

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

Not Restricted

S ECI 2020 04566

GREG LIEBERMAN

Plaintiff

v

CROWN RESORTS LIMITED (ACN 125 709 953)

Defendant

JUDGE: Stynes J
WHERE HELD: Melbourne
DATE OF HEARING: 24 November 2022
DATE OF RULING: 16 December 2022
CASE MAY BE CITED AS: Lieberman v Crown Resorts Ltd
MEDIUM NEUTRAL CITATION: [2022] VSC 787

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 the proposed Group Costs Order incorporates a sliding scale – Whether proper evidentiary basis to make the proposed Group Costs Order – Whether proposed percentage appropriate or necessary – Principles to be applied – Application granted – *Supreme Court Act 1986, s 33ZDA* – *Allen v G8 Education Ltd* [2022] VSC 32, *Fox v Westpac; Crawford v ANZ* [2021] VSC 573, *Nelson v Beach Energy* [2022] VSC 424, *Gehrke v Noumi Ltd* [2022] VSC 672, applied – Application granted.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	W A D Edwards SC with R V Howe	Maurice Blackburn
For the Defendant	K Loxley with H Whitwell	Allens



TABLE OF CONTENTS

A	Introduction	1
B	Summary of decision	3
C	Legal principles	3
D	Current funding arrangement	7
E	The proposed application and the support for it	9
F	Evaluative assessment - The categorisation of issues	11
G	Issue 1 - The certainty to be conferred by the proposed GCO	13
H	Issue 2 - Other benefits to be conferred by the proposed GCO	15
I	Issue 3 - Appropriateness of the proposed rate	16
I.1	Power of the Court to make an order employing a rate on a sliding scale.....	17
I.2	Evidentiary basis for the proposed sliding scale.....	18
I.3	Appropriateness of the rates	20
I.3.1	Modelled outcomes.....	20
I.3.2	Risk and reward	21
J	Conclusion	24
K	Orders	25



HER HONOUR:

A Introduction

1 This is a group proceeding issued under Part 4A of the *Supreme Court Act 1986* (Vic) ('**Act**').

2 It was commenced following the publication by the defendant ('**Crown**') of an ASX announcement on 19 October 2020 that Crown had been informed by AUSTRAC's Regulatory Operations branch that it had identified potential non-compliance by Crown Melbourne Ltd with the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) and related rules. Following the announcement, the price of ordinary shares in Crown fell.

3 This proceeding is an "open class" representative proceeding on behalf of all persons (subject to some limited exceptions) who either acquired or held an interest in ordinary shares in Crown between 11 November 2014 and 18 October 2020 ('**the Relevant Period**').

4 The plaintiff on his own behalf and on behalf of group members alleges that:

(a) Crown engaged in conduct that was misleading or deceptive in that it:

(i) made representations to the market relating to its (or its subsidiaries') corporate governance generally, its dealings with relevant regulators, its compliance with anti-money laundering/counter-terrorism financing regulatory requirements and its casino taxation obligations; and

(ii) failed to disclose material information to the market in contravention of s 674 of the *Corporations Act 2001* (Cth) ('**Corporations Act**'); and

(b) throughout the Relevant Period, Crown engaged in conduct which was contrary to the interests of members of Crown as a whole in contravention of s 232 of the *Corporations Act* ('**the Oppression Claim**').



5 The plaintiff's solicitors are Maurice Blackburn Pty Ltd ('**Maurice Blackburn**').

6 The plaintiff seeks a Group Costs Order ('**GCO**') pursuant to s 33ZDA of the Act in the following terms:

- a. the legal costs payable to Maurice Blackburn Pty Ltd in relation to this proceeding be calculated as a percentage of the amount of any award or settlement that is recovered in the proceeding, in accordance with the following table:

For each dollar of any award or settlement that is recovered in the proceeding:	The applicable percentage (including GST) is:
Between \$0 - \$100,000,000	27.5%
Between \$100,000,001 - \$150,000,000	22.0%
Over \$150,000,000	16.5%

- b. liability for payment of the legal costs referred to in a. above is to be shared among the plaintiff and all group members (other than those group members who opt out of the proceeding in accordance with s 33J of the Act).

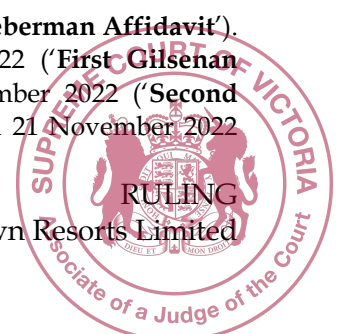
7 In addition to counsel's written and oral submissions, the plaintiff relies on:

- (a) the affidavit of the lead plaintiff;¹ and
- (b) three affidavits of Rebecca Gilsean,² a Principal partner of Maurice Blackburn and the solicitor with overall carriage of this proceeding.

8 By orders made by Justice Attiwill on 21 October 2022, which I amended on 7 December 2022 following the hearing of this application, some of the plaintiff's material was redacted on the basis of confidentiality. It was provided to me but not

¹ Being the affidavit and exhibit of Greg Lieberman affirmed 8 September 2022 ('**Lieberman Affidavit**').

² Being the affidavit and exhibit of Rebecca Gilsean affirmed 30 August 2022 ('**First Gilsean Affidavit**'), the affidavit and exhibit of Rebecca Gilsean affirmed 16 September 2022 ('**Second Gilsean Affidavit**') and the affidavit and exhibit of Rebecca Gilsean affirmed 21 November 2022 ('**Third Gilsean Affidavit**').



to Crown in unredacted form.

9 In order to sufficiently set out my reasoning, it has been necessary for me to refer to some parts of this confidential material in these reasons. I have done so in a way that does not disclose the confidential material.

10 Crown has only a narrow interest in this application. It relied on its counsel's brief written and oral submissions. In short, before me, Crown did not oppose the application but made submissions about costs. Counsel also foreshadowed that Crown intends to apply for security for costs.

B Summary of decision

11 For the reasons set out below, I am satisfied that it is appropriate to make the GCO in the form proposed by the plaintiff to ensure that justice is done in this proceeding.

C Legal principles

12 Section 33ZDA provides as follows:

- (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order –
 - (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
 - (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
- (2) If a group cost order is made –
 - (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
 - (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.
- (3) The Court, by order during the course of the proceeding, may amend a



Group Costs Order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

(4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

(5) In this section –

Group Costs Order means an order made under subsection (1);

legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

13 Save for the principles relating to the Court’s power to make a GCO incorporating a sliding scale mechanism (which I address in section I.1 below), the principles governing the application of s 33ZDA were not in dispute and have been clearly laid out in a number of decisions of this Court,³ including in the recent decision of Justice Delany in *Mumford v EML Payments Limited*⁴ which was handed down after the hearing of this application but in respect of which I allowed the plaintiff to provide further submissions.

14 Having regard to those decisions, and the evidence adduced and submissions made in this application, the applicable principles may be summarised as set out in the following paragraphs.

15 Section 33ZDA is a law regulating the calculation of, and liability of the plaintiff and group members to pay, legal costs in group proceedings.⁵

16 Section 33ZDA sits within Part 4A of the Act which permits and governs the conduct of group proceedings in this Court. The principal object of that part of the Act is to enhance group members’ access to justice.⁶ Section 33ZDA then builds on the existing

³ *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (Nichols J) (*Fox/Crawford*), *Allen v G8 Education Ltd* [2022] VSC 32 (Nichols J) (*Allen*), *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 (John Dixon J) (*Bogan*), *Nelson v Beach Energy* [2022] VSC 424 (Nichols J) (*Beach Energy*), *Lay v Nuix Ltd* [2022] VSC 479 (Nichols J) and *Gehrke v Noumi Ltd* [2022] VSC 672 (Nichols J) (*Noumi*).

⁴ [2022] VSC 750, [13]-[14].

⁵ *Fox/Crawford* (n 3) [12]-[15] (Nichols J). The section adopts the definition of legal costs set out in the Legal Profession Uniform Law (Victoria), which (by s 6) includes disbursements but does not include interest.

⁶ *Ibid* [21].



provisions of Part 4A by conferring on the Court the power, in an appropriate case, to facilitate access to justice for group members by making a GCO, subject to the statutory pre-conditions to the exercise of the discretion being met.⁷

17 An order under s 33ZDA has the following effect:⁸

- (a) recoverability of legal costs by the law practice representing the plaintiff is contingent on the recovery of an award or settlement (exclusive of costs) (sub-s 1(a));
- (b) the quantum of such costs is calculated as a percentage of that resolution sum (sub-s 1(a));
- (c) the liability for the payment of legal costs is shared amongst all group members (sub-s 1(b)); and
- (d) the plaintiff is relieved of the risk of adverse costs orders payable to a defendant and of any requirement to give security for a defendant's costs, each of which is imposed on the law practice (sub-s (2)).

18 The statutory criterion for the exercise of the power to make a GCO 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. Given that statutory language, this Court has the widest possible power to do what is appropriate to achieve justice in the circumstances,⁹ and it is not appropriate to read down the scope of the section by implications or limitations that are not found in the express words of the provision.¹⁰

19 The exercise of the discretion requires the Court to be satisfied that the making of the order would be a "suitable, fitting or proper way to ensure that justice is done in the proceeding" specifically as it relates to the calculation of legal costs payable by the

⁷ Ibid.

⁸ *Bogan* (n 3) [9].

⁹ *Allen* (n 3) [18], citing *Fox/Crawford* (n 3) [25] and the authorities there cited.

¹⁰ *Allen* (n 3) [18], citing *Fox/Crawford* (n 3) [25] and the authorities there cited, [27].



group to the law practice.¹¹

20 The statutory criterion is capable of being satisfied in myriad ways.¹² Whether or not that criterion has been satisfied involves a broad evaluative assessment.¹³

21 The following matters are relevant to, and have been considered by me, as a part of my broad evaluative assessment in this case:

- (a) The questions of whether to make an order and if so, at what rate, are intertwined.¹⁴
- (b) The Court must be astute to protect the interests of group members. The effect on group members of a proposed order must be a primary consideration in forming the evaluation required by the section.¹⁵
- (c) An order that is appropriate to ensure that justice is done in the proceeding will require fairness and equity, and must not unjustly affect the interests of any party to the proceeding.¹⁶
- (d) The price, or the costs that group members are likely to pay under a proposed GCO.¹⁷
- (e) Whether a proposed GCO is more advantageous to group members than under another funding arrangement. However, this consideration is not a substitute for the statutory test.¹⁸
- (f) An outcomes based analysis which employs predictive modelling to demonstrate that a GCO can be expected to provide a better financial outcome

¹¹ *Allen* (n 3) [19], citing *Fox/Crawford* (n 3) [20]-[32].

¹² *Beach Energy* (n 3) [38] and the authorities there cited.

¹³ *Allen* (n 3) [20].

¹⁴ *Allen* (n 3) [20], citing *Fox/Crawford* (n 3) [33].

¹⁵ *Allen* (n 3) [21], citing *Fox/Crawford* (n 3) [34].

¹⁶ *Allen* (n 3) [22], citing *Fox/Crawford* (n 3) [36].

¹⁷ *Allen* (n 3) [24], citing *Fox/Crawford* (n 3) [8(a)].

¹⁸ *Allen* (n 3) [25], citing *Fox/Crawford* (n 3) [51].



to group members than another funding model. However, the relevance of the modelling may be limited particularly where it is undertaken early in the life of the proceeding and recognising that predictive modelling will be riven with significant uncertainty.¹⁹

- (g) The assumption of financial risk by the law practice.²⁰
- (h) Considerations of proportionality and reasonableness. That is, the question of whether the return to the law practice under a GCO 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 and may be relevant. However, its relevance may be limited having regard to the real limitations on the Court's ability to make an informed assessment.²¹ In *Allen and Noumi*, her Honour Justice Nichols applied the *prima facie* threshold when considering proportionality and reasonableness.²²
- (i) The power in s 33ZDA(3) to amend a GCO. The existence of this power is significant. A review under that subsection, of a percentage fixed at an earlier time, will facilitate the Court ensuring that the percentage to which the law practice is ultimately entitled remains appropriate.²³ The time at which a Court might amend an order and the basis for doing so are not constrained by the statute, but an obvious use of the provision would be the adjustment of the percentage specified in an order, at the time of the settlement of the proceeding, having regard to the recovery achieved by the plaintiff, among other relevant considerations.²⁴

D Current funding arrangement

¹⁹ *Allen* (n 3) [26], citing *Fox/Crawford* (n 3) [22]; *Bogan* (n 3) [12(h)].

²⁰ *Allen* (n 3) [28], citing *Fox/Crawford* (n 3) [20].

²¹ *Allen* (n 3) [29], citing *Fox/Crawford* (n 3) [145]-[148].

²² *Allen* (n 3) [86]-[89]; *Noumi* (n 3) [48]-[54].

²³ *Allen* (n 3) [30]; *Fox/Crawford* (n 3) [148].

²⁴ *Allen* (n 3) [30], citing *Fox/Crawford* (n 3) [23].



22 Maurice Blackburn is retained by the plaintiff pursuant to a retainer and costs agreement (**‘Costs Agreement’**).

23 In summary, the Costs Agreement provides (with capitalised terms having the meaning denoted in clause 14 of the Costs Agreement) that:²⁵

- (a) Maurice Blackburn will prosecute the class action on behalf of the plaintiff on a ‘no-win-no-fee’ basis. Insofar as it acts on this basis, it will only recover its Disbursements at cost, and will only be paid its Professional Fees to which an Uplift Fee of 25% together with interest applies, if there is a Successful Outcome.
- (b) An application for a GCO may be made. The Costs Agreement records that “if the Court makes orders for a Group Costs Order, the amount that Maurice Blackburn will be paid will be subject to the Court’s orders, which to the extent of any inconsistency will supersede this Agreement”. The Costs Agreement will not come to an end or cease to be binding on Maurice Blackburn in the event that a GCO is made.
- (c) The plaintiff must pay Legal Costs to Maurice Blackburn for the Legal Work. Legal Costs are Professional Fees and Disbursements;
- (d) Professional Fees are calculated at hourly rates and are subject to the charge of an additional 25% of that amount where there is a Successful Outcome. The hourly rates may be varied by Maurice Blackburn each year.
- (e) Maurice Blackburn has a reasonable belief that a Successful Outcome is reasonably likely in the proceeding.
- (f) Maurice Blackburn may reasonably change the terms of the Cost Agreement and will provide 30 days’ written notice to the plaintiff of any such change. The plaintiff is presumed to agree to the change unless they give written objection

²⁵ Gilsenan Exhibit RG-1 (n 2) 1-21.



to Maurice Blackburn prior to the date the change takes effect.

- (g) If the plaintiff objects to Maurice Blackburn changing the terms of the Cost Agreement, Maurice Blackburn may terminate the Cost Agreement.
- (h) The Costs Agreement may otherwise be terminated by Maurice Blackburn if, among other things, Maurice Blackburn forms the opinion that a Successful Outcome resulting in a substantial benefit to the plaintiff is no longer reasonably likely.
- (i) The Cost Agreement otherwise sets out the obligations of the parties including in respect of giving instructions, confidentiality and privacy, billing and statements of account, the role of the Representative, and the definition of Legal Work to be performed.

24 The Costs Agreement contains a confidential estimate of the total Legal Costs to be incurred in conducting the proceeding up to, and including, a full trial of common issues, if calculated on the basis of its hourly rates. Major variables affecting the total legal costs are set out, which include, among other things, the complexity of the issues, the strategy or tactics adopted by Crown and other unexpected problems.

25 The Costs Agreement does not contain an indemnity by Maurice Blackburn in favour of the plaintiff in respect of any adverse costs order that may be made against the plaintiff in the proceeding. However, Maurice Blackburn has given an undertaking to Crown to pay any adverse costs order. Pursuant to that undertaking, Maurice Blackburn agrees, in lieu of Crown seeking any other form of security for costs for the time being, to pay any adverse costs orders that may be made against the plaintiff in this proceeding.²⁶

E The proposed application and the support for it

26 The proceeding is still at a relatively early stage. A substantial amount of discovery is

²⁶ Gilsenan Exhibit RG-1 (n 2) 22.



yet to be made,²⁷ and there are no orders currently in place for the filing of evidence.²⁸

27 It is the plaintiff's evidence that an application for a GCO was contemplated from the outset.²⁹ The plaintiff says he waited for the determination and delivery of reasons in other GCO applications before this Court before bringing this application.³⁰

28 Prior to making this application, Maurice Blackburn corresponded with the plaintiff and group members. The plaintiff originally identified all information about this correspondence as being confidential. However, during the hearing, confidentiality was waived in relation to the following relevant facts (which facts were subsequently un-redacted in the material filed pursuant to my orders of 7 December 2022):

- (a) Maurice Blackburn wrote to the plaintiff regarding the proposal to seek a GCO fixed at the rate of 27.5% (being 25% plus GST) of any amounts recovered.³¹ The plaintiff was agreeable to this, but was of the view that a GCO incorporating a rate on a sliding scale (with the rate reducing as the amount recovered increases) would be preferable to the group members.³²
- (b) Maurice Blackburn then wrote to a randomly selected sample of registered group members to obtain their feedback on the proposed GCO which would incorporate a sliding scale ('**Survey**').³³
- (c) The Survey included worked examples describing different outcomes for group members based on different assumptions as to the amount recovered and the amount of legal costs (based on hourly rates) incurred to that point.³⁴ This allowed the group members to compare those outcomes with a rate of return fixed in accordance with a sliding scale. The Survey asked recipients to

27 First Gilsenan Affidavit (n 2) [17].

28 Second Gilsenan Affidavit (n 2) [6].

29 Lieberman Affidavit (n 1) [4].

30 Lieberman Affidavit (n 1) [4]-[5].

31 Lieberman Affidavit (n 1) [6].

32 Lieberman Affidavit (n 1) [8], [10].

33 First Gilsenan Affidavit (n 2) [33], [34(b)].

34 First Gilsenan Affidavit (n 2) [34(c)].



indicate whether they would prefer that legal costs be calculated either in accordance with the proposed GCO or in accordance with the standard hourly billing method. They were asked to select 'Neutral' if they were unsure or did not hold a view either way.³⁵

(d) The results of the Survey are confidential. However, I am able to make the following high level observations:

(i) The sample group was small but was selected in a random way to ensure that it was not skewed to any particular category of group member.³⁶

(ii) All of the recipients to the Survey were registered group members.³⁷

(iii) It was submitted that while some recipients did not respond, as they have registered an interest in the class action generally, "one might take it that they were agnostic and they're not against [the GCO]."³⁸

(iv) The Survey included several modelled examples of potential outcomes, meaning the respondents were able to provide informed responses.³⁹

(v) The responses received reveal that both by number but even more by value, the proposed GCO has support.⁴⁰

29 The results of the Survey are relied on as evidence that there is some active support for the GCO application amongst registered group members.⁴¹

F Evaluative assessment - The categorisation of issues

30 The plaintiff submitted that it would be appropriate or necessary to make its proposed

³⁵ First Gilsenan Affidavit (n 2) [34(d)].

³⁶ First Gilsenan Affidavit (n 2) [33].

³⁷ First Gilsenan Affidavit (n 2) [33].

³⁸ Transcript of Proceedings, *Lieberman v Crown Resorts Limited* (Supreme Court of Victoria, Stynes J, 24 November 2022), 44.18-23 ('**Application Transcript**').

³⁹ *Ibid* 51.29-52.7.

⁴⁰ First Gilsenan Affidavit (n 2) [35]-[38].

⁴¹ Application Transcript (n 37) 44.25-30.



GCO to ensure that justice is done in this proceeding, in substance because:

- (a) a GCO will provide simplicity, certainty and transparency to the plaintiff and the group members in respect of funding and costs arrangements, in that they would be guaranteed to receive no less than 72.5% of any recovered amount;⁴²
- (b) having regard to the Survey, the group members have expressed a clear preference for the GCO, and while those views are not to be taken in substitution for the statutory test, they are relevant to the consideration of the appropriateness of the GCO;⁴³
- (c) a GCO incorporating a sliding scale will ensure that legal costs are proportionate to any settlement or award, and will transfer the risk of disproportionate legal costs away from the plaintiff and group members to Maurice Blackburn and will do so from the outset;⁴⁴ and
- (d) while it is not necessary for the plaintiff to identify the relevant counterfactual funding arrangement and positively prove that the proposed GCO is more advantageous, Maurice Blackburn's analysis of different outcomes for group members indicates that members would experience a better return with the proposed GCO in many of the predicted realistic outcomes, than under the current hourly billing method.⁴⁵

31 Having regard to the applicable principles, the evidence adduced and submissions made, I have identified the following issues to be significant to my assessment of whether the statutory criterion has been satisfied:

- (a) The certainty to be conferred by the proposed GCO.

⁴² Plaintiff, written outline of submissions in support of the application for a Group Costs Order dated 21 September 2022, [29]-[31], [33] ('**Plaintiff's Submissions**').

⁴³ Ibid [38], [57].

⁴⁴ Ibid [32], [39]-[54].

⁴⁵ Ibid [55], [58]-[59].



- (b) Other benefits to be conferred by the proposed GCO.
- (c) The appropriateness of the proposed percentage rate for the GCO.

32 I have addressed each of these issues in turn.

G Issue 1 - The certainty to be conferred by the proposed GCO

33 As set out in *Allen*, a GCO has certain inherent structural benefits.⁴⁶

34 The proposed GCO guarantees that the plaintiff and group members will receive a fixed percentage of no less than 72.5% of any award or settlement that is achieved. The consequence is that legal costs payable, which will include disbursements, will be confined to a fixed percentage of no greater than 27.5%.

35 The plaintiff submitted that such certainty cannot be achieved through the hourly billing arrangement currently in place.⁴⁷ The Cost Agreement contains an estimate of the total legal costs to be incurred in conducting the proceeding up to, and including, a full trial of common issues on the basis of hourly rates. However, Ms Gilsean deposes that, in her experience with representative proceedings:⁴⁸

- (a) costs in class actions, when calculated on the basis of hourly rates, can and do exceed estimates, which impacts adversely on proportionality of returns to group members;
- (b) it is more common than not for legal costs estimates and budgets to be revised upwards over the course of the duration of a class action once more is known about the approach of the other party(ies) to interlocutory matters and evidence;
- (c) a GCO, by fixing the legal costs as a percentage of the recovery, acts to prevent the inherent and often unavoidable exigencies of class action litigation from

⁴⁶ *Allen* (n 3) [33]-[34].

⁴⁷ *Ibid* [30].

⁴⁸ *First Gilsean Affidavit* (n 2) [23].



adversely impacting on group members' returns; and

- (d) accordingly, a GCO effectively shifts the burden of a costs blow-out from the plaintiff and group members to their lawyers.

36 Since 1999, Ms Gilsean's principal area of practice has been representative proceedings. In her role as a Principal in Maurice Blackburn's Class Actions division, she has, on behalf of clients, negotiated many litigation funding arrangements with third party litigation funders for representative proceedings. She is also a director of Maurice Blackburn's wholly-owned subsidiary, Claims Funding Australia Pty Ltd, a litigation funder which provides funding in matters in which lawyers other than Maurice Blackburn act for the funded litigant.⁴⁹

37 Having regard to Ms Gilsean's extensive experience and the fact that her evidence is uncontested, I accept it.

38 The evidence of the plaintiff, Mr Lieberman, is also significant. He deposes that:⁵⁰

- (a) he communicated to Maurice Blackburn the importance of the proceeding not imposing any financial risk to him, specifically because he did not have the means to satisfy, nor the willingness to personally incur, the legal costs that are likely to be incurred in prosecuting the proceeding; and
- (b) he considered that a GCO was desirable because it allows the legal costs to be easily calculated and known in advance, it guarantees to him and the group members a minimum return by capping the legal costs as a fixed percentage of any amounts recovered, and it protects him and the group members:
- (i) in the event of an unexpectedly poor outcome in the proceeding, by still ensuring that a fixed percentage of any amounts recovered will be distributed to him and the group members; and

⁴⁹ First Gilsean Affidavit (n 2) [7]-[9].

⁵⁰ Lieberman Affidavit (n 1) [4], [7].



- (ii) from the potential adverse consequences of any cost blow-outs, which he understands are not uncommon occurrences in any legal proceedings, including class actions.

39 Counsel for the plaintiff noted during oral submissions that the certainty of the percentage of net returns, transparency and simplicity of a GCO were “very, very important” to the group members.⁵¹ Having regard to the considered evidence of Mr Lieberman, which I accept, I agree.

40 Having considered this evidence, and bearing in mind the Court’s duty to protect the interests of group members, I am satisfied that a GCO will confine the exposure of the plaintiff and group members to legal costs from the outset and that such a confinement, and the consequential certainty as to the percentage of recovery, is objectively and subjectively important to the plaintiff and group members in this case.

H Issue 2 – Other benefits to be conferred by the proposed GCO

41 As set out in *Allen*, a GCO engenders simplicity and transparency from the outset, which is also in the interests of group members.⁵² The simplicity and transparency apply to both costs payable, and returns recoverable, by the plaintiff and group members.

42 It was submitted that a GCO is easier to understand than an hourly billing arrangement because a GCO allows costs to be understood in advance by group members.⁵³

43 In Ms Gilseman’s experience in taking instructions from clients, plaintiffs and group members in class actions often become confused, disengaged or overwhelmed by the various components of legal and funding costs which are (or may be) payable in the

⁵¹ Application Transcript (n 37) 58.18-22.

⁵² *Allen* (n 3) [41].

⁵³ Plaintiff’s Submissions (n 41) [33].



proceeding.⁵⁴

44 Ms Gilsenan states, and I accept, that the simplicity of the GCO model assists plaintiffs and group members to understand that a single percentage of the final sum will be deducted for legal costs if the case is successful, regardless of other events or arrangements arising in the proceeding.⁵⁵

45 It is clear from Mr Lieberman's evidence, as set out above, that he is astute to the benefits of simplicity and transparency that a GCO can provide.

46 A further benefit of a GCO is the liability imposed on the law practice to pay any adverse costs order or to give any security for costs of the defendant in the proceeding that the Court may order the plaintiff to give. While similar protection is afforded in this case to the plaintiff and group members by the undertaking that is in place, there is some comfort to be gained by the group members having that protection enforced by statute. I note that Crown advised the Court during the hearing of this application that unless agreement can be reached, it intends to apply for security for its costs.⁵⁶

47 Finally a GCO serves to align the interests of the plaintiff, group members and Maurice Blackburn to maximise the sum recovered. This was specifically recognised by Mr Lieberman in his evidence as being one of the reasons he considered that a GCO would be beneficial to him and the group members.⁵⁷

48 Having considered the above, I am satisfied that simplicity and transparency are more readily obtainable by the making of a GCO than the current funding arrangement.

I Issue 3 – Appropriateness of the proposed rate

49 The question of whether or not a GCO should be made is intertwined with the appropriateness of the proposed rate.

⁵⁴ First Gilsenan Affidavit (n 2) [70].

⁵⁵ First Gilsenan Affidavit (n 2) [71].

⁵⁶ Application Transcript (n 37) 68.23-34.

⁵⁷ Lieberman Affidavit (n 1) [7(c)].



50 The plaintiff proposes the following percentage rates for legal fees recoverable by Maurice Blackburn under its proposed GCO:

- (a) 27.5% for each dollar of award or settlement sum that is recovered between \$0-\$100 million;
- (b) 22% for each dollar of award or settlement sum that is recovered between \$100,000,001-\$150 million; and
- (c) 16.5% for each dollar of award or settlement that is recovered over \$150 million.

51 The following issues arise for consideration:

- (a) The power of the Court to make a GCO employing a rate on a sliding scale.
- (b) The evidentiary basis for the sliding scale.
- (c) The appropriateness of each of the proposed rates.

I.1 Power of the Court to make an order employing a rate on a sliding scale

52 As submitted by the plaintiff, an order employing a sliding scale is not beyond the power conferred by s 33ZDA.⁵⁸ Consistent with the terms of s 33ZDA(1)(a) and as stated by Nichols J in *Nelson v Beach Energy*:⁵⁹

An order of the kind proposed, incorporating a rate on 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.

...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.

53 Her honour's analysis was strictly obiter, however I find no reason to depart from her analysis which I consider to be clear and correct.

⁵⁸ *Beach Energy* (n 3) [87]-[102].

⁵⁹ *Ibid* [92], [95].



I.2 Evidentiary basis for the proposed sliding scale

54 It is necessary to consider whether there is a proper evidentiary basis for the making of a GCO incorporating the proposed sliding scale.

55 First, there is evidence that it was the plaintiff, and not Maurice Blackburn, that proposed a GCO incorporating a sliding scale. Mr Lieberman deposed that:

- (a) conscious of his obligations to the group members, he thought that it would be preferable for the GCO to be based on a sliding scale so as to avoid Maurice Blackburn obtaining a windfall at the expense of him and the group members in the event of a very successful outcome;⁶⁰
- (b) he considered that the group members would hold a similar view;⁶¹ and
- (c) he therefore instructed Maurice Blackburn to proceed with the Survey on the basis that a GCO with a sliding scale was preferable.⁶²

56 Accordingly, it was submitted, and I accept, that the proposed order accords with the plaintiff's clear and explicit instructions,⁶³ and the preference expressed by the registered group members surveyed.⁶⁴

57 Second, I must consider whether there is evidence demonstrating that the sliding scale serves a purpose and is more than "mere window dressing".⁶⁵

58 The sliding scale is intended to take effect at \$100,000,001 and again at \$150 million. By applying different percentages to different portions of the recovered sum, an overall costs sum is reached. The purpose of such a mechanism is to avoid a disproportionate or otherwise unreasonable cost impost on group members in the

⁶⁰ Lieberman Affidavit (n 1) [8].

⁶¹ Ibid.

⁶² Ibid [10].

⁶³ Plaintiff's Submissions (n 41) [39].

⁶⁴ Application Transcript, 51.29-52.15; Plaintiff, supplementary submissions regarding the application for a Group Costs Order dated 9 December 2022, [6] ('**Plaintiff's Supplementary Submissions**').

⁶⁵ *Beach Energy* (n 3) [148].



event of a higher settlement or award; an important objective.⁶⁶ It was submitted, and I agree, that the proposed sliding scale makes it plain that Maurice Blackburn accepts that, at certain junctures, it will be appropriate to step down the rate of legal costs it is entitled to recover.⁶⁷ However, a principled approach must be shown to exist in relation to the selection of the threshold points.

59 It was submitted that there was sufficient evidence for the Court to be satisfied that there is some prospect that the higher threshold points may be engaged in certain circumstances, and that they are not just an illusion put forward to give the appearance of reasonableness.⁶⁸ In other words, the plaintiff submitted that it would not be unlikely for the award or settlement sum in this proceeding to exceed \$100 million or \$150 million.

60 The evidence relied on in support of that submission is confidential. It is the evidence of Ms Gilsenan at paragraphs 32(c) and 44 to 53 of the First Gilsenan Affidavit. Significantly, the evidence addresses:

- (a) the steps taken by Maurice Blackburn to arrive at an estimate of the total value of the group members' claim; and
- (b) what has and hasn't been taken into account in arriving at that estimate.

61 It is early days in this proceeding. There are considerable uncertainties and risks in litigation which make it difficult to estimate the total claim value and likely outcomes. That has been acknowledged by the plaintiff.⁶⁹ Nonetheless, I am satisfied by the evidence relied on by the plaintiff that care has been taken to identify thresholds that have some evidentiary basis and that there is a possibility, which is a real and not fanciful possibility, that the lower rates will be engaged for the benefit of the group members.

⁶⁶ Ibid [107].

⁶⁷ Application Transcript (n 37) 28.6-16.

⁶⁸ Ibid 29.1-8.

⁶⁹ First Gilsenan Affidavit (n 2) [44].



62 It is significant to my decision that the Court is empowered to amend any GCO made to avoid disproportionate returns. The legitimacy of the proposed thresholds is an obvious area for review at the relevant time.

I.3 Appropriateness of the rates

63 It was submitted that at this relatively early stage in the proceeding, it is not known whether, and if so at what stage, the proceeding might resolve or the amount that may be recovered.⁷⁰ Accordingly, it is difficult for Maurice Blackburn to predict rates of return to group members under both the current funding arrangement and the proposed GCO.

64 The Court must be satisfied that the proposed rate is *prima facie* reasonable and proportionate.⁷¹

65 I have had regard to the evidence addressing the following matters to inform my assessment of the *prima facie* reasonableness and proportionality of the proposed rate:

- (a) Maurice Blackburn's modelling comparing legal costs that may be payable under the GCO with legal costs that may be payable under the current funding arrangement; and
- (b) the risk to be assumed by, and the potential return to, Maurice Blackburn.

66 I address each of these below.

I.3.1 Modelled outcomes

67 Maurice Blackburn provided the plaintiff and group members with worked examples of potential returns in various scenarios under both the proposed GCO and the current hourly billing model. The worked examples were based on various factors including a range sums recovered and legal costs based on the predicted time it would take to

⁷⁰ Plaintiff's Submissions (n 41) [55].

⁷¹ *Allen* (n 3) [86]-[89]; *Noumi* (n 3) [48]-[54], [93(b)]; see also *Beach* (n 3) [109], [113(c)].



reach a resolution.⁷²

68 The inputs into the worked examples and the specific estimated returns under each scenario are confidential. They are set out in an annexure to the letter to group members containing the Survey, a copy of which is exhibited to the First Gilsenan Affidavit.⁷³ At a high level, the worked examples show that:

- (a) generally, in the scenarios involving a lower resolution sum, group members would experience a greater return under the proposed GCO compared to legal costs based on hourly rates under the Costs Agreement; and
- (b) generally, the opposite would occur in scenarios involving a higher resolution sum. In some instances, the legal costs payable under the proposed GCO may be regarded as a windfall return on investment to Maurice Blackburn.

69 It was conceded that not every scenario would yield a better outcome for group members under the proposed GCO. However, it was submitted that a significant number of the scenarios are better for group members, and, more importantly, those scenarios are the ones where group members' protection is most needed.⁷⁴

70 I am mindful that any modelling will only be as good as the input data. In relation to this modelling, I have very limited ability to scrutinise the cost estimates that underpin each worked example. Notwithstanding that limitation, I am satisfied that it does tend to support the proposition that the proposed GCO will serve to protect the plaintiff and group members, where the sum recovered is low, from disproportionately high legal costs. Further, I am satisfied that in relation to the potential for windfalls, sub-s 33ZDA(3) provides adequate protection to group members.

I.3.2 Risk and reward

71 Section 33ZDA(2) provides that a law practice the subject of the GCO will be made

⁷² First Gilsenan Affidavit (n 2) [74].

⁷³ Gilsenan Exhibit RG-1 (n 2) 27-28.

⁷⁴ Application Transcript (n 37) 14.22-28; Plaintiff's Supplementary Submissions (n 63) [6].



liable to pay the defendant's adverse costs and to give any security for the defendants costs. It follows from the text that the calculation of legal costs in the manner permitted by s 33ZDA may properly take into account not only the value of legal services performed, but the assumption of financial risk by the law practice.⁷⁵

72 The plaintiff submitted that the proposed rate is a reasonable and not disproportionate rate when considered against the risks which Maurice Blackburn will undertake,⁷⁶ such risks which are "in excess" of the sorts of risk typically experienced in class actions.⁷⁷

73 Confidential (and therefore unchallenged) evidence was adduced identifying and describing a range of risks in relation to the group members' claim in the proceeding.⁷⁸

74 During the hearing of this application, the plaintiff's counsel drew attention to one of those risks which is that the Oppression Claim is a novel claim in shareholder class actions.⁷⁹ It is a claim that enables shareholders to pursue a remedy against Crown for its engagement in the underlying conduct, rather than merely for what it said and did not disclose to the market about that conduct. It was submitted that there were risks associated with the claim, as described by Ms Glisensen.⁸⁰

75 Having regard to that evidence, I am satisfied that there are risks confronting the plaintiff's claim that are relevant to the question of whether the return to Maurice Blackburn under the proposed GCO is reasonable and whether it bears a proportionate relationship to the assumption of the risk of adverse costs and the provision of security for costs.

76 For the purpose of assisting my assessment of whether the proposed rate is proportionate to the risk to be assumed by Maurice Blackburn, my attention was

⁷⁵ *Fox/Crawford* (n 3) [20].

⁷⁶ Plaintiff's Submissions (n 41) [43].

⁷⁷ Plaintiff's Supplementary Submissions (n 63) [7].

⁷⁸ First Gilsonan Affidavit (n 2) [42]-[53].

⁷⁹ Application Transcript (n 37) 45.29-46.27.

⁸⁰ Plaintiff's Submissions (n 41) [46]; Application Transcript (n 37) 46.18-27.



drawn to the case of *Allen*.⁸¹

77 In *Allen*, a GCO was made by Nichols J providing for legal costs to be calculated at a rate of 27.5%. In that case, the plaintiffs relied on a report of an expert economist who conducted research on the funding of and cost incurred in class actions in Australia. Details of his methodology and findings are set out in paragraphs 67 to 72 of her Honour's ruling. In short, he found that for shareholder class actions, the median proportion of an award or settlement deducted by litigation funders in respect of legal and funding fees was 46% while the mean was 44%. It was submitted in that case, on the basis of that material, that the proposed GCO capped at 27.5% of any gross settlement or award would self-evidently be better for group members than an arrangement which would cost group members 44% to 46%.⁸²

78 Her Honour stated that:⁸³

That argument may be accepted. The numbers are unambiguous, and as a matter of simple logic a funding agreement which includes a commission likely to be in the range of 21% to 29%, before the further deduction of legal costs, will almost certainly be more expensive than a single deduction of 27.5% in all cases but those resolved with very little legal work done, proportional to outcomes.

79 The circumstances in *Allen* were different to this case because the counterfactual funding arrangement was litigation funding. However, the plaintiff submitted, and I accept, that the commission paid to litigation funders is the price paid for the risk taken on by litigation funders, being the risk of adverse costs orders, the risk of security for cost orders and the cost of paying legal costs pending a resolution of the proceeding.⁸⁴ In other words, the expert evidence that was accepted in *Allen* established that there is a market for those risks. If the combined legal costs plus litigation funding commission in shareholder class actions has been over 40%, then that supports the proposition that a rate of 27.5% (being the primary rate proposed by

⁸¹ Application Transcript (n 37) 9.5-15, 21.11-22.17; Plaintiff's Supplementary Submissions (n 63) [8(a)].

⁸² *Allen* (n 3) [73].

⁸³ *Ibid* [74].

⁸⁴ Application Transcript (n 37) 22.4-25.



the plaintiff in this case) is reasonable and proportionate to the risks assumed.

80 The plaintiff also relied on Ms Gilsenan's confidential evidence relating to Maurice Blackburn's return on investment.⁸⁵ Counsel for the plaintiff characterised the role of this evidence as providing a "sanity check on reasonableness".⁸⁶

81 I am satisfied that Ms Gilsenan has first-hand knowledge of the specific claims in this class action, as well as Maurice Blackburn's historical business practices specifically in relation to class actions and the litigation funding market. Her evidence in relation to Maurice Blackburn's return on investment, particularly that set out in paragraph 62 of the First Gilsenan Affidavit, tends to support the proposition that a rate of 27.5% is not excessive for an investment attended by the risks to be assumed by Maurice Blackburn in this case.

82 Finally, I am satisfied, in light of Ms Gilsenan's evidence, in particular paragraph 6 of the Third Gilsenan Affidavit, that Maurice Blackburn has the financial ability to comply with its obligations to fund this proceeding and to satisfy any adverse costs liability that may arise.

J Conclusion

83 As may be apparent from my analysis set out above, based on the evidence available to me, I am satisfied that a GCO in the proposed form is appropriate to ensure justice is done in the proceeding for the following reasons:

- (a) It provides a level of certainty as to the legal costs to be incurred which cannot be achieved through the hourly billing arrangement that is currently in place and that would continue if no GCO is made.
- (b) It engenders simplicity and transparency to the costs payable and returns recoverable by the plaintiff and group members.

⁸⁵ First Gilsenan Affidavit (n 2) [54]-[66].

⁸⁶ Application Transcript (n 37) 48.16-26.



- (c) It will likely serve to protect the group members, where the sum recovered is low, from disproportionately high legal costs.
- (d) There is a real and not fanciful possibility that the lower rates of the GCO will be engaged and that group members will obtain a better financial outcome under the GCO.
- (e) The proposed rate is appropriate having regard to the risks confronting the claims made, the risks to be assumed by Maurice Blackburn under the GCO and the reward it might reasonably expect in return for the assumption of those risks.

84 Of course any order now put in place may be subject to review under s 33ZDA(3). I refer to the comments made by Nichols J in *Beach* on this very point (footnotes omitted):⁸⁷

... 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 where the assessment of potential recovery sums is likely to be fraught with uncertainty. 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.

... 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.

K Orders

85 Subject to hearing from the parties as to the form of order, I propose to order that:

- (a) The legal costs payable to Maurice Blackburn in relation to this proceeding be calculated as a percentage of the amount of any award or settlement that is

⁸⁷ *Beach Energy* (n 3) [39]-[40].



recovered in the proceeding, in accordance with the following table:

For each dollar of any award or settlement that is recovered in the proceeding:	The applicable percentage (including GST) is:
Between \$0 - \$100,000,000	27.5%
Between \$100,000,001 - \$150,000,000	22.0%
Over \$150,000,000	16.5%

- (b) Liability for payment of the legal costs referred to above is to be shared among the plaintiff and all group members (other than those group members who opt out of the proceeding in accordance with s 33J of the Act).
- (c) The plaintiff is to bear its cost of this application.
- (d) The defendant's costs of this application are reserved.

CERTIFICATE

I certify that this and the 27 preceding pages are a true copy of the reasons for ruling of Justice Stynes of the Supreme Court of Victoria delivered on 16 December 2022.

DATED this sixteenth day of December 2022.



Associate

