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

Not Restricted

S ECI 2020 04505

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| Nicholas John Gehrke | First Plaintiff |
| Lester Buch | Second Plaintiff |
| v | |
| Noumi Limited (formerly Freedom Foods Group Limited (ACN 002 814 235)) | First Defendant |
| Deloitte Touche Tohmatsu (A Firm) (ABN 74 490 121 060) | Second Defendant |

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| JUDGE: | Nichols J |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 26 October 2022 |
| DATE OF RULING: | 8 November 2022 |
| CASE MAY BE CITED AS: | Gehrke v Noumi Ltd |
| MEDIUM NEUTRAL CITATION: | [2022] VSC 672 |

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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 —Whether proper evidentiary basis to make the proposed 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 — Application granted.

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| APPEARANCES: | Counsel | Solicitors |
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| For the Plaintiffs | Mr A Pound SC<br>Ms E Levine | Slater and Gordon Lawyers<br>Phi Finney McDonald |
| For the First Defendant | Ms JA Findlay | Arnold Bloch Leibler |
| For the Second Defendant | Ms WA Harris KC<br>Mr A Roe | Corrs Chambers Westgarth |

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HER HONOUR:

**Introduction**

1 This is a group proceeding issued under Part 4A of the *Supreme Court **Act** 1986* (Vic). The plaintiffs seek damages on behalf of group members who were shareholders in the first defendant, **Noumi** Limited, an ASX-listed company, on the ground that it misrepresented its true financial position to the market as a result of accounting errors which overstated its performance. The second defendant, **Deloitte** Touche Tohmatsu, was Noumi's auditor, and is alleged to have engaged in misleading conduct by certifying as correct, incorrect accounts. The alleged breaches are said to have affected the value of Noumi's shares, and to have caused loss to the group-member investors.

2 The plaintiffs now seek a Group Costs Order pursuant to s 33ZDA of the Act, which is the subject of this judgment.

3 The proceeding took its present form as a consequence of orders I made in November 2021, consolidating separate group proceedings issued by each of the plaintiffs. Mr **Gehrke** and Mr **Buch** were appointed joint plaintiffs, and their solicitors (**Slater and Gordon** Lawyers and Phi Finney McDonald (**PFM**)) were granted leave to be jointly named as solicitors on the record in the consolidated proceeding.

4 Leave for joint representation was conditioned upon the plaintiffs and their solicitors undertaking to conduct the proceeding in accordance with a co-operation protocol, which governs the joint conduct of the proceeding by the plaintiffs and their respective solicitors. A related agreement between the two firms provides that they will equally contribute to the costs of the proceeding (including the payment of disbursements) and that they will equally share any obligation to provide security for costs and to meet any adverse costs order. The plaintiffs have different funding arrangements in respect of the work to be undertaken by their respective lawyers for the purpose of the proceeding. Slater and Gordon is acting on a "no win, no fee" (**NWNF**) basis, bearing the costs of the action itself. PFM has financed its costs and, in effect, insured its exposure by a funding agreement with the litigation funder Omni Bridgeway

(Fund 5) Australian Invt Pty Ltd (the **Funder**), pursuant to which the Funder will indemnify PFM in respect of its liabilities for the payment of any adverse costs and security for costs. The plaintiffs and their solicitors (and the Funder, in Buch's case) had, from the outset of their respective proceedings and when seeking consolidation, determined to seek a Group Costs Order permitting the plaintiffs' costs to be calculated in accordance with s 33ZDA of the Act. By this application, they seek an order in the following terms:

> 1 The legal costs payable to the solicitors for the plaintiffs and group members, Slater and Gordon Limited and Phi Finney McDonald Pty Limited, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding (up to the conclusion of the trial of common issues), with such payment to be shared equally between the two firms of solicitors.
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> 2 Subject to further order, the percentage referred to in order 1 above be 22% inclusive of GST.
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> 3 Liability for payment of the legal costs pursuant to orders 1 and 2 be shared among the plaintiffs and all group members.
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> 4 The solicitors for the plaintiffs and group members, Slater and Gordon Limited and Phi Finney McDonald Pty Limited, be liable to pay any costs payable to the defendants in the proceeding, with each firm of solicitors being severally liable for 50% of such costs.
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> 5 The solicitors for the plaintiffs and group members, Slater and Gordon Limited and Phi Finney McDonald Pty Limited, be liable to give any security for the costs of the defendants in the proceeding that the Court may order to be given, with any such security to be given in equal proportions by the two firms of solicitors.

5 The terms of order in part reflect the structure of the statutory provision. They also reflect the substance of the costs sharing arrangement between PFM and Slater and Gordon by which they assume equal responsibility for the funding of the action and seek, accordingly, to share the proceeds of any costs award.[1]

6 The plaintiffs relied on affidavits of Mr Buch and Mr Gehrke and their solicitors Emma **Pelka-Caven** and Benjamin **Phi**, and an affidavit of Alistair **Morgan** of Omni Bridgeway Limited.

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[1] The terms of the funding arrangements, including those governing the joint conduct of the proceeding, are set out in more detail below.

7 Some of the plaintiffs' evidence was subject to claims for confidentiality and was filed in redacted form pursuant to orders made under rule 28A.06 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). 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.

8 For the reasons set out below, the application is granted. I will make orders in the terms sought.

**Governing principles — Group Costs Orders**

9 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 governing the application of s 33ZDA were not in dispute. I refer to what is said in *Fox v Westpac; Crawford v ANZ* (***Fox/Crawford***), ***Allen v G8*** *Education Ltd*,[2] ***Bogan*** *v The Estate of Peter John Smedley (Deceased)*,[3] *Nelson v Beach Energy*,[4] and *Lay v* ***Nuix*** *Ltd*,[5] without setting out those passages here. I discuss relevant aspects of the principles, where necessary, below.

**The parties' submissions**

10 The plaintiffs submitted that it would be a suitable, fitting and proper way to ensure that justice is done in the proceeding[6] to make a Group Costs Order, in substance because:

(a) it would provide certainty and transparency to the plaintiff and group members in respect of funding arrangements and legal costs;

(b) the costs and retainer agreements between the plaintiffs and their solicitors expressly contemplate the plaintiffs seeking Group Costs Orders, and the

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2 [2022] VSC 32, [15]–[31] (***Allen v G8***). Those paragraphs distil the principles articulated in *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).

3 [2022] VSC 201, [6]–[14] (***Bogan***).

4 [2022] VSC 424, [36]–[49] (***Beach Energy***).

5 [2022] VSC 479, [74]–[77] (***Nuix***).

6 Referring to the tests set out in *Allen v G8* [2022] VSC 32, [19] and *Fox/Crawford* [2021] VSC 573, [31].

agreements do not provide for more favourable costs arrangements in the absence of a GCO;

(c) by comparison with the most likely funding arrangements 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;

(d) a Group Costs Order would establish a framework for providing a reasonable return to the law practices in the event of a successful outcome for group members in return for the risks assumed and the legal work performed. The proposed rate at which legal costs may be calculated is, at least *prima facie*, reasonable and proportionate.

11 The defendants each assumed a very limited role in this application. They did so, expressly acknowledging the guidance given in earlier cases about the proper role of a defendant to an application for a Group Costs Order.[7] The defendants were concerned to ensure that nothing arising from this application could prejudice any subsequent application for security for costs, should it be made. Accordingly, the parties proposed, and I made, orders under s 136 of the *Evidence Act 2008* (Vic) limiting the use to be made of particular parts of the plaintiffs' evidence. The defendants also each sought orders that the plaintiffs bear their own costs of the application and that the defendants' costs be reserved, relying on the reasoning in the costs ruling in *Allen v G8*,[8] on the basis that, like the defendant in that case, they had appropriately confined their involvement on the application. The first defendant raised an additional issue (the provision of undertakings by the plaintiffs, discussed below). The submissions in respect of that issue did not make clear the first defendant's interest in the issue. They were, however, confined and extremely brief.

12 The plaintiffs had initially sought that the costs of the application be costs in the

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7 See *Fox/Crawford* [2021] VSC 573, [15], [37]; *Allen v G8* [2022] VSC 32; *Beach Energy* [2022] VSC 424, [11]; *Bogan* [2022] VSC 201, [13(v)].

8 *Allen v G8 Education Ltd (No 3)* [2022] VSC 302.

proceeding, but by the time of the hearing, they sensibly did not resist the costs orders sought by the defendants. Orders will be made accordingly.

**Contractual arrangements governing costs and funding**

*Gehrke and Slater and Gordon*

13 By their costs and retainer **Agreement**, Slater and Gordon and Mr Gehrke have agreed, relevantly and in substance, as follows:

(a) The plaintiff instructs Slater and Gordon to undertake such legal work as Slater and Gordon considers reasonably necessary to conduct the class action and protect the plaintiff's rights in relation to the subject claims. Slater and Gordon is also retained by other clients with an interest in the class action who have retained or will retain Slater and Gordon on substantially the same terms. The Agreement is said to constitute a disclosure statement and conditional costs agreement within the meaning of the *Legal Profession Uniform Law Application Act 2014* (Vic).

(b) In circumstances permitted by the Court, Slater and Gordon may seek to charge for work done through a Group Costs Order in which legal costs are calculated as a percentage of the amount of any award or settlement that may be recovered in the class action. If a GCO is made, Slater and Gordon will be paid pursuant to an order of the Court following settlement or judgment.

(c) The plaintiff agrees that, in circumstances where a Group Costs Order is not sought by Slater and Gordon or granted by the Court, Slater and Gordon may seek litigation funding to fund the legal costs and defray the risk of adverse costs orders in the class action, including the need to provide security for costs. Any litigation funding arrangement will be subject to a litigation funding agreement between the claimant and the litigation Funder. Slater and Gordon will be paid in accordance with that agreement, by which disbursements and some or all of the professional fees incurred prior to resolution of the class action will be paid by the litigation Funder, and the litigation Funder will

receive a litigation funding fee or the amount paid by the Funder prior to the resolution of the class action.

(d) Slater and Gordon will otherwise charge for work done by reference to the time reasonably and properly spent in accordance with the hourly rates set out.

(e) Regardless of the outcome of the claim, provided the plaintiff complies with his obligations under the Agreement, he will not be required to meet any liability for legal costs and disbursements by making payment out of his own pocket at any stage. His liability for legal costs and disbursements will be funded by a litigation Funder or carried by Slater and Gordon on a NWNF basis and recovered out of the compensation or damages received, in the event of a successful outcome.

(f) Where Slater and Gordon's fees are incurred on a NWNF basis, its fees will only be recoverable out of the compensation or damages received in the event of a successful outcome. A successful outcome is defined as receipt by the claimant of an amount of money after payment of all liabilities (including tax) that the claimant incurs in a matter to Slater and Gordon, and to any other person, or where a reasonable offer of settlement is made that Slater and Gordon recommends the claimant accepts. The Agreement does not guarantee any minimum return net of legal costs.

(g) In the event that Slater and Gordon has conducted all or part of the case on a conditional (NWNF) basis and the case is successful, Slater and Gordon is entitled, pursuant to the terms of the *Legal Profession Uniform Law Application Act 2014* (Vic), to charge the claimant a success fee of up to 25% of professional fees incurred on a NWNF basis (i.e., an uplift fee).

(h) Estimates for the total legal costs and disbursements estimated to be incurred in prosecuting the claims are given, as is the estimated uplift fee that will apply in the event that Slater and Gordon funds the proceeding on a NWNF basis.

(i) Slater and Gordon agrees to indemnify the plaintiff against adverse costs orders made by the Court in the class action subject to the plaintiff acknowledging that any recovered amount will first be deployed to meet any adverse costs liability.

(j) Slater and Gordon is entitled to terminate the Agreement if (among other circumstances) it "believes that the Class Action does not enjoy sufficient financial support", subject to having first provided the plaintiff with reasonable written notice of its intention to do so, and its reasons for doing so. "Financial Support" is defined to mean one or more of a Group Costs Order, a litigation funding agreement or a *decision by Slater and Gordon to conduct the Class Action on a 'No Win, No Fee' basis*.

14 The parties, then, did not confine themselves to a single means by which Slater and Gordon's legal costs would be paid but stipulated that legal costs and disbursements will be funded in one of three ways — by the plaintiffs seeking and the Court making a Group Costs Order; or in the event that no GCO is sought or obtained, by obtaining litigation funding (which will itself be subject to an agreement between the plaintiffs and the relevant Funder); or by Slater and Gordon acting in the proceeding on a NWNF basis. The agreement also contemplates a hybrid or fourth alternative, namely that litigation funding might be obtained in respect of some but not all costs, in which case Slater and Gordon will act on a NWNF basis in respect of those costs.

15 The Agreement is evidently intended to operate irrespective of which funding model is adopted. The Agreement does not itself provide a process by which funding options are to be considered. There is no requirement, for example, that the parties first seek a GCO before seeking litigation funding. What is clear, however, is that by the agreement the parties have expressly agreed that they may seek a Group Costs Order or, in the alternative, litigation funding. Litigation funding may be sought where the parties decide not to seek a GCO or where the Court refuses a GCO. Relevantly, Slater and Gordon is entitled to seek a litigation funding arrangement to fund the categories of costs of the proceeding, in circumstances where a GCO is either not sought, or not obtained. The Agreement is in substantially the same form as the Agreement between

Slater and Gordon and the plaintiff in *Allen v G8*.[9] As I said in that case, the drafting of the agreement in respect of its termination provisions is in some respects ambiguous. It can be accepted, however, that in the absence of the alternative funding mechanism, Slater and Gordon is bound to act in the proceeding on a NWNF basis, but subject to its termination rights. I refer to what is set out in *Allen v G8* at [48]–[60]. That conclusion does not detract from the clarity of the parties' agreement that they may seek a Group Costs Order or third-party funding.

16 Ms Pelka-Caven's evidence was that it is not the practice of Slater and Gordon to conduct shareholder class actions on a NWNF basis. Rather, its usual practice is to obtain third-party funding or to issue proceedings on the basis that an application for a Group Costs Order will be made by the plaintiff, unless there is a compelling reason to the contrary — such as might prevail in claims for personal injury or for particular claimant cohorts. In each of the 12 group proceedings issued by Slater and Gordon on behalf of shareholders and resolved in the proceeding decade, all have been supported by third-party funding.

*Mr Buch and Phi Finney McDonald*

17 The arrangements for the funding of Mr Buch's legal costs in respect of the proceeding comprise a retainer and costs agreement between the plaintiff and PFM and related agreements between PFM, the plaintiff and the Funder.

18 The plaintiff has retained PFM to act on his behalf in respect of the litigation and to undertake legal work in respect of it, pursuant to a conditional costs agreement.[10] PFM acts for the plaintiff on a NWNF basis and will not pursue the plaintiff for the payment of any legal costs. By the Retainer, the plaintiff has instructed PFM to apply for a Group Costs Order. If the Court makes a group costs order, PFM's entitlement to recover legal costs will be pursuant to the terms of that order in place of any inconsistent terms of the costs agreement.

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9 *Allen v G8* [2022] VSC 32, [43]–[62].

10 The costs agreement between PFM and Mr Buch is defined as a conditional legal costs agreement within the meaning of the *Legal Profession Uniform Law Application Act 2014* (Vic).

19 PFM is entitled to seek funding for the litigation. Subject to the terms of any GCO, PFM will conduct the litigation on a no win, no fee basis, with the Funder providing funding to PFM in respect of a proportion of its professional fees and 100% of disbursements on a monthly basis; the balance of PFM's professional fees are to be carried by PFM. PFM is entitled to an uplift of 25% on its professional fees carried on a no win, no fee basis in the event of a successful outcome.

20 The funding arrangements between the plaintiff, PFM and the Funder are the subject of a "litigation funding scheme" (**Funding Scheme**), characterised as a managed investment scheme for the purposes of the ***Corporations Act*** *2001* (Cth), which is registered with ASIC under s 601EB of the Act.[11] PFM and the responsible entity for the Funding Scheme have agreed to conduct the litigation in accordance with the terms of that Scheme. The Funder is the authorised representative of the responsible entity of the Funding Scheme. The Scheme provides in substance as follows.

21 The costs of conducting the litigation will be partly met by the Funder who, in return, will be entitled to a share of any resolution sum. PFM caries a proportion of its costs and is entitled to be paid for those costs, with a 25% uplift, from the resolution sum, if the litigation is successful, subject to the terms of the Scheme. The Funder has agreed to indemnify the plaintiff and all members of the Funding Scheme against any adverse costs order which might otherwise require the plaintiff to pay another party's legal costs. The plaintiff (and other group members who become members of the Scheme) agree to assign their future entitlements to share in any resolution sum, in order that it can be divided up between the lawyers, the Funder and the claimants in accordance with the scheme. The Scheme is created, then, by the pooling of the Funder's promises to pay the costs of the litigation, the lawyers' promises to conduct the class action with a portion of their fees at risk, and the claimants' assignment to the scheme of their entitlements to any resolution sum. PFM agrees to request that every claimant applying to become a member of the Funding Scheme also enters into an arrangement

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[11] Freedom Foods Litigation Funding Scheme ARSN 646 754 378. The documents governing the Scheme were in evidence. It is unnecessary to set out their provisions in detail.

with them so that each claimant is a client of the lawyers.

22 It is expressly contemplated that the plaintiff will seek a Group Costs Order in respect of the litigation at the rate set out, acknowledging that the grant of any GCO, and its terms, are matter for the Court.

23 In the event of a successful outcome, the plaintiff authorises PFM to receive any resolution sum and, subject to Court approval, to withhold a portion of that sum (being a percentage of the resolution sum fixed by the GCO, as made — the *GCO Amount*) to be divided between PFM and the Funder in accordance with the terms of the Funding Scheme, with the balance of the resolution sum to be distributed amongst group members.

24 If a GCO is made, the amounts payable to the lawyers and ultimately to the Funder will be calculated as a percentage of the resolution sum.[12] The responsible entity is obliged to administer the scheme in accordance with the terms of any GCO.

25 PFM and the Funder have no right to recover any amount of costs from the plaintiff other than as a distribution of the resolution sum. In particular:

(a) The costs agreement provides that PFM is to receive and hold on trust the resolution sum and to withhold an amount to be divided between PFM and the Funder in accordance with the terms of the Funding Scheme. That amount is the percentage of the resolution sum determined by the Group Costs Order, with the balance to be distributed amongst group members and otherwise in accordance with Court order.[13]

(b) The costs agreement further provides that the GCO Amount will comprise a *maximum of 22% withheld from the Resolution Sum*.[14]

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12 The resolution sum is defined as any money, services, benefits or in kind assets for which the class action is settled or for which judgment is given, including any interest or costs pursuant to a costs order made by the court or by agreement.

13 Clause 4.3.

14 Clause 17.2.

(c) The Amended Constitution of the Funding Scheme provides for the assignment by the claimants of their entitlements to any part of the Resolution Sum to the Trustee, to be held in accordance with the Scheme. The Trustee must pay the amount of each member's entitlement to the Resolution Sum in the order of priority as set out in clause 12.3. That clause provides for the distribution of the **Group Costs Order Sum** (i.e. the percentage of the resolution sum stipulated in the Group Costs Order as fixed and as later adjusted by the Court, if that occurs) between the lawyers and the Funder, such that costs paid in respect of the litigation are first reimbursed.[15] That formula for distribution makes clear that costs entitlements are to be paid from the Group Costs Order Sum. The necessary corollary is that costs are not to be paid from the remaining proportion of any recovery sum. The product disclosure statement (**PDS**) for the Scheme makes this explicit.[16]

(d) Clause 12.6 of the Scheme states, in substance, that the amounts to which the Funders and lawyers are entitled under clause 12 cannot exceed *the Resolution Sum*. I raised with the parties my concern that the terms of the Scheme might be thought to contain an ambiguity or inconsistency between clauses 12.3 and 12.6. Each of PFM and the Funder stated in response that they understand that the lawyers' and Funders' entitlements under the scheme cannot exceed the Group Costs Order Sum, in keeping with the intention stated in the PDS. PFM did so by Mr Phi setting out his understanding of the Scheme Constitution and PFM's intention in respect of it, in an affidavit. The Funder did so by Mr Morgan, who is General Counsel, Australia and Asia, of Omni Bridgeway Limited, setting out his understanding of the Scheme Constitution and the Funder's intention in respect of it, in an affidavit. I am satisfied, having regard to the scheme documents, the PFM costs agreement and the evidence of Mr Phi and Mr Morgan, that the funding arrangements are not intended to operate in

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15 The scheme describes the costs amount as the "Quantum Weighted Amount". Read in context, including by reference to the Product Disclosure Statement (PDS), that amount is intended as reference to the percentage of the resolution sum fixed by any Group Costs Order — that is, the **Group Costs Order Sum**.

16 PDS cl 37.

a manner that is inconsistent with the effect of the proposed Group Costs Order — in particular that the lawyers (and through them, the Funder) may not have recourse to any moneys recovered in the litigation over and above the Group Costs Order Sum. That is so, even if it happens that the costs actually incurred in conducting the proceeding are greater in amount than the Group Costs Order Sum.

(e) This is subject to one reservation in respect of the costs to be incurred in administering any settlement. The Scheme Constitution allows for the person appointed by the Court as the settlement scheme administrator (in the event that the proceeding is resolved by a settlement) to seek to be paid their costs of administering the settlement scheme, by applying to the Court. That is, should PFM be appointed in the future as settlement scheme administrator, the Scheme does not itself confine PFM to seeking its costs of administering any settlement scheme, from the Group Costs Order Sum. Mr Phi said in his evidence that PFM has not yet decided whether, in the event of a successful resolution of the proceeding, it would apply to the Court to be appointed as settlement scheme administrator or, if it did so, whether it would apply to the Court for payment of its costs of doing so, over and above the costs it will receive from the Group Costs Order Sum. The question as to how a settlement administrator ought be compensated for its work, should the proceeding successfully resolve in that way, is a question for determination when and if it arises.

26 The scheme documents set out the GCO rate that the Buch plaintiff had initially proposed to seek (described below), which was a rate higher than 22%. Group members who have retained PFM were advised that Mr Buch was making application for a GCO fixed at 22% plus GST, in a communication from PFM. The Scheme Constitution provides that its terms shall be automatically amended if a GCO is made, in such manner as is necessary to give effect to the terms of the GCO, without the need

for a variation agreement.[17] It also provides that the trustee must give notice to all scheme members of any amendment to the constitution effected by Court order. PFM (and Slater and Gordon) will be directed to give notice to group members of the making of the Group Costs Order.

*Conclusion — existing costs arrangements*

27 Each plaintiff and his lawyers explicitly agreed that the plaintiff may seek a Group Costs Order, from the outset of commencing their respective proceedings. In Gehrke's case, the agreement itself did not require an election between funding models but expressly contemplated the plaintiff making that application as an alternative to third-party funding. In Buch's case the arrangements were predicated on the plaintiff seeking a Group Costs Order. The plaintiffs retained their original intentions while contemplating conducting the litigation jointly, and upon consolidation of their proceedings.

28 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 alternative funding models, discussed below.

29 The defendants did not submit that any element of the funding arrangements in this case — either the involvement of the Funder in financing PFM's commitments, or the sharing arrangement between the law firms — undermined or was inconsistent with the essential operation of the Group Costs Order as intended by s 33ZDA; and nor was it apparent that the funding and costs-sharing arrangements had that effect. Nothing about those arrangements changes the basis on which the plaintiffs' legal costs are to be calculated, or the return to group members that will follow from the Group Costs Order (meaning the proportion of any recovered amount that will be returned to group members, net of costs, as stipulated in the Order). In respect of PFM's defraying of its costs by entering into the arrangement with the Funder, it relied upon John Dixon J's holding in *Bogan*, that s 33ZDA does not invoke any inquiry into

[17] Clause 12.7.

the means by which the law practice chooses to fund its obligations.[18] Regard should also be had to the observations in *Nuix*.[19] The financing of PFM's obligations has been undertaken transparently, and evidently in conformity with the understanding of the Funder and PFM of the requirements of Part 5C.1 of the *Corporations Act* in respect of managed investments schemes.

**Structural benefits of a Group Costs Order**

30 The plaintiffs emphasised the structural benefits they sought to obtain by seeking a Group Costs Order. As set out in *Allen v G8*, a Group Costs Order has certain inherent structural benefits:[20]

> 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 eradicate any risk that their compensation, if recovered, will be eroded by costs whose proportion to that compensation exceeds the specified percentage.
>
> In this respect the GCO statutory funding model may be generally compared with those forms of conditional funding in which the plaintiff and group members will not pay any costs unless they are successful but are otherwise liable to pay their solicitor's costs, meaning that the funding arrangement permits that moneys recovered for the represented class might still be substantially eroded by legal costs. It may also be generally compared with a litigation funding arrangement in which a funding commission is fixed as a proportion of moneys recovered (or spent) *in addition to* recovery by the Funder of the legal costs expended. That is to describe other forms of funding only in general terms. Hybrid and indeed novel funding models that may emerge might not be so readily distinguishable in effect from this aspect of a Group Costs Order. Nevertheless, it may be accepted that the making of a GCO will confine the exposure of the plaintiff and group members to legal costs, from the outset.

31 I also accept, as set out in earlier cases, that a Group Costs Order engenders simplicity and transparency about funding and legal costs from the time at which a GCO is made. Making costs liability transparent and simple is in the interests of group

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18 *Bogan* [2022] VSC 201, [101].
19 *Nuix* [2022] VSC 479, [74]–[77].
20 *Allen v G8* [2022] VSC 32, [33]–[34].

members. It must be recalled that solicitors acting for a plaintiff in a class action are expected, in discharge of their professional obligations, to give sufficient and comprehensible information to group members regardless of the funding model in place, which objective is assisted by Court-ordered processes involving notice to group members. Simplicity and transparency are likely more readily obtainable, however, by the fixing of a GCO than by disclosures addressing time-based legal costs plus funding commission. Separately, where a Group Costs Order is made, s 33ZDA(1)(b) provides that the liability for costs (i.e., payment of the plaintiff's solicitors' legal costs calculated as specified) must be shared among the plaintiff and all group members. The statute has that effect without the need for the plaintiffs to make an application for the sharing of costs, at settlement or upon judgment.[21]

32 The plaintiffs themselves gave evidence of the value they each placed on these and other benefits they sought to obtain for themselves and the represented class.

33 Mr Gehrke's evidence was, relevantly, that:

(a) He understands that if a Group Costs Order is granted, legal costs in the proceeding, subject to further order, will be calculated at 22% of any award or judgment that is ultimately obtained, *with no further deductions for disbursements, legal fees or funding costs*. He understands that the rate can be amended by the Court at a later time if the Court determines that a different rate would be more appropriate.

(b) He gave instructions to his solicitors to seek a Group Costs Order because he considered it to be in the interests of group members to do so. He took into account the fact that subject to further Court order, a GCO would ensure that legal costs were fixed at 22%,[22] *therefore guaranteeing that at least 78% of any settlement or judgment would be shared between group members*.

(c) He considers it likely important for group members to have certainty and

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21 *Allen v G8* [2022] VSC 32, [42].

22 That is, 22% including GST.

transparency about the likely percentage of cots to be deducted from any settlement or judgment. A flat 22% rate is a lot simpler and provides greater certainty than a litigation funding commission charged in addition to time-based legal costs.

(d) As to the proposed rate, his application is premised on an understanding that (for the reasons set out in his evidence) third-party litigation funding is likely to result in less money being distributed to group members, if the proceeding is successful, than would be the case under a Group Costs Order fixed at 22% of the recovered amount.

(e) He considers that having his lawyer's fees calculated as a percentage of the final outcome will provide an added incentive to obtain the best outcome for the group.

(f) It is important to Mr Gehrke that he is indemnified against paying the defendants' costs, which he would be personally unable to meet. Section 33ZDA provides protection over and above a contractual indemnity by requiring the solicitors to assume liability for adverse costs and for paying any security for costs.

34 Mr Buch said, relevantly, that:

(a) A tiered GCO rate was contemplated when he entered into a costs agreement with PFM,[23] but in the course of PFM and Slater and Gordon arriving at an agreement to conduct the proceedings together (as consistent with the Court's orders) the rate of 22% had been agreed, which rate was lower than the effect of the proposed tiered rates and therefore better for group members);

(b) He understands that if a GCO is made, 22% of any recovered sum will be paid to the lawyers, split between them in equal shares, and that PFM will in turn split its share with the Funder in accordance with the funding agreement. The

[23] The then-proposed tiered rate is set out below.

plaintiff and group members' share of any award or settlement will therefore be 78%. He understands that the Court has power to change the terms of a GCO, "including to lower the GCO rate such that the plaintiffs and group members receive a larger share of any sum recovered in the proceeding, than 78%".

(c) He is presently indemnified against adverse costs by the Funder, and in the event a GCO is made, PFM will be required to provide an adverse costs indemnity, and a corresponding indemnity will be provided to PFM by the Funder as part of their commercial arrangement. It is very important that he be indemnified against the risk of having to pay adverse costs.

(d) He believes that a fair outcome will be achieved for group members if a GCO is granted at the rate sought. It will put group members in a better position to understand the costs of participating in the proceeding and to have certainty as to the percentage return to group members out of any amount recovered. It will ensure that the same proportion of costs will be subtracted from each group member's recovery if the proceeding is successful, which he considers fair. He takes comfort in the fact that the Court can amend the GCO rate if deemed necessary and in the interests of group members.

(e) He understands that a third-party funding arrangement without a GCO is likely to be a more costly and less simple method of charging legal costs in the proceeding.

35 The evidence of each plaintiff demonstrated their accurate understanding of the substantive effect of the contractual arrangements in place in respect of the funding of the litigation. Each advanced cogent reasons for seeking a Group Costs Order, in the circumstances of this case.

36 I accept that the making of a Group Costs Order will provide the plaintiffs and group members with the certainty that they will recover no less than 78% of any amount recovered on settlement or judgment, subject only to any further order of the Court.

This is a real and substantive benefit that is specifically sought by the plaintiffs in this proceeding and is protective of group members' interests.

**Comparison with alternative forms of funding**

37 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.[24] As a matter of principle, a price comparison between the proposed GCO and the most likely alternative funding model must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA.[25] It nevertheless remains a relevant consideration. In the evaluative inquiry, the particular consequences or effects of the making of a GCO in the instant case should be considered wholistically. For example, the certainty in respect of legal costs engendered by the making of a GCO is readily appreciable as a tangible benefit, as is the insurance it affords against the erosion of recoveries by costs (in the manner explained earlier). However that benefit might be ephemeral if the proposed costs impost is demonstrably higher than other available funding for the proceeding in question. The relative significance of those considerations is fact-sensitive.

38 It is implicit in the foregoing that the plaintiffs 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, in addition to the structural benefits that a Group Costs Order would confer. In evaluating that submission there are two issues — what is the appropriate alternative funding model to which regard might be had, and what can be said of the comparison?

39 The plaintiffs in each case gave detailed and considered evidence, by their solicitors, about what alternative would likely prevail, should a Group Costs Order be refused. I have considered that evidence, which included the solicitors carefully working

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24 *Fox/Crawford* [2021] VSC 573, [51], [135]–[136]; *Allen v G8* [2022] VSC 32, [25]; *Bogan* [2022] VSC 201, [12(e)].

25 See *Allen v G8* [2022] VSC 32, [93].

through the existing contractual arrangements and the steps that they would take (and the steps that would be available to the Funder, in the case of Mr Buch and PFM), what options would be available to them, and how likely it is that alternatives would materialise. I have been assisted by that evidence. It is unnecessary to set it out here. It suffices to say that I accept, on the basis of that evidence, that in the event that I refused a Group Costs Order, it is likely that third-party litigation funding would be obtained for the proceeding, meaning funding of legal costs by litigation Funder and assumption by the Funder of a contractual obligation to the plaintiffs to provide security for costs and an indemnity for adverse costs; on terms that the Funder would, from any recovered amount, seek reimbursement of amounts paid out by it, and a commission.

40 The evidence of both solicitors (Mr Phi and Ms Pelka-Caven) which I accept, was that it was not realistically possible to obtain an offer from a funder that would set out the terms on which it would be prepared to fund this proceeding were a GCO refused, for use by the plaintiffs in seeking to obtain a GCO. Given the hypothetical and speculative nature of the counterfactual funding arrangements at this stage, it is not possible to give a precise estimate as to the likely costs or applicable percentage to be taken by a litigation funder if such an arrangement were secured. As to the comparative outcomes, the evidence was, broadly described, as follows.

41 First, Ms Pelka-Caven estimated that the counter-factual funding commission for this proceeding would most likely be in the range of 24% to 29% of any award or settlement. This assessment was based on publicly available data in respect of court-approved class action settlements between 1997 and 2021, to which reference has been made in decided cases in this Court.[26] Mr Phi's evidence was that, were a GCO refused, a Funder would likely offer funding on the condition that the plaintiff apply for a common fund order. A common fund order does not enjoy the same clear statutory foundation as a GCO, and because a common fund order cannot be made until the conclusion of the proceeding,[27] a Funder would consider rationally pricing

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26 *Allen v G8* [2022] VSC 32, [67]–[78]; *Bogan* [2022] VSC 201, [70]–[72].

27 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

in that additional risk. Mr Phi's assessment was that funding would likely be obtained on terms within the 24% to 29% commission range. Both solicitors gave evidence of their relevant substantial experience in conducting cases of this kind, which supported their respective abilities to make assessments of this kind.

42 Secondly, the solicitors' evidence was that their agreement to seek a GCO at the proposed rate of 22% was a product of competition between the Buch and Gehrke proceedings. In short, PFM and Omni Bridgeway agreed to a financing structure for the Buch proceeding built around a Group Costs Order, as reflected in the Scheme PDS and conditional legal costs agreement. They selected that mechanism because it had a clear statutory basis and, in that way, did not carry the risks associated with a common fund order, and facilitated the commencement of an open class action without the delay and cost of a client book-build. PFM and Omni Bridgeway agreed upon a GCO rate with a ratchet provision, namely that costs be calculated at 29.5% of the first $25m on any resolution sum; 28% of the amount on any sum greater than $25m but less than $50m; 25.5% of the amount of any resolution sum greater than $50m but less than $75m, and 22.5% of the amount of any resolution sum in excess of $75m. Mr Phi's evidence was that the Scheme GCO rate was the product of negotiation between PFM and Omni Bridgeway. He considered the rate to be reasonable and obtainable without compromising the financial stability of the proceeding. At the time at which the Gehrke proceeding was commenced, Slater and Gordon had not sought Mr Gehrke's instructions as to the percentage at which to seek a GCO. After the commencement of the Buch proceeding by PFM, Slater and Gordon and PFM conferred in relation to a potential solution to the multiplicity issue.

43 At that time, Ms Pelka-Caven and staff reporting to her performed preliminary modelling to endeavour to ascertain, in broad terms, the returns to group members under a Group Order and with third-party funding. They concluded that a GCO should be sought at a rate of 22% inclusive of GST and that that rate could be properly characterised as competitive and advantageous to group members.[28] Ms Pelka-Caven

[28] More detailed reasoning was given but it is unnecessary to set it out here.

retained that view at the time of preparing her evidence on this application. Slater and Gordon then sought Mr Gehrke's instructions to seek a GCO at the rate of 22% including GST. Ms Pelka-Caven's evidence was that, in forming that view, she had regard to the shareholder class actions in which Slater and Gordon had acted for plaintiffs and group members that had resolved in the previous five years and the fact that had a 22% GCO been in place in each of those proceedings, group members would have shared in a greater proportion of the amount recovered in each case, as follows:

| **Slater and Gordon settled proceedings** | | Actual Result | | 22% GCO counterfactual | |
|---|---|---|---|---|---|
| **Representative shareholder proceeding** | **Settlement amount ($m)** | **GM returns ($m)** | **GM Returns (%)** | **GM Returns ($m)** | **GM Returns (%)** |
| Murray Goulburn | $42 | $28.6 | 68% | $32.8 | 78% |
| Bellamy's | $30 | $17.7 | 59% | $23.4 | 78% |
| Vocus | $35 | $26.3 | 75% | $27.3 | 78% |
| Spotless | $95 | $67.5 | 71% | $74.1 | 78% |
| **Average** | **$51** | **$34.3** | **68%** | **$39.4** | **78%** |

44 After receipt of those instructions and following further discussions with PFM, Ms Pelka-Caven sought and obtained approval from Slater and Gordon's board to propose joint carriage of the proceeding with PFM on the basis that a GCO of 22% be sought by the plaintiffs and payable to the two firms on a 50–50 basis. In accordance with their discussions, PFM also sought instructions from Mr Buch to apply at an appropriate time for a GCO of 22%. Mr Phi's opinion was that it would be difficult to replicate that result were the GCO application refused.

45 I accept that the law-firms' joint proposal to seek a Group Costs Order fixed at 22% was the product of competition between them, notwithstanding that the competition was ultimately resolved in their joint appointment on the record in this consolidated proceeding.

46 Thirdly, taking the hypothetical commission range of 24–29% of a recovered amount

and the current budget for the proceeding, Ms Pelka-Caven modelled the outcomes to group members at a range of assumed resolution points comprising settlement or judgment amounts, the stage in its life at which the proceeding resolves, and the proportion of the costs budget consumed by the resolution point (be it settlement or judgment). I accept that modelling is only as good as its inputs, and at this stage of the proceeding assessments as to whether and when a proceeding will resolve or be the subject of a favourable judgment, and as to the likely costs required to fund it to resolution, involve numerous layered and intersecting assumptions. However, in all cases, the outcome to group members was better, meaning a greater proportion of the recovered amount was available for distribution to group members and a lesser proportion was consumed in costs. By comparison with NWNF funding at certain lower estimate resolution amounts, a NWNF model could result in better financial outcomes to group members. But as discussed, the evidence was that that was not the likely alternative funding model.

47 I am satisfied that there is a real prospect of group members obtaining a better financial outcome should a GCO at 22% be fixed, than would be achievable should they obtain third-party funding.

**The proposed Percentage Rate — reasonableness and proportionality**

48 The plaintiffs contended that, insofar as the evidence reasonably available at this stage permits an assessment of the reasonableness and proportionality of the proposed GCO rate, it can be taken to be *prima facie* reasonable. That conclusion could be drawn from the comparison with third-party funding rates.

49 The plaintiffs properly accepted that, depending on the ultimate result, it was possible that costs calculated at that rate could produce a disproportionate outcome and that a later adjustment under s 33ZDA(3) might be required.

50 Ms Pelka-Caven set out in her evidence a number of factors which she contended inform the reasonableness of the proposed GCO rate for the calculation of costs, including the budget for costs and estimates of the proportion of the budgeted costs

amounts that will be expended if the proceeding resolves at particular stages in its life, preliminary assessments of the prospects of success and ranges of damages that might be obtained on settlement or judgment. All of those assessments were very preliminary and said to be subject to a high degree of uncertainty at this point. For that reason, Ms Pelka Caven said that she did not consider it productive to engage an expert to opine as to the likely rate of return to law firm. Inherent uncertainty in the inputs to such an assessment would denude it of utility. Ms Pelka-Caven provided a simple annualised rate of return using a formula embedded in Excel, and explained the difficulty in properly founding a rate of return calculation, at this stage, on sound assumptions.

51 In the broad, it was submitted that the plaintiffs' solicitors have undertaken and will continue to undertake "substantial risk" in carrying legal costs in what is obviously complex litigation that will require substantial legal work over a lengthy period. That risk was, to an extent, addressed in the plaintiff's evidence, which was expressed in very general terms. Ms Pelka-Caven gave a broad assessment of the quantum of the claim (expressed as a range with considerable variance), the possible rate of group member participation and the stages in the life of the proceeding at which it might resolve. Mr Phi agreed with that evidence. The solicitors provide a budget based on their assessment of the likely costs to be incurred, were those costs calculated on an hourly-rate basis.

52 It is not possible for the Court to make an informed assessment at this point, and on the basis of the available evidence, about the extent of risk in fact assumed by the solicitors (including by interrogating the proposed costs budget), much less evaluate risk in terms that are reasonably capable of quantification. Any assessment would have to take into account, among other things, the fact that PFM has defrayed its risk by its agreement with the Funder. PFM is carrying only a portion of its legal costs with no guarantee that they will be paid, in return for its agreement to pay the Funder part of the fees it receives upon a successful outcome. Slater and Gordon is assuming the entirety of its risk, and will not be sharing its fee income.

53 It is helpful at this juncture to recall the principles set out in earlier decisions, on this issue, which are as follows:

(a) Considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform the setting of an appropriate percentage under s 33ZDA.[29] 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.[30]

(b) 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 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.[31] 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;[32] and 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.[33]

(c) 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

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29 See *Fox/Crawford* [2021] VSC 573, [140]–[155]; *Bogan* [2022] VSC 201, [15].

30 *Fox/Crawford* [2021] VSC 573, [145]–[148]; *Allen v G8* [2022] VSC 32, [90]; *Beach Energy* [2022] VSC 424, [37]–[42].

31 *Fox/Crawford* [2021] VSC 573, [24]; *Bogan* [2022] VSC 201, [13(a)].

32 *Fox/Crawford* [2021] VSC 573, [31]; *Beach Energy* [2022] VSC 424, [38].

33 *Fox/Crawford* [2021] VSC 573, [30], [33]; *Allen v G8* [2022] VSC 32, [18], [20]; *Bogan* [2022] VSC 201, [13]; *Beach Energy* [2022] VSC 424, [38].

the life of proceedings[34] where the assessment of potential recovery sums is likely to be fraught with uncertainty.[35] 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.[36]

(d) 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[37]).

(e) 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.[38] Subsections (1) and (3), then, operate in a complementary way. 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.[39] 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

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34 *Fox/Crawford* [2021] VSC 573, [22].
35 *Allen v G8* [2022] VSC 32, [93].
36 *Fox/Crawford* [2021] VSC 573, [148].
37 See ibid [12]–[14].
38 *Fox/Crawford* [2021] VSC 573.
39 *Beach Energy* [2022] VSC 424, [41].

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.

(f) 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. Where evidence of that kind is available, provided it is formulated on sufficient relevant instructions and assumptions, 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.[40]

54 I am satisfied that the evidence provides a sufficient basis to made a Group Costs Order at this point in the proceeding fixed at 22% plus GST, on the basis that it appears *prima facie* appropriate, having regard to the considerations traversed above. That is so, notwithstanding the limits of the evaluation as to the proportionality and reasonableness of the rate, that can be made on the available evidence at this time. At least upon any settlement or award of damages, the appropriateness of the rate ought be reviewed. I accept that the proposed percentage (22%) could give rise to a disproportionate return to the solicitors and Funder. However, in this case, that

[40] *Beach Energy* [2022] VSC 424, [42]; *Fox/Crawford* [2021] VSC 573, [145]–[146], [149]–[155]; *Bogan* [2022] VSC 201, [30].

speaks to the necessity of a review at a time at which facts capable of informing the necessary evaluation can be put in evidence.

55 I reiterate what I said in *Allen v G8*, namely that the plaintiffs' solicitors must be mindful of the need to facilitate any future assessment on questions concerning the appropriate reward for the assumption of risk, which is by its nature a forward-looking decision but which might be later evaluated by reference to the facts and judgments that informed the decision to assume the risk, made at the commencement of the litigation. There may well be other measures of reasonableness and proportionality in respect of costs that will require reference to what will be past events, at the time when any question under s 33ZDA(3) arises.[41]

56 The plaintiffs submitted that it was unnecessary for them to give an undertaking that they would not apply in the proceeding for an order under s 33ZDA(3) that increased the GCO rate above 22% plus GST. The plaintiffs in *Allen v G8* gave an undertaking to that effect. The purpose of the undertaking was to support the fixing of the rate at which legal costs are to be calculated as a cap on costs, the corollary of which is a guaranteed return to group members out of any recovery. As I said in that case, there was force in the plaintiffs' point that it might be reasonably expected that any variation made under s 33ZDA(3) would be made taking into account the basis on which the original GCO was sought and made, and in a different case it might be thought that an undertaking was unnecessary.[42] Undertakings were also offered and accepted by the plaintiffs in *Beach Energy*.[43]

57 Where such an undertaking is given, it provides an additional benefit to group members because it lessens the prospect that there could be any upwards movement in the rate fixed for the Group Costs Order. A plaintiff who has given such an undertaking would first have to seek to be released from it, in order to apply, under s 33ZDA(3), for any increase in the rate first fixed under s 33ZDA(1). The effect of such an undertaking is, then, to enhance the certainty of the position of the plaintiff

41 *Allen v G8* [2022] VSC 32, [92].
42 Ibid [37]–[38].
43 [2022] VSC 424.

and group members in respect of costs. In minimising the prospect of a later application by the plaintiff to increase the GCO rate, the proffering of such an undertaking might also be understood as serving to narrow the issues potentially in dispute in the proceeding, thereby serving the Overarching Purpose.[44]

58 That said, I do not consider that without such an undertaking, the certainty as to legal costs and recoveries afforded by a Group Costs Order is substantially undermined. The rate fixed for the Group Costs Order will remain as fixed, subject only to Court order. In exercising its power under s 33ZDA(3), any future court will, of necessity, have regard to its role in protecting the interests of group members. Furthermore, any party (and that party's solicitors) applying for an upwards variation in a GCO rate would have to confront the basis on which the GCO was first sought and made. In this case, the GCO was sought in a context in which:

(a) The fee agreement between the plaintiff and PFM sets out that the GCO Amount will comprise a *maximum of 22% withheld from the Resolution Sum*.[45]

(b) The evidence of Mr Gehrke on this application was that a Group Costs Order would guarantee a return of at least 78% to group members.

(c) The evidence of Mr Buch was that he understands that the effect of a GCO would be that the plaintiffs and group members would share in 78% of any recovered amount. Mr Buch adverted to the power of the Court to vary the terms of a GCO, "including to lower the GCO rate such that the plaintiffs and group members receive a larger share of any sum recovered in the proceeding than 78%".

(d) Slater and Gordon advised group members who are its clients that, "our current intention,[46] subject to further analysis, is that we will not seek a group costs order higher than 20% (plus GST) of any amount recovered. We may seek a lower amount than 20% but our intention is that we will not seek any amount

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44 *Civil Procedure Act 2010* (Vic) s 7.

45 Clause 17.2.

46 The communication was sent to group members in May 2021.

higher than that".

(e) The PDS for the Funding Scheme in respect of Mr Buch's costs states that, "it is unlikely that the Court would make an award of a greater share of the resolution sum to the lawyers and/or the funder, than that requested in the application for the Group Costs Order".[47]

(f) In the material in support of this application (including communications with group members) there is no reference to the possibility that the plaintiffs might apply in the future, for an upwards adjustment of the GCO rate, or that their solicitors might seek instructions for that to occur.

59 While the provision of undertakings such as have been proffered and accepted in other cases is beneficial to group members, it is not a requirement fixed by the statute. I will not require an undertaking when it has not been proffered, in the circumstances of this case.

**Plaintiffs' Lawyers' ability to fund the proceedings**

60 Slater and Gordon is a publicly listed entity. On this application it produced its financial reports for the period ended 30 June 2022.

61 Mr Morgan gave evidence about the structure and financial resources available to the Funder. It is structurally independent from Omni Bridgeway Limited. It was commenced in June 2019 with a fund size of US$500m. It has disclosed to the ASX its investment portfolio as at June 2022 which includes US$175m of undeployed capital and US$213m of uncommitted capital. Separately, Omni Bridgeway Limited has executed a deed poll embodying its undertaking to pay the defendants the amount of any quantified adverse costs order in their favour, such that they may enforce payment of those amounts as a debt due and owing by Omni Bridgeway Limited.

62 As noted earlier, the form and quantum of any security provided to the defendants for their costs is to be resolved separately, if not agreed.

63 I am satisfied on the evidence that each of Slater and Gordon and PFM, through the

47 PDS cl 37.

Funder, has sufficiently demonstrated its ability to marshal the financial resources to meet the commitments it must assume by virtue of the Group Costs Order.[48]

**Conclusion**

64 In summary, I am persuaded that it is appropriate, to ensure that justice is done in the proceeding, to make the proposed Group Costs Order:

(a) I accept that the making of a Group Costs Order will provide the plaintiffs and group members with the certainty that, subject only to any further order of the Court, they will recover no less than 78% of any amount recovered on settlement or judgment. This is a real and substantive benefit that is specifically sought by the plaintiffs in each proceeding and is protective of group members' interests.

(b) 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 alternative funding models, discussed below.

(c) I am satisfied that there is a real prospect of group members obtaining a better financial outcome should I make a Group Costs Order at the rate of 22%, than would be achievable should the plaintiffs obtain third-party funding without a GCO, which is the likely alternative means of funding should a GCO be refused.

(d) There is sufficient evidence of the appropriateness of the proposed rate at this time, notwithstanding the limits of that evidence, with the consequence that the rate will require review at a later date so as to, in particular, avoid a disproportionate outcome.

(e) I am satisfied on the evidence that each of Slater and Gordon and PFM, through the Funder, has sufficiently demonstrated its ability to marshal the financial

[48] As to the relevance of this issue to the making of a Group Costs Order, see *Nuix* [2022] VSC 479, [74]–[77].

resources to meet the commitments it must assume by virtue of the Group Costs Order.

65 The parties are directed to submit minutes of orders giving effect to these Reasons, including orders in respect of a proposed regime for the provision of notice to group members of the making of the Group Costs Order.

## CERTIFICATE

I certify that this and the 31 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 8 November 2022.

DATED this eighth day of November 2022.


**Associate**