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

Not Restricted

S ECI 2020 2946

ALANNAH FOX
(and another according to the attached schedule) — Plaintiffs

v

WESTPAC BANKING CORPORATION
(ACN 007 457 141)
(and another according to the attached schedule) — Defendants

S ECI 2020 3365

DANIEL CHRISTIAN O'BRIEN — Plaintiff

v

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522)
(and another according to the attached schedule) — Defendants

S ECI 2020 3924

TANIA NATHAN
(and another according to the attached schedule) — Plaintiffs

v

MACQUARIE LEASING PTY LTD
(ACN 002 674 982) — Defendants

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	23 February 2023
DATE OF JUDGMENT:	3 March 2023
CASE MAY BE CITED AS:	Fox v Westpac Banking Corporation (No 2)
MEDIUM NEUTRAL CITATION:	[2023] VSC 95

PRACTICE AND PROCEDURE — 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 — Judicial discretion in open textured legislation — Where previous Group Costs Order application in two of the proceedings where adjourned and now brought on a "re-enlivened" basis — Where new retainers express a clear contractual intention to enter into a funding agreement with a third-party funder consistent with the terms of each plaintiff's retainer — Satisfaction of evidentiary burden — Whether "appropriate or necessary to ensure justice is done in the proceeding" — *Supreme Court Act 1986* (Vic) s 33ZDA — Applications granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs in each proceeding	Mr D Fahey	Maurice Blackburn
For the Defendants in S ECI 2020 2946	Ms P Neskovcin KC	King & Wood Mallesons
For the Defendants in S ECI 2020 3365	Dr M Rush KC Ms E Brumby	Herbert Smith Freehills
For the Defendant in S ECI 2020 3924	Mr M Borsky KC Mr A Roe	Gilbert + Tobin

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HER HONOUR:

Introduction and background

1 The plaintiffs in these proceedings each seek a Group Costs Order (**GCO**) pursuant to s 33ZDA of the ***Supreme Court Act*** *1986* (Vic), in the following terms:

> 1 The legal costs payable to the solicitors for the plaintiffs and group members, Maurice Blackburn, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, and that percentage be 24.5% (subject to further order).
>
> 2 Liability for payment of the legal costs pursuant to paragraph 1 be shared among the plaintiffs and all group members.
>
> 3 Such other orders as the Court considers appropriate.
>
> 4 Costs be reserved.

2 The proceedings are being case managed together, and the plaintiffs' applications for Group Costs Orders were, by consent, heard together.

3 Alannah **Fox** and Bridget **Nastasi** bring claims against **Westpac** Banking Corporation and its subsidiary St George Finance Ltd. Daniel **O'Brien** brings claims against Australia and New Zealand Banking Group Limited (**ANZ**), for loans taken with the Esanda car finance business (a subsidiary of ANZ), and against Macquarie Bank Limited. Tania and Daimin **Nathan** bring claims against **Macquarie Leasing** Pty Ltd. In each case the plaintiffs allege that, under the so-called "flex commission" arrangements, car dealers were authorised by the relevant financiers to set their own interest rates for loans that the banks provided to consumers, introduced to them by the dealers, by setting the rates charged to consumers higher than the base rate set by the banks. Where a higher interest rate was set, the dealer was paid a commission calculated as a proportion of the difference. The plaintiffs say that these arrangements, which were not disclosed or required to be disclosed to customers, incentivised the dealers to set higher interest rates than they would otherwise have set. The dealers are alleged to have been acting on behalf of the lenders, and engaging in conduct that was, among things, unfair within the meaning of s 180A(1)(b) *National*

Consumer Credit Protection Act 2009 (Cth).[1] The claims are disputed. Although the claims and defences, concerning different entities, are necessarily not identical, the issues raised in each proceeding are substantially similar.

4 The plaintiffs are each represented by Maurice Blackburn. They each rely in these applications on materially similar evidence given by the senior solicitor with conduct of the proceedings, Andrew Watson, who is head of Maurice Blackburn's class actions division. Each plaintiff personally gives evidence in similar terms, addressing his or her own circumstances.

5 The distinguishing feature of the Fox and O'Brien applications is that each is the second application for a Group Costs Order made in that proceeding.[2] For the reasons given in *Fox v Westpac; Crawford v ANZ* (***Fox/Crawford***),[3] the initial applications were refused and the summonses adjourned with liberty to the plaintiff to re-apply for Group Costs Orders at a later date, if so advised. The present applications are made in a re-enlivened form, as it were. The plaintiffs each now seek a GCO fixed at the rate of 24.5%, which is lower by 0.5% than the rate originally sought.

6 The Nathan plaintiffs did not make an earlier application. Otherwise, the issues raised by their application and that of Fox and O'Brien, are the same. None of the defendants opposed the applications.

7 For the reasons that follow, in which I substantially accept the plaintiffs' submissions, I consider that it is appropriate, to ensure that justice is done in each proceeding, to make a Group Costs Order in the terms sought. These reasons should be read as applying to each proceeding, save where I distinguish between them.

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1 It is also alleged that the conduct for which the defendants are responsible was misleading or deceptive conduct under s 1041H of the *Corporations Act 2001* (Cth) or s 12DA of the *ASIC Act 2001* (Cth) and that, for similar reasons, the payments by the plaintiffs and group members were vitiated by an actionable mistake. The plaintiffs seek damages, and restitution.

2 The application in the O'Brien Proceeding was made by the previous plaintiff, Steele Crawford, for whom Mr O'Brien was substituted upon Mr Crawford's bankruptcy. The terms on which the substitution occurred relevantly provided in effect that the new plaintiff was to assume the accrued rights and obligations of the first plaintiff in respect of the proceeding.

3 *Fox v Westpac/Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).

Governing Principles – Group Costs Orders

8 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. There was no dispute as to the application of the principles governing the application s 33ZDA. For those principles, reference may be made to what is said in *Fox/Crawford*,[4] *Allen v G8 Education Ltd*,[5] *Bogan v The Estate of Peter John Smedley (Deceased)*,[6] *Nelson v Beach Energy*,[7] *Lay v Nuix Ltd*[8] and *Mumford v EML Payments Ltd*[9] without setting out the relevant passages here.

The initial applications in *Fox v Westpac* and *O'Brien v ANZ*

9 It is appropriate to start with the reasons for which the initial applications of Fox and O'Brien were declined. A contradictor was appointed to appear on those applications. The contradictor and the defendants opposed the orders sought by the plaintiffs. The reasons are sufficiently set out in the following passages extracted from *Fox/Crawford* (stated here with some editing for brevity):

(a) Satisfaction of the statutory criterion for the exercise of the discretion to make a GCO will depend upon a broad, evaluative assessment of the relevant facts and the evidence before the Court. In making that assessment the interests of group members must be given primacy. *Price*, or the costs that group members are likely to pay, is a relevant consideration, but not the only consideration.[10]

(b) However, the central thrust of each of the plaintiffs' cases was that fixing a group costs order at 25% of the recovered amount would cause the group to be "better off" than under alternative arrangements. Calculating legal fees in that way would deliver a better price and therefore a better financial return to group members. The proposed rate was also said to be appropriate because it would

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4 [2021] VSC 573.
5 [2022] VSC 32, [15]–[31] (***Allen v G8***). Those paragraphs distil the principles articulated in *Fox/Crawford* [2021] VSC 573.
6 [2022] VSC 201, [6]–[14] (***Bogan***).
7 [2022] VSC 424, [36]–[49] (***Beach Energy***).
8 [2022] VSC 479, [74]–[77] (***Nuix***).
9 [2022] VSC 750 (***Mumford***).
10 *Fox/Crawford* [2021] VSC 573, [8].

not result in remuneration that would be disproportionate to the risks to be assumed by Maurice Blackburn in funding the proceeding. Further, a group costs order would ensure transparency and certainty of funding arrangements.[11]

(c) The plaintiffs said that the costs to group members and thus the return to them under the proposed group costs order should be assessed against the costs and likely returns that would be achieved should third party funding be obtained for the proceedings. Compared with historical returns to group members in proceedings that were litigation funded, the proposed GCO would deliver a better result to group members.[12]

(d) It is plain that the existing "no-win, no-fee" (**NWNF**) agreements between Maurice Blackburn and the plaintiffs are not in any sense interim or conditional, meaning that they would come to an end or cease to be binding on Maurice Blackburn in the event that a group costs order were *not* made. There is no indication in the agreements that Maurice Blackburn will cease to act for the plaintiffs in the event that a group costs order application is not successful; rather, the NWNF agreements contemplate that Maurice Blackburn will continue to act. Further, the NWNF agreements do not provide that, failing the grant of a group costs order, Maurice Blackburn may obtain third-party funding that will "supersede" the NWNF funding arrangements or operate as a variation to which the plaintiffs' consent is taken to have been given.[13]

(e) I accept Mr Watson's evidence that Maurice Blackburn entered the NWNF agreements in anticipation of a group costs order being made. However, ultimately, the evidence established no more than a subjective intention on the part of Maurice Blackburn that the NWNF agreements act in effect as a bridge between the commencement of the proceedings and the Court awarding a GCO, or the plaintiffs and Maurice Blackburn making alternative arrangements

11 *Fox/Crawford* [2021] VSC 573, [8].
12 *Fox/Crawford* [2021] VSC 573, [8].
13 *Fox/Crawford* [2021] VSC 573, [61]–[62].

with a third-party funder, and, only failing that, reverting to a NWNF arrangement. That subjective intention was the parties', not Maurice Blackburn's *contractual* intention as objectively determined.[14]

(f) Notwithstanding a stated intention on the part of Maurice Blackburn to seek third-party funding in the event that Group Costs Orders are not made, the default contractual arrangement is the present NWNF agreement, and not third-party funding.[15] In each of these cases the plaintiffs are the beneficiaries of existing funding arrangements in which Maurice Blackburn is acting on a NWNF basis, and has indemnified the plaintiffs against the risk of adverse costs.[16]

(g) Making Group Costs Orders in these cases would effect a fundamental change in the arrangements from one funding model to another; and to make an order effecting such a change, I must be positively satisfied that doing so would be appropriate or necessary to ensure that justice is done in the proceeding. That requires, in this case, an assessment against the existing NWNF funding arrangements.[17]

(h) On the question of outcome, the proposition that group members will be "better off" under a Group Costs Order is founded on predictive modelling that is riven with significant uncertainty. In the Fox proceeding, that modelling does not, on its face, indicate that group members will be better off under the proposed GCO. In the Crawford proceeding (now the O'Brien proceeding), the modelling does support that contention, but it too is founded on significantly uncertain assumptions, and the evidence is otherwise presently unsatisfactory. Ultimately, the present evidence is insufficient to support the exercise of the discretion.[18]

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14 *Fox/Crawford* [2021] VSC 573, [68].
15 *Fox/Crawford* [2021] VSC 573, [67].
16 *Fox/Crawford* [2021] VSC 573, [8].
17 *Fox/Crawford* [2021] VSC 573, [8].
18 *Fox/Crawford* [2021] VSC 573, [8].

(i) The answer to the statutory question *in this case* turns on whether the proposed Group Costs Order is more advantageous to group members than the present funding arrangements. That is not a general proxy for the statutory test. Section 33ZDA does not, as a matter of construction, require in every case that a proposed GCO be demonstrated to likely yield a better outcome than a counterfactual funding arrangement.

(j) There was no evidence as to whether in the absence of a GCO the plaintiffs wished or would be prepared to renegotiate a fresh retainer and costs agreement accommodating third-party funding and associated funding commission payments.[19]

(k) Maurice Blackburn have entered into a cost sharing arrangement with the litigation funder Vannin, whose obligations under the agreement will commence only when and if a GCO is made in each of the proceedings. If the GCO is refused Mr Watson presently anticipates that Maurice Blackburn would approach Vannin to see whether they may fund the proceeding on the basis of a traditional third-party litigation funding arrangement and, if so, negotiate terms. If Vannin and Maurice Blackburn were not able to reach terms amenable to group members' interests, then Maurice Blackburn would consider negotiating with other third-party litigation funders or proceeding on a "no-win, no-fee" basis with appropriate adverse costs protection.[20]

(l) It was submitted that taking the contradictor's submission to its logical conclusion, applications for Group Costs Orders would only be successful in the event that retainers between law practices and plaintiffs were conditional and terminated in the event that a GCO was unsuccessful or plaintiffs, law practices and litigation funders spent considerable time and resources negotiating short-lived funding agreements that would soon become redundant upon the making of Group Costs Orders.[21] That would be

19 *Fox/Crawford* [2021] VSC 573, [66].
20 *Fox/Crawford* [2021] VSC 573, [74].
21 *Fox/Crawford* [2021] VSC 573, [88].

commercially unworkable for plaintiffs, law practices and litigation funders, and contrary to the policy behind the introduction of s 33ZDA. Although those factors explain why Maurice Blackburn put in place the arrangements it did, they do not permit a different legal characterisation of the existing "no-win, no-fee" Agreements (and were not said to have that effect). They do not provide a basis to overlook the legal effect of the NWNF Agreements, particularly in the circumstances in which these applications are framed – focusing on what is the better deal for the plaintiffs and group members.[22] The difficulties of accommodating a genuinely interim arrangement in contractual terms may be overstated. The significance of the comparative analysis of returns, and hence the focus on the contractual terms, has arisen because of the particular circumstances of this case. The present facts may well be anomalous.[23]

(m) In the circumstances I consider it appropriate to adjourn the applications to permit the plaintiffs to consider their respective positions and if so advised, to re-apply at a later time, for Group Costs Orders.[24]

10 To summarise, on the initial applications I accepted Mr Watson's evidence that it had been intended that the plaintiffs apply for Group Costs Orders to fund the proceedings and, if the applications were declined, Maurice Blackburn and the plaintiffs would seek to make alternative arrangements for third-party funding; in the event that third-party funding were unavailable, Maurice Blackburn would revert to acting on a NWNF basis. However, the plaintiffs were in fact beneficiaries of existing NWNF arrangements that could not be objectively construed as intended only to take effect for the purposes of facilitating an application for a GCO. The essential premise of the applications was that group members would be "better off" under the proposed GCOs, including (and especially) financially better off. That contention was not made out on the evidence.

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22 *Fox/Crawford* [2021] VSC 573, [89].
23 *Fox/Crawford* [2021] VSC 573, [90].
24 *Fox/Crawford* [2021] VSC 573, [8].

***Fox* and *O'Brien* – Plaintiffs' submissions**

11 The Fox and O'Brien plaintiffs submit in substance that:

(a) Mindful of the Court's findings in *Fox/Crawford*, and since that decision, the plaintiffs and Maurice Blackburn have entered into new retainers and costs agreements[25] that express a clear objective contractual intention for costs to be governed by way of a Group Costs Order (with the current conditional fee arrangement being interim in nature and made for the purposes of facilitating an application of a GCO) and if a GCO is not made, a preparedness to enter into a funding agreement with a third-party funder consistent with the terms of each plaintiff's retainer. The new terms provide a funding arrangement in which the plaintiffs are no worse off than the terms of the Group Costs Order which had been originally explained to the plaintiffs.

(b) Maurice Blackburn has also entered into an amended cost sharing agreement with Vannin Capital Operations Limited (subsequently novated to Vannin Capital Investments Australia Pty Ltd) (**Vannin**), which provides for costs and fee sharing where a GCO is made and sets out the terms on which a related entity will fund the proceedings in the event that a GCO is *not* made. Those terms are also incorporated into the retainers between Maurice Blackburn and the plaintiffs.

(c) The plaintiffs have each, on these applications, filed evidence expressing their reasons for seeking a Group Costs Order. Their reasons are sound, and evidence the pursuit of the best interests of group members. Evidence of that kind had not been filed in support of the initial applications. With the benefit of that evidence, it is evident that the plaintiffs have given very particular and considered instructions to seek Group Costs Orders. They have each done so after obtaining independent legal advice. In exercising a discretion to make an order under s 33ZDA, the plaintiffs' contractual choice should be afforded

[25] The agreement between Maurice Blackburn and Mr O'Brien does not replace any earlier agreement but was in effect from the commencement of Mr O'Brien's appointment as substitute plaintiff.

weight.

(d) Group Costs Orders will provide inherent structural benefits to group members, namely certainty by way of a guaranteed 75.5% return of recovered proceeds, simplicity and transparency in respect of the manner in which funding and legal costs are calculated and shared, and guaranteed equality between group members from the outset in respect of the sharing of liability for legal costs. Sharing of costs liability will occur under a GCO without the need for any subsequent application raising any question of the scope of the Court's power.

(e) The proposed GCO is less expensive than the alternative funding regime that would prevail in the event that a GCO were not made (described more particularly below, but in substance that Vannin would fund the proceeding, in part, in return for a charge of 25% of the recovered sum, such charge to be distributed between group members on a common fund order basis).

(f) The GCO rate that is sought is *prima facie* reasonable. Among other measures, it would not represent a disproportionate return to Maurice Blackburn having regard to the risk and opportunity cost to Maurice Blackburn.

Fox and _O'Brien_ – consideration of the current contracts for legal fees and funding

12 Having considered the contractual terms (which it is unnecessary to set out here in any detail), I accept the plaintiffs' submission that the present retainer and costs agreements between each the plaintiffs and Maurice Blackburn make plain that both contracting parties in each case intend that:

(a) the costs of the proceeding will be calculated in accordance with the proposed Group Costs Order (with the related provisions in respect of security for costs and adverse costs), subject only to the Court being prepared to make such an order;

(b) in contemplation of a GCO being made, Maurice Blackburn will act on a wholly

conditional basis, provide an indemnity to the representative plaintiff(s) in relation to adverse costs and provide any security for costs (if ordered) until a GCO application is determined;[26]

(c) if the Court makes a GCO, the terms of that order will, to the extent of any inconsistency will supersede the terms of the retainer and costs agreement. The agreement makes plain which parts of it will only apply in the event that the Court does not make a GCO; and

(d) if a GCO is not made, Maurice Blackburn may, in its sole discretion, elect to prosecute the proceeding in accordance with the third-party funding arrangement with Vannin, to continue to prosecute the proceeding on a conditional basis (with the effect that the costs agreement continues to operate as a conditional costs agreement), or terminate the retainer and costs agreement.

13 The cost sharing agreement between Maurice Blackburn and Vannin:

(a) applies expressly to each of the Fox, O'Brien (and Nathan) proceedings and sets out terms that will apply in the event that a GCO is made, and in the event that it is not made;

(b) provides that where a GCO is made, Vannin will pay 50% of project costs including professional fees and disbursements, and Maurice Blackburn will pay to Vannin 50% of any contingency fee payment it receives from the recovered sum in the proceeding. Vannin will pay 50% of any adverse costs or security for costs amount that Maurice Blackburn is required to pay; and

(c) provides that, where the Court does not make a GCO, Maurice Blackburn will record and charge for its work at hourly rates but defer 67.5% of its professional fees (with a 25% uplift on deferred professional fees). The funder will pay

[26] Those terms will remain in effect for a reasonable time after any GCO application is determined, in order to provide for the operation of the alternative provisions that will apply if the Court does not grant the application.

> 32.5% of Maurice Blackburn's professional fees during the life of the proceeding, 50% of all disbursements, 50% of any adverse costs, and will provide 50% of any Court-ordered security for costs. Upon successful resolution of the proceeding, as relevant, the funder will seek a common fund order of 25% of the resolution sum in the proceeding (including all legal costs, but excluding amounts paid or provided by way of security for costs).

14 Mr Watson's evidence was that if the Court declines to grant a Group Costs Order Maurice Blackburn intends to conduct the proceeding on a funded basis pursuant to the agreement with Vannin, and that the funder intends to fund the proceeding on the terms set out, notwithstanding any present uncertainty about the Court's power to make a common fund order.[27] The plaintiffs' evidence disclosed in each case that they understood that that would occur if a GCO were not made, and that they had made their decisions accordingly.

15 It follows that there are relevant substantive differences between the original and current costs and retainer agreements between Maurice Blackburn and Ms Fox and Ms Nastasi (which agreements (original and revised) were materially the same for each plaintiff).

16 As noted above, in *Fox/Crawford*, Mr Watson's evidence was that Maurice Blackburn's subjective intention was that the plaintiffs apply for Group Costs Orders and, if those orders were made, their terms would supersede relevant inconsistent parts of the existing costs agreements. It was implicit that the intention to which Mr Watson referred was also said to be the intention of the respective plaintiffs. However, in the respects discussed in that judgment, the subjective intentions of the parties described in the evidence were not sufficiently reflected in the agreements themselves so as to found the conclusions that were required to support the plaintiffs' applications. The plaintiffs did not give evidence on those applications.

17 The terms of the new agreements are consistent with the subjective intentions

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27 On this point see further below.

described in Mr Watson's evidence on the initial applications, but they go further. They set out, clearly, the alternative funding model that will apply in the event that a Group Costs Order is not made, including the precise financial terms for that funding.

18 I do consider that it matters whether the present agreements are characterised as amended forms of the original agreements, or as new agreements. The essential point is that their intention *vis a vis* the funding for the proceeding is clear. I am inclined to think that the better characterisation is that they are new, and, upon execution, the previous agreements came to an end.

19 In *Fox/Crawford*, the terms of the original retainer agreements were considered in the context of the issues there in play. As was discussed there,[28] the original agreements provided that Maurice Blackburn may change the terms of the NWNF agreements on notice to the client subject only to the variation being reasonable, and if the client objects to the change, Maurice Blackburn may terminate the retainer. As I said in *Fox/Crawford*, any future variation would have to be assessed on its terms. Subsequently, Maurice Blackburn and the plaintiffs in the Fox proceeding have agreed upon new terms (whether characterised as giving effect to a revised or new agreement). Maurice Blackburn has not unilaterally sought to change the terms of the original agreement. Mr Watson's evidence was that mindful of the terms of the *Fox/Crawford* judgment, Maurice Blackburn has negotiated new retainers and cost agreements with Ms Fox, Ms Nastasi and Mr & Ms Nathan which better reflect the original intention of Maurice Blackburn and the plaintiffs as to how the proceedings would be funded, including in circumstances where a GCO is not made.

20 Alannah Fox and Bridget Nastasi are joint plaintiffs in the proceeding against Westpac.

21 Ms Fox is 33 years old and works as a teacher's aide while studying to be a humanities teacher. Her evidence was that she entered into a written cost and retainer agreement with Maurice Blackburn, in July 2020. She instructed the firm to make the first GCO

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28 See *Fox/Crawford* [2021] VSC 573, [58], [62]–[66].

application. Her understanding is that in declining to make the Group Costs Order the Court gave her the opportunity to think about her position further and decide whether not she wanted to reframe the application and bring it back before the Court. She signed an amended costs and retainer agreement with Maurice Blackburn in August 2022. She received independent legal advice in relation to the amended retainer, which she relied upon in deciding to execute it. She maintained privilege in respect of the content of the advice. She said that,

> I understand that the Amended Retainer included amendments to take into account what her Honour Justice Nichols said about the last application for a GCO and amongst other things, to make it clearer that I intended to apply for a GCO, and to include the details of the third party funding arrangement [Maurice Blackburn] negotiated with Vannin on my behalf and class members' behalves to allow MB to continue with the conduct of the case on the terms of that arrangement if a GCO was not made. I have instructed MB to file the application for a GCO of 24.5%. My understanding is that if the GCO application is granted, all of the costs of the case will be capped a 24.5% of the amount of any settlement or damages amount in the proceeding until further order. I understand that this means that if the GCO is granted, 75.5% of the compensation will be shared amongst class members.

22 Ms Nastasi is a 29-year-old administration manager who is trained as an enrolled nurse. She signed a retainer and costs agreement with Maurice Blackburn in July 2020, and an amended agreement in August 2022, for which purpose she received independent legal advice. She gave evidence about the amended retainer and the present GCO application in terms similar to those given by Ms Fox.

23 Notwithstanding that the plaintiffs have maintained privilege on their independent legal advice, I am satisfied that the plaintiffs have received advice and relied upon it in deciding whether or not to continue to act as plaintiffs retaining Maurice Blackburn on the present terms. I am also satisfied that the plaintiffs each subjectively intended to seek a Group Costs Order from the outset. The present agreements give effect to what has been described by them as their consistent intention, although not in so many words. Contrary to Westpac's submission (which did not lead it to submit that the applications should be refused), I do not consider that further evidence is required in order to be so satisfied.

24 Daniel O'Brien, the plaintiff in the proceeding against ANZ, is 49 years old and works

as a light rail driver. He entered into a retainer agreement with Maurice Blackburn in May 2022 in relevantly the same terms as the current agreements between Maurice Blackburn and the plaintiffs in the Fox proceeding. There has been no previous retainer agreement between Maurice Blackburn and Mr O'Brien, who was appointed as plaintiff in August 2022. The terms of the agreement between Maurice Blackburn and the previous plaintiff in that proceeding (Mr Steele Lee Crawford) were identical to the terms agreed in respect of the Fox proceeding. Mr O'Brien's evidence makes clear that he consented to act as plaintiff on the understanding that a revised Group Costs Order application would be made, and that he would be protected against any exposure to adverse costs, without which protection he would not have agreed to do so. He has instructed Maurice Blackburn to make the present application on the understanding that if the application is granted, all of the costs in the case will be capped at 24.5% of the amount of any settlement or damages award, subject only to any further order.

***Nathan* – plaintiffs' submissions and current contracts for legal fees and funding**

25 Tania Nathan and Daimin Nathan are the plaintiffs in the proceeding against Macquarie Leasing. The Nathans entered into a retainer and costs agreement with Maurice Blackburn in July 2020 and an amended retainer and costs agreement in August 2022. Each of those agreements is in substantially the same form as the agreements between Maurice Blackburn and the plaintiffs in the Fox and O'Brien proceedings.

26 Ms Nathan is a qualified teacher and, among other things, has worked selling finance and insurance. Her evidence was that the retainer agreement was amended to make it clearer that they had intended to apply for a Group Costs Order and to incorporate the details of the third-party funding arrangement that Maurice Blackburn negotiated with Vannin to allow it to continue to conduct the case on the terms of that arrangement if a GCO were not made. The Nathans received independent legal advice in relation to the amended retainer which they relied upon in deciding to execute it. This is the first application for a GCO in the Nathan proceeding.

27 The submissions advanced for Mr and Ms Nathan were in substance the same as those advanced for the Fox and O'Brien plaintiffs in support of the proposition that the proposed Group Costs Orders are appropriate to ensure that justice is done in the proceedings.

***Fox, O'Brien* and *Nathan* - implications of a GCO for group members**

28 Each of the plaintiffs gave evidence about their understanding of the benefits that a Group Costs Order would afford to group members, which was the basis upon which they had each instructed Maurice Blackburn to make these applications.

29 As noted earlier, Mr O'Brien brought the application on the basis that group members would be guaranteed to receive 75.5% of any settlement or damages award. That would protect him and group members against the costs of the legal proceeding disproportionately consuming any compensation available to them, because no matter what the final amount recovered, legal costs will always be a fixed percentage of the amount without any other deduction being made. Mr O'Brien said that, otherwise, he would be troubled by what would happen if the final amount were lower than hoped or if complicated issues or previously unforeseen setbacks occurred, which could drive up legal costs.

30 Mr O'Brien's evidence was that he understood that the higher the settlement or damages amount, the higher amount payable to Maurice Blackburn under a Group Costs Order. His belief was that this is fair because Maurice Blackburn was also taking on the risk that there might be a lower final amount than expected and therefore a lower payout to them. Mr O'Brien emphasised that a GCO funding model in which legal fees are not recovered unless the case succeeds and where they are calculated as a proportion of the money recovered will encourage the lawyers to work efficiently and effectively to keep costs down and avoid unnecessary delays. As a result, the lawyers' interests would align more closely with the interests of the plaintiff and class members in minimising legal costs and maximising compensation.

31 A Group Costs Order entails a requirement that the solicitors assume responsibility

for any adverse costs. Mr O'Brien's evidence was that he would not have agreed to act as plaintiff without such protection.

32 Mr O'Brien said it was very important to him, and a benefit for group members, that the Court supervises the legal costs in the case and may revisit the percentage order or any other aspect of the GCO, including before any settlement is approved and any legal costs paid. He considered it a significant benefit to group members that if the Court later finds that the percentage rate of 24.5% would give the lawyers a windfall return, that the Court could decide to reduce the rate.

33 Mr O'Brien also said that the GCO had the benefit of being simple and easy to understand compared with other forms of funding. He has previous experience as a group member in another class action, which has informed his approach to this proceeding.

34 Mr O'Brien acknowledged that the third-party funding arrangement that Maurice Blackburn has negotiated with Vannin on behalf of group members is a "good deal", with an all-in 25% costs cap for funding and legal costs combined. The Group Costs Order, however, removes any uncertainty about whether the Court can make the type of order contemplated by the third-party funding arrangement. He is concerned that that uncertainty might lead to a more complicated or expensive result.

35 Mr O'Brien also considers that a GCO funding arrangement introduces another way for private citizens like him to bring litigation against large companies for alleged breaches of the consumer law, which otherwise may not be able to be commenced because the costs are unaffordable. He believes that new ways of funding legal costs benefit society at large.

36 Ms Fox and Ms Nastasi emphasised certain of the considerations addressed by Mr O'Brien's evidence. Both placed considerable importance on the protection that a group costs order would provide to group members against compensation amounts being eroded by legal fees because the GCO will guarantee that 75.5% of the compensation will be distributed amongst class members and the plaintiffs. Each said,

in different ways, that they would be reassured by the protection that a GCO would afford in this respect and that they were worried about what would happen if such a guarantee were not in place. They each also emphasised the significance of the Court's role in protecting group members' interests via the power to amend a Group Costs Order in order to preclude an unfair or disproportionate return to the lawyers.

37 As to the relationship between the recovered amount and the quantum of legal costs ultimately paid to the solicitors, Ms Fox said that she believed it was fair that the solicitors received more in legal fees the higher the settlement or damages amount, because they were taking the risk of not being paid at all or being paid a lower amount and would only be paid for some of their work throughout the life of the case, which could run for several years. Both Ms Fox and Ms Nastasi emphasised the alignment of interests between solicitors and group members which they expected to result in the lawyers being incentivised to work efficiently.

38 Both acknowledged the merit of the alternative third-party funding model with an all-in 25% costs cap. Both had been informed that there was some uncertainty about whether the Court could make the type of orders that the arrangement contemplates, and each was worried that that uncertainty might lead to additional cost and complication (although neither had an understanding of how that might arise).

39 Ms Nathan (the plaintiff in the proceeding against Macquarie Leasing) gave evidence about her reasons for instructing Maurice Blackburn to apply for a Group Costs Order in terms similar to that given by the plaintiffs in the Fox and O'Brien proceedings. Ms Nathan emphasised, among other things, the alignment of the interests of group members and the solicitors in maximising compensation and working efficiently, and the protection that a group costs order affords against costs blowouts eroding the returns to group members and the power of the Court to vary the GCO rate to avoid windfall returns to the solicitors. Ms Nathan is a group member in another class action and her understanding of these issues has been informed by that experience.

Defendants' positions – Fox, O'Brien and Nathan

40 As noted earlier, none of the defendants opposed the GCO applications. The defendants each took that position acknowledging the guidance provided on earlier occasions as to the proper role of a defendant to a GCO application, arising from the fact that s 33ZDA is a provision that concerns the plaintiffs' liability in respect of legal costs and does not directly concern the defendant, subject to the proviso that if in particular circumstances a Group Costs Order were likely to unjustly affect the interests of the defendant, it could not be said to be an order the making of which was *appropriate or necessary to ensure that justice is done in the proceeding*.[29]

41 ANZ and Macquarie Leasing made extremely confined submissions only directed to the preservation of their interests in keeping open all relevant issues on the question of security for costs, which, if not resolved, was understood by all parties to require separate determination.

42 Westpac went somewhat further. It submitted that additional *clarifications* were required in respect of the Fox plaintiffs' evidence about the circumstances of their new retainer and costs agreements. I did not accept that submission, having regard to the evidence.

43 Separately, Westpac submitted that it has what it called "legitimate concerns" as to Maurice Blackburn's capacity to pay any adverse costs order or provide security for costs in the future, and that that issue is relevant to the exercise of the discretion to make a Group Costs Order. The submissions were addressed to parts of Maurice Blackburn's financial statements. They did not, however, lead Westpac to submit that I should decline to make the orders that the Fox plaintiffs sought, or that Westpac would be prejudiced by the making of such orders. The plaintiffs responded by submitting that there was no reason for Westpac to call into question — or for the Court to doubt — Maurice Blackburn's ability to fund the proceedings, meet any security for costs order or meet any adverse costs order such as to weigh against the making of a GCO. Several points were made in support of that submission, including

[29] *Allen v G8* [2022] VSC 32, [11].

that Westpac had not put on any evidence to belie Maurice Blackburn's audited financial statements, which record significant net assets. There is no need to address this issue any further, save to say that the points made in the submissions did not amount to a serious analysis of the financial position of Maurice Blackburn such that would sustain a conclusion that the firm would likely be unable to meet the liabilities it would assume upon the making of a GCO. Westpac's submission did not establish prejudice to Westpac or undermine the ultimate conclusion that the statutory criterion for the making of a Group Costs Order was satisfied in the Fox proceeding, and nor did they seek to do so. Ultimately, the submission went nowhere.[30] As I apprehend it, the submission was likely directed to the anticipated future contest on the question of the provision of security.

Analysis – *Fox, O'Brien* and *Nathan*

44 I consider it appropriate, in order to ensure that justice is done in each of the Fox, O'Brien and Nathan proceedings, to make Group Costs Orders in the terms sought. I accept that making those orders will benefit group members including in the respects identified by the plaintiffs.

45 First, the Group Costs Orders will provide that legal costs are calculated as a fixed percentage of recoveries with no additional funding costs which, in this case, will guarantee to group members recovery of 75.5% of any settlement sum or damages award. This protects against costs and funding fees disproportionately eroding compensation. As observed in other cases, I consider this to be a real and substantial benefit to group members.[31]

46 The percentage fixed by these orders may only be varied by Court order, and any subsequent court would be bound to consider the interests of group members. As the plaintiffs emphasised in their evidence, but without saying so in these terms, they have chosen this funding method by agreement with their solicitors (i.e., by contractual choice, subject to the Court being prepared to make the proposed order).

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30 For completeness I note that the submissions were made only in writing. The Court's time was not consumed by additional oral submissions.

31 See, eg, *Allen v G8* [2022] VSC 32, [33].

But what they have sought is a funding model whose elements are statutory, and whose price may only be varied by Court order. That is another way of expressing the benefit of certainty afforded group members by the proposed orders.

47 Secondly, the benefits of certainty must be evaluated in the context of the particular order sought. As observed elsewhere, the benefits of certainty might rightly be considered illusory where the price to be paid (the percentage by which cost are to be calculated) is unreasonably high.

48 In these proceedings, the reasonableness of the costs to group members under the proposed Group Costs Orders may be most relevantly evaluated by reference to the Vannin funding agreement described earlier, which has been negotiated specifically for these proceedings. Under those terms (which would apply if a GCO were not made), the impost on the plaintiff and group members will be 25% of any recovered amount, subject to the funder obtaining a common fund order. Under the proposed Group Costs Orders the cost of funding will be 0.5% lower than it would be under the cost sharing arrangement. The difference might be thought immaterial. How much it matters to group members will depend on the size of their individual recoveries. Assessed by reference to any global recovery sum, the difference in return to the solicitors under the GCO compared with the return to the funder under the cost sharing agreement might be more than *de minimis*, depending on the overall recovery sum.

49 It is significant for this evaluation that the Vannin funding arrangement is itself, to borrow the plaintiffs' language, a "good deal", assessed by reference to publicly available data establishing the mean and average returns to group members in class actions with third-party funding. Mr Watson gave evidence that, in traditional funding arrangements, a funder would typically receive a charge of around 25% of the gross recovery as a commission (*exclusive* of legal costs). Data in respect of legal and funding costs in finalised Australian class actions published by the Australian Law Reform Commission (for the period 1997 to 2016) and by the Law Council of Australia (for the period 2001 to 2016) shows that for all proceedings captured by that

data the median and mean funding commission rate was 25%. The interquartile range for combined legal and funding costs for that data set was 37% – 56%. For all class actions, the median proportion of an award or settlement deducted in respect of legal fees and funding commissions was 47%. That same data was relied upon in *Allen v G8*.[32] I refer to what I said there in respect of the utility of that data despite its limitations, and the conclusion that it shows what has been accepted by litigants and funders in previous class actions and is logically something that could inform future actors in the same market. Although the value of the legal and funding services provided in each case and the reasonableness of the costs charge must necessarily be informed by factors relevant to that case, I nevertheless consider that the published data is a meaningful measure of *prima facie* reasonableness.[33] I would add, however, that the utility of such data in future cases might well have to take account of any market disruption including any provoked by the introduction of s 33ZDA.

50 The alternative funding arrangement, like the proposed Group Costs Orders, has the attraction of simplicity, because it calculates the cost to group members as a flat percentage of recoveries. Unlike many other funding models, it does not entail a commission charge in addition to legal fees calculated by reference to hourly rates. In many respects, the proposed GCOs and the alternative funding mechanism are similar. The Group Costs Order will afford group members the protections of the statutory framework that the plaintiffs seek.

51 One difference between the two regimes is that the proposed Group Costs Orders will provide, from the outset, equality between group members in the sharing of liability for legal and funding costs. There is no need for the plaintiffs to separately apply for an order effecting the equitable distribution of legal and funding costs later in the proceedings. There presently remains unsettled controversy as to the Court's power to make a common fund order at the conclusion of proceedings.[34]

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32 *Allen v G8* [2022] VSC 32, [67]–[75].

33 See *Fox/Crawford* [2021] VSC 573, [165]; *Allen v G8* [2022] VSC 32, [75]; *Noumi* [2022] VSC 672, [48].

34 Following the High Court of Australia's decision *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, a division emerged in the Federal Court as to whether ss 33V, 33Z or 33ZF of the *Federal Court of Australia*

52 It can be expected that the controversy will be resolved at intermediate appellate court level (by the Full Court of the Federal Court) in the very near future. A decision of a relevant court that it is *beyond* the scope of the powers conferred under pt 4A of the *Supreme Court Act 1986* (Vic) (or its Federal or state equivalents) would directly affect the funder, who would be seeking such an order. How that might affect the interests of group members is a matter of speculation. It would lead, on the present alternative cost sharing arrangements, to a contractual lacuna. That fact could conceivably add complexity, cost and delay, but it is impossible to measure the possible impact of those potential consequences or the likelihood of their occurrence. It is unnecessary to say anything here about the likely resolution of the unsettled controversy, and no submissions addressed it.

53 Separately, as the plaintiffs submitted, a Group Costs order can reasonably be regarded as promoting the alignment of the interests of the lawyers and the interests of the plaintiffs and group members in maximising recoveries and conducting the proceeding efficiently. That proposition may only be generally stated, but it may be regarded as a beneficial characteristic of the GCO funding model.

54 At this point, I return to what I said in *Fox/Crawford*. The statute requires that a Group Costs Order be appropriate or necessary to ensure that justice is done in the proceeding, but the statutory text, read in its context, does not require or suggest that a GCO is intended to be available only as a funding model of last resort. It does not require or suggest that a Group Costs Order may be awarded *only if* it can be positively proved that it would deliver a better financial outcome to group members than some

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Act 1976 (Cth) permit the making of a common fund order. A number of first instance decisions have affirmed the Federal Court's power to make a common fund order *upon settlement*, pursuant to the legislation and also the Court's equitable jurisdiction: see *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 (Beach J); *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 (Moshinsky J); *Court v Spotless Group Holdings Ltd* [2020] FCA 1730 (Murphy J); *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* [2020] FCA 1885 (Lee J). This position has also been maintained regarding the power to make common fund orders at the time of *judgment*: see *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423 (Lee J). It has been held to the contrary on two occasions that the Federal Court is bereft of power to make a common fund order at *any stage* in the life of a proceeding: see *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637 (Foster J); *Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84 (O'Callaghan J). See generally the observations in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 502 (Middleton, Moshinsky and Lee JJ).

other funding model.[35] Comparisons with alternative funding models can be expected to inform the evaluation as to whether what is sought satisfies the statutory test.[36] Furthermore, both financial and non-financial attributes of the relevant funding models will inform the evaluation.

55 In this case, put succinctly, the proposed Group Costs Orders will deliver funding at a cost that is clearly no worse and in fact marginally better than the alternative arrangement, which can itself be assessed as reasonable or competitive by relevant measures. They will also deliver the structural benefits discussed. The making of the proposed orders is then, a suitable, fitting or proper way to ensure that justice is done in the proceedings. The orders are reasonably adapted to the purpose of seeking or obtaining justice in the proceedings.[37]

56 Finally, as observed in *Fox/Crawford*, on the question of the reasonableness and proportionality of the costs quantified by reference to a percentage of recoveries fixed by a Group Costs Order, the relationship between the risk assumed by the law firm and the reward it obtains is, among others, a relevant consideration.[38] There are limitations on the Court's ability to assess that relationship *ex ante*, and the extent to which conclusions can be drawn about whether a particular percentage rate will result in a reasonable and proportionate return to the solicitors will depend on the quality of evidence directed to that question.[39] It is important that the forward looking assessments made at the time of the assumption of risk be exposed, and also made subsequently available to inform any revision of the rate under s 33ZDA(3).[40]

57 Evidence was given on these applications of the financial risks to be assumed by Maurice Blackburn should the proposed Group Costs Orders be made, taking into account the cost sharing arrangement. It was submitted that, taking into account the assumption of risk in addition to the value of legal services to be performed (which, I

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35 *Fox/Crawford* [2021] VSC 573, [135].
36 *Allen v G8* [2022] VSC 32, [25]; *Fox/Crawford* [2021] VSC 573, [51]; *Bogan* [2022] VSC 201, [12(e)]; *Lieberman v Crown Resorts Ltd* [2022] VSC 787, [21(e)].
37 *Fox/Crawford* [2021] VSC 573, [31].
38 *Fox/Crawford* [2021] VSC 573, [145]–[148], [168]–[170].
39 See *Beach Energy* [2022] VSC 424, [41]–[42].
40 *Allen v G8* [2022] VSC 32, [92]; *Beach Energy* [2022] VSC 424, [39]–[42].

interpolate, can only be assessed in any meaningful sense once that work has been performed or at least on more detailed evidence once the proceedings have progressed), the rate of 24.5% represents a reasonable and not disproportionate return.

58 Mr Watson gave evidence about that issue in the confidential parts of his affidavits. I have considered that evidence.[41] Without setting out the material that is appropriately the subject of confidentiality orders, it will suffice to indicate that that evidence addressed the following issues:

(a) the extent to which the claims advanced in these proceedings are legally novel;

(b) the assessment that Mr Watson has made of the risk profile of these proceedings and how it compares with that of other class actions that Maurice Blackburn has conducted;

(c) the estimated costs of each of the proceedings which have been formulated against assumptions as to the course the proceedings might take;

(d) the outlays required of Maurice Blackburn to fund costs and disbursements in this proceeding; and

(e) the estimated range of recoveries for each proceeding and how those recoveries compare with other consumer class actions that Maurice Blackburn has conducted. Projections as to recovery are informed by assumptions including as to the rate at which eligible group members might participate in the proceedings and claim compensation should common questions be decided favourably to the plaintiffs.

59 Having regard to those factors, Mr Watson has modelled potential internal rates of return (**IRR**) to Maurice Blackburn that might be achieved in respect of these proceedings. The modelling addresses different scenarios positing settlement or judgment at points in time in the life of the proceeding and at assumed damages or

[41] Mr Watson's evidence was given by his affidavits dated 2 September 2022 (in the Fox proceeding and the O'Brien proceeding) and 26 August 2022 (in the Nathan proceeding).

settlement amounts. Those rates of return were compared with Maurice Blackburn's cost of capital, and the rates of return that Maurice Blackburn has achieved in funded and unfunded class actions over a five-year period. The modelled returns were described in the context of the rules that Maurice Blackburn applies to make investments by reference to internal rates of return, including on a portfolio basis (across the firm and across the class actions practice), addressing rates of return derived from class actions categorised according to a range of criteria. For each proceeding, on assumptions as to when and for what sum the proceeding would resolve, the return to the firm was compared with the average return for the firm's entire portfolio and for funded class actions. The recovered sum for each proceeding that would be required for the return to the solicitors to exceed the IRR for the portfolio and funded cases average, and where that recovered sum sat within the estimated range for each proceeding, were identified.

60 That evidence was of assistance in placing a stake in the ground, as it were, setting out the relative anticipated returns from these proceedings, informing Maurice Blackburn's investment decision. Beyond that, it was not possible to draw much from that data at this juncture, on the question of the reasonableness and proportionality of the return that might be made on these proceedings, at the proposed GCO rate. Moreover, the prospective returns are modelled on a number of assumptions that are subject to considerable uncertainty at this time.[42] The conclusion I have reached as to the *prima facie* reasonableness of the proposed rate, is informed more particularly by the evidence concerning historical recoveries in funded cases. The evidence as to Maurice Blackburn's prospective return on investment, if developed and further explained, is likely to inform any later re-assessment on the question of proportionality under s 33ZDA(3) when more is known about the returns in fact to be achieved and the extent of the work required to achieve the result, among other things.

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42 The inputs to the projections were explained in some detail in Mr Watson's evidence in the first iteration of the applications in Fox and Crawford.

SCHEDULE

S ECI 2020 2946

BETWEEN

ALANNAH FOX

First Plaintiff

and

BRIDGET NASTASI

Second Plaintiff

and

WESTPAC BANKING CORPORATION (ACN 007 457 141)

First Defendant

and

ST GEORGE FINANCE LIMITED (ACN 001 094 471)

Second Defendant

S ECI 2020 3365

BETWEEN

DANIEL CHRISTIAN O'BRIEN

Plaintiff

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

First Defendant

and

MACQUARIE BANK LIMITED (ACN 008 583 542)

Second Defendant

S ECI 2020 3365

BETWEEN

TANIA NATHAN

First Plaintiff

and

DAIMIN NATHAN

Second Plaintiff

and

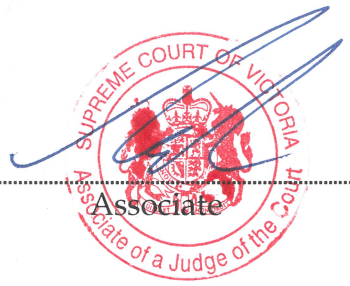
MACQUARIE LEASING PTY LTD (ACN 002 674 982)

Defendant

CERTIFICATE

I certify that this and the 26 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 3 March 2023.

DATED this third day of March 2023.



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Associate