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

Not Restricted

S ECI 2021 04738

BETWEEN:

PAUL LEIGHTON MUMFORD — First Plaintiff

GAYLE MUMFORD — Second Plaintiff

v

EML PAYMENTS LIMITED — Defendant

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	3 November 2022, further submissions 16 November 2022
DATE OF RULING:	6 December 2022
CASE MAY BE CITED AS:	*Mumford v EML Payments Limited*
MEDIUM NEUTRAL CITATION:	[2022] VSC 750

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 proposed percentage appropriate or necessary – Retainer providing for solicitors to continue to conduct the proceeding if a GCO made – GCO made at a lesser percentage than specified in the application – Principles to be applied – *Supreme Court Act 1986* (Vic), s 33ZDA – *Civil Procedure Act 2010* (Vic), s 24 – *Legal Profession Uniform Law Application Act 2014* (Vic), ss 172, 181 and 182 of Schedule 1 – *Gehrke v Noumi Ltd* [2022] VSC 672, applied – *Allen v G8 Education Ltd* [2022] VSC 32, *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424, *Fox v Westpac* [2021] VSC 573, considered – *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, distinguished.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	W Edwards SC with O Nanlohy	Shine Lawyers
For the Defendant	K Raghavan	Herbert Smith Freehills

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HIS HONOUR:

1 Paul Leighton Mumford and Gayle Mumford are the lead plaintiffs in a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic) ('*Act*'), a shareholder class action, brought on behalf of persons who acquired an interest in the ordinary shares of EML Payments Ltd ('EML') between 19 December 2020 and 18 May 2021 ('the relevant period').

2 EML is listed on the Australian Stock Exchange. It provides a payment solutions platform worldwide. On or about 31 March 2020, EML completed its acquisition of Prepaid Financial Services (Ireland) Limited ('PFS'). From 19 December 2020, PFS's European business primarily operated through PFS Card Services (Ireland) Limited ('PCSIL'). On 17 May 2021, EML securities were placed into a trading halt. On 19 May 2021, EML announced to the market that PCSIL had received correspondence from the Central Bank of Ireland raising significant regulatory concerns in respect of PCSIL's Anti-Money Laundering/Counter Terrorism Financing ('AML/CTF') risk and control frameworks and governance. Immediately following the announcement, EML's share price fell from $5.15 to $2.80 - a 45% reduction.

3 The Statement of Claim alleges that during the relevant period EML engaged in misleading or deceptive conduct and breached the continuous disclosure obligations in the ASX Listing Rules by making and failing to correct or qualify statements that EML had made as to the robustness of its compliance and governance framework. The lead plaintiffs allege that they and the group members suffered loss and damage as a result of that conduct. EML has filed its Defence. It denies engaging in misleading and deceptive conduct. It denies breach of its continuous disclosure obligations.

4 These reasons concern an application by the lead plaintiffs for a Group Costs Order ('GCO') under s 33ZDA(1) of the *Act* as follows:

> 1. The legal costs payable to the solicitors for the Plaintiffs, Shine Lawyers Pty Ltd, and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, and that percentage be 30%.
>
> 2. Liability for payment of the legal costs pursuant to Order 1 be shared

among the Plaintiffs and all group members.

5 EML does not oppose the application. Having regard to the nature of the proceeding, a shareholder class action, and the jurisprudence dealing with s 33ZDA(1) applications, it was not necessary to appoint a contradictor.

6 I consider the criteria for the making of a GCO pursuant to s 33ZDA(1) are satisfied. Particularly in light of the terms of the costs agreement between the lead plaintiffs and their lawyers, Shine Lawyers, the making of a GCO is appropriate to ensure that justice is done in the proceeding.

7 I have determined to refuse the application to fix the legal costs payable calculated as a percentage of any award or settlement at 30%. The appropriate percentage to be set out in an order pursuant to s 33ZDA(1)(a) is 24.5%. I have come to that conclusion noting that, pursuant to s 33ZDA(3), the Court may subsequently amend a GCO, including by amendment of the percentage ordered under s 33ZDA(1)(a). The reasons for my decision are set out below.

Relevant legislation

8 The primary legislation for consideration is s 33ZDA of the *Act*. That section is in the following terms:

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

must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

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

(5) In this section—

group costs order means an order made under subsection (1);

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

9 As the application involves questions of costs, s 24 of the *Civil Procedure Act 2010* (Vic) ('*CPA*') is relevant. Section 24 binds both the lead plaintiffs and Shine Lawyers, both being persons to whom the overarching obligations in the *CPA* apply. Section 24 is in the following terms:

Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

(a) the complexity or importance of the issues in dispute; and

(b) the amount in dispute.

10 'Legal costs' is defined in s 33ZDA(5) of the *Act* to have the same meaning as in Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) ('*Uniform Law*'). Section 169 of the *Uniform Law* includes the following relevant objectives of Part 4.3:

(a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and

(b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and

…

11 Section 172(1) of the *Uniform Law* provides:

A law practice must, in charging legal costs, charge costs that are no more than

fair and reasonable in all the circumstances and that in particular are:

(a) proportionately and reasonably incurred; and

(b) proportionate and reasonable in amount.

12 Sections 181 and 182 of the *Uniform Law* are concerned with conditional costs agreements and conditional costs agreements involving uplift fees. Those sections include:

> **181 Conditional costs agreements**
>
> (1) A costs agreement (a ***conditional costs agreement***) may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.
>
> …
>
> (6) A conditional costs agreement may provide for disbursements to be paid irrespective of the outcome of the matter.
>
> …
>
> **182 Conditional costs agreements involving uplift fees**
>
> (1) A conditional costs agreement may provide for the payment of an uplift fee.
>
> (2) If a conditional costs agreement relates to a litigious matter—
>
> …
>
> (b) the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.
>
> (3) A conditional costs agreement that includes an uplift fee—
>
> (a) must identify the basis on which the uplift fee is to be calculated; and
>
> (b) must include an estimate of the uplift fee or, if that is not reasonably practical—
>
> (i) a range of estimates for the uplift fee; and
>
> (ii) an explanation of the major variables that may affect the calculation of the uplift fee.
>
> (4) A law practice must not enter into a costs agreement in contravention of this section or of the Uniform Rules relating to uplift fees.
>
> Civil penalty: 100 penalty units.

Applicable principles

13 Section 33ZDA(1) requires that, for the Court to make a GCO, it must be satisfied that such an order is 'appropriate or necessary to ensure that justice is done in the proceeding'.

14 The principles to be applied are not in dispute. They were recently summarised by Nichols J in *Gehrke v Noumi Ltd* ('*Noumi*'),[1] a decision handed down after this application was heard, but in respect of which further submissions were received:[2]

> 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.[3] 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.[4]
>
> (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.[5] 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;[6] 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.[7]
>
> (c) Although the amount recovered will likely be a significant integer in any proportionality assessment, it must be recalled

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1 [2022] VSC 672.
2 Ibid, [53]..
3 See *Fox/Crawford* [2021] VSC 573, [140]–[155]; *Bogan* [2022] VSC 201, [15].
4 *Fox/Crawford* [2021] VSC 573, [145]–[148]; *Allen v G8* [2022] VSC 32, [90]; *Beach Energy* [2022] VSC 424, [37]–[42].
5 *Fox/Crawford* [2021] VSC 573, [24]; *Bogan* [2022] VSC 201, [13(a)].
6 *Fox/Crawford* [2021] VSC 573, [31]; *Beach Energy* [2022] VSC 424, [38].
7 *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].

that the statutory funding scheme created by s 33ZDA is intended to be capable of taking effect early in the life of proceedings[8] where the assessment of potential recovery sums is likely to be fraught with uncertainty.[9] 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.[10]

(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).[11]

(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.[12] 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.[13] In the ordinary course it can be expected that the appropriateness of a rate set on the making of the GCO would arise for consideration on the resolution of the proceeding, including on an application by a plaintiff for approval of a settlement under s 33V. That s 33ZDA makes provision for the amendment of a percentage in this way is consistent with its broader statutory context within which it sits, including the requirement in s 33V that no group proceeding may be settled without the Court's approval. The prospect that a percentage fixed upon the making of a GCO may be later amended *by the Court* does not detract from the relative certainty that is achieved by the making of a GCO.

(f) That is not to exclude the possibility that some conclusions might be drawn early in the life of a proceeding about the

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8 *Fox/Crawford* [2021] VSC 573, [22].
9 *Allen v G8* [2022] VSC 32, [93].
10 *Fox/Crawford* [2021] VSC 573, [148].
11 See ibid [12]–[14].
12 *Fox/Crawford* [2021] VSC 573.
13 *Beach Energy* [2022] VSC 424, [41].

> 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.[14]

The evidence

15 In support of the application, the lead plaintiffs relied upon affidavits from Mr Mumford, Wynand Nicolaas Mullins and the expert report (confidential as to part) exhibited thereto and the affidavits of Joshua Ian Aylward dated 1 June 2022, 29 September 2022, 17 October 2022 and 2 November 2022, parts of which are also confidential.

16 An unredacted version of the costs agreement between the lead plaintiffs and Shine Lawyers dated 1 December 2021 was tendered as an exhibit. Parts of the costs agreement are confidential.

17 There is no dispute that it is appropriate for parts of the evidence, including parts of the costs agreement, to be treated as confidential for the purposes of filing as provided for in r 28A.06(1) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). In some previous decisions dealing with s 33ZDA, confidential evidence has been dealt with in a confidential annexure to the Court's reasons. EML raised the question of whether r 28A.06(1) provides the appropriate basis to support such an approach to confidentiality when providing reasons or whether it is necessary, when providing confidential reasons, to have regard to the *Open Courts Act 2013* (Vic) ('*Open Courts Act*').

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

18 EML submitted that an order is required under the *Open Courts Act* where part of the reasons are the subject of a confidentiality constraint. Attention was directed to the decision of Elliott J in *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 26)*[15] where his Honour identified the circumstances in which the *Open Courts Act* has application and the approach to be adopted in such cases.[16] As it has not been necessary for me to refer to confidential material in order to express my reasons, it is unnecessary to determine the application or otherwise of the *Open Courts Act* in this case.

19 The costs agreement is a No Win No Fee ('NWNF') costs agreement that does not expose the lead plaintiffs to an obligation to pay legal costs and disbursements unless there is a successful outcome in the proceedings. It is a conditional costs agreement as provided for by s 181 of the *Uniform Law*. It includes provision for the payment of a 25% uplift fee, not including in respect of disbursements, as contemplated by s 182 of the *Uniform Law*.

20 Clause 7 of the costs agreement provides that Shine Lawyers may make a GCO application on behalf of the lead plaintiffs following the commencement of the proceeding. Clause 7 states:

> If the Court makes a Group Costs Order, then Shine's legal costs will be payable in accordance with the Group Costs Order…

21 The definition of Group Costs Order in the costs agreement does not specify a minimum percentage at which a GCO is required to be made to satisfy the definition. It simply states that '[t]he percentage rate of any Group Costs Order is determined by the Supreme Court of Victoria'.

The Proceeding

22 The issues in the proceeding are defined by the Statement of Claim and the Defence.

23 The Statement of Claim alleges that, on 19 August 2020, by a Corporate Governance Statement published to the ASX, EML made representations regarding its corporate governance practices ('Compliance Representations'). It alleges that, as at 19 August

15 [2021] VSC 242.
16 Ibid.

2020 and during the relevant period, EML did not have reasonable grounds for making the Compliance Representations and that, by failing to correct or qualify them during the relevant period, EML engaged in misleading and deceptive conduct contrary to s 1041H of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and/or s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) and/or s 18 of the Australian Consumer Law set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). Further, that, as a publicly listed company, EML contravened its continuous disclosure obligations in the ASX Listing Rules and thereby contravened s 674(2) of the *Corporations Act*.

24 Although the plaintiffs propose to amend the Statement of Claim, that has not yet occurred. The GCO application is to be determined based on the current pleadings.

The plaintiffs' anticipated legal costs

25 Section 24 of the *CPA* imposes an overarching obligation upon parties and their lawyers to ensure that costs are reasonable and proportionate. Section 172(1) of the *Uniform Law* provides that law practices must not charge more than fair and reasonable amounts for legal costs.

26 The identification of a realistic and appropriate estimate of legal costs, including one made by reference to obligations imposed under the *CPA* and the *Uniform Law*, is an important component in the determination of this application. The estimate of costs feeds into the comparative analysis of the benefits of a GCO and other funding models, including the potential funding of the proceeding with the assistance of a litigation funder. The estimated costs are an input into Mr Mullins' internal rate of return ('IRR') calculations upon which reliance was placed in support of the application. If the likely estimated costs are too high, then IRR calculations based on those estimated costs will not be reliable.

27 The costs agreement specifies the fees to be charged for legal work. It specifies the hourly rates in accordance with which professional fees will be calculated, and provides an estimate of the total likely legal costs and disbursements, including the

25% uplift fee payable by the lead plaintiffs on legal costs in the event of a successful outcome ('estimated costs'). The figure specified for the estimated costs is confidential.

28 The estimated costs include an allowance for discovery and subpoenas which amounts to more than 20% of the estimated total costs, including disbursements, before the application of the 25% uplift to Shine Lawyers' professional fees. I am not persuaded that the allowance for discovery and subpoenas, which forms such a substantial part of the estimated costs, is realistic.

29 Section 26 of the *CPA* imposes an obligation upon parties and legal practitioners to disclose documents which are critical to the resolution of the dispute. At an earlier hearing, senior counsel for EML informed the Court that preliminary document searches by EML had identified 500,000 documents. What is relevant on the pleadings and required to be provided to and analysed on behalf of the plaintiffs, whether pursuant to s 26 of the *CPA* or as a result of orders for discovery, is likely to be less than 500,000 documents.

30 The key factual matters relied upon by the lead plaintiffs are set out at paragraphs 31 – 41 of the Statement of Claim. For the most part, those allegations involve discrete documents and events. During the hearing, the lead plaintiffs directed attention to paragraph 49 of the Statement of Claim which alleges that, during the relevant period, the AML/CTF risk control frameworks and governance applicable to the PFS business were not up to the standard EML applied to its other businesses. It was submitted that discovery would be a wide-ranging task.

31 I do not agree that discovery is likely to be a wide-ranging and costly task, at least not as costly as provided for in the estimated total costs. The submissions concerning paragraph 49 ignore the contents of EML's Defence. In substance, EML admits that, when it agreed to purchase PFS, the PFS business's risk control frameworks and governance were not as high as the standard AML/CTF risk control frameworks and governance that EML had developed and implemented in other parts of its business.

The Defence admits that, after completion of the PFS acquisition, EML implemented improvements to the PFS business's risk control frameworks and governance, including in relation to AML/CTF risks.

32 Having regard to the obligations imposed by ss 24 and 26 of the *CPA*, and the terms of Part 4.3 of the *Uniform Law*, including s 172(1), the issues defined by the pleadings, and the estimate of the number of documents for review referred to by senior counsel for EML, I consider that the monetary allowance for the costs of discovery and subpoenas, which is a significant component of what is said to be the 'likely' legal costs and disbursements, is materially overstated. I therefore consider that the 25% uplift fee applied to the professional costs of Shine Lawyers, so far as it applies to the overstated component of the allowance for discovery and subpoenas, is also overstated. In the circumstances, I proceed on the basis that the sum specified as the estimated costs is overstated.

Alternatives to a GCO: No Win No Fee (NWNF) funding

33 Shine Lawyers has conducted the proceeding to date on behalf of the lead plaintiffs on a NWNF basis. The estimated costs assume a continuation of the NWNF funding model.

34 In a confidential part of his evidence, Mr Aylward identifies three figures for potential settlement or award of the group proceeding, which I will refer to as the 'low', 'base' and 'high' scenarios.

35 Each of Mr Aylward's assessments are based upon an assumption that 25% of eligible shareholders will participate. He may be correct. Mr Aylward does not elaborate upon the basis for that assumption.

36 Adopting those three scenarios, if the NWNF estimated costs figure including 25% uplift is accepted, the lead plaintiffs and group members would be materially better off in two of the three scenarios if the case was run on a NWNF basis than if a 30% GCO was made. If the estimated costs adopted for the purposes of the comparison are too high, as I consider to be the case, the pendulum swings in favour of group

members being better off or not materially worse off under all scenarios if the application is refused and the proceeding is conducted on a NWNF basis.

37 The evidence is equivocal concerning the willingness of Shine Lawyers to continue to conduct the proceeding on a NWNF basis should the GCO application be refused. After referring to significant risks involved in the firm acting on a NWNF basis, Mr Aylward states:

> [a]t this stage of the proceedings, Shine Lawyers have not made a decision as to whether to conduct the proceedings on a NWNF basis, beyond the hearing and determination of the GCO application, if it is not possible to obtain an offer from a third-party litigation funder.[17]

38 Mr Aylward gives evidence that Shine Lawyers is presently running a number of actions on a NWNF basis. He says that, notwithstanding that is the case, it is consistent with the general practice of the firm that third-party litigation funding is required to be obtained for class actions 'unless there is a compelling reason for the firm to act without such funding'.[18] It is his evidence that GCO orders are intended to be sought in some of those shareholder class actions presently being funded by the firm on a NWNF basis. His first affidavit refers, amongst others, to the class actions against Beach Energy Limited and Nuix Limited. Since the date of that affidavit, applications for GCOs have been heard and determined in both of those proceedings.[19] It is his evidence that he is 'uncertain whether approval' for NWNF would be granted in this case.[20] That is, assuming the GCO application is refused.

39 Mr Mumford refers in his affidavit to his understanding that if a GCO is not made then, pursuant to clause 9 of the costs agreement, it 'would be open to Shine Lawyers' to terminate the retainer.[21] Mr Mumford does not say that Shine Lawyers has told him they will terminate the retainer if a GCO is not made or if a GCO is made not at 30% but at a lesser rate.

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17 Affidavit of Joshua Ian Aylward affirmed 1 June 2022, [76].
18 Ibid, [69].
19 *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424 (Nichols J); *Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479 (Nichols J).
20 Affidavit of Joshua Ian Aylward affirmed 1 June 2022, [78].
21 Affidavit of Paul Leighton Mumford sworn 31 May 2022, [6(d)].

40 While Mr Aylward has made four affidavits, in none of those affidavits does he say that, if a GCO is made at less than 30%, Shine Lawyers will cease to conduct the proceeding on behalf of the lead plaintiffs and group members on a NWNF basis.

A litigation funder

41 The lead plaintiffs submit that the costs agreement provides that, in the event the Court does not allow the GCO application, Shine Lawyers 'may' seek and obtain third party litigation funding.

42 The primary submissions contend that it is not necessary for the lead plaintiffs to identify a counterfactual funding arrangement and to positively prove that the proposed 30% GCO is more advantageous to group members than the counterfactual funding alternative.[22] Supplementary submissions made following the decision in *Noumi* contend that *Noumi* emphasises the need to identify the correct counterfactual. That is, what will likely happen in the absence of a GCO being made.

43 Irrespective of whether there is a requirement to do so, the lead plaintiffs submit that the relevant counterfactual is the funding of the proceeding by a litigation funder. They submit that this is the proper proxy against which the reasonableness of the proposed GCO percentage should be measured and that, assessed on that basis, the counterfactual supports the making of the GCO for which they contend.

44 It is Mr Aylward's evidence that, where a third party litigation funder is involved, funding commissions are 'usually around 30%'.[23] He says that, even if a litigation funder was prepared to agree to a 20% funding commission (which he says is far lower than he believes they would accept), the return to group members would be lower than under the proposed 30% GCO because, in addition to the funding commission, the legal costs must also be paid.

45 The confidential estimates provided by Mr Aylward support the proposition that, in

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22 See *Fox v Westpac; Crawford v ANZ* [2021] VSC 573, [51]; *Allen v G8 Education Ltd* [2022] VSC 32, [25]; *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424, [27]; *Lay v Nuix Ltd; Batchlor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479, [78].

23 Affidavit of Joshua Ian Aylward affirmed 1 June 2022, [123].

each of the three scenarios, a GCO at 30% is likely to provide a better return to group members than if a litigation funder is involved. That is the case assuming either a 20% or a 30% funding commission, together with legal costs as per the costs estimate.

46 There are two observations to be made concerning that evidence. The first, the comparison adopts the estimated costs which, so far as the discovery and subpoena component is concerned, I have found to be materially overstated. The second, the estimated costs include a 25% uplift on Shine Lawyers' professional fees.

47 I do not accept that an uplift fee of 25% will be charged on all of Shine Lawyers' professional fees if a litigation funder becomes involved. There is no evidence that, if a litigation funder assumes the funding of the proceeding, payment of all of Shine Lawyers' professional fees from that time will only be made if there is a 'successful outcome' of the matter. It is more likely that, in return for its commission, the litigation funder will fund not only the disbursements, but also the majority, if not all, of Shine Lawyers' professional fees on an unconditional basis. It is only if the payment of those fees or some of them are conditional on a successful outcome that an uplift fee may be charged.

48 If a litigation funder does become involved, I do not accept that commission of 30% would likely be payable. Mr Aylward's scepticism about the willingness of a litigation funder to fund an action such as the present in return for a 20% commission rate appears to be based on his assessment of the likely commission payable in class actions in general. That is, rather than the likely commission rates in shareholder class actions such as this proceeding. Annexure A to these reasons is a helpful table prepared on behalf of the lead plaintiffs primarily derived from a 2020 submission from the Law Council of Australia to the Parliamentary Joint Committee on Corporations and Financial Services listing the percentage return charged by litigation funders in shareholder class actions. As appears from the table, the range is generally between 20 and 30% with a mean rate of 23.91%, a median rate of 24.58% and with commission rates below 20% in some past cases.

49 As there has not yet been an approach to a litigation funder in relation to this proceeding, the commission percentage that a litigation funder would require to fund the proceeding is unknown.

50 If a litigation funder was prepared to accept funding commission of 20% then, depending upon the legal costs payable and the timing and quantum of the award or settlement, based on Mr Aylward's estimates, there would still be an advantage to group members from the making of a 30% GCO. If the funding commission agreed to be accepted by the litigation funder is substantially less than 20%, then the position changes.

Internal Rates of Return: The Mullins report

51 It was submitted that Mr Mullins' report provides some degree of corroboration that the proposed rate of 30% is *prima facie* reasonable. Further, that 30% is not disproportionate to the risks which Shine Lawyers will undertake if a GCO is made.

52 Mr Mullins' report was relied on for the 'secondary purpose' of confirming that the IRR that Shine Lawyers would experience at 30% is not outside the range for early stage (the riskiest stage) of venture capital investments.

53 At the outset, a difficulty with Mr Mullins' report should be noted. While sought to be relied upon as the report of an independent expert, Mr Mullins was told as part of his instructions that the percentage GCO to be sought is 30%. If expert evidence of this nature is sought to be relied on in the future, it is highly desirable that the expert not be given instructions about the 'target' which his or her report is intended to support.

54 Assuming the accuracy of the inputs adopted by Mr Mullins, the mean and median calculations summarised in confidential paragraph 4.4.2 of his report reflect a percentage IRR which is less than the 30% for which the application contends.

55 As noted in *Noumi*, s 33ZDA invites a consideration of whether the costs sought are

proportional to the risk.[24] Mr Mullins expressly recognises that his IRR calculations do not consider the probability of Shine Lawyers achieving the scenario outcomes or the risk of not achieving a particular scenario.[25]

56 The costs agreement refers to Shine Lawyers having undertaken extensive legal work, including liaising with counsel regarding prospects and receiving advice. Mr Aylward said that he took into account his own assessment of prospects in arriving at his estimates. Mr Mullins was not provided with a prospects advice from counsel or with Mr Aylward's assessment of prospects.

57 What Mr Mullins is attempting to measure is an appropriate return based upon the risk profile which accompanies the proposed investment in legal costs and disbursements. His evidence is sought to be relied upon in support of a finding that 30% is not disproportionate to the risks which Shine Lawyers will undertake if a GCO is made. However, without an appreciation of the prospects of success and therefore an ability to appreciate the anticipated the risk of failure and total loss, it is highly questionable what weight might be placed on the calculations undertaken, whether to support a rate of 30% or any other rate. As is obvious, if the prospects of success are assessed as very strong then, objectively, the rate of return that a prudent investor would accept in order to undertake to fund the legal costs will be materially lower than would otherwise be the case.

58 The weight properly attributed to the opinions expressed by Mr Mullins is highly dependent upon the validity or otherwise of the inputs to his IRR calculations, whether instructed or assumed.

59 The calculations proceed on the basis that what is required is to calculate a return on the estimated costs. I have found those costs to be overstated so far as the costs of discovery and subpoenas are concerned. The adoption of the estimated costs as the cost base for the calculations also assumes that the 25% uplift payable under the NWNF agreement is part of the costs upon which a return is required. That is, rather

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24 *Gehrke v Noumi Ltd* [2022] VSC 672, [53(a)].

25 Confidential Exhibit WM-1 to the Affidavit of Wynard Nicolaas Mullins sworn 31 May 2022, [2.1.3].

than regarding the uplift percentage as an opportunity to derive a 25% return on costs when acting on a NWNF basis. That opportunity, or at least a large portion of it, is likely to be required to be foregone if a third-party litigation funder model is adopted and the funder is responsible for the payment of professional fees, irrespective of the outcome. The costs base used for the IRR calculation should not include 100% of the uplift on legal costs, excluding disbursements.

60 The IRR outcomes summarised in confidential table 3 of Mr Mullins' report were submitted to support a 30% GCO because the IRR was said to be not outside the range for early stage venture capital investment returns. Table 5 in the Mullins report titled 'Venture capital indicative rates of return' gives a minimum IRR of 30%, a maximum IRR of 400% and a mean IRR of 105% for the 'seed' investment stage. Mr Mullins reported that he uses venture capital rates of return for the purpose of assessing an appropriate company specific risk premium. That is quite a different use of the rates of return for early stage capital investment returns than the use of those rates of return here. Mr Mullins does not provide a satisfactory explanation of why early stage venture capital is an appropriate comparator with GCO funding.

61 For the reasons stated, I do not consider Mr Mullins' report to be of assistance.

Percentages allowed in other GCO applications

62 While not addressed in written submissions and not discussed during the hearing, the effect of clause 7 of the costs agreement is that, if a GCO is made as determined by the Supreme Court, then legal costs will be payable by the lead plaintiffs to Shine Lawyers in accordance with that order. Clause 7 binds Shine Lawyers to continue to act up to the resolution or determination of the proceeding if a GCO is made, irrespective of the percentage specified in the order.

63 The experience of the percentage returns approved in earlier GCO applications in shareholder class actions, while limited in number, is relevant to the percentage that may be 'appropriate or necessary to ensure that justice is done in the proceeding'.

64 Three s 33ZDA(1) applications were decided in shareholder class actions prior to the

hearing of the present application. One such application was decided shortly after the hearing. In chronological order, the earlier cases are *Allen v G8 Education Ltd* ('*Allen*'),[26] where the GCO percentage was fixed at 27.5% inclusive of GST;[27] *Bogan v The Estate of Peter John Smedley (Deceased)* ('*Bogan*'),[28] where the percentage was fixed at 40%;[29] and *Nelson v Beach Energy; Sanders v Beach Energy* ('*Beach Energy*'),[30] where the percentage was fixed at 24.5%.[31] In *Noumi*, decided after the hearing of this application, the percentage was fixed at 22%.[32] In each of the cases, except *Bogan*, the GCO rate was fixed at a percentage below, or well below, the percentage sought in this case.

65. In *Allen*, the Court-appointed contradictor accepted the *prima facie* reasonableness of the proposed rate of 27.5% and that rate was not opposed by the defendant.[33] The rate was put forward and accepted by the Court on the basis that it was a maximum rate, potentially subject to downward adjustment on later review.[34]

66 In *Bogan*, the existing funding arrangements involved funder's commission of 45% together with reimbursement of legal costs.[35] John Dixon J found that, if a GCO was not made at all, there was a considerable risk, indeed a probability, that the funder would not continue to fund the proceeding.[36] The premise for the 40% GCO was that the funder and the solicitors firm would enter into an agreement to share the costs.[37] It was found that, if a GCO was made, but at a lesser rate than 40%, there was a considerable risk that the funder would not enter into a new agreement.[38] No other viable method of funding having been identified, unless a 40% GCO was approved, it was probable the proceeding would end without any adjudication or resolution on

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26 [2022] VSC 32 (Nichols J).
27 Ibid, [6].
28 [2022] VSC 201 (J Dixon J).
29 Ibid, [106].
30 [2022] VSC 424 (Nichols J).
31 Ibid, [113].
32 *Gehrke v Noumi Ltd* [2022] VSC 672, [64] (Nichols J).
33 *Allen v G8 Education Ltd* [2022] VSC 32, [88] (Nichols J).
34 Ibid, [86], [89].
35 *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, [44] (J Dixon J).
36 Ibid, [105(a)].
37 Ibid, [62]-[63].
38 Ibid, [105(b)].

the merits.[39] In *Bogan*, the proceeding was complex and difficult, there was risk both in establishing liability and also, due to the insolvency of the company, concerning recovery of any judgment that might be won.[40]

67. *Beach Energy* involved competition between two class actions. The Sanders plaintiff was represented by Shine Lawyers. The Nelson plaintiff was represented by Slater and Gordon. Shine Lawyers was prepared to continue acting if an order was made fixing the GCO percentage at 24.5%. By their retainer agreement, Nelson and his solicitors had initially agreed to seek a GCO fixed at 28%.[41] Sanders submitted that, in putting forward a rate of 24.5%, his conduct advanced the interests of group members by effectively setting the lower GCO rate, which both plaintiffs then adopted as the rate for which they contended.[42]

68. In *Noumi*, the rate was lower again at 22%. Responding to the decision in *Noumi*, the lead plaintiffs submitted that there were individual and potentially anomalous features of the rate sought and awarded in that case. Firstly, the rate was the product of competition in the context of a carriage dispute. Secondly, one of the law firms had back-end litigation funding which reduced its risk exposure and the risk exposure of the joint venture conducting the consolidated proceeding. Thirdly, the consolidated arrangements involved a number of different entities sharing the risk of funding the proceeding.

Should a GCO be made?

69 In *Fox v Westpac* ('*Fox*'),[43] Nichols J made the following observations about the GCO scheme generally:[44]

> 12. As the statutory text makes clear, s 33ZDA facilitates the funding of group proceedings by introducing what might be described as a statutory common fund of three parts: when a group costs order is made the plaintiff's liability to pay its own legal costs is contingent on recovery of an award or settlement, and the quantum of the costs

39 Ibid, [105(c) – (e)).
40 Ibid, [105(i)].
41 *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424, [122] (Nichols J).
42 Ibid.
43 [2021] VSC 573.
44 Ibid, [12]-[13] (citations omitted).

payable to the legal practice representing the plaintiff and group members is calculated as a percentage of that award or settlement (sub-s 1(a)). An order permitting the calculation of fees in this way must also require that liability for payment of legal costs be shared among all group members (sub-s 1(b)), and where such an order is made the statute shifts the plaintiff's risk of paying adverse costs and any requirement to give security for the defendant's costs to the law practice (ss (2)).

13. In that way, the provision addresses and links these things: first, when a proceeding is funded this way, how legal costs may be calculated (as a percentage of the award or settlement recovered in the proceeding, as specified in the Court's order); second, where a proceeding succeeds, who shares in the liability for the costs of having brought the proceeding (the plaintiff and all group members); third, who bears the financial risks of bringing a group proceeding (the law practice representing the plaintiff and group members).

70 Concerning the criterion for the exercise of the s 33ZDA(1) discretion, her Honour said:[45]

24. On application by the plaintiff in a group proceeding the Court may make a group costs order if *satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding*. The provision does not set out any other criteria for the exercise of the discretion. Section 33ZDA is an example of an open-textured legislative provision that "leave[s] courts with a large measure of significantly unguided discretion in making orders considered to be appropriate to do justice in all the circumstances of a given case", as Nettle J said, in *BMW v Brewster*, of the similarly worded s 33ZF of the cognate Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**). A group costs order is novel in this jurisdiction as a means of regulating litigation funding, but the conferral on a Court of a discretion of this kind, where the court is to determine what is "appropriate or necessary", not by an idiosyncratic assessment but in order to achieve what is "just" in a proceeding, is not.

25. As Nettle J went on to say in *Brewster*, generally speaking, provisions of that kind "may be seen to reflect a legislative intention to confer on courts the widest possible power to do what is appropriate to achieve justice in the circumstances". Section 33ZDA is a provision, the interpretation of which attracts the long-established principle stated in *Owners of the Ship 'Shin Kobe Maru'*, that it is "quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words".

…

29. The parties in both the Fox and Crawford proceedings directed their submissions to the question whether the making of a group costs order

[45] Ibid, [24]-[25], [29]-[33] (citations omitted).

would be *appropriate* to ensure that justice is done in the proceeding, implicitly proceeding on the basis that the words *necessary* and *appropriate* have separate work to do. That reading sits naturally with the statutory language. As will become clear, the parties' positions did not, and the result in each case does not turn on any differentiation between those expressions.

30. Each part of the statutory criterion permits of a range of meanings and is capable of satisfaction in myriad ways. The dictionary meaning of "appropriate" is suitable, fitting or proper in the circumstances. To "ensure" is to make certain of something. In the course of considering s 33ZF of the *Federal Court Act* the Full Court of the Federal Court said in *Money Max* that the word "necessary" and the phrase, "to ensure" do not bear fixed meaning but depend upon and must be construed in their contexts. The Court there cited the United States Supreme Court which, in *McCulloch v State of Maryland*, said of the word *necessary*, "we find that it frequently imports no more than that one thing is convenient, or useful or essential to another". The Full Court in *Money Max* went on to conclude that in s 33ZF there was less of a difference between the expressions, "necessary to ensure justice" and "appropriate to ensure justice" than might initially appear. It further considered that in s 33ZF, the word "necessary" identifies a connection between the proposed order an identified purpose as to which the Court must be satisfied before making an order, and that the expression, *necessary to ensure that justice is done* required that the proposed order be "reasonably adapted to the purpose of seeking or obtaining justice in the proceeding".

31. In the present context, it may be said that before making a group costs order the Court must be satisfied that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding. As the contradictor submitted in this case, such an order would be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

32. As to *ensuring that the justice is done in the proceeding*, it must be recalled that the criterion governs the making of an order concerning the funding of the proceeding in question, specifically the calculation of legal costs payable by the group to the law practice representing it on the conditions set by the statute. A court making a group costs order will, then, have regard to what is appropriate or necessary to ensure justice in the proceeding in respect of the fees payable to the law practice representing the group.

33. The framing of the criterion for the exercise of the power in s 33ZDA by reference to whether a group costs order will be "appropriate or necessary to ensure that justice is done in the proceeding" indicates that what is required in determining whether to make a GCO is a broad, evaluative assessment. In that assessment, the question whether to make an order, and the question what is the rate that ought be set by the order, will be intertwined.

71 It is clear that the lead plaintiffs are not in the position to themselves fund this

proceeding through to judicial determination or earlier settlement. Mr Aylward identified the following factors in support of the making of a GCO in this case:[46]

> (a) a GCO would fairly distribute the burden of legal costs incurred in pursuit of common questions among all Group Members;
>
> (b) a GCO would make funding arrangements for the proceeding certain and transparent;
>
> (c) a GCO would not expose the Plaintiff to significant and disproportionate exposure to financial risks as a result of assuming that role;
>
> (d) having regard to the expected rate of return to Group Members under a third-party litigation funding agreement with the proposed percentage of the GCO, the GCO will result in a greater return to Group Members than the return if third-party litigation funding were required to be obtained;
>
> (e) a GCO will ensure that the costs of prosecuting and proceeding are fairly distributed among all group members, while giving certainty to the percentage net return to group members;
>
> (f) a GCO will put the proceeding on a stable base of funding, and avoid the risk of the proceedings either being discontinued, abandoned, delayed or made uncertain; and
>
> …

72 Having regard to the observations made by Nichols J in *Fox* set out above, I agree that each of the matters in (a) – (c), (e) and (f) above, combined with the inability of the lead plaintiffs to themselves fund the proceeding, support the proposition that the making of a s 33ZDA(1) order is appropriate or necessary in this case to ensure that justice is done.

73 In relation to (d), I accept that that a GCO will result in a greater return to the lead plaintiffs and group members than a third-party litigation funding agreement at the same percentage. That fact also supports the making of a GCO in this case.

74 However, what I consider to be a critical consideration in favour of making a GCO in this case is a matter not identified by Mr Aylward. Namely, that no matter what the percentage fixed by the Court, provided a GCO is made, as a consequence of clause 7 of the costs agreement, Shine Lawyers will be obliged to continue to conduct the

[46] Affidavit of Joshua Ian Aylward affirmed 1 June 2022, [131].

proceeding for the benefit of the lead plaintiffs and group members.

75 The costs agreement includes an indemnity against adverse costs orders by Shine Lawyers in favour of the lead plaintiffs and includes the provision by Shine Lawyers of security for costs if required. The indemnity against adverse costs orders is limited, in the first instance, to adverse costs orders made in the proceeding until the Court determines whether to allow a GCO. If a GCO is made, then the costs agreement provides, as required by s 33ZDA(2)(a) of the *Act*, that Shine Lawyers will be liable for any adverse costs order. The costs agreement similarly includes an agreement by Shine Lawyers to provide security for costs of EML from the commencement of the proceeding until the Court determines whether to allow a GCO should the Court order the provision of security for costs against the lead plaintiffs. The costs agreement provides that, if a GCO is made, Shine Lawyers will give security for EML's costs if so ordered, as required by s 33ZDA(2)(b) of the *Act*.

76 In *Bogan*, John Dixon J identified the financial viability of both existing and proposed funding arrangements as relevant considerations.[47] There is no controversy about those issues in this case. Shine Lawyers is a wholly owned and controlled subsidiary of the ASX listed Shine Justice Ltd ('SHJ'), and is party to a Deed of Cross Guarantee with SHJ. As at 30 June 2022, SHJ had total current assets of approximately $332 million, with approximately $51.8 million in cash and cash equivalents.

77 In these circumstances, provided the GCO rate is one which is consistent with the obligations in s 24 of the *CPA* which bind the lead plaintiffs and Shine Lawyers to ensure that legal and other costs are reasonable and proportionate, and provided the GCO rate is fair and reasonable when assessed against other measures, it will be appropriate to make a GCO in this case.

Is 30% an appropriate or necessary percentage?

78 As Nichols J observed in *Fox*:[48]

> Because of its subject matter and its place within Part 4A of the Act, s 33ZDA

47 *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, [14].

48 *Fox v Westpac* [2021] VSC 573, [34] (citations omitted).

> requires that in exercising the power to grant a group costs order the Court must be astute to protect the interests of group members …

79 The critical question is whether it is appropriate or necessary to approve a rate of 30%, or whether some lesser, and if so what, percentage is appropriate or necessary.

80 The interests of group members will be protected by a GCO that fixes a percentage which ensures a greater, rather than a lesser, return to group members. However, the rate must also be one which reflects a reasonable and realistic return to the law firm who has agreed to undertake the risk. I consider that the Court should be cautious in approving a percentage rate that is higher than GCO percentages approved in other like cases.

81 In support of the 30% rate, Mr Aylward advanced the following propositions:[49]

> (g) the proposed percentage of the GCO at 30% is:
>
> (i) proportionate to the significant capital cost to Shine Lawyers of paying disbursements throughout the life to the matter and performing legal work without payments, in all likelihood, for a number of years;
>
> (ii) proportionate to the significant cost to Shine Lawyers arising from the lack of ability to withdraw capital invested in the litigation when required/desired;
>
> (iii) proportionate to the significant risks to be incurred by Shine Lawyers that it will not be repaid, either in full or at all, for disbursements, or paid for legal work undertaken, in the event of an unsuccessful outcome from the class action or a modest settlement where the GCO does not cover the costs incurred;
>
> (iv) proportionate to the significant risks to be incurred by Shine Lawyers that no settlement can be reached and the Plaintiff's claims fail at trial;
>
> (v) proportionate to the significant risk to Shine Lawyers of having to put up security for costs and having to potentially meet a significant Adverse Costs Order;
>
> (vi) ultimately subject to s33ZDA of the *Supreme Court of Victoria Act 1986* (Vic), which acts as a safeguard in ensuring access to justice for Group Members as the Court has the express power to vary the percentage set under a GCO if the outcome resulted in a disproportionate windfall under the GCO. Accordingly, if circumstances later materialised that demonstrated that the proposed rate was disproportionate or unreasonable, this rate can and would

[49] Affidavit of Joshua Ian Aylward affirmed 1 June 2022, [131(g)].

> likely be adjusted, which will assist in ensuring a greater return to Group Members than the return imposed by third-party litigation funding.

82 The matters to which Mr Aylward refers do not assist in identifying why it is, as he contends, that 30% is the appropriate percentage. As Nichols J said in *Noumi*, proportionality and reasonableness of costs may be evaluated against numerous measures.[50]

83 The fact that a 30% GCO will result in a greater return to group members than the return under a third-party litigation funding agreement with the same percentage also does not assist. No steps have been taken to obtain litigation funding. The percentage at which a funder would be prepared to fund this litigation, taking into account matters including the funder's assessment of the prospects of success and quantum, is unknown. However, based on funding arrangements in other shareholder class actions, it seems likely that litigation funding at a commission rate of 20% or perhaps less would be able to be obtained.

84 The evidence relied on by the lead plaintiffs taken at face value shows that, based on the estimated costs, group members would be better off with a 30% GCO than a litigation funder at 20%. I accept that, unless the percentage the funder is prepared to accept is less than 20%, it appears that a 30% GCO will result in a greater return to group members. It is, however, to be borne in mind that, if the proceeding was to be funded by a litigation funder, for the reasons earlier discussed, the estimated costs to be added to the funding commission would be less than the estimated costs referred to in the evidence. Once the overstatement of the costs of discovery and subpoenas is factored into the comparison and the 25% uplift component of the estimated costs is either substantially or totally removed, the benefits to group members of a 30% GCO compared to a litigation funder model at 20% are, at least in a high settlement scenario, harder to identify.

85 The more fundamental issue with this comparison is that it assumes that third-party

[50] *Gehrke v Noumi Ltd* [2022] VSC 672, [53(a)].

litigation funding is the appropriate proxy against which the proposed GCO percentage should be measured. I do not agree. While the costs agreement provides that litigation funding 'may' be sought if a GCO is not made, it also provides that, if a GCO is made, Shine Lawyers will continue to act and to fund the proceeding. If a GCO is made at a rate lower than 30%, the costs agreement does not permit Shine Lawyers to seek third-party litigation funding.

86 Another relevant measure on this application includes the NWNF model, which the evidence does not exclude as continuing to be available to the lead plaintiffs if a GCO is not made. That is so albeit that Shine Lawyers is not bound to proceed on a NWNF basis. It may seek to obtain third-party litigation funding, and it retains the ability to terminate the retainer if such third-party litigation funding is sought but not obtained. If Shine Lawyers was prepared to proceed on a NWNF basis, to do so would provide a materially more favourable return to group members under two of the three scenarios than under a 30% GCO.

87 The final relevant measure, and the measure that I find to be of most assistance in this case where the costs agreement obliges Shine Lawyers to conduct the proceeding if a GCO is made, irrespective of the percentage, is the GCO percentage ordered in other similar proceedings.

88 No distinguishing features about the present case were identified that would set it apart from other shareholder class actions where GCOs have been ordered. *Bogan* may be put to one side because particular risk considerations applied in that case as earlier discussed. Additionally, in *Bogan*, unless a GCO at 40% was made, the case would not go forward. That is not the case here.

89 In *Beach Energy*, the lead plaintiff in one of the competing class actions was represented by Shine Lawyers, who represent the lead plaintiffs in this proceeding. Where there was 'competition', Shine Lawyers was prepared to continue acting if a GCO was made which fixed the rate at 24.5%. Neither the lead plaintiffs nor Shine Lawyers have filed any evidence and nor have any submissions been advanced to the effect that, if the

GCO were to be fixed at 24.5% in this case, Shine Lawyers would not be prepared to continue acting. Indeed, clause 7 of the costs agreement requires them to do so.

90 I do not accept the submission that the absence of competition in the context of a carriage dispute as occurred in *Beach Energy* and in *Noumi* sets this application apart from those cases. There is a statutory obligation upon legal practices not to charge more than fair and reasonable amounts for legal costs There is a further obligation upon parties and their legal practitioners to ensure that legal and other costs incurred in connection with proceedings are reasonable and proportionate to the complexity or importance of the issues in dispute. In determining whether costs are reasonable and proportionate, and no more than fair and reasonable, the fact that competition might drive down the percentage that a law practice is prepared to accept rather than lose the opportunity to conduct the litigation is relevant. It is relevant because it provides an indication of what the market is prepared to accept, and what is 'fair and reasonable'.

91. The statutory provision requires that the Court is satisfied that it is 'appropriate or necessary' to make a GCO in order to ensure that justice is done in the proceeding. I am satisfied that a GCO which is 'appropriate or necessary' to ensure justice is done in this proceeding is a GCO that specifies a rate of 24.5%. I infer that, if a GCO is made at the rate of 24.5%, even if they were not contractually obliged to do so (which they are), it is likely that Shine Lawyers would agree to conduct the proceeding in return for that rate. I infer that to be the case first, because that is the rate that Shine Lawyers propounded in the *Beach Energy* shareholder class action. Second, because although every action is different, no evidence was adduced, and no submissions were made, which sought to distinguish between the risk profile of the *Beach Energy* shareholder class action and the risk profile of this shareholder class action.

92 I am conscious that in *Noumi* the GCO rate was set at 22% in the context of competition between two class action firms. *Noumi* provides objective support that a commission rate of 22% reflects a broadly acceptable rate of return in the marketplace for a shareholder class action for firms commonly engaged in the conduct of such actions.

It is lower than the percentage that I propose to order in the present case, but not significantly lower. In all the circumstances, I consider a 24.5% GCO to reflect costs that are no more than fair and reasonable.

93 Although it was submitted on behalf of the lead plaintiffs that the obligations imposed by s 24 of the *CPA* can be dealt with at a later time pursuant to s 33ZDA(3) of the *Act*, the s 24 obligations apply to the proceeding as a whole and at all times. The same is the case so far as the obligation to ensure that costs are no more than fair and reasonable as provided for in the *Uniform Law* is concerned.

94. It is important to note that s 33ZDA(3) allows the Court to ensure that, once information informing proportionality becomes available, a review of the GCO percentage can be undertaken. That is so as to ensure that the percentage that I have determined pursuant to s 33ZDA(1) remains appropriate.

95 The s 33ZDA(1) task is a separate and distinct task to the s 33ZDA (3) task. However, whatever the percentage fixed at this time, it creates a default position from which there will be at least be a practical onus upon those who urge departure on either settlement approval or following the conclusion of the proceeding to displace the s 33ZDA(1) percentage.

96 For those reasons, the application to fix the GCO percentage at 30% is refused. I will make a GCO which fixes the percentage pursuant to s 33ZDA(1) at 24.5%. That percentage may be revisited at a later time pursuant to s 33ZDA(3).

CERTIFICATE

I certify that this and the 28 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 6 December 2022.

DATED this sixth day of December 2022.

.....

ANNEXURE A[51] PROVIDED ON BEHALF OF THE LEAD PLAINTIFFS

Settlement distributions in shareholder[52] class actions
2001 - 2020

The highlighted column sets out the combined percentage of legal fees as a proportion of the gross settlement sum (**LF**), and litigation funding agreement rates in shareholder class actions (**LFR**). This represents the best proxy for the combined pricing of legal fees, unrecovered legal work investments (ordinarily borne by the litigation funder), risk of adverse costs, the cost of obtaining security for costs. This is the proper proxy against which the reasonableness of a proposed GCO should be measured.

Table 1						
Case	*Gross settlement sum*	*Net return*	*Litigation funding rate*	*Litigation funding amount*	*Legal Fees (LF)*	*LF + LFR %***
Dorajay Pty Ltd v Aristocrat Leisure Ltd [2009] FCA 19	$144.5m	$101m (70%)	24%	$35m	$8.5m (6%)	30%
P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029	$110m	$60.5m (55%)	35%	$38.5m	$11m (10%)	45%
Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd [2011] FCA 801	$60m	$40.1m (59%)	25%	$15m	$4.9m (8%)	33%

51 The evidentiary sources for the material, although included in the table provided on behalf of the lead plaintiffs, have been omitted from this table.

52 The table is limited to shareholder class actions. It is derived from settlement distribution for class actions 2001 – 2020 to the Law Council of Australia's Submission to the PJCCFS, '*Litigation funding and the regulation of the class action* industry' (16 June 2020) (**Law Council Submission**). The table is limited to those shareholder cases in which both the litigation funding commission rate and the legal fees were disclosed.

Kirby v Centro Properties Ltd (No 6) [2012] FCA 650	$200m	$108.9 (54.45%)	30%[53]	$60m	$31.1m (15.5 %)	45.55%
Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3) [2012] VSC 625	$115m	$68.7m (60%)	30%	$34.5m	$11.8m (10%)	40%
Hadchiti v Nufarm Ltd [2012] FCA 1524	$46.6m	$39.9m (85%)	5%	$2.2m	$4.5m (10%)	15%
Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 3) [2014] FCA 680	$75m	$47.75 (64%)	25%	$18.75m	$8.5m (11%)	36%
Inabu Pty Ltd v Leighton Holdings Ltd [2014] FCA 622	$69.45m	$46.05 (66%)	28%	$19.5m	$3.9m (6%)	34%
Earglow Pty Ltd v Newcrest Mining Ltd [2016] FCA 1433	$36m	$18.92m (52%)	19%	$6.78m	$10.3m (29%)	48%
Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3) [2017] FCA 330	$40m	$20.65m (52%)	22%	$8.85m	$10.5m (26%)	48%

[53] There appears to be an error in the LFA percentage figure for *Kirby v Centro Properties Ltd (No 6)* [2012] FCA 650 in the Law Council Submission, which misstates the LFA as "40%".

Mitic v OZ Minerals Ltd (No 2) [2017] FCA 409	$32.5m	$11m (34%)	27%	$8.9m	$12.6m (39%)	66%
HFPS Pty Ltd (Trustee) v Tamaya Resources ltd (in Liq) (No 3) [2017] FCA 650	$6.75m	$2.13m (32%)	17%	$1.2m	$3.42m (51%)	68%
Jones v Treasury Wine Estates Ltd (No 2) [2017] FCA 296	$49m	$25.8m (52%)	24%	$11.7m	$11.5m (24%)	48%
Caason Investments Pty Ltd v Cao (No 2) [2018] FCA 527	$19.25m	$6m (31%)	30%	$5.75m	$7.5m (39%)	69%
Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd [2018] FCA 1030	$132.5m	$79.95m (60.3%)	23.2%	$30.75m	$21.8m (16.5%)	39.7%
Santa Trade Concerns Pty Ltd v Robinson (No 2) [2018] FCA 1491	$3m	$1m (34%)	16%	$500,000	$1.5m (50%)	66%
Hopkins as Trustee of the David Hopkins Super Fund v Macmahon Holdings Ltd [2018] FCA 2061	$6.7m	$2.405m (36%)	19%	$1.295m	$3m (45%)	64%
Hall v Slater & Gordon Ltd [2018] FCA 2071	$36.5m	$23.1m (63%)	22%	$8m	$5.4m (15%)	37%

Bradgate (Trustee) v Ashley Services Group Ltd (No 2) [2019] FCA 1210	$14.6m	$6.19m (43%)	33%	$4.84m	$3.57m (24%)	57%
Kuterba v Sirtex Medical Ltd (No 3) [2019] FCA 1374	$40m	$20.5m (52%)	25%	$10.2m	$9.3m (23%)	48%
Rushleigh Services Pty Ltd v Forge Group Ltd (in liq) [2019] FCA 2113	$16.5m	$8.35 (51%)	24%	$3.95m	$4.2m (25%)	49%
Clime Capital Ltd v UGL Pty Ltd [2020] FCA 66	$18m	$8m (44%)	23%	$4.05m	$5.95m (33%)	56%
McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3) [2020] FCA 461	$49.7m	$27.8m (66%)	29%	$14.4m	$7.5m (15%)	44%
Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd [2020] FCA 510	$32.4m	$13.2m (40.9%)	25.8%	$8.4m	$10.8m (33.3%)	59.1%
Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2) [2020] FCA 579	$35m	$28.7m (82.1%)	11.1%	$3.9m	$2.4m (6.8%)	17.9%

Court v Spotless Group Holdings Limited [2020] FCA 1730[54] (***Spotless***)	$95m	$67.65m (69.3%)	22.5%	$19.5m	$7.85m (8.2%)	30.7%
Zantran Pty Ltd v Crown Resorts Limited (No 4) [2022] FCA 500 (***Zantran***)	$125m	$81.6m (65%)	24.16%	$30.2m	$11.5m (9.2%)	33.36%
Hall v Arnold Bloch Leibler (a firm) (No 2) [2022] FCA 163 (***ABL***)	$28m	$15.4m (55%)	28%	$7.84m	$4.75m (17%)	45%
Hall v Pitcher Partners (a firm) (***Pitcher Partners***) VID 918/2018[55]	$41m (40.05%)	$16.42m (44.65%)	28%	$11.48m	$13.1m (31.95%)	59.95%
Peter Hermann Eckardt v Sims Limited NSD220/2019[56] ***(Sims)*****	$29.5m	43%	25%	$7.37m	$9.5m (32.2%)	57%

Table 2 – Median and Mean rates for the figures in Table 1
<u>Median rates for shareholder class actions</u>

[54] The settlement approval reasons in *Spotless, Zantran, ABL and Pitcher Partners* were all published after the Law Council Submission was submitted to the PJCCFS.
[55] The settlement in *Pitcher Partners* was heard by Beach J on 28 October 2022. The metrics are extracted from final orders made on 28 October 2022.
[56] The *Sims* s 33V settlement approval application has yet to be determined. The metrics are those set out in the Notice of Proposed Settlement issued to group members, which seeks a Funding Equalisation Order, rather than a Common Fund Order.

Median net return to group members	**Median LFA Rate**	**Median Legal Fees**[57]	**Combined Median Legal Fees and LFA Rate**
53.22%	24.58%	20%	46.77%
Mean rates for shareholder class actions			
Mean net return to group members	**Mean LFA Rate**	**Mean Legal Fees**	**Combined Mean Legal Fees and LFA Rate**
53.85%	23.91%	22.32%	46.30%

[57] Calculated by reference to the percentage of the gross settlement sum which was paid over for legal fees.