

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

Not Restricted

S ECI 2023 01899

BETWEEN:

RAEKEN PTY LTD ATF DOWRICK  
SUPERANNUATION FUND (ACN 110 057 684)

Plaintiff

and

JAMES HARDIE INDUSTRIES PLC (ARBN 097 829 895)

Defendant

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JUDGE: M Osborne J  
WHERE HELD: Melbourne  
DATE OF HEARING: 28 March 2024  
DATE OF JUDGMENT: 11 April 2024  
CASE MAY BE CITED AS: Raeken Pty Ltd v James Hardie Industries PLC  
MEDIUM NEUTRAL CITATION: [2024] VSC 173

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GROUP PROCEEDINGS – Costs – Application for 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 – Norris v Insurance Australia Group Ltd [2024] VSC 76 – Allen v G8 Education Ltd [2022] VSC 32 – Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201 – Nelson v Beach Energy Ltd; Sanders v Beach Energy Ltd [2022] VSC 424 – Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd (2022) 167 ACSR 27.*

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	W A D Edwards KC with S L Hogan	Echo Law Pty Ltd
For the Defendant	Dr M Rush KC with S C B Brenker	Herbert Smith Freehills

HIS HONOUR:

**Introduction**

- 1 By summons dated 28 November 2023 the plaintiff seeks orders under s 33ZDA of the *Supreme Court Act 1986* (Vic) (the ‘Act’) for a group costs order (‘GCO’) in this proceeding.
- 2 The application was neither consented to nor opposed by the defendant (‘James Hardie’). Counsel for James Hardie made only brief submissions as to the proposed rate of 27.5% in light of the rates set in other cases and on the question as to the extent to which the Court should consider the capacity of the plaintiff’s solicitors Echo Law to meet the obligations to which it will be subject if a GCO is made.
- 3 The plaintiff brings claims against James Hardie for damages on behalf of group members who acquired shares in James Hardie, an ASX listed company, on the grounds that it engaged in misleading or deceptive conduct, made misleading statements, and breached its obligations of continuous disclosure to the market in relation to the representations made about its expected growth, and information withheld about its likely FY23 performance. This affected the value of James Hardie’s shares, and caused loss to the group-member investors.
- 4 The plaintiff relies on the following materials:
  - (a) the affidavit of Mathew Glen Chuk of Echo Law, affirmed on 28 November 2023 (with redactions for confidentiality);
  - (b) the affidavit of Kenneth James Dowrick, Director of the plaintiff, affirmed on 23 November 2023; and
  - (c) the affidavit of John Francis Walker, Executive Chairman of litigation funder CASL Funder Pty Ltd (‘CASL’), affirmed on 28 November 2023 (with redactions for confidentiality).
- 5 For the reasons set out below, I am satisfied that it is appropriate, to ensure that justice is done in the proceeding, for the Court to make a GCO in the terms sought. The

making of a GCO will promote the overarching purpose of the just, efficient, timely and cost-effective resolution of the real issues in dispute (and therefore is consistent with ss 7 and 8 of the *Civil Procedure Act 2010* (Vic)).

### **Relevant principles**

6 Section 33ZDA of the Act provides as follows:

- (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order –
  - (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
  - (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
- (2) If a group costs order is made –
  - (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
  - (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.
- (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).
- (4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).
- (5) In this section –

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

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

7 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. Further, a 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.<sup>1</sup>

8 The relevant principles for governing the application of s 33ZDA are not in dispute.<sup>2</sup>

9 Section 33ZDA is a law regulating the calculation of and liability to pay legal costs; more specifically, it is concerned with the liability of the plaintiff and group members to pay the law practice representing them. It addresses and links the following:

- (a) how legal costs may be calculated when a proceeding is funded as contemplated by s 33ZDA (as a percentage of the award or settlement recovered in the proceeding, as specified in the Court's order);
- (b) who shares the liability for the costs of having brought the proceeding, when a recovery is made (the plaintiff and all group members); and
- (c) who bears the financial risks of bringing a group proceeding (the law practice representing the plaintiff and group members).<sup>3</sup>

10 The Court may make an order if 'satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding'. Section 33ZDA is an example of an open textured legislative provision that 'leave[s] courts with a large measure of significantly unguided discretion in making orders considered to be appropriate to do justice in all the circumstances of a given case'.<sup>4</sup> The provision reflects a legislative intention to confer on the Court the widest possible power to do what is appropriate to achieve justice in the circumstances and is not to be read down by making implications or imposing limitations which are not found in the express words of the provision. Unlike s 33ZF of the Act, s 33ZDA is not a gap-filling power and the provision serves a different purpose. The term 'justice is done' occurs within a specific statutory

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<sup>1</sup> *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (Nichols J) ('*Fox/Crawford*').

<sup>2</sup> *Ibid*; *Allen v G8 Education Ltd* [2022] VSC 32 (Nichols J) ('*Allen*'); *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 (J Dixon J) ('*Bogan*'); *Gehrke v Noumi Ltd* [2022] VSC 672, [53]; *Lidgett v Downer EDI Ltd; Kajula Pty Ltd v Downer EDI Ltd; Jowene Pty Ltd v Downer EDI Ltd; Teoh v Downer EDI Ltd* [2023] VSC 574, [29], [31], [41]-[42] (Delany J); *5 Boroughs NY Pty Ltd v State of Victoria (No 5)* [2023] VSC 682, [14], [85]-[96].

<sup>3</sup> *Fox/Crawford* (n 1) [12]-[15]; *Allen* (n 2) [16]; *Bogan* (n 2) [12].

<sup>4</sup> *Fox/Crawford* (n 1) [24]-[25], citing *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 269 CLR 574, 623 [123] (Nettle J); see also *Allen* (n 2) [18]; *Bogan* (n 2) [12(b)].

context which is focussed on enhancing group members' access to justice. Thus, s 33ZDA confers on the Court the power to enhance or facilitate access to justice for group members by making a GCO, subject of course to the pre-conditions for the exercise of that power being satisfied.<sup>5</sup> The statutory criterion is capable of being satisfied in 'myriad ways'.<sup>6</sup>

11 As a matter of textual analysis, the words 'necessary' and 'appropriate' have separate work to do, although in a given case the result may or may not turn on any differentiation between those expressions. The word 'necessary' identifies a connection between the proposed order and an identified purpose as to which the Court must be satisfied before making an order. The exercise of the discretion requires that the Court be satisfied that making an order would be a suitable, fitting or proper way to ensure that justice is done in the proceeding, specifically in relation to the calculation of legal costs payable by the group to the law practice representing it on the conditions set by the statute.<sup>7</sup>

12 What is required in determining whether to make a GCO is a broad evaluative assessment. In that assessment, the question whether to make an order, and the question what is the rate that ought be set by the order, will be intertwined.<sup>8</sup>

13 Section 33ZDA requires that in exercising the power to grant a GCO, the Court must be astute to protect the interests of group members. The effect on group members of a proposed order must be a primary consideration in forming the evaluation required by the section.<sup>9</sup>

14 An order that is appropriate to ensure that justice is done in the proceeding will require fairness and equity, and must not unjustly affect the interests of any party to the proceeding.<sup>10</sup>

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<sup>5</sup> *Fox/Crawford* (n 1) [21].

<sup>6</sup> *Nelson v Beach Energy Ltd; Sanders v Beach Energy Ltd* [2022] VSC 424, [38] ('*Beach Energy*'); *Bogan* (n 2) [13(c)(i)].

<sup>7</sup> *Fox/Crawford* (n 1) [20]-[32]; see also *Allen* (n 2) [19].

<sup>8</sup> *Fox/Crawford* (n 1) [33]; see also *Allen* (n 2) [20].

<sup>9</sup> *Fox/Crawford* (n 1) [34]; see also *Allen* (n 2) [21].

<sup>10</sup> *Fox/Crawford* (n 1) [36]; see also *Allen* (n 1) [22].

15 The purpose of s 33ZDA is to enhance justice by reducing potential barriers to commencing class actions in the Supreme Court of Victoria. The provision sits within Part 4A of the Act, which permits and governs the conduct of group proceedings in this Court, the principal object of Part 4A being to enhance group members' access to justice.<sup>11</sup>

16 In the context of the broad evaluative assessment of the relevant facts in evidence before the Court, the question of 'price', or the costs that group members are likely to pay under a proposed GCO, is a relevant consideration, but not the only consideration.<sup>12</sup> Its significance will depend on the facts and evidence relevant to the particular case in question.

17 Whether group members are likely better off under a proposed GCO than under another funding arrangement is not a general proxy for the statutory test, however a comparative analysis may be relevant on the facts of a particular case.<sup>13</sup>

18 An outcome-based analysis (which employs predictive modelling to demonstrate that a GCO can be expected to provide a better financial outcome to group members than another funding model) may inform the statutory question but may not be a particularly apposite touchstone for the question of whether a GCO is appropriate or necessary to ensure that justice is done in the proceeding.<sup>14</sup>

19 Section 33ZDA should not be construed as embodying threshold requirements not present in its legislative text, especially when those requirements would make it harder, not easier, for plaintiffs and group members to conduct representative proceedings.<sup>15</sup>

20 Section 33ZDA implicitly permits the linking of risk and reward in the calculation of fees. It follows from the text that the calculation of the legal costs in the manner

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<sup>11</sup> See *Fox/Crawford* (n 1) [8(a)], [21]; see also Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 2019, 4586, 4590.

<sup>12</sup> *Fox/Crawford* (n 1) [8(a)]; see also *Allen* (n 2) [24].

<sup>13</sup> *Fox/Crawford* (n 1) [51]; see also *Allen* (n 2) [25]; *Bogan* (n 2) [12(e)].

<sup>14</sup> *Allen* (n 2) [26]; *Fox/Crawford* (n 1) [120]-[121], [131]; *Bogan* (n 2) [12(h)].

<sup>15</sup> *Allen* (n 2) [27].

permitted by s 33ZDA may properly take into account not only the value of legal services performed but the assumption of financial risk by the law practice.<sup>16</sup>

21 Considerations of proportionality and reasonableness are not substitutes for the statutory test, but will assist in answering the statutory question when it comes to setting a percentage rate.<sup>17</sup>

22 It is relevant and significant that s 33ZDA contains a power to amend a GCO and that power is generally expressed in sub-s (3). The time at which a Court might amend an order and the basis for doing so are not constrained by the statute, but an obvious use of the provision is the adjustment of the percentage specified in an order, at the time of the settlement of the proceeding, having regard to the recovery achieved by the plaintiff, among other relevant considerations.<sup>18</sup>

23 It is appropriate to evaluate individual considerations that arise on the evidence in a given case having regard to their relationship with one another, evaluating all of the evidence together. The significance of the considerations identified above, and of related evidence, will naturally vary from case to case. The formulation of rule-based characterisations of particular considerations or categories of evidence is inimical to the evaluative exercise required by s 33ZDA, which is inherently fact-sensitive.<sup>19</sup>

24 GCOs 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.<sup>20</sup>

25 The financial viability of both the existing funding agreements and the proposed funding arrangement by a GCO are relevant considerations.<sup>21</sup> The prospect of termination of the existing funding arrangement in this proceeding directly affects the viability of the proceeding. The arrangements by which the law practice proposed to

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<sup>16</sup> Ibid [28]; *Fox/Crawford* (n 1) [20].

<sup>17</sup> *Fox/Crawford* (n 1) [145]-[148]; *Allen* (n 2) [29].

<sup>18</sup> *Fox/Crawford* (n 1) [23]; *Allen* (n 2) [30]; *Bogan* (n 2) [12(k)].

<sup>19</sup> *Allen* (n 2) [31].

<sup>20</sup> *DA Lynch Pty Ltd v Star Entertainment Group Ltd* [2023] VSC 561, [31] (Nichols J).

<sup>21</sup> *Bogan* (n 2) [14].

bear or share the financial risk are critical to the financial viability of the proposed GCO and are thus relevant considerations to the Court in exercising its broad discretion.

**GCO and certainty**

- 26 When a GCO 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.
- 27 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.
- 28 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.
- 29 Mr Dowrick gave evidence in this proceeding as to the benefits of the certainty of a GCO to the following effect:
- (a) if the GCO is made, the costs in this proceeding would be capped at a percentage of 27.5% with no additional deductions for disbursements, legal or funding costs;
  - (b) the GCO is appealing to and in the interests of group members because group members would be guaranteed a return of at least 72.5% from any award or settlement in this proceeding;
  - (c) if a GCO is made, Mr Dowrick understands that the Court has power to review and amend the GCO, including the percentage rate, later in the proceedings; and
  - (d) Mr Dowrick believes that this provides the plaintiff, and group members, with protection in the event the class action settles at an early stage, where the costs incurred and risk borne by Echo Law would potentially be lower than would



otherwise be expected.

30 The Conditional Legal Costs Agreement and Costs Disclosure Statement ('CCA') entered into between the plaintiff and Echo Law on 18 April 2023 contemplates an application for a GCO at a rate of 27.5% (inclusive of GST). The rate was designed as a contractual cap to provide certainty to the plaintiff prior to the commencement of the proceeding, that at least 72.5% of any compensation recovered would be distributed to group members under a GCO arrangement.

31 In setting the rate in the CCA, Echo Law as solicitors with carriage of the proceeding had regard to the Court's comments in *Fox/Crawford* and *Allen* regarding the importance of contractual certainty in setting a rate in the CCA.

32 As such, if the proceeding is funded by the GCO sought, the plaintiff and group members can participate in the proceeding knowing that legal (and funding) costs will not exceed 27.5% of any award of damages or statutory compensation recovered in the proceeding, or any settlement of the proceeding. There is a very significant benefit in receiving certainty in that outcome for the plaintiff and group members. It is highly relevant in the Court's assessment in the exercise of its discretion under s 33ZDA.

33 Further, making the GCO will fix the funding mechanism for the proceeding, providing further certainty as to how the proceeding will be funded and avoid delays in the proceeding progressing. The evidence filed in support establishes that if a GCO is not made, the plaintiff and Echo Law will seek third-party funding, which will:

- (a) likely cause a delay in the proceeding while funding is sought, and if conventional litigation funding is obtained, it is highly likely the arrangement will be more expensive for group members than the proposed GCO; and
- (b) if litigation funding is not obtained, Echo Law is not in a position to fund on a conditional basis. This means that there is significant uncertainty in any fall-back funding position, likely causing the plaintiff to discontinue being the lead plaintiff in the proceeding or seek to discontinue the proceeding altogether.

34 Any alternative arrangement is unlikely to be better for group members. Mr Chuk's evidence shows that where litigation funding costs and legal costs have been treated as separate charges, experience shows that the total cost to group members is higher because there are two entities (the law firm and the funder) separately taking on distinct risks. Data collated by Mr Chuk demonstrates that, across 51 settled securities class actions that have been conventionally funded, an average of 48.5% of the resolution sum was deducted for litigation funding costs and legal costs. A further recent example may be seen in the recent settlement approval in *Colin Graham Ingram and Judy Gail Tulloch atf the Ingram Superannuation Fund v Ardent Leisure Ltd*,<sup>22</sup> where the funder sought (and was awarded) a 30% commission in addition to reimbursement of costs paid (an additional 22% of the resolution sum, such that deductions for legal and funding costs totalled 52% of the resolution sum).<sup>23</sup> While the dynamics of the litigation funding market at the time that case was issued may well form part of the explanation for that outcome, the evidence suggests that funded litigation outside a GCO structure is more expensive than the GCO structure in which the law firm takes on the risk (albeit that it may share it with a funder through financing arrangements).

### **Transparency and equity**

35 There is simplicity and transparency in the GCO funding model.<sup>24</sup> Ultimately, such simplicity and transparency are in the interests of group members. That is because fixing a cost-recovery percentage under a GCO is easier to understand in the communications received by group members regarding the cost of the proceeding.

36 The GCO as an available funding mechanism for this proceeding will ensure equity between the group members in relation to their liability to pay for legal costs incurred in the proceeding. This assurance is given to group members from the date that the GCO is made. Such simplicity and transparency are inherent characteristics of a GCO and relevant to the assessment the Court has to make when considering whether a

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<sup>22</sup> *Colin Graham Ingram and Judy Gail Tulloch as trustees for the Ingram Superannuation Fund v Ardent Leisure Limited (ACN 104 529 106) & Ors* QUD 182/2020 (reasons not yet published).

<sup>23</sup> Ibid orders made by Justice Derrington on 30 November 2023.

<sup>24</sup> *Allen* (n 2) [41].

GCO is appropriate or necessary to ensure that justice is done in the proceeding pursuant to s 33ZDA.

37 The plaintiff's evidence is consistent with this; Mr Dowrick states that 'a GCO, which guarantees a fixed rate for all cost deductions, provides that certainty. In addition, a GCO is attractive to us because it is a simpler arrangement than a traditional litigation funding arrangement that mixes a percentage-based fee with time-based legal costs, and will guarantee that legal costs would be shared equally among all group members.'

**The plaintiff's contractual position**

38 Mr Dowrick entered into the CCA with Echo Law and the Funder-Plaintiff Agreement with CASL on 18 April 2023.

39 By the terms set out below (by way of example), the CCA sets out the applicable method for calculating and charging legal costs depending upon whether the matter proceeds pursuant to a GCO, or a third-party funding arrangement. These terms include:

- (a) the method of calculation of legal costs and disbursements if not charged pursuant to a GCO, being time-based billing and disbursements at cost (see cls 2.4 to 2.11, cls 3.2 to 3.4);
- (b) the condition(s) that must arise before there is any liability to pay those legal costs and disbursements (being, when the plaintiff and group members receive an amount of money payable in the class action after all liabilities to Echo Law or any other person including the defendant are settled, or if an offer recommended by Echo Law and the most senior barrister briefed in the class action as a reasonable resolution of the class action is made (see cls 2.1, 2.3(b), 7.2)); and
- (c) who is liable to pay legal costs and disbursements (being, if not pursuant to a GCO or a third-party litigation funding agreement, the plaintiff and group members out of the compensation or damages received in the event of a

successful outcome).

40 The terms of the CCA (in particular cls 2.3, 2.4, 2.7, 2.12, 3.1, and 5.1 to 5.5) indicate that both parties to the CCA intended that the proceeding, from its commencement, would be supported by a GCO, subject to the Court making such an order, and that, in the event the Court did not make a GCO, Echo Law would take steps for the proceeding to be funded by third-party litigation funding. The CCA does not contemplate the proceeding progressing under a conditional time-based, 'No-Win, No-Fee' ('NWNF') arrangement absent a GCO being made or a Case Funding Agreement being entered into (see cl 2.12).

41 The key terms of the Funder-Plaintiff Agreement are as follows:

- (a) that funding will be provided for the proceeding pursuant to the Litigation Funding Finance Agreement ('LFFA') between CASL and Echo Law;
- (b) that the funder has certain rights over the conduct of the class action, including receipt of information and providing instructions to Echo Law; and
- (c) consent of the funder is required prior to a major decision regarding the proceeding, including the filing of any interlocutory application including but not limited to the GCO application.

42 Since 24 December 2022, Echo Law and CASL have had in place a portfolio financing arrangement, being the LFFA. On 11 February 2023 CASL provided notice to Echo Law that the proposed class action against James Hardie was an eligible case for the purposes of the LFFA.

43 The key terms of the LFFA, and the portfolio financing it offers, were set out in Mr Walker's evidence. Taken together, these terms effectively provide CASL with an exclusive right of first refusal to fund, through the LFFA, all cases that Echo Law originates and proposes to run on a GCO basis (or as an alternate contingency fee arrangement if and where allowed) for a period of at least two-years, with the ability to extend further. As there is no maximum budget value for any eligible case, subject

to the relevant approvals, the relative cost of capital is reduced which in combination with the financial benefits arising from cross-collateralisation provides a cost-effective arrangement that reduces the cost of funding. Relevantly, under the LFFA, in respect of any eligible case, consistent with an 'Agreed Budget' (prepared by Echo Law based on their experience, and accepted by CASL based on its experience, to pursue the eligible case through the likely phases of the litigation with reference to the specific issues in dispute and case strategy), CASL will provide Echo Law with funding equal to:

- (a) 50% of the professional fees (calculated with reference to Echo Law's standard hourly rates); and
- (b) 100% of the disbursements (including upfront insurance costs and costs associated with the provision of an agreed form of security).

#### **Continued protection for the plaintiff**

44 Mr Dowrick does not have capacity to personally meet any security for costs order made against the plaintiff in the proceeding and, understandably, strongly wishes to avoid any exposure to an adverse costs order. Mr Dowrick's evidence is that he would not have assumed the role of lead plaintiff if the plaintiff were not protected by an indemnity.

45 Pursuant to cl 6.1 of the CCA, Echo Law has agreed to indemnify the plaintiff against any adverse costs order in this proceeding up until the CCA is terminated.

46 However, pursuant to cl 6.2 of the CCA, the indemnity offered by Echo Law to the plaintiff will lapse after 90 days from the making of a decision by the Court to decline a GCO.<sup>25</sup> As such, if the GCO application is unsuccessful, the indemnity under the CCA will only protect the plaintiff for 90 days after that decision is handed down. If the GCO application were declined, Mr Chuk's evidence is that a 90-day period is sufficient time to take steps to protect the interests of the plaintiff and to obtain

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<sup>25</sup> The provision is designed to ensure that the plaintiff has sufficient protection from an adverse costs order but that a key benefit of the GCO (the assumption of adverse costs risk by the law practice) is not provided in contract ahead of the GCO order being made.

instructions from the plaintiff regarding the continuance of the case. In the event the GCO application is declined the current funding arrangements under the LFFA will be terminated.

47 Mr Dowrick's evidence is that if the indemnity from Echo Law and the after the event insurance coverage obtained from AmTrust Europe Limited were to lapse (with no appropriate substitutes put in place), he would instruct Echo Law to replace the plaintiff as lead representative or discontinue the proceeding.

48 A GCO in this proceeding would shift the risk of adverse costs and burden of providing any security ordered from the plaintiff to Echo Law for the duration of the proceeding. Further, a GCO would increase the protection to the plaintiff by preserving the indemnity currently provided by the CCA and, the plaintiff would also be protected by order of the Court. Mr Dowrick gave evidence that this would provide him with a great deal of comfort.

#### **The funding alternative**

49 Mr Chuk provided a detailed and informative explanation of why the portfolio financing arrangement embodied in the LFFA (which sits behind the proposed GCO) has been adopted, and its benefits to group members by allowing this litigation to be funded at a lower cost to group members than what might be achieved otherwise via traditional third-party funding. The benefit to group members is illustrated by modelling undertaken by Echo Law which shows that:

- (a) a GCO arrangement at a rate of 27.5% offers better returns to group members than third-party funding for any outcome within the estimated settlement range for this proceeding with the difference most pronounced at the lower end of the settlement range;
- (b) the final GCO rate in this proceeding may, of course, be varied by the Court to be lower than 27.5% if an outcome were achieved that resulted in an unreasonable and disproportionate windfall. This means that the modelling prepared by Echo Law in setting the rate in the CCA (using a rate of 27.5%)

represents the minimum return to group members under a modelled GCO arrangement in this proceeding. Therefore, in each scenario the returns to group members can only increase. Mr Chuk accepts that a downward revision of the GCO rate would be appropriate in circumstances that would deliver a windfall gain to Echo Law and CASL; and

- (c) regardless of what ultimately transpires by way of costs and resolution sum, a GCO deduction of 27.5% sits well below the average total deduction for litigation funding and legal costs of 48.5% for a conventionally funded securities class actions.

50 If a GCO was not made by the Court in this proceeding, the evidence demonstrates that:

- (a) it is likely that CASL will seek to take steps to terminate the current funding arrangement with Echo Law;
- (b) CASL and Echo Law may seek to explore a more conventional litigation funding model, but at this stage, the terms of such a model are speculative;
- (c) in any event, if a GCO is not obtained, Echo Law will seek third-party litigation funding, and expects that at least one suitable and reasonable offer of litigation funding will be made for this proceeding;
- (d) any such litigation funding arrangement will likely involve a funder indemnifying the plaintiff for adverse costs risk, providing security for costs, paying for 100% of disbursements and paying between 50% and 80% of Echo Law's professional fees;
- (e) if litigation funding was unable to be secured, then:
  - (i) Echo Law does not presently have sufficient liquidity (outside of the LFFA) to enable it to take on a proceeding of this scale on a time-based NWNF basis; and

- (ii) under cl 9.1(d) of the CCA, Echo Law is entitled to terminate its retainer with the plaintiff with notice.

51 In all likely scenarios, a conventional litigation funding arrangement will be more expensive for group members than the proposed GCO. Even if third-party litigation funding involved the funder incurring a similar amount of outlay (50% of solicitor fees and 100% of disbursements (and there is no guarantee that it would)), the funding would be more expensive because it would stand outside the portfolio financing arrangement, which enables lower rates to be offered for the reasons explained by Mr Chuk. There is no alternative basis under which Echo Law could conduct the proceeding without funding.

52 Echo Law was only founded in 2022 and is a very new specialised boutique law firm. The large-scale budgets required to run class actions are effectively in the millions, and for a law firm to fund such cases (and assume the necessary adverse costs risk) they would need to be of a significant scale and have significant assets. The LFFA arrangement with CASL is the cheapest means by which Echo Law can take on the risks of this proceeding for the benefit of the plaintiff.

53 These factors all point to the necessity of the GCO in this proceeding, to ensure that justice is done by permitting it to continue, and to give effect to the overall purpose of s 33ZDA which is to assist in reducing barriers for parties to bring group proceedings in the first place.

#### **Reasonableness of the proposed rate**

54 As noted above, the plaintiff seeks a GCO at the rate of 27.5%.

55 Section 33ZDA implicitly permits the linking of risk and reward in the calculation of a GCO.<sup>26</sup> Considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform setting the appropriate percentage rate.<sup>27</sup> It will be relevant to consider whether the costs to be allowed are, among other things,

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<sup>26</sup> *Lay v Nuix Ltd; Batchelor v Nuix Ltd and Ors; Bahtiyar v Nuix Ltd & Ors* (2022) 167 ACSR 27, 48-49 [72] (Nichols J) ('Nuix').

<sup>27</sup> *Beach Energy* (n 6) [37], citing *Bogan* (n 2) [15].



proportional to the risk undertaken by the law firm in funding the proceeding, the value of the services provided and the value of a reasonable return to the law practice for the financial risk assumed by it.<sup>28</sup> In *Bogan*, J Dixon J had occasion to consider how 'reward for risk' might be approached in a principled manner.<sup>29</sup> His Honour said that assessing the return on invested capital at risk can rise above speculation when careful assessments of future expectations are made, and also that converting the law practice's reasonable and proportionate expectation of a return on its investment into a proportion of an unknown sum is fraught.<sup>30</sup> Nevertheless, as Nichols J noted in *Beach Energy*, the assumption of risk by a law firm is but one element of the equation and investment analysis tools may or may not assist to measure that element of the equation in a principled way and can only be assessed meaningfully on the facts of a particular case.<sup>31</sup>

56 It is recognised that the prima facie reasonableness of the rates may be gauged by reference to the third-party funding rates generally available.<sup>32</sup> However, according to the authorities, it is not necessary for the plaintiff to identify the relevant counterfactual funding arrangement and positively prove that the proposed GCO is more advantageous to group members than the counterfactual funding.<sup>33</sup> Modelled outcomes predicting rates of return to group members under different funding scenarios may not be 'a particularly apposite touchstone for the question whether a Group Costs Order is appropriate or necessary to ensure that justice is done in a proceeding',<sup>34</sup> particularly – as is the case here – where the GCO is sought at a relatively early stage of the proceeding, and it is not known whether, and if so, at what stage, the proceeding might resolve or the amount at which the proceeding is likely to resolve.

57 That said, it is more likely than not that group members will obtain a better financial

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<sup>28</sup> *Beach Energy* (n 6) [37]; *Bogan* (n 2) [12(f)]; *Nuix* (n 26) [72].

<sup>29</sup> *Bogan* (n 2) [15] ff.

<sup>30</sup> *Ibid* [28]; see also *Beach Energy* (n 6) [46].

<sup>31</sup> *Bogan* (n 2) [49].

<sup>32</sup> *Allen* (n 2) [87].

<sup>33</sup> *Ibid* [25]; *Fox/Crawford* (n 1) [51]; *Beach Energy* (n 6) [27]; *Nuix* (n 26) [78].

<sup>34</sup> *Allen* (n 2) [26]; *Beach Energy* (n 6) [27]-[28].

outcome should a GCO at 27.5% be fixed. When considered together with the simplicity, transparency and certainty of the GCO at proposed percentage rates, this supports an overall conclusion that the proposed GCO is appropriate in this proceeding. The evidence of the plaintiff in support of the reasonableness, and appropriateness of the proposed GCO rate of 27.5% in this proceeding includes:

- (a) the comparative modelling as against a traditional third-party litigation funded model (and Mr Chuk's consideration of the integers that go into that modelling in relation to claim size and likely outcome ranges);
- (b) Mr Chuk's analysis as to the risks of the case, and its prospects of succeeding at trial;
- (c) the data collected by Mr Chuk as to average duration and outcome for other securities class actions, and his comparison with the returns of the 27.5% GCO to the long-term average returns; and
- (d) a comparison of the GCO with the budget Echo Law has put together, modelling what the case would cost in legal fees if charged on a traditional time-costed basis, including Mr Chuk's consideration of outcomes at different stages of the litigation as against that budget.

58 The plaintiff's evidence is that it considers that a GCO of a rate of 27.5% is appealing to and in the interests of group members because group members (including the plaintiff) would be guaranteed a return of at least 72.5% from any award or settlement in this proceeding.

59 I am satisfied that a rate of 27.5% is appropriate and that it would not be in the interests of justice to give a lower rate. In particular I have had regard to the assumption based internal rate of return analysis carried out by Mr Chuk, Mr Chuk's assumption based comparison of the 27.5% rate with other funding arrangements and conventional litigation funding and comparison rates ordered in other GCO applications.

60 In *Norris v Insurance Australia Group Ltd*<sup>35</sup> Nichols J acceded to an application for a GCO at a rate of 30%. In that case, her Honour referred to a recently published report, *Group Costs Orders and Funding Commission* (January 2024) where Professor Morabito set out the GCOs 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 actions). In 18.7% of cases in which GCO's have been sought, rates have been fixed between 25% and 29.99%. As at December 2023, 16 GCOs 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.<sup>36</sup> Her Honour refers to GCO rates of 27.5% granted in *Allen* and *Medibank* which are both securities class actions.<sup>37</sup> While the utility of comparing rates has its limitations and each case must be decided on its own facts, the rates fixed in other cases is still a relevant factor. I am satisfied that the rate sought of 27.5% is consistent with rates granted in comparable cases.

#### **Echo Law's ability to conduct the proceeding pursuant to a GCO**

61 As noted above, the financial viability of the proposed funding arrangement by a GCO may be relevant. In *Bogan*, J Dixon J said that the statutory language does not invoke any inquiry into the means by which the law practice chooses to fund its obligations. It is not appropriate to deploy a requirement that a proceeding in which a GCO is sought be shown to be financially viable as a bar to continuation of the proceeding at all, and the relevance or otherwise of the resources of the firm of solicitors to meet the obligations to which it will be subjected if a GCO is made may depend on whether there is any contest as to that issue.<sup>38</sup>

62 The plaintiff submitted that in a case where there is no competing proceeding seeking to advance the rights of group members (unlike *Beach Energy* and *Nuix*), the significance of considering the financial viability of the proposed GCO should not be overstated. Of course, in the weighing of a decision to resolve a multiplicity of class

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<sup>35</sup> [2024] VSC 76.

<sup>36</sup> *Ibid* [47].

<sup>37</sup> *Ibid* [45].

<sup>38</sup> *Nuix* (n 26) [74]-[77], [83]-[84], citing *Bogan* (n 2) [14], [99]-[101].

actions the respective capacity of the firms to conduct the matter may well be significant. That is not the this case. Regardless, I am satisfied that Echo Law has the financial capacity and ability to conduct the proceeding on behalf of the plaintiff and perform the necessary legal work (which involves paying its own staff their wages, and carrying disbursements), and there is no reason to think that the making of a GCO would result in any change to that situation. If the GCO is granted, Echo Law will continue to have the portfolio funding under the LFFA to pay 50% of its legal costs (which approximates the actual cost of Echo Law staffing the proceeding), and 100% of disbursements.

### **Conclusion and appropriate orders**

63 In light of the above and the evidence filed in support of the GCO application in this proceeding, I am satisfied that it is appropriate to make a GCO at a rate of 27.5% to ensure justice is done. It will ensure that the proceeding can continue to be run and funded by Echo Law and CASL under the LFFA, CCA and Funder-Plaintiff Agreement. There is a real prospect of group members obtaining a worse outcome if the GCO is not ordered and instead third-party litigation funding is obtained. If that occurred the case could not continue on a NWNF basis without third-party litigation funding. It is in the interests of certainty and transparency for a GCO to be awarded.

64 The orders I shall make are as follows:

1. The legal costs payable to the solicitors for the plaintiff and group members, Echo Law, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding.
2. Subject to further order, the percentage referred to in paragraph 1 above be 27.5%.
3. Liability for payment of the legal costs pursuant to paragraphs 1 and 2 be shared among the plaintiff and all group members.
4. The defendant's costs of the application be reserved.

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**CERTIFICATE**

I certify that this and the 19 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 11 April 2024.

DATED this 11<sup>th</sup> day of April 2024.

*Katherine Clements*  
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Associate

