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

Not Restricted

S ECI 2022 02887

Damian Christopher Norris — Plaintiff

v

Insurance Australia Group Ltd — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	30 June 2023, 18 August 2023, further submissions 9 February 2024
DATE OF RULING:	29 February 2024
CASE MAY BE CITED AS:	Norris v Insurance Australia Group Ltd
MEDIUM NEUTRAL CITATION:	[2024] VSC 76

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 — Application granted — *Supreme Court Act 1986* (Vic), s 33ZDA — *5 Boroughs NY Pty Ltd v State of Victoria (No 5)* [2023] VSC 682, considered.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr A Hochroth with Ms K Lindeman and Mr H Whitwell	Quinn Emanuel
For the Defendant	Mr K Loxley	Allens

HER HONOUR:

Introduction

1 The proceeding is a group proceeding issued under Part 4A of the *Supreme Court Act 1986* (Vic) (**Act**). The issue for decision is whether the Court should, on the plaintiff's application, make a Group Costs Order under s 33ZDA of the Act.

2 The group members represented in the proceeding are those persons who acquired shares in Insurance Australia Group Limited (**IAG**) between 11 March 2020 and 20 November 2020. IAG is the parent company of a general insurance group operating in Australia and New Zealand. Its subsidiary, Insurance Australia Ltd (**IAL**) provides business interruption insurance. One of IAG's principal activities is underwriting general insurance.

3 On 16 June 2016, the ***Quarantine Act*** *1908* (Cth) was repealed and the *Biosecurity Act 2015* (Cth) came into force. After the repeal of the *Quarantine Act*, IAL continued to issue certain business interruption policies which included an exclusion referring to the repealed Act. During 2020, IAG made various statements to the market about its financial position. Certain of the statements were to the effect that IAG's business interrupt policies excluded coverage 'in a pandemic scenario'. In November 2020, the New South Wales Court of Appeal determined in a 'test case' concerning exclusion clause in the same terms as those contained in unamended IAL policies, that certain exclusions referring to the repealed *Quarantine Act* were not effective to exclude cover in respect of COVID-19 pandemic-related loss.[1] Shortly thereafter, IAG issued a corrective disclosure to the ASX, estimating the post-tax impact on earnings of the *HDI Global Speciality* decision to be $865 million.

4 The plaintiff alleges that IAG failed to inform the market about its potential exposure to cover COVID-19-related business interruption claims when it had knowledge of the true position during a period before the corrective disclosure, and that it engaged in misleading or deceptive conduct in relation to the impact of the COVID-19 pandemic on its financial position, including as to its insurance margin, claims exposure and

1 *HDI Global Speciality SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296.

profitability. It is alleged that group members paid more for shares in IAG than would have been the case had it complied with its obligations; alternatively that some group members would not have purchased IAG shares had the alleged wrongdoing not occurred.

5 The plaintiff's solicitors are Quinn Emanuel Urquhart & Sullivan (**Quinn Emanuel**).

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

> 1. The legal costs payable to the solicitors representing the plaintiff and group members, Quinn Emanuel Urquhart and Sullivan LLP (**Quinn Emanuel**), be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, that percentage being 30% inclusive of GST (subject to further order).
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> 2. Liability for payment of the legal costs pursuant to paragraph 1 be shared among the plaintiff and all group members.
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> 3. Such other orders as the Court considers appropriate.
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> 4. The costs of the application be costs in the proceeding.

7 The plaintiff relies upon evidence given by Damian Scattini,[2] a partner of Quinn Emanuel who has carriage of this proceeding, and his own evidence.[3] Mr Scattini has over 30 years of experience as a solicitor, specialising in litigation and dispute resolution. He has conducted numerous representative and group actions.

8 Pursuant to orders made on 18 and 23 August 2023, some of the plaintiff's material was redacted on the basis of confidentiality.[4] The relevant evidence was provided to the Court in unredacted form but not to the defendant. In order to sufficiently set out my reasoning, it has been necessary for me to refer to some parts of this confidential material. I have done so in a way that does not disclose the confidential material.

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2 Confidential affidavit and exhibit of Damian Scattini affirmed 24 February 2023, the affidavit of Damian Scattini affirmed 6 April 2023, the affidavit of Damian Scattini affirmed 20 June 2023, the affidavit of Damian Scattini affirmed 30 June 2023, and the further confidential affidavit of Damian Scattini affirmed 11 August 2023.

3 Confidential affidavit of Damian Christopher Norris affirmed 24 February 2023.

4 Claims to confidentiality were supported by Mr Scattini's evidence.

9 The defendant has only a narrow interest in this application. The defendant neither consented to nor opposed the application. In relation to the plaintiff's submission that Quinn Emanuel would be able to meet any security for costs order, the defendant said that it adopted a neutral position on this application but reserved its right to challenge the plaintiff on the firm's financial position in a later application. It did not accept that the firm had the means, available to it within Australia, to meet a costs order on the basis of its global presence.

10 The parties agreed that as to the costs of this application, that the plaintiff should bear his own costs with the defendant's costs to be reserved.

Summary of decision

11 For the reasons set out below, I am satisfied that it is appropriate to make the GCO at the rate of 30% to ensure that justice is done in this proceeding.

Governing Principles

12 Section 33ZDA provides as follows:

> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order —
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> (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
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> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
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> (2) If a group costs order is made —
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> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
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> (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.
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> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

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

(5) In this section —

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

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

13 The principles governing the application of s 33ZDA were not in dispute. I refer, for example, to what is said in *Fox/Crawford*,[5] ***Allen*** *v G8 Education Ltd*,[6] ***Bogan*** *v The Estate of Peter John Smedley (Deceased)*,[7] and ***Mumford*** *v EML Payments Ltd*.[8] For present purposes it is helpful to set out some aspects of those principles.

14 The statutory criterion for the exercise of the power — *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.[9] The court should be satisfied, in order to make a GCO, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding.[10] 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.[11] The evaluative assessment will of course be fact and context specific in each case.

15 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[12] of three parts: when a GCO 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 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

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5 *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).
6 [2022] VSC 32, [15]–[31] (***Allen***).
7 [2022] VSC 201, [6]–[14]; [101] (***Bogan***).
8 [2022] VSC 750 (***Mumford***).
9 *Allen* (n 6), [24]; *Bogan* (n 7) [13(a)].
10 *Fox/Crawford* (n 5) [31].
11 *Fox/Crawford* (n 5) [30], [33]; *Allen* (n 6) [18], [20]; *Bogan* [2022] VSC 201 (n 7) [13], [19].
12 The descriptor is used for convenience, it does not appear in the text.

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 (sub-s (2)).[13]

16 When a Group Costs Order is made, it guarantees that the plaintiff and group members will receive a fixed proportion of any award or settlement that is offered, subject only to variation by Court order. It does so by stipulating that the legal costs payable to the law practice representing the group be calculated as a percentage of the amount of any award or settlement recovered. A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred. By fixing the calculation of costs in this way, it allows a plaintiff and group members to eradicate any risk that their compensation, if recovered, will be eroded by costs whose proportion to that compensation exceeds the specified percentage. In this respect, the GCO statutory funding model may be generally compared with those forms of conditional funding in which the plaintiff and group members will not pay any costs unless they are successful but are otherwise liable to pay their solicitor's costs, meaning that the funding arrangement permits that moneys recovered for the represented class might still be substantially eroded by legal costs. It may also be generally compared with a litigation funding arrangement in which a funding commission is fixed as a proportion of moneys recovered (or spent) *in addition to* recovery by the funder of the legal costs expended.[14]

17 GCOs also offer simplicity and transparency in relation to funding arrangements, designating a simple and readily understandable method for calculating costs by a deduction from the plaintiff's recovered sum. In respect of this aspect of GCOs, it must be recognised that whatever form of funding is employed in a group proceeding,

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13 *Fox/Crawford* (n 5) [12].

14 *Allen* (n 6) [33].

the Court retains control over communications to group members with a view to ensuring that they understand how costs are to be charged.

18 As to the fixing of a percentage rate under s 33ZDA(1), it is convenient to set out what was said in *Gehrke v Noumi*[15] (as adopted in *Mumford v EML*[16] and *Maglio v Hino Motors*[17]):

> (a) Considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform the setting of an appropriate percentage under s 33ZDA. 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.
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> (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. 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; 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.
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> (c) Although the amount recovered will likely be a significant integer in any proportionality assessment, it must be recalled that the statutory funding scheme created by s 33ZDA is intended to be capable of taking effect early in the life of proceedings where the assessment of potential recovery sums is likely to be fraught with uncertainty. As was observed in *Fox/Crawford*, the question of whether the return to the law practice under a Group Costs Order is or is likely to be reasonable, and whether it bears a proportionate relationship to the assumption of risk or to any other relevant measure, may be considered prospectively, but there may be real limitations on the Court's ability to make an informed assessment of that question.
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> (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

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15 *Gehrke v Noumi Ltd* [2022] VSC 672 (***Gehrke***), [53(a)-(f)] (citations omitted).

16 *Mumford* (n 8) [2022] VSC 750, [14].

17 *Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd* [2023] VSC 757 (***Maglio***), [99].

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).

(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. 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. 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 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.

Current funding arrangement

19 Quinn Emanuel is retained by the plaintiff pursuant to a retainer and costs agreement. There is no other funding arrangement between Quinn Emanuel, the plaintiff or a third party. Quinn Emanuel is conducting the proceeding on the basis of a 'no-win-no-fee' arrangement operative for an interim period only, until the determination of the plaintiff's application for a Group Costs Order. Relevantly, the costs agreement provides that:

(a) The agreement is a preliminary or interim funding arrangement which applies until the plaintiff's GCO application has been heard and determined. The scope of engagement is defined by the plaintiff's instructions to Quinn Emanuel to represent him as the representative plaintiff in a group proceeding against IAG.

(b) Quinn Emanuel's costs are to be charged on a 'no-win-no-fee' basis, for which, there is no provision for the charging of an uplift fee.

(c) Quinn Emanuel will seek a GCO at the earliest possible time after the close of pleadings subject to the Court's direction. The application will seek an order for Quinn Emanuel's legal costs and disbursements to be the responsibility of the plaintiff and group members and be a percentage of the amount recovered in the proceeding. The percentage sought will be capped at a percentage that Quinn Emanuel estimates is more favourable to group members than the commission of a litigation funder.

(d) In the case that a GCO is not granted, Quinn Emanuel may seek to engage a third party litigation funder to continue the litigation on the basis that a GCO was not awarded. If Quinn Emanuel is unable to obtain litigation funding for the proceeding, the firm may elect to take other courses of action including not continuing to represent the plaintiff.

(e) Quinn Emanuel will bear the costs of the class action and not yet issue any bills for legal costs or disbursements. If a GCO is not made or the class action is ultimately unsuccessful, the firm will not seek payment from the plaintiff. At no time will the plaintiff be liable for out of pocket costs of the proceeding.

(f) Quinn Emanuel indemnifies the plaintiff in respect of any adverse costs orders that may be made against him in the course of the proceeding.

Evidence

20 Mr Scattini gave detailed evidence in support of the application.[18] Particularly having regard to the confidential nature of parts of that evidence, it suffices to describe it in broad terms.

21 First, as noted above, under the costs agreement Quinn Emanuel is not obliged to proceed on a no-win-no-fee basis regardless of whether a Group Costs Order is made. If it is not made, the solicitors intend endeavour to obtain third party litigation funding. The Quinn Emanual partnership will consider its position under the retainer agreement in the event that a GCO is not made. Mr Scattini described his discussions with Mr Norris, the plaintiff, on the question of how the proceeding might be funded were a GCO not granted.

22 Second, Mr Scattini described (at a very high level) his dealings with litigation funders to date. I accept, on the basis of that evidence, that there is no certainty that the plaintiff will obtain litigation funding, were it to be sought once the plaintiff's application for a GCO is determined. I consider there to be a real risk that third party litigation funding will not be obtained.

23 Third, Quinn Emanuel is of good financial standing and can readily meet the obligations it would assume were a GCO granted. On the basis of the material before me on this application, there was no reason to doubt that proposition. This application was not the occasion to consider how any application for security for costs would be determined. The defendant, appropriately, adopted a neutral position in that regard. But there was nothing on this application to suggest that the defendant's interests would be relevantly and adversely affected by the grant of a GCO.

24 Fourth, Mr Scattini produced comparative modelling of the outcomes for group members at different resolution sums at different stages of the proceeding, comparing the outcome under a 30% GCO and third party funding at different commission rates.

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[18] Initially, the application was supported by very general evidence. I indicated on the return of the summons that the evidence appeared to be inadequate. The plaintiff sought and was granted an adjournment and returned with more comprehensive evidence, on which basis the application proceeded.

The modelling incorporated estimated total group size; costs estimates (including actual costs in the pre-commencement stage)[19] and an estimated range of total damages resolution sums. The inputs to the estimate were explained in the evidence.

25 As has been discussed in several judgments of this Court in this context, estimating future litigation outcomes at an early stage of proceedings is fraught with uncertainty. That does not mean that outcome projections are lacking utility in a comparative evaluation between funding alternatives, but their limits should be kept steadily in mind.[20]

26 Hypothetical funding commission rates based on published data for third party funding of Australian group proceedings were adopted, and taken together with the estimated costs budget for this proceeding, they allowed for a comparison of outcomes for group members under the proposed GCO and a hypothetical funding arrangement. The chosen commission rates were 20%, 22.5% and 25%. The plaintiffs relied upon Professor Morabito's recent study, *Empirical Perspectives on Twenty One Years of Funded Class Actions in Australia* (April 2023, Monash University Department of Business Law and Taxation). Among other things, that study established median funding commissions agreed and approved for payment in class actions of various categories and at relevant periods referable to significant legal developments in this arena. By reference to that helpful study, I accept that the comparator rates were appropriate.[21] Similar data has been relied upon in earlier decisions of this Court in ascertaining what alternative funding arrangements might be compared with a proposed Group Costs Order.[22]

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19 The Court was not in a position, on this application, to ascertain the reasonableness of those estimates or of the costs incurred to date, including in respect of the investigation and issue of proceedings.

20 E.g. *Allen* (n 6) [83]; *Fox/Crawford* (n 5) [113], [119].

21 See also Professor Morabito's more recently published study, *Group Costs Orders and Funding Commissions* (January 2024 April 2023, Monash University Department of Business Law and Taxation).

22 See for example the Houston evidence referred to in *Fox/Crawford* (n 5) [158]–[160], where the plaintiff's expert compiled data sets from the Australian Law Reform Commission and the Law Council of Australia. See also for example the table at Annexure A in *Mumford* (n 8) derived from same data available from the Law Council of Australia and submitted to the Parliamentary Joint Committee on Corporations and Financial Services in June 2020.

27 The outcomes for group members under the proposed GCO and hypothetical third party funding were compared for resolution scenarios early in the litigation, pre-trial and post-trial. Under a Group Costs Order, the costs will always be a fixed proportion of the recovered damage sum. Under a traditional funding arrangements the proportional relationship between costs and damages changes with the damages outcome. The net recovery to group members will be also be affected by the stage of the litigation at which a resolution is reached, on the basis that more costs will be expended the longer the litigation continues. In this case, the outcome to group members under a GCO is likely to be better than under third party funding in a number of scenarios that fall comfortably within the estimated damages range. Whilst a conclusion to that effect is not a proxy for the statutory test for awarding a GCO, it is one consideration that may inform what is appropriate.[23]

28 Mr Scattini gave evidence concerning his assessment of the risk profile of this proceeding. It was said (and emphasised in submissions) that this case is not a 'garden variety' shareholder action. It was said to entail particular complications that involves the law firm taking on a greater degree of risk than in other shareholder class actions. Among the burdens of this proceeding was the question whether the exposure information (i.e. information concerning IAG's exposure to business interruption claims arising from the COVID-19 pandemic) was in fact known to the defendant during the relevant time frame; accordingly that would have to be proved by inference and may involve questions of legal privilege; that the plaintiff would need to engage an expert to quantify the exposure information and that evidence was likely to be complex; and that the plaintiff would need to prove that the exposure had materialised with the loss of the test case. It was emphasised that the proceeding involved a considerable degree of investigation before it was issued.

29 Mr Scattini addressed the potential returns to Quinn Emanual under the proposed GCO, calculated simply as a percentage of the projected recoveries less expected costs. Mr Scattini gave his opinion about where in the projected range of outcomes, he

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23 *Allen* (n 6) [25]; *Maglio* (n 17) [106], [107].

expected a resolution to be most likely. There was, however, little evidence directed to the reasonableness of the return. The firm's gross profit margin on fees (assuming they were paid in the ordinary course by a litigation funder) was given. That evidence provided a reference point against which to contextualise the returns under the proposed GCO at different recovery sums. It did not allow the reasonableness of the return, taking into account the GCO funding model as a whole, to be examined to any meaningful extent.

30 Mr Norris' evidence was, relevantly, that:

(a) He is a tax accountant by profession.

(b) Before agreeing to act as plaintiff in this proceeding and giving instruction to Quinn Emanuel to commence the proceeding, he had several discussions with Mr Scattini.

(c) He understood that the effect of the GCO if approved was that Quinn Emanuel's legal costs would be calculated as a single percentage of any amount recovered in the proceeding rather than on an hourly basis.

(d) The results of the modelling prepared in support of the GCO rate had been explained to him (he gave the substance of that application in his evidence);

(e) On the basis of his understanding of how legal costs would be calculated under a Group Costs Order, it appeared that funding by a GCO would be more beneficial to him and group members than hourly-rate plus commission based funding, *because legal costs would be 'capped' at a single amount at the approved rate*. Mr Norris said that he took great comfort knowing that the GCO rate could be reviewed by the Court and amended later in the proceeding.

(f) He was concerned that a third party funding arrangement would be more costly than a GCO and would likely reduce the amount of any settlement or award and the distribution amongst group members.

(g) He understood that under his retainer with Quinn Emanuel, if a GCO was not made, Quinn Emanuel might consider an alternative funding arrangement. His evidence addressed the risks attending the need to obtain alternative funding if a GCO were not awarded.

Submissions

31 The plaintiff submitted that it would be appropriate or necessary to make its proposed GCO to ensure that justice is done in this proceeding, in substance because:

(a) It would secure funding for the proceeding in circumstances in which there was uncertainty about how the proceeding would be funded in the event that a GCO were not ordered.

(b) A GCO will deliver a level of certainty to the plaintiff and group members at this early stage of the proceeding as to what proportion of a successful outcome will be deducted for legal costs. The GCO "caps" legal costs and although it may be later adjusted at the Court's discretion, it is unlikely that the Court would raise the rate.

(c) A traditional funding model would likely be less transparent and more expensive than a GCO. The Court would be asked to approve a funding commission following a settlement or awarding of damages. Group members would not know until that point in the proceedings the amount to be deducted from the proceeds.

32 As I have said earlier, I accept that there is real uncertainty about whether a third party funder would be prepared to fund the proceedings. I note for completeness however, that the evidence in this case was significantly different from that in *Bogan*,[24] in which this Court established on the evidence that if a GCO were not made at the rate sought, it was probable that the funder would not continue to fund the proceeding, and that there was no other viable method of funding the proceeding.

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24 *Bogan* (n 7).

33 Evidence of solicitors reserving their position on applications of this kind may, in some circumstances, be regarded as self-serving. In this case, I am satisfied that for the reasons explained, Quinn Emanuel has not yet decided what it will do in respect of its position under the retainer agreement in the event that a GCO is not made and that that position has been explained to and is understood by the plaintiff.

34 I accept that a Group Costs Order would provide certainty as to the quantum of legal costs and protection against the erosion of damages by costs and uncertainty about whether gross recoveries will be consumed by costs, particularly in the event of a low recovery sum. I accept that certainty of that kind is of real value to the plaintiff and that he has reasonably assessed that it will be of real value to group members.

35 The value of certainty in that respect needs to be understood in the context of the rate at which a GCO is fixed. Were a GCO fixed at an unreasonable proportion of the recovered sum, the value to group members of the certainty afforded by the fixed percentage nature of the costs calculation would be undermined.

36 On the question of the proposed rate of 30% inclusive of GST, it was submitted that it would likely result in a better return for group members than a proceeding that involves a third party litigation funder. I accept that submission for the reasons set out earlier.

37 The plaintiff (by his Counsel) accepted that it is permissible for the Court to take into account the rates fixed in Group Costs Orders made by this Court in other proceedings. The rates ordered in other proceedings were considered a relevant factor by Delany J in *Mumford*[25] and Osborne J in *Hino*.[26]

38 The plaintiff had submitted that having regard to the 'complexities' of the proceeding (as mentioned above) that this case was to be distinguished from say, a 'standard earnings guidance class action'. The case of *Allen v G8 Education Ltd*,[27] in which the

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25 *Mumford* (n 8) [64], [80].
26 *Maglio* (n 17) [105].
27 *Allen* (n 6).

Court ordered a rate of 27.5% inclusive of GST was described as an example of such a case.

39 After the application in this case was heard, in *5 Boroughs NY Pty Ltd v State of Victoria (No 5)*[28] Keogh J made a Group Costs Order fixed at the rate of 30% inclusive of GST. Quinn Emanuel are also the solicitors for the plaintiffs in *5 Boroughs*. That case concerns a claim brought on behalf of retail businesses that suffered economic due to Victoria's COVID-19 lockdown restrictions made under the *Public Health and Wellbeing Act 2008* (Vic). 5 Boroughs alleges that lockdown directions were made as a result of the State's negligent failure to contain COVID-19 transmissions in its hotel quarantine program. In that case there are four defendants in addition to the state of Victoria.

40 The analysis of risk for the purposes of the GCO application in *5 Boroughs* was assisted by the fact that the defendants had made application for summary judgment. The reasons of the Court in determining that application (which failed) considered the asserted difficulties with the plaintiff's case at length. On the GCO application, against that background, Keogh J said that the case was novel, complex, difficult and attended with significant risk, although it was not to be implied that the Court would be facilitating the speculative and meritless prosecution of a claim by granting the GCO application. Keogh J said that the novelty, complexity and difficulty of the proceeding and the resulting degree of magnitude of risks faced by Quinn Emanuel were important factors justifying the GCO percentage sought and granted. His Honour observed that the rate of 30% was the second highest of the rates ordered in applications for Group Costs Orders to date and that that outcome was 'only justifiable because of the complexity of 5 Boroughs' claim, and the resulting degree of risk…'[29]

41 In this case, the submissions about risk and complexity were put at a high level of generality. Obviously, it is difficult for a court in these circumstances to say anything meaningful about risk and complexity other than by expressing a general impression.

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28 *5 Boroughs NY Pty Ltd v State of Victoria (No 5)* [2023] VSC 682.

29 *5 Boroughs* (n 28) [90], [94].

I can nevertheless say, by reference to the scope of the issues in dispute and the number of parties involved, that this case is likely to be considerably less complex than *5 Boroughs*.

42 I can accept that the actuarial evidence required in this case is likely to be complex. I accept that the existence of the 'disclosure information' will have to be proved by inference, but that is not unusual in shareholder class actions.

43 The plaintiff in this case was invited to make further submissions in light of the *5 Boroughs* decision.

44 In supplementary submissions, Norris said that there were limitations in the extent to which comparative exercise could be undertaken in circumstances in which the *5 Boroughs* matter is not before the Court. Considerations informing a comparison would include evidence of possible resolution sums, noting that the same GCO rate will deliver a higher return to the law firm in the proceeding in which the resolution sum is higher, compared with the other proceeding. I accept that submission.

45 The plaintiff went on to say, however, that there are obvious differences between the proceedings that are apparent on the face of Keogh J's reasons. *5 Boroughs* involves the issue of establishing a novel common law duty of care, and the proceeding has been plagued by interlocutory applications. Nevertheless this case has its own complexities. It is more appropriately compared to cases such as *Allen v G8* and the *Medibank* securities class action,[30] in which GCO rates were granted at 27.5%. The plaintiff said it remained appropriate that a rate of 30% inclusive of GST be fixed in this case.

46 The plaintiff then sought, on the one hand, to say that this case ought be distinguished from 'typical' shareholder actions (like *Allen v G8*) but on the other hand, that it was more like that case than *5 Boroughs*. Each of the comparisons were, of necessity, impressionistic in nature.

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30 Order of Attiwill J in *Kilah v Medibank Private Limited* (Supreme Court of Victoria, S ECI 2023 01227, 6 February 2024).

47 In a recently published report, *Group Costs Orders and Funding Commissions* (January 2024), Professor Morabito has set out the Group Costs Orders made by this Court to date. The range of GCO rates is 14% to 40%. The median rate is 24.5% (across all cases) and 24% (in shareholders class action). In 18.7% of cases in which GCO's have been sought, rates have been fixed at between 25% and 29.99%. As at December 2023, 16 Group Costs Orders had been made. The cases traversed a range of subject matter. Some had the involvement of a litigation funder and some did not. Some were made in the course of multiplicity contests, some were not.

48 In this case, I have been asked to approve a GCO rate to which the plaintiff has agreed. Making a Group Costs Order would have the substantial benefits that have been identified. The benefits of certainty in respect of costs would not, *prima facie*, be undermined by the fixing of the proposed rate, in circumstances in which it has been shown that it is reasonably likely to produce a better outcome for the plaintiff and group members than would have prevailed had third party funding been obtained. There are sufficient reasons then, to grant the application. That conclusion is, however, subject to the following observations.

49 The plaintiff accepted on this application, properly, that GCO rates fixed in other cases are a relevant consideration that the Court may take into account when deciding whether to grant an application for a GCO. By comparison to what has occurred in other cases, the percentage rate is at the upper end of the range.[31] Obviously, every case has to be decided on its own facts. However, as the plaintiff implicitly accepted, orders made in other cases reflect market behaviour and are a relevant comparator, among others. It is also not irrelevant that the plaintiff's solicitors have sought a rate of 30% in another case that appears to be significantly more complex than this case. That said, as the plaintiff in this case rightly observed, consideration of the reasonableness of a GCO rate in a particular case will take into account information including projected recoveries. Comparisons between individual cases therefore do

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31 *Bogan* (n 7) on its particular facts, can be regarded as a outlier.

have real limitations. As a matter of impression, the rate sought in this case appears at the high end of what might be reasonable.

50 Separately, as I have said, the evidence going to the possible return to Quinn Emanuel was limited. Whether a 30% GCO will result in a reasonable return or a disproportionate return to Quinn Emanuel, cannot be reliably assessed at this point.

51 On balance, I consider it appropriate to allow the proposed rate, rather than reduce it on the basis of impression, with limited information by which to make that assessment at this time. It is significant in that decision that the order now made will be subject to review under s 33ZDA(3). The importance of that provision is set out earlier. On a review under that section at the time at which the plaintiff makes an application to have his costs approved (upon any settlement approval or consequent upon any judgment in favour of the plaintiff), considerations including but not limited to:

(a) the extent and nature of the legal work undertaken on the case (which will then be known);

(b) compliance with the obligation in s 24 of the *Civil Procedure Act 2010* (Vic) to use reasonable endeavours to ensure that costs are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute;

(c) the risk assumed by the firm in conducting the proceeding (which includes a forward looking enquiry judged at the time of the assumption of the risk);

(d) returns to the firm (by reference to meaningful metrics); and

(e) comparative costs awards in other cases to the extent that they are relevant,

can be considered in detail. The reasonableness and proportionality of the claim for legal costs may be evaluated against numerous measures.[32]

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32 *Gehrke* (n 15) [53]; *Mumford* (n 8) [82].

CERTIFICATE

I certify that this and the 18 preceding pages are a true copy of the reasons for ruling of Nichols J of the Supreme Court of Victoria delivered on 29 February 2024.

DATED this twenty-ninth day of February 2024.

Associate