deploy the Mullins Report. To be clear, it was a matter for *Sanders' solicitors* (and not Mr Mullins) to ensure that any material they sought to rely on was in a form that would assist the determination of the issues in contest.

77 Furthermore, Sanders' invoking "procedural unfairness" and the absence of cross-examination failed to engage with the circumstances in which Sanders sought to rely on the report, which were as follows. On 1 April 2022, before I commenced hearing the applications on the multiplicity dispute, I directed that the parties file their respective applications for Group Costs Orders and that they do so by 6 May, serve the other parties by 9 May, and return for the resumed hearing on 19 May. Nelson and Sanders both filed their material on 6 May as directed. Sanders' submissions indicated that Shine had taken steps to engage Mr Mullins and made reference to the utility of evidence of the kind discussed in *Bogan*, which had been delivered on 26 April 2022. They did not indicate that they proposed to call Mr Mullins to give

evidence. Shine's letters of instruction to Mr Mullins were in fact dated 6 and 12 May. The 6 May letter did not set out any substantive instructions. The report was dated 16 May.

78 On 17 May, Shine filed an affidavit of Mr Allsopp seeking orders supporting the redaction of the entirety of the Mullins Report.[43] On 17 May, Shine filed supplementary written submissions (without seeking leave to do so) which addressed the utility of the Mullins Report by reference to the matters discussed in *Bogan*, emphasising that the fact that the report had been procured should weigh heavily in Sanders' favour on the carriage contest. That claim to confidentiality and privilege was made together with many other claims, a short period before the hearing. The hearing proceeded, without objection, on the basis that I would resolve the claims to confidentiality as soon as was practicable and give any affected party the opportunity to be heard on any evidence that they had received after the hearing, should they wish to be heard. Subsequently, pursuant to my directions, Shine provided to S&G a copy of the Mullins Report, largely unredacted,[44] and both parties made written submissions in relation to it.

79 The Mullins Report superficially sets out an analysis of the kind described by John Dixon J in *Bogan*. But the instructions and basis for the analysis, and the quality of the analysis, are in important respects, deficient. A more careful approach to the issue, in which the expert was properly briefed and qualified, might have provided a basis for the kind of evaluation discussed in *Bogan*.

80 Notably, even leaving to one side those criticisms and taking the report on its face, Sanders' submissions relying on the Mullins Report addressed only the IRR calculated for the "base case" (the lowest end of the estimated damages range) and said that those returns compared suitably with returns in the relevant classes of venture capital

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43 The basis for the proposed orders, sought under the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rule 28A.06, was said to be "confidential – conduct of Shine Lawyers' business – litigation privilege, duty of confidentiality".

44 I permitted Nelson and S&G (and the defendant) to have access to the report with redactions. The redactions were confined to the parts of the report that would reveal Shine's instructions as to the assumptions Mr Mullins was asked to make about the quantum and timing of costs and settlement amounts and Mr Mullins' numerical calculations that would have revealed those instructions.

investments. The submissions did not deal with the returns for the higher end of the estimated range.

81 In other circumstances, the limits of the Mullins Report in particular might have required less detailed consideration, given that, despite its apparent limitations, I would nevertheless conclude that the statutory criterion for the making of a GCO had been satisfied. The deployment by Sanders of the evidence directed to Shine's prospective rate of return on the proposed GCO for the purposes of the carriage dispute with Nelson and S&G, however, has required more considered reflection on its quality.

Nelson's evidence on the proposed percentage rate

82 Nelson's evidence concerning the proposed rate was in the form of an explanation by S&G principal Mr Chuk of the reasoning process undertaken by Mr Chuk and S&G for seeking a GCO at 24.5%. Broadly described, that reasoning was as follows:[45]

(a) A number of factors informed the proposed rate, including a comparison to third-party funding arrangements (for which modelling was set out in Mr Chuk's evidence);

(b) Mr Chuk described the process of obtaining authority from S&G to seek the proposed GCO which included the modelling of costs potentially payable to the firm and by the firm. He explained how the firm understands risk premium across the life of a proceeding. That modelling allowed the computation of a risk premium that would result should a GCO be made at 24.5% under various scenarios with variables being costs incurred, the stage at which resolution is reached and the resolution sum.

(c) By that modelling, having regard to resolution sums that sit within a reasonable range of outcomes foreseeable at the outset of the proceeding (i.e., at the point in time at which a funding decision is made) it can be ascertained whether a particular GCO percentage would or would not deliver any (and if so what)

45 See further, the confidential schedule.

reward for risk taking and for illiquidity. The rate of return can then be compared to the estimated premiums for risk and illiquidity that would result under a no win no fee (conditional, time-costed) funding model, on the same assumptions as to recovery amounts, costs and time-frame.

(d) Mr Chuk said that he does not consider it to be the purpose of a GCO to deliver a risk premium to the firm in all scenarios when group members recover funds. The firm must take a portfolio view of its practice, which in some cases, might result in outcomes above expectations and others might fall short.

(e) Mr Chuk said he was mindful of the Court's observations in *Allen v G8 Education* to the effect that it would be necessary to consider the appropriate percentage rate by reference to relevant evidence and that he anticipates that this will likely involve actuarial analysis and evidence that goes to the appropriate return on the risk that was taken. His evidence was that it would be extremely difficult to provide much by way of evidence on this issue at this stage.

(f) Mr Chuk modelled the returns that would result across of range of outcomes. He accepted that in the event of a very large resolution sum a 24.5% GCO fee could deliver a disproportionate outcome, but that questions of proportionality are best left for assessment once they are capable of being informed by sufficient facts rather than speculation.

83 The evidence comprised a contemporaneous record of the reasoning process undertaken by S&G in deciding to fund the proceeding, in a manner that is likely to be of assistance in any later review of the GCO rate now set. The reasoning set out by Mr Chuk was considered and clear. The analysis of the range of outcomes that could be modelled at this point was comprehensive. The inability to meaningfully take the analysis further was explained, and the need to review the proposed rate was plainly accepted.

A Group Costs Order Incorporating a ratchet or sliding scale

84 Sanders sought an order for a GCO in the following form:

> The legal costs payable to the solicitors for the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in a proceeding, the percentage being calculated (subject to further order) as:
>
> (a) 24.5% of the amount of any award or settlement up to $100m;
>
> (b) in addition to the amount in (a), the amount of 18% of the amount of any award or settlement above $100m and up to $150m (i.e., 18% of the additional $50m or part thereof); and
>
> (c) in addition to the amount awarded in (a) and (b), the amount of 15% of the amount of any award or settlement above $150m.[46]

85 Two questions arose, namely whether s 33ZDA permitted an order of that kind, and whether there were grounds for making an order of that kind in this case.

86 For reasons set out below, I do not consider that it would be appropriate to make the order proposed by Sanders. I will, however, briefly set out why I consider that an order of the kind proposed, employing a sliding scale or ratchet (ratcheting the percentage down as the recovered amount increases), is not beyond the power conferred by s 33ZDA.

87 Nelson initially expressed doubt about whether such an order was permissible but said that Sanders bore the onus of establishing that it was. Nelson ultimately did not take the point any further but instead submitted that it should be refused as a matter of discretion. Beach also submitted that a question arose as to the permissible form of order, focussing on the use of the singular form of the word "percentage" in s 33ZDA(1), but did not take the point further.[47]

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46 All percentages are inclusive of GST.

47 The scope of s 33ZDA in this respect arose during oral argument. Sanders, who sought the "ratchet" form of order, had not made any submissions beforehand as to whether or not such a form was permissible, and sought leave to address the point in writing. I gave leave for the parties to file short written submissions on the point. Beach accepted that if it did not put on any written submissions it would not be subsequently seeking to resist a GCO in the form proposed by Sanders (or like form) on the basis of a lack of power to make such an order. It did not seek to advance the point further. It raised some matters in a general way for the Court's consideration, in oral submissions. Nelson filed short written submissions addressing the appropriate exercise of discretion.

88 The relevant part of s 33ZDA(1) reads 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.

89 The textual argument to which Beach alluded was that the statute deliberately only employs the singular form of percentage ("a percentage" and "the percentage") by reference to which costs are to be calculated, whereas an order in the proposed form incorporates more than one percentage by reference to which legal costs are to be calculated.

90 The question is whether such an order conforms in substance with s 33ZDA — that is, whether such an order may be properly described as an order made under that provision. It is helpful to focus first on the substance of the provision and then ask whether an order in a particular form meets the statutory description.

91 Section 33ZDA empowers a court to "make an order that the legal costs payable to the law practice … be calculated as a percentage of any [recovery amount], being the percentage set out in the order". It does not stipulate that the order must be made in a specified form. In concentrating upon the expressions "a percentage" and "the percentage" in s 33ZDA(1)(a), regard must be had to their significance and purpose within the context of the provision as a whole. Section 33ZDA regulates the liability of the plaintiff and group members for legal costs *vis-à-vis* the law practice representing them, where an order is made under that section.[48] Quintessentially, s 33ZDA(1) does so by permitting legal fees to be calculated by reference to the amount of damages recovered, providing that the relationship between the recovery amount and the amount of costs is proportional in the sense that costs are to be calculated as a percentage of the recovery amount.

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48 *Fox/Crawford* [2021] VSC 573, [14]–[15].

92 An order of the kind proposed, incorporating a sliding scale which stipulates that a nominated percentage of the recovery amount will apply up to a certain threshold with a different percentage or percentages applying beyond that, will produce, in any given case, a sum of costs that has been calculated as a percentage of the recovery amount. This may be illustrated by an example. Assume an order that legal costs are to be calculated at 25% on any recovery amount up to $10m and at 20% on any amount above $10m. Assume a settlement amount of $12m. Legal costs would be calculated as follows: on the first $10m, the costs would be $2.5m. On the second $20m of the recovery amount, the costs would be $400,000. The total amount of costs would be $2.9m, which is 24.1% of $12m (the recovery amount).

93 The difficulty with the textual argument is that it confuses the form of the order with its substance. A calculation of costs made in the way illustrated, applying a sliding scale of percentages, is still a calculation of legal costs as a percentage of the amount recovered. Employing the sliding scale or ratchet means that the ultimate percentage is reached by taking more than one step. When there are two bands in the sliding scale, as in the example, two simple calculations are performed and the result may be expressed as, and in fact equates to, a proportional relationship between the amount of legal costs and the amount recovered, and may be expressed as a percentage.

94 In substance then, an order employing such a provision is an order 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 recovery amount.

95 There is a further question. Returning to the text of s 33ZDA(1)(a), the percentage by which costs may be calculated must be "set out in the order". The requirement in this regard is that the percentage be fixed. It would not be permissible for a court merely to order that legal costs payable be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding without more. The order must go on to set out the percentage. An order that sets out graduated percentages dependent upon the recovery amount is in no less a sense the fixing of a percentage than an order which specifies only a single percentage applicable to any settlement

amount. The percentage is fixed ("set out", in the language of the section) because its relationship to the relevant recovery amount is specified.

96 Section 33ZDA does not, in my view, require that an order made under it be expressed literally and precisely in the language of the provision. Any order purportedly made under that provision must, in substance, express what the provision intends.

97 I do not consider that the language of s 33ZDA precludes, either expressly or by necessary intendment, a calculation of legal costs that is in substance a percentage of the recovered amount, but is calculated using more than one step (which is the effect of incorporating a sliding scale or ratchet provision of this kind). Where there is a basis to make an order of this kind, its effect would be to provide for a reduced percentage for the costs calculation as the recovery sum increases. I cannot see that reading the provision in a way that permits that outcome is contrary to its purpose.[49]

98 The above-mentioned analysis does not depend on the invocation of the presumption that statutory references to the singular includes the plural (and vice versa).[50] As discussed, when the substance and effect of the particular order proposed in this case is considered, it is apparent that it would result in the quantification of costs as *a percentage* of any particular recovery amount. In that form of order, the function of the reference to the set of percentages is to specify both the percentage at which the costs are to be calculated (which is arrived at by a simple calculation) *and* how that percentage is to be calculated.

99 If I am wrong about there being no need to resort to the presumption - because, for example, the applicable percentage will differ according to the recovery amount - I cannot see, at least on the arguments before me, that the statute indicates a contrary intention.

100 As the Privy Council said in *Blue Metal Industries Ltd v Dilley*, "the mere fact that the reading of words in a section suggests an emphasis on singularity as opposed to

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49 As to the purpose of the provision, see the discussion in *Fox/Crawford*: at [10]–[14], [20]–[21].

50 *Interpretation of Legislation Act 1984* (Vic) s 37; and see, for example, *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651.

plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears".[51] A contrary intention may appear from the subject matter or from the language of the text, read in context having regard to its purpose. The presumption will not be applied, for example, where its application would distort the plain meaning of the text[52] or where the purpose of the legislation may only be able to be met if it is regarded as having a singular operation.[53] In some cases it may be evident that the drafter has taken particular care in the use of the articles, definite or indefinite; but the use of a definite article does not necessarily manifest an intention to exclude plurality.[54] A contrary intention might be found where employing either form significantly alters the nature of the provision[55] or defeats its purpose.[56] It is permissible to apply the presumption selectively to the same word in a single provision. It is not necessary to read each reference to the same word in the same way. plural. Doing so must not, of course, distort the statutory meaning or purpose.[57]

101 In that way, ss 33ZDA(1)(a) may be read as follows:

> The court may order … that the legal costs … be calculated *as a percentage* of the amount of any award or settlement that may be recovered in a proceeding being the *percentage or percentages* set out in the order.

102 The reference to, "a percentage" in this reading expresses the fundamental relationship between recovery and costs. The reference to, "percentage or percentages" allows for alternatives which, as discussed, would be employed depending upon the amount recovered. This is in my view a coherent reading of the provision. For the reasons discussed, permitting quantification of legal costs by reference to more than one percentage in the manner discussed, is not inconsistent with the statutory purpose expressed in s 33ZDA. Whether or not there is a basis to

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51 (1969) 117 CLR 651.
52 See, for example, *Lockwood v Commonwealth* (1954) 90 CLR 177, 182.
53 See, for example, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 234 ALR 114; [2007] HCA 14 (***Bodruddaza***).
54 See, for example, *Tamas v Victorian Civil and Administrative Tribunal* (2003) 9 VR 154, [7]-[9]; [45]-[46].
55 See, for example, *Blue Metal Industries*.
56 *Bodruddaza.*
57 See, for example, *Plaintiff B15A v Minister for Immigration and Border Protection* [2015] 89 ALJR 673, [8].

make such an order in any particular case is a different question.

Is there a basis for making the form of order proposed by Sanders?

No proper evidentiary basis for the proposed ratchet

103 Nelson submitted that there was no proper evidentiary basis on which to make an order in the form sought. Sanders had not sought to establish that at the percentages or damages or recovery amounts nominated, the costs result would be reasonable or proportionate, by any measure at all. The ratchet or scale mechanism was, then, mere window dressing. I accept that submission.

104 The "ratchet" mechanism in the proposed order was intended to take effect only once damages recovered reached $100m, with progressively lower percentages applied to any resolution sum exceeding that amount. Once $100m is reached, costs on *that portion* of the compensation amount between $100m and $150m are to be calculated at 18%, and if the compensation amount reaches $150m, costs on any amount above that sum are to be calculated at 15%. By applying different percentages to different portions of the recovered sum, an overall costs sum, which may be expressed as a percentage, is reached. On a settlement of amount of $110m, for example, the costs amount would equate to $23.9% of the settlement sum.

105 I accept, as I have said above, that the effect of an order employing a sliding scale or ratchet mechanism is that, as the amount of compensation recovered increases above the point at which the mechanism takes effect, the percentage by which legal costs are calculated decreases. On the face of things one might be tempted to ask, why not just adopt a ratchet mechanism so that whatever the result, the costs will be lower than if it were not adopted, if the threshold point is reached (in this case, $100m). Further reflection is required, however.

106 As discussed earlier, the statutory criterion for making a GCO is not that the rate adopted be "reasonable and proportionate" or some cognate of that expression. However, when considering the effect of a particular percentage rate fixed by a GCO, a number of considerations will become relevant to achieving an outcome whereby

the costs in fact awarded are reasonable, not disproportionate and so on. Much of what needs to be known to make such an assessment will not be known at the outset of a proceeding when a GCO is first fixed. The making of a Group Costs Order under s 33ZDA(1) serves the purpose of permitting the proceeding to be funded in a particular way (the law firm funding the proceeding and assuming the burden of meeting any adverse costs and security for costs liability, and group members sharing liability for payment of legal costs[58]). Section 33ZDA(3) complements s 33ZDA(1) by permitting a later adjustment to the percentage fixed at the outset. An adjustment may be made at any stage of a proceeding but will at least arise for consideration once a recovery amount has been achieved by settlement or judgment.

107 With that background it is necessary to ask, what is the purpose of making a Group Costs Order with a sliding scale or ratchet provision? As Sanders put it, the purpose of a ratchet mechanism is to "avoid unnecessary costs in the event of a higher settlement or award". That is, a ratchet or sliding scale mechanism might be employed to avoid a disproportionate (or otherwise unreasonable) cost impost on group members (and its corollary, an unreasonable or disproportionate return to the law firm). That is an important objective. However, the ability to make a calibrated order requires the ability to make a judgment about the point or points at which the percentage should change, and what the adjusted percentages should be. To return to the language of Shine's submission, if a ratchet mechanism is to avoid "unnecessary costs" where the settlement is at the high end, fixing the points of differentiation raises the question, what is the point at which costs become "unnecessary", unreasonable or disproportionate? It is not a principled approach to randomly select ratchet points at which the percentage rate by which costs are to be calculated, will reduce.

108 Sanders and Shine might have led some evidence to address the basis for proposed "ratchet" points. They might have made submissions about why it is they proposed the percentages change in a particular way at a particular recovery amount. But they did not do that. The only submission was that the making of an order in the form

58 See *Fox/Crawford* [2021] VSC 573, [12]–[14].

proposed would "further ensure the interests of group members was protected", without any elaboration. That no submission was made addressing the rationale for the particular amounts and percentages was striking because it occurred in a context in which Sanders strongly emphasised the importance of evidence concerning the "internal rate of return" that would be achieved were a GCO fixed at 24.5%. There were difficulties with that evidence, as discussed earlier. But on Sanders' own premise, there was no attempt to address that evidence to the circumstances in which the ratchet provision would take effect. In the affidavit evidence of Mr Allsopp, there was no engagement with the particular ratchet provision proposed, nor any attempt to show that there was a real prospect that the ratchet mechanism might in fact take effect.[59] There was no attempt to argue that the particular percentages nominated, taking effect at particular recovery amounts, would equate to a reasonable, proportionate or otherwise appropriate quantum of costs.

109 I accept that the proposed percentage (24.5%) could give rise to a disproportionate outcome. But in this case, that speaks to the necessity of a review at a time at which facts capable of informing the necessary evaluation can be put in evidence. The essential vice in the Sanders proposal is that it would have the effect of the Court appearing to calibrate the costs allowance to the recovery amount, but doing so without being informed by any evidence. If the purpose of the incorporation of a ratchet mechanism at the point at which a GCO is made is to avoid a disproportionate costs outcome, the implication of setting particular "ratchet" points is that they at least, *prima facie*, indicate what is reasonable or proportionate, insofar as that inquiry can be undertaken at this point. The proposed order is formulated so that the percentage is to reduce at $100m on that portion of the recovery amount above that sum as opposed, say, to reducing once the recovery sum reaches $90m and on the whole of the recovery amount. It is incumbent then on a party seeking such an order to identify a basis in fact for the particular order sought. Sanders and Shine did not do that.

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59 See the confidential schedule.

Form of order — lack of clarity?

110 Separately, Nelson submitted that the inclusion of reference in the order to more than one percentage might be confusing to group members, and in that way an order in that form would not serve the statutory objective. Beach also alluded to the question of simplicity. The parties did not press this to the point of contending that such a feature would take an order of this kind outside of the power conferred by the provision. It was put that group members might form the view that the tiered percentage rates operate distinctly from one another, rather than being cumulative. A group member could make the mistaken assumption that, for a resolution sum of $125m, the costs would be calculated at a flat rate of 18% on the entirety of the sum, rather than 24.5% on the first $100m and 18% on the next $25m, which would result in an overall percentage of 23.2%.

111 I accept that the Sanders order is overly wordy. I expect that an order of that kind could be formulated more simply.

112 I accept that certainty and transparency and the ability for group members to understand in a straightforward way how costs will be calculated is an objective of the provision.[60] I also accept that an order that makes reference only to one percentage is simpler in form to the one under discussion here. However, it does not follow that an order that employs a scale or ratchet provision is inherently apt to mislead or confuse or is incapable of being readily understood by group members. That kind of order is not dissimilar in form to a progressive taxation scale, with which members of the public must be taken to be familiar. The broader context should be recalled. Where a proceeding is funded by a third-party litigation funder, costs will ordinarily be calculated by reference to the work undertaken on an hourly rate basis for which estimates may vary significantly during the life of a proceeding, and an agreed commission amount in respect of which the solicitors and funder may propose to seek a common fund order at the conclusion of the proceedings. Compared with other forms of funding, a GCO employing a sliding scale or ratchet provision is relatively

60 Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018) [3.89].

much simpler and more transparent in achieving notice to group members of how their costs will be calculated.

G Conclusion — Group Costs Order

113 It would be appropriate in my assessment to make a Group Costs Order in the proceeding that goes forward. My reasons are implicit in the foregoing discussion, but in summary they are as follows:

(a) In each case, by making their applications, the plaintiffs specifically sought benefits which I accept a Group Costs Order will confer, in particular that, by that funding mechanism, they would be guaranteed to receive not less than 75.5% of any compensation recovered. That is a tangible benefit to them, provided in a way that the likely alternative funding model would not afford, and it is protective of group members' interests.

(b) The existing contractual arrangements in each case expressly contemplate an application for a Group Costs Order and, in the alternative, third-party funding. In neither case is the plaintiff seeking to trade away a funding arrangement that would demonstrably result in a better outcome for the plaintiff and, through the plaintiff, the group members.

(c) A Group Costs Order in the terms proposed by Nelson (and Sanders in the alternative) will permit the calculation of costs at a prima facie reasonable rate, by comparison with the likely alternative form of funding. I am satisfied on the evidence that in this case it is likely that group members would obtain a worse outcome were third-party funding obtained.

(d) That conclusion is sufficient to support the proposed rate, having regard to the power to revise the rate at a later time. For the reasons discussed at length, while it is apparent that the percentage rate will likely warrant revisiting to ensure that in the result the quantum of costs is not unreasonable or disproportionate, the evidence does not permit that assessment to be made on a proper basis at this time. That notwithstanding, it is appropriate to make the

order at this time.

(e) A GCO will, in addition, provide a readily understandable and straightforward means of calculating legal costs.

Part III: Resolving the Multiplicity Problem

A Governing Principles — Multiplicity

114 The principles governing applications of this kind are well settled and may be stated succinctly for present purposes.

115 There is no provision in Part 4A or its equivalents that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. The commencement of a subsequent bona fide class action against the same defendant on overlapping subject matter is not of itself, vexatious, oppressive or an abuse of process.[61] As the Full Court of the Federal Court said in *Perera v* ***GetSwift Ltd***,[62] the object of Part IVA is facultative, not restrictive, and in permitting a more efficient dispute resolution through group proceedings, Part IVA "does not insist on the *most* efficient means of dispute resolution".[63] That fact must be understood in light of an equally foundational principle, which is that a multiplicity of proceedings is not to be encouraged and competing representative proceedings may be inimical to the administration of justice.[64]

116 Accordingly, while multiple representative proceedings against the same defendant on overlapping subject matter do not constitute an abuse of process, they present a problem for courts to solve.[65] Courts deploy a range of tools in doing so, including the staying of one or more proceedings, consolidation of proceedings, the closing of one class and running closed and open classes in parallel and adopting a "wait and see" approach.[66] The Court's task is to ensure that justice is done in the proceedings,

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61 *Wigmans v AMP Ltd* (2021) 270 CLR 623 (***Wigmans***).
62 (2018) 263 FCR 92 (Middleton, Murphy and Beach JJ).
63 *GetSwift* (2018) 263 FCR 92, 126 [148].
64 *Wigmans* (2021) 270 CLR 623, 666 [106].
65 Ibid 667 [107], citing *GetSwift* (2018) 263 FCR 92, 126 [150].
66 *Wigmans* (2021) 270 CLR 623, 666 [106].

being astute to protect the interests of group members.[67] It is necessary for the Court to determine which arrangement, including which proceeding should go ahead if one is to be stayed, would be in the best interests of group members.[68]

117 It is well recognised that there is no one right answer to questions that arise in this context and no "silver bullet" solution to a problem that may require weighing incommensurable and sometimes competing considerations.[69] As Lee J said in *Klemweb Nominees*, fastening upon a remedial response to competing class actions involves "an evaluation, not a calculus", and it is inevitable that different judges may way different considerations differently.[70]

118 The judicial task in this context has been described as applying a multifactorial analysis by reference to all relevant considerations.[71] Previous cases have identified, at least, the following factors which may be relevant to a greater or lesser extent in resolving a multiplicity problem by comparing sets of competing proceedings:

(a) the competing funding proposals, costs estimates and net hypothetical returns to group members;

(b) proposals for security;

(c) the nature and scope of the causes of actions advances (and the relevant case theories);

(d) the size of the respective classes;

(e) the extent of any book build;

(f) the experience of legal practitioners (and funders) and the availability of resources;

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67 Ibid 667–8 [109], 670 [116]–[117].
68 Ibid 649 [52].
69 *GetSwift* (2018) 263 FCR 92, 151–2 [274].
70 *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd* (2019) 369 ALR 583, 593 [48]–[49].
71 *Wigmans* (2021) 270 CLR 623, 651 [60].

(g) the state of progress of the proceedings;

(h) the conduct of the representative plaintiffs to date;

(i) the degree of expedition with which the respective parties have approached the proceedings;

(j) the order of filing (although there is no rule or presumption that the proceeding filed first in time should necessarily be preferred, and this consideration is less relevant where the competing proceedings have been commenced within a short time of each other).[72]

119 Lists such as this are useful tools for organising concepts and categories of information, provided they do not detract from the essential nature of the exercise for which they are employed. The exercise is an evaluative one, in which all relevant considerations should be weighed. As the High Court emphasised in *Wigmans*, the factors that might be relevant to managing competing group proceedings cannot be exhaustively listed and will vary from case to case.[73] In some cases, a significant distinguishing feature might by comparison render some or all other factors irrelevant or insubstantial. In other cases, there will be little to distinguish between the proceedings. The inquiry in each case will be highly fact-sensitive.

B The distinguishing features relied upon by the parties

120 Briefly described, the distinguishing factors upon which the parties relied were as follows:

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72 See *Wigmans* (2021) 270 CLR 623, 667 [107]. In *Wigmans*, the carriage contest had been decided by the primary judge (who was upheld by the Court of Appeal) primarily by reference to the competing funding proposals, costs estimates and net hypothetical returns to group members. It had been assumed, given the position the parties had taken, that there was no real basis to distinguish between the ability and experience of the legal practitioners. The question before the High Court was whether a subsequently issued representative proceeding was *prima facie* vexatious and oppressive in circumstances where a representative proceeding was already pending in respect of the same controversy in which the same relief was available. A majority of the Court held that it was not, and that there was no error in applying a multifactorial analysis. In that context, the Court observed that no party had submitted that the factors considered by the primary judge (factors (a)–(i) above) were irrelevant save for the competing funding proposals: at [109]. See also *GetSwift* (2018) 263 FCR 92.

73 *Wigmans* (2021) 270 CLR 623, 667 [109]. See also *CJMcG Pty Ltd (as trustee for the CJMcG Superannuation Fund) v Boral Limited (No 2)* (2021) 389 ALR 699, 704 [14] (Lee J) (***Boral***).

(a) Sanders submitted that by seeking at GCO at 24.5% when Nelson had initially agreed with S&G to seek a GCO at 28%, he was a "price setter" and his conduct as such should be recognised as having advantaged group members;

(b) Sanders submitted that he was more likely to reach accommodation with Beach as to the provision of security for costs because he had the benefit of an ATE insurance policy, whereas Nelson did not;

(c) Sanders had obtained the opinion of Mr Mullins who calculated the internal rate of return that would accrue to Shine should a GCO be fixed at 24.5%. That evidence was relied upon to demonstrate the reasonableness and proportionality of the rate sought, and to distinguish the work done by Shine on this application from that of S&G, which Sanders submitted should weigh heavily in his favour. The Nelson plaintiffs submitted that their evidence going to the appropriate GCO rate was informative of the real issues, and that Mr Mullins' evidence was ultimately of little assistance to the Court;

(d) Sanders submitted that his proposed Group Costs Order with a "ratchet" provision was a "potential advantage" to group members and therefore a distinguishing feature in Sanders' favour. Nelson submitted that there was no basis on which to make such an order, and that the supposed benefit was illusory and mere window-dressing;

(e) Sanders said that because he had retained the services of an independent expert in petroleum engineering and reservoir simulation, he should be awarded carriage because group members ought not be deprived of that expertise;

(f) Nelson submitted that their causes of action and case theories, as expressed in their pleadings, ought be preferred. Sanders made the opposite submissions and said that the parties' respective case theories were a neutral consideration;

(g) Nelson submitted that they and S&G had shown a greater degree of care and expedition in the preparation of the proceeding to date, which would have a

bearing on the shape and progress of the proceeding and represented in effect a higher standard of work than was evident in the Sanders proceeding;

(h) Nelson submitted that their instructors, S&G, were relevantly more experienced in conducting actions of this type, and that group members should have the benefit of that experience;

(i) Nelson relied upon their extent of book building, which was somewhat more extensive than that of Sanders';

(j) Sanders submitted that he has a more "secure back up plan" for funding (third-party funding) in the event that a group costs order were refused.

C Analysis

121 I will separately consider the factors addressed by the parties, before considering how they ought be evaluated together.

The price setter point

122 Sanders submitted that he was a price setter because he had sought a Group Costs Order at a percentage rate of 24.5%, whereas Nelson and S&G had initially agreed (by their retainer agreement) to seek a GCO fixed at 28%. Sanders submitted that, in doing so, his conduct had advanced the interests of group members by effectively setting the lower GCO rate, meaning the rate at which the parties sought an order from the Court.

123 The Nelson plaintiffs said that they were in fact the price setters because they had, from the outset, sought to fund the proceedings by seeking a Group Costs Order, whereas Sanders had initially arranged funding with a third-party funder. A GCO was likely to deliver better returns to group members than third party litigation funding would achieve.

124 The premise of the submission in each case was that the plaintiff who had engaged in "price-setting conduct" that had won an advantage for group members in the form of a "better price" (an application for a GCO at a lower rate than would otherwise have been the case) ought be regarded as a better representative.

125 The evidence does not establish that there was any clear "price setter". The point did not therefore assist in distinguishing between the proceedings.

126 The evidence was that both parties had varied their pricing models in the context of a competition for carriage of the action.

127 Upon transfer to this Court, Shine and Sanders revoked their costs agreement and agreed that a Group Costs Order would be sought. The evidence on this application was that the setting of a GCO at the proposed rate (24.5%) is likely to produce a better financial outcome for group members than third-party funding would produce. Sanders' evidence made that point explicitly. In that way, the Nelson plaintiffs might be considered "price setters".

128 The Nelsons' solicitors' evidence was that they and the Nelson plaintiffs had agreed, in their fee agreement, upon the maximum GCO rate that would be sought (28%), for reasons including the perceived need to state a percentage in their agreement, but that the rate ultimately sought was the product of a changed understanding of the relative risks and rewards in the proceeding.

129 Both sets of plaintiffs' solicitors gave evidence that accounted for the changes to their clients' proposed funding models, including the GCO rates. A number of considerations influenced their eventual proposals for funding and pricing. Both parties and their lawyers made adjustments to their proposed pricing in an environment in which the solicitors were pursuing carriage of the proceeding. As courts have recognised in this context, competition between proceedings will involve the self-interest of funders, including solicitors.[74] It is problematic in those circumstances, at least on the evidence in this case, to attribute to one party or the other the status of price setter in pursuit of the interests of group members, and on that basis to prefer one plaintiff to another.

Security for costs

130 Section 33ZDA(2) provides that, if a Group Costs Order is made, the law practice

[74] See, eg, *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1, 7–8, [14]–[15].

representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding and must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give. Neither plaintiff submitted that the other would likely not be in a position to give adequate security. The defendant did not make that submission.

131 Sanders relied upon a process point. He submitted that because Shine has the benefit of an ATE insurance policy that will take effect if Sanders is awarded carriage of the proceeding, it is more likely that any dispute with the defendant about the appropriate form of security will be more quickly resolved than will be the case if Nelson and S&G are awarded carriage. It was then said that the ability to foreshorten any interlocutory dispute (including by agreement) will be to group members' advantage by the avoidance of delay and reducing costs.

132 The ability of competing plaintiffs to provide security may provide a relevant basis on which to discriminate between them; however, in this case, I am not persuaded that the differences between the Nelson and Sanders proceedings are material. The proposition that procurement of an ATE policy would secure an advantage for group members was speculative in the circumstances.

133 Shine has entered a costs sharing arrangement with Woodsford. Under that agreement Woodsford agrees to indemnify Shine against adverse costs that Shine become properly liable to pay, and has obtained an ATE policy underwritten by AmTrust under which Woodsford is indemnified in respect of costs which it or Shine become liable to pay the defendant, up to the policy limit. The policy contemplates that the insured liability may be met in part by the provision of a deed of indemnity by the insurer in favour of the defendant.

134 The Nelson plaintiffs have not at this point obtained an ATE policy and intend in the first instance for S&G to offer a deed poll indemnifying the defendant. Nelson and S&G did not state that they would not seek to obtain ATE insurance in the event that they were awarded carriage. Their preferred position was that they provide security

by way of deed poll. Nelson submitted that the significant cost of obtaining ATE insurance, which would ultimately be passed on to group members (albeit indirectly were a GCO made), would be a relevant consideration in any determination of the security issue. That issue was not addressed by Sanders.

135 In fact, both plaintiffs have corresponded with the defendant on the question of security. Both have proposed that security be given by way of a deed poll provided by the law firm, by which, in substance, the firm would submit to the jurisdiction of this Court in relation to any adverse costs order within the relevant period, and agree to pay the defendant the final quantified amount of any such order. The deed poll would be supported by undertakings to the Court. Both firms (or related entities) are ASX-listed and both provided to the defendant (and produced on this application) audited financial statements. Both have sought to persuade the defendant that the provision of a deed poll by the firm is the appropriate form of security. Beach, through its lawyers, has taken the position, at least presently, that it is unsatisfied with the proposed form of security offered by each of Nelson and Sanders. It has taken the view, expressed in correspondence and stated on this application, that it considers it is entitled to security in the form of a bank guarantee or cash.

136 No party suggested that the foreshadowed dispute was incapable of resolution, and there was no factual basis on which I could form a view about the likelihood of the dispute resolving. Nelson submitted generally that a defendant is unlikely to be incentivised to resolve a dispute over security for costs before the resolution of a carriage dispute because competing plaintiffs may improve the defendant's position by making "better" security offerings. There is some force in that observation.[75]

137 Although I accept that the provision of an ATE policy in addition to or in lieu of a deed poll from Shine or S&G *might* hold some attraction to the defendant and that the dispute *might* in fact resolve on that basis, the evidence does not provide a sufficient basis on which to infer that the question of security is more likely to be resolved (at all

75 See *CJMcG Pty Ltd v Boral Ltd* [2021] FCA 699, 706, [26].

or on terms more favourable to group members) if Sanders is awarded carriage.

138 If the question of security is not resolved by negotiation (including by one or both parties moving from their presently stated positions) the defendant will seek a determination that it is entitled to cash or a bank guarantee and the plaintiffs will press for security in a less liquid form.

139 The parties, appropriately, did not attempt to conduct this application as a proxy dispute in respect of security for costs, as it were. The defendant said only that its position was that it was seeking security by way of cash or a bank guarantee, and sought orders (which were made by consent) that the evidence given on this application was limited to the purposes of determining the carriage dispute.

140 No party advanced argument for determination on this application that its position as to the appropriate form of security would be factually or legally preferred; that question is for another occasion. For present purposes it suffices to say that the issue is contestable.

141 Sanders submitted that if the question of security could not be resolved and had to be determined by the court, Sanders would be in a better position to have the dispute determined more expeditiously. It was said that because Shine has the benefit of the ATE policy, the parameters of any dispute would be confined. There would be likely less need for the adequacy of Shine's balance sheet to be examined, whereas S&G was in effect putting its balance sheet in contest which would require a factually intensive inquiry. The submission was put at that very high level of generality.

142 Nelson submitted, and I accept, that the "balance sheet" inquiry would not necessarily be avoided by the fact that Shine's funder has procured an ATE policy. The policy would be brought into play in any dispute about the appropriate form of security, by the proposed provision of a deed of indemnity by the insurer. That itself may raise a question about the sufficiency of assets. Beyond that, the adequacy of Shine's balance sheet may be the subject of inquiry should there be a gap between the policy limit and

the amount of security ordered.[76] I could not, on the material before me, conclude that the existence of an ATE policy would itself reduce the scope of any contest on the question of security, to any appreciable extent.

Funding Proposals

143 Both plaintiffs have sought a Group Costs Order. For the reasons set out in Part II, I have concluded that each has established that it would be appropriate to make such an order.

144 As discussed, Nelson seeks an order fixing the percentage at 24.5%. Sanders seeks an order with a "rachet" provision whereby the percentage reduces on *that portion of the resolution sum above $100m*, if that point is reached, and again on *that portion of the sum above $150m*, if that point is reached. In the alternative, Sanders submits that I should fix a flat rate of 24.5%.

145 For the reasons discussed earlier, I have concluded that Sanders has not established a basis for the making of an order with the proposed ratchet provision.

146 The same reasons also go to show why, even if an order incorporating a ratchet mechanism were made, Sanders has not established that there is a real or genuine price difference between the Shine and S&G funding proposals, despite it having been open to him to have done so.

147 Funding models for competing group proceedings may be compared by making assumptions, and in circumstances where not all relevant facts may be known.[77] However, having formulated a proposed Group Costs Order in which the proposed percentage was to reduce *only on any portion of the recovered proceeds exceeding $100m and not otherwise,* Sanders did not attempt to establish that the price difference would be anything other than hypothetical. The price difference was only faintly emphasised in submissions, in which the ratchet mechanism was described as a "possible benefit" for group members. It was open to Sanders and Shine to adduce evidence as to why

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76 See the confidential schedule.

77 See *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 552 [28]–[29], 553 [33], 566–7 [108]; *Wigmans* (2021) 270 CLR 623, 670 [115].

the ratchet provision ought be regarded as a real benefit, and as to the prospects of it materialising. But they did not do that. In particular:

(a) Sanders did not seek to make a case as to the likelihood that the point at which the ratchet mechanism would take effect (where the recovered amount exceeds $100m);

(b) Although a ratchet or sliding scale mechanism might be employed to avoid a disproportionate or otherwise unreasonable cost impost on group members (and its corollary, an unreasonable or disproportionate return to the law firm), the ability to make a calibrated order requires the making of a judgment about the point or points at which the percentage should change, and what the adjusted percentages should be. Sanders and Shine might have led some evidence to address the basis for proposed "ratchet" points. They might have made submissions about why it is they proposed the percentages change in a particular way at a particular recovery amount. But they did not do that;

(c) For the purposes of the carriage contest, Sanders relied heavily on having obtained evidence addressing the internal rate of return that Shine would receive on its investment in the proceeding should a GCO be made. That evidence was addressed only to a GCO fixed at 24.5%, on assumptions that did not address the recovery amount at which the ratchet mechanism was to take effect. It was open to Sanders to have instructed his expert to take into account the range of damages at which the "ratchet" mechanism was to take effect, but he did not do that.[78]

148 Without having done any of those things, the ratchet form of order was proposed. In those circumstances, the addition of a ratchet mechanism to the proposed Group Costs Order was not shown to amount to a real price difference and the description of it as "window dressing" was apt.

149 For those reasons, even if (contrary to what I have decided) it were thought

[78] See further the confidential schedule

appropriate to make a GCO with a ratchet mechanism as proposed, what has been proposed in this case does not provide a principled or evidence-based reason for concluding that the offerings of Shine and S&G are to be distinguished on the basis of a genuine difference in price.

The evidence as to Shine's Internal Rate of Return

150 As discussed, Sanders procured the opinion of an expert, Mr Mullins, who calculated the internal rate of return that would accrue to Shine were a GCO made at 24.5%. Sanders relied upon the report to submit that a GCO fixed at that rate would deliver a reasonable return to Shine (meaning, I infer, a not disproportionate return having regard to the investment of costs and assumption of risk by Shine) and said that the fact of his having procured it was a strong factor in his favour in the carriage contest. The submission was put this way:

> While due to the early stage of this proceeding the Mullins report is subject to a number of assumptions, some of which may prove to be wrong, in light of the court's indication in earlier decisions, the Mullins report is nevertheless an important and significant factor for the court to take into account in the competing GCO applications. Apart from Mr Sanders providing the court with a basis to assess whether the possible returns are reasonable, the court will be able to revisit this evidence upon review of any ultimate GCO awarded. In other words, the IRR [internal rate of return] is likely to provide a valuable reference point and yardstick to any future review. It does not appear to Mr Sanders that any similar evidence has been adduced by the Nelson plaintiffs. This is a significant omission in their evidence in light of the court's indication given in recent decision. The absence of such evidence ought to be a factor which heavily weighs in favour of granting the GCO to Mr Sanders.

151 Nelson said that his evidence (evidence given by his solicitor) was to be preferred, and criticised numerous aspects of the Shine evidence.

152 For the reasons set out earlier, I have concluded that there are significant difficulties with the Mullins evidence. The shortcomings of the report significantly limited its utility. They reflected a paucity of instructions and a failure by Sanders' solicitors to engage with the fundamental requirements of properly briefing an expert and preparing material in a way that would ensure that it was of assistance to the Court.

153 The fact that the report had been procured was submitted to be "an important and significant factor for the court to take into account in the competing GCO

applications". It was implicit in the submission that Shine's conduct of the proceeding in this respect was to be taken as an indication of greater diligence and of legal work and of a superior quality, by comparison with the Nelson proceeding in which no such report had been obtained.

154 In fact, the quality of the report serves to distinguish Sanders' proceeding, but not favourably. I accept that the context and aspects of the subject matter of the report are, in legal terms, novel, but the principles and accepted practices informing the preparation of such material are not. The exercise was evidently focussed on obtaining a piece of work that appeared to meet what had been described in this Court's decision in *Bogan*. The evidence superficially met that description but the substance of it did not provide a basis to engage with the issues to which it was directed.

Causes of action and case theories

155 The claims in both proceedings concern the same factual substratum. Each pursues substantially the same claims made on the same causes of action — damages for misleading or deceptive conduct said to be in contravention of s 1041H of the *Corporations Act* or s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth), and compensation under s 1317HA of the *Corporations Act* for damage suffered by reason of contraventions of s 674(2) of the *Corporations Act*. Summarised very broadly, in each case it is alleged that Beach made a series of representations to the market between August 2020 and February 2021 concerning its oil reserves and production and its financial outlook. In each case it is said that Beach did not have reasonable grounds to make those representations, which were misleading by reason of a number of facts positively alleged in the statement of claim. Those facts are also formulated as information said to have been known by Beach during the relevant period. The information is said to have been price sensitive and not generally available; and it is alleged that Beach did not tell the ASX of the information despite being required to do.

156 The legal advisers for Nelson and Sanders have taken different views about the

significance or otherwise of certain of the facts relied upon to falsify the alleged representations and said to have been material but not disclosed to the market. Nelson alleges that in FY20 Beach had undertaken appraisal and exploration drilling in the Western Flank with largely unsuccessful results. That fact is relied upon, together with other facts, to undermine the reliability of Beach's represented reserve estimates and financial outlook. The Sanders pleading does not make any allegation concerning the FY20 drilling program. Nelson submitted that that was a significant omission.

157 Mr Allsopp gave evidence that he has considered those allegations and made inquiries about the publicly available data that is said to support the "drilling program" allegation and that it is his present understanding that the success or otherwise of the appraisal and exploration drilling "does not provide support for the allegations made in the Nelson pleading". The criticism was put in this general way. Mr Allsopp said that he intends to keep the matter under review, noting the early stage of the proceeding.

158 Separately, the Sanders pleading alleges that, at the time of making each of the representations, Beach had not adequately checked or cross-checked the geological model it used to estimate reserves in its Bauer oil field against relevant seismic data. The "seismic data" information is alleged to have been material information not disclosed to the market. Mr Allsopp said that the seismic data issue is likely to become an important matter in the case, and that he will further investigate it with the benefit of discovery and expert opinion. The Nelson pleading does not make a specific allegation about any failure by Beach to cross-check its geological model against seismic data. The Nelson plaintiffs submitted that the allegations in their claim concerning the unreliability of the model for the purposes of estimating oil reserves in the Western Flank sufficiently raise the issue.

159 It is unnecessary to further describe the criticisms made by Nelson and Sanders about the other's case theories. Neither party went so far as to say that the claimed deficiency (including on the drilling program and seismic data points) would make the other's claim unmaintainable, and nor did any material on this application permit

that conclusion to be drawn. Each party said, in very general terms, that the matter it emphasised was important, but with little elaboration. That the submissions were approached in that way is unsurprising given the early stage of the proceedings, the fact that the allegation said to be absent from each pleading was only one among other facts relied upon, and the fact that the contest as to the superior case theory was conducted openly and in view of the defendant. I take the view that the matters upon which the respective attacks focussed are matters upon which, given the early stage of the proceeding, the parties' legal advisers might reasonably have taken different views. The criticisms did not establish a basis on which I could conclude that either claim was inherently untenable, or materially superior or inferior to the other claim; as I have said, the submissions did not go that far.

Pleadings

160 There is one respect, however, in which the pleadings themselves may be distinguished, namely that although they traverse broadly the same subject matter, the Nelson pleading is notably more particular and comprehensive and the Sanders pleading more general. The claims in both cases concern a series of representations made by Beach during the period between August 2020 and February 2021 and related non-disclosure. Depending upon how the interactions between the representations are analysed, there are at least three relevant sub-periods of time over which particular representations were operative. The Nelson pleading deals with each representation in turn, setting out in some detail for each period the facts and information said in effect to represent the true state of affairs during that period of time.

161 Having set out that factual basis, each representation in turn is said to constitute misleading or deceptive conduct by comparison with the facts earlier alleged, in respect of the relevant part of the period. It is then said, by reference to each period, that Beach was aware or ought to have been aware of the particular facts alleged in respect of the period. Although it is said that further particulars will be provided after discovery and expert evidence, a serious attempt has been made to provide particulars of the basis on which it is said that Beach was or ought to have been aware of certain information during particular periods, and the basis on which it is said that Beach's

conduct in making representations was in breach of the relevant statute.

162 The relationship between the true state of affairs and the matters represented is at the centre of a claim for misleading or deceptive conduct, and the defendant company's state of mind, in the sense described by *Corporations Act* s 674A(2), is an essential element of the statutory obligation imposed by that section. The Nelson pleading allows for the accumulation of facts and the development of the defendant's alleged knowledge over time, and by adopting the structure it does, recognises that representations made at a particular point in time must be assessed against the facts established in respect of that period.

163 By comparison the Sanders pleading rolls up all of the relevant facts said to render Beach's representations misleading and its forecasts unreliable. It also rolls up the allegations concerning Beach's alleged knowledge (actual or constructive) into a single paragraph by reference to the whole period of time.

164 The Sanders pleading had its genesis in a concise statement filed in the Federal Court. A concise statement is an alternative to the traditional form of pleading, permitted in Federal practice, in which claims are expressed in narrative form, widely used in commercial matters. A concise statement is a very useful pleadings form, but the Federal Court's Class Actions Practice Note provides that, except in cases where it is unlikely that there will be any substantial factual matters in contest, it will usually be the case that the concise statement pleadings process will be inappropriate for use in class actions.[79] It would have been anticipated by Sanders' legal advisers that there would be substantial factual matters in contest in the present proceeding. There was no explanation by Sanders' solicitors as to why they commenced the claim in that form. The pleading was developed somewhat into its current form when filed in this Court. Neither version is signed by counsel, although Senior Counsel for Sanders said on this application that counsel would "stand by" the pleading.

165 It evident that the Nelson pleading is more comprehensive and reflects a greater

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79 Federal Court of Australia, *General Practice Note: Class Actions Practice Note*, 20 December 2019, para 3.1.

investment of time and attention to relevant detail and nuance, compared with the Sanders pleading. I accept that were each claim permitted to proceed, it is likely that each pleading would evolve, including after the receipt of discovery and the preparation of expert evidence. It may be that the more comprehensive Nelson pleading would more robustly support the earlier production of discovery and give rise to fewer pleadings disputes, compared with the Sanders claim. The Sanders claim would undoubtedly require re-pleading at least to address the rolled-up nature of some of the central allegations. It is difficult to draw any more particular conclusion in the circumstances. A comparison between pleadings has its limits, particularly where the case is at an early stage and both claims traverse the same factual substratum and assert the same causes of action.

Retention of Liability Expert

166 Sanders submitted that his proceeding should be preferred because Shine has retained a liability expert, Miles Palke of Ryder Scott. Mr Palke is relevantly qualified and experienced in petroleum engineering and reservoir stimulation studies. Ryder Scott are independent consultants in the petroleum industry. It was put that group members should have the benefit of Mr Palke's expertise, which they would not get if Nelson were appointed. Nelson has not yet retained an equivalent expert. S&G have engaged a consultant expert who has assisted them with their pleadings and case theory, and are in discussions with a firm from whom they intend to engage a subject-matter expert; those discussions have not yet concluded. Nelson was critical of Mr Palke's credentials insofar as his curriculum vitae does not indicate experience in Australia or in respect of the Western Flank — that part of the Copper Basin which Nelson alleges has "unusual" geology (wide and flat oil fields creating a high degree of uncertainty in estimating reserves without significant production history).

167 I accept, and it was not disputed, that the engagement of suitably qualified experts is important in cases of this kind. However, in the circumstances, I do not consider that Sanders had demonstrated a substantive advantage attributable to his retention of Mr Palke. I say that on the assumption that Mr Palke has suitable expertise to give an opinion in relation to the matters the subject of the claim. The submission would have

carried weight had Sanders been able to demonstrate that Mr Palke has unique expertise, or that there was a scarcity amongst relevantly qualified experts, or that, for any other reasons, Nelson would likely struggle to find and retain a suitable expert. However, no evidence was proffered to support any of those conclusions. Shine did not submit that it had undertaken any particular work with Mr Palke such that its preparation of the proceeding was materially more advanced than the Nelson proceeding.

Expedition

168 The Nelson plaintiffs submitted that they had conducted their proceeding with greater expedition and developed their claim more comprehensively than had Sanders, which favoured their proceeding continuing. As discussed, the Nelson pleading is presently superior in form. The more comprehensive pleading likely reflects the fact that S&G commenced investigations about three months before Shine commenced its investigations.

169 The Nelson plaintiffs submitted that Sanders caused delay and costs by issuing proceedings in the Federal Court and not agreeing immediately to have the matter transferred to this Court in order to avoid a cross-jurisdictional multiplicity contest. I am not satisfied that the evidence permits that conclusion. Sanders was entitled to commence proceedings in the Federal Court. Subsequently, there was an exchange between the parties about how to resolve the multiplicity issue in late November–early December 2021. The Nelson plaintiffs requested that Sanders transfer his proceeding to this Court and Sanders maintained that his proceeding ought remain in the Federal Court. In correspondence, both plaintiffs' solicitors provided reasons to support their forum choice. At that point, Beach's position was that both proceedings should be brought before the same court to resolve the multiplicity question, but it expressed no preference as to forum.

170 By January 2022, the parties had conferred as directed by each court, and agreed and sought orders setting in train a process for this court and the Federal Court to jointly resolve the multiplicity and forum issue. However, by 25 January 2022, Sanders

consented to transferral to this Court. Sanders says that this represented an accession to Beach's preference that both proceedings be in this Court, expressed via letter to the plaintiffs on 24 January 2022. Orders were made by the Federal Court transferring the Sanders proceeding to this Court on 26 January 2022. All that can be concluded from the evidence is that both plaintiffs sought to maintain their proceedings in the Court in which they filed, until the defendant expressed a preference. At that point Sanders promptly acceded to transferral. No inference is available that Sanders unreasonably delayed the resolution of the forum issue.

Solicitors' experience

171 The Nelson plaintiffs submitted that there is a significant disparity between the experience of S&G and that of Shine in securities class actions, such that although they did not dispute that Shine is competent to run the proceedings, S&G should be regarded as more likely to conduct the proceedings with a greater level of proficiency. Sanders submitted that the factor is neutral and urged the Court to decline to engage in a comparative assessment of the firms' respective performances in class actions.

172 Courts have expressed some reluctance in comparing the experience of legal practitioners in this context.[80] The Full Court of the Federal Court said in *GetSwift* that a very significant consideration in resolving a multiplicity contest is the selection of the most experienced and capable legal team and, although it may be a difficult exercise, the Court should not "dodge" that question if there is a basis for differentiation.[81]

173 In *Wigmans*, the multiplicity contest had been conducted on the basis that it could be assumed that there was no relevant difference between the competing parties' legal teams. When *Wigmans* was before the New South Wales Supreme Court, Bell P took issue with the observations of the Full Court in *GetSwift* concerning the importance of selecting the most capable and experienced legal team, saying (in *obiter*) that that

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80 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 565 [97]–[98] (Bell P). Also, in *GetSwift* (2018) 263 FCR 92, the Full Court of the Federal Court at [278] acknowledged that a comparison of this kind is a "difficult" exercise.

81 *GetSwift* (2018) 263 FCR 92, 152–3 [278].

exercise would involve criteria for the assessment of capability that may be highly subjective and the evaluation of capability quite problematic, taking the court into invidious territory. That may be a relevant consideration, however, where the respective legal teams differed vastly and starkly in terms of their experience in the conduct of class actions.[82]

174 In the High Court the issue did not arise for consideration in *Wigmans*. Justices Gordon, Gageler and Edelman observed that no party had submitted that the factors identified by the primary judge including the experience of legal practitioners and resources available were irrelevant (save for the first factor which was the competing funding proposals).[83] Their Honours noted that the case had been conducted on the basis that the experience and abilities of the legal and funding teams was a neutral factor, and so it was "unsurprising that [the primary judge] assumed that the solicitors in each proceeding were of equal experience and ability, that each of them would take the same number of hours of work to reach settlement or judgment, and, at least implicitly, that each of them had the same chance of achieving each given settlement or judgment sum".[84] That observation was made in the context of the question whether it was permissible to assess net hypothetical returns to group members in the way that the trial judge had done, by making a number of assumptions.

175 In light of the above, I do not think it can be said that a comparison between the capabilities of legal teams must be disregarded as irrelevant to the multifactorial assessment of all relevant factors when evaluating competing proceedings. It remains the case, however, that the appropriate weight to be given to such a comparison will depend upon the extent of disparity between legal teams' respective experience. Where the apparent differences are slight, it may be difficult to identify rational and objective criteria and the criteria for assessing their weight and their application will become problematic.

176 I accept that S&G has *more* experience in securities class actions. S&G principal Mr

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82 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 565 [96]–[98] (Bell P).
83 *Wigmans* (2021) 270 CLR 623, 651 [60], 668 [109].
84 Ibid 652 [63].

Chuk has worked on seven securities class actions, five of those as a principal lawyer or practice group leader. Five of its senior practitioners have combined experience in several securities class actions. Shine is relatively newer to the securities class actions arena, having run five concluded class actions. Mr Allsopp was responsible for each of them. Plainly enough, Mr Allsopp would not have conducted those cases single-handedly, but there was no evidence that other senior lawyers at Shine have securities class actions experience.

177 The Nelson plaintiffs submitted that S&G has a *better track record* than Shine in terms of outcomes in securities class actions, comparing group member returns in twelve securities class actions undertaken by S&G with two securities class actions conducted by Shine, both of which were settled.[85] It was submitted that the returns in the actions conducted by S&G were higher than those conducted by Shine.[86] Sanders submitted that on the material before me I could draw no meaningful conclusion about the likely comparative abilities of Shine and S&G to conduct matters efficiently and effectively. The sample was extremely small, and it would be necessary to know considerably more about each case in order to determine the quality of the solicitors' performances, as it were. I accept that submission in relation to the question of returns to group members from historical securities class actions.

178 Whilst it cannot be gainsaid that S&G senior lawyers have, between them, more experience in securities class actions than those lawyers identified in the Shine material, both firms have significant experience in conducting class actions. Both plaintiffs are represented in these proceedings by experienced counsel.

Extent of book build

179 The Nelson plaintiffs faintly pressed the extent of their book build, conceding that it

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85 In two other securities class actions conducted by Shine where there was an unsuccessful outcome at trial. In on matter, the applicants (Shine's clients) succeeded on appeal. In the other matter, the time for filing of an appeal had not expired at the time of this application.

86 The twelve matters conducted by S&G achieved settlements ranging from $21m – $95m, with legal costs ranging from 6% – 30% of the settlement sum, and group member distributions of $16.4m – $67.1m or 51% – 79% of the settlement sum. The two matters conducted by Shine achieved settlements of $6.7m – $32.5m, with legal costs ranging from 39% – 45% of the settlement sum, and group member distributions of $2.4m – $11.0m or 34% – 36% of the settlement sum. S&G emphasised that across its twelve matters, its legal costs had averaged 14% of the settlement sum.

was not a "major distinguishing factor". The concession was proper. There was limited book building in each proceeding, and there was no evidence to suggest that potential group members who have registered an interest in one proceeding would not join the other proceeding. As Sanders submitted, book building is of limited relevance where there is an open class because the proceeding is conducted on behalf of every group member who does not actively opt out.[87]

Back-up plan

180 I do not regard it as relevant in the present circumstances that Sanders had an advanced "back up plan" in the form of third-party funding, should a Group Costs Order be refused. Sanders and Shine entered into a retainer agreement under which the Sanders proceeding was to be funded by third-party funding, pursuant to an agreement between Shine and Woodsford. That retainer agreement was "voided" upon Sanders and Shine deciding to seek a Group Costs Order. On this application, Sanders and Shine submitted that the proposed Group Costs Order would be more advantageous to group members. The "back up plan" is to revert to the previous arrangement. The fact that an earlier arrangement was made and might be re-enlivened, if need be, is not a proper basis for distinguishing between the Sanders offering (in which a different funding model is now proposed) and its competitor.

Conclusion – Multiplicity

181 In some multiplicity contests there is one striking feature by which one proceeding and set of representatives can be readily separated from the other, but this is not such a case.

182 As will be apparent from the foregoing, the proceedings overlap almost entirely and there is very little that separates the competing parties and their lawyers. The parties acknowledged this, at least implicitly, by the factors they emphasised in their submissions. Most of the apparent distinguishing characteristics had a chimerical quality and were not, upon closer examination, points of real significance. The factors said to be of advantage to group members (a better cause of action, a potential

87 See *Boral* (2021) 389 ALR 699, 720 [78] (Lee J).

advantage in negotiations and so on) could not be characterised that way on the evidence without engaging in speculation.

183 As discussed earlier in these Reasons, the nature of the assessment required in this context is evaluative. It is not a calculus. It may involve (as it does in this case) weighing incommensurable or competing considerations.

184 Where, for example, a comparison of competing funding models produces a clear price difference, that feature is attractive as a means of differentiation because, on the face of things, it presents as relatively concrete and objective, even if the comparison must be made by making assumptions. That said, as the High Court observed in *Wigmans*, litigation funding arrangements may be relevant, but there is no requirement that they be taken to be determinative.[88] As the High Court also observed in *Wigmans*, the court's task in this context cannot be characterised as an "auction process" and is instead more akin to that employed when considering the position of trustees, liquidators or persons under a disability.[89]

185 Although the considerations that may inform a comparison of competing proceedings cannot be stated exhaustively, when regard is had to the list of relevant factors identified in earlier cases (which includes the conduct of the representative parties, the progress of the proceedings, the degree of expedition and the case theories advanced), it is clear that what is permitted, and what may be necessary in an exercise of this kind, is to have regard to the standard or quality of the work performed or likely to be performed in the proceedings. Such an evaluation will necessarily be qualitative in nature and cannot be quantified in the way that a funding proposal may be quantified.

186 The plaintiff parties in this case each in their own way invited an evaluation of the quality of the work undertaken in respect of the proceedings, by drawing attention to the retention of experts, the procuring of evidence supporting the making of a Group Costs Order, the case theories and pleadings and the degree of expedition exhibited

88 *Wigmans* (2021) 270 CLR 623, 668 [111] (Gageler, Gordon and Edelman JJ).
89 Ibid 673 [123].

by the practitioners in the prosecution of the proceedings.

187 As I have said, most of the factors relied upon by the parties did not present a basis for a genuine differentiation. What could also be evaluated, however, was the standard and quality of the evidence relied upon in this application as evidencing the work done to progress the proceeding.

188 The matters given considerable emphasis by Sanders on this application did in fact distinguish the Sanders–Shine offering, but not favourably.

189 First, Shine and Sanders were in effect seeking an advantage in their contest with Nelson and S&G for their having procured evidence that Nelson had not procured. In pressing the importance of their having done so, they could not avoid an evaluation of the work that had been done. When the opinion of their expert Mr Mullins was examined for its substance (not just the fact of it having been obtained), its quality was lacking in important respects. The analysis of that evidence is set out in detail elsewhere in these Reasons. Although the evidence is addressed to a novel field of legal discourse, the standards that were not observed are standards with which experienced practitioners ought be well familiar.

190 Secondly, as discussed earlier, Sanders sought to distinguish his offering by proposing a GCO with a "ratchet" provision. Having done so, Sanders and Shine did not lead any evidence or make any submissions about their proposed "ratchet" points. They did not address why they had proposed that the percentages decreased by a particular amount once the recovery sum reached $100m (why at $100m and not $85m, for example). And having obtained evidence (with its limitations) about the rate of return to Shine under a GCO, they did not address in that evidence the returns that would accrue at the point at which their ratchet mechanism was to take effect. Sanders did not even attempt to address, by way of evidence or submissions, why the proposed adjustments would have the effect of producing an appropriate, reasonable or proportionate return at the "ratchet points" nominated. It is apparent that, although a GCO made in the form proposed might work to "avoid unnecessary costs" as the

damages increase (as Sanders put it), no effort was made to establish why it was that the "unnecessary costs" point was reached at a recovery amount of $100m. No explanation was given for that approach.

191 By comparison, Nelson's analysis of the issues informing the question of the appropriate rate was considered, and did not leave the obvious gaps and inconsistencies apparent in the Sanders approach. Although Nelson did not obtain an expert report, they adduced evidence from their solicitor which would ultimately be informative of the question. Nelson accepted that the proposed rate would require revisiting, but said, for reasons which were coherent, that that would more appropriately occur in this case at a later stage.

192 It might be said that the Mullins Report could be put to one side and the matter regarded as a neutral factor. But to state the matter simply, when the material before me was examined, it revealed some notable deficits on matters that Sanders and Shine emphasised as being of considerable importance. In what is in effect a competition between specialist practitioners for the carriage of overlapping proceedings where the features of the proceedings themselves do not provide a sufficient basis to distinguish between them, those deficiencies matter.

193 To be clear, although I have identified particular differences in the quality of the work of the firms *in this particular case*, I do not conclude in any general way that one firm is more capable than the other in respect of its class action practice.

194 Thirdly, although I do not accord it significant weight, the pleaded case has been prepared at this point by Nelson with an evidently greater investment of time and attention to detail.

195 Making a qualitative evaluation of the matters addressed, I consider that the standard of legal work before me, where it is different, clearly favours the Nelson–S&G proceeding, in circumstances where it is not possible to identify a real difference in the causes of action advanced or to be satisfied that a real price difference has been established, and where the other asserted advantages to group members involve

speculation. For those reasons, the Nelson proceeding should go forward.

CERTIFICATE

I certify that this and the 69 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 9 August 2022.

DATED this ninth day of August 2022.

Associate