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

Not Restricted

S ECI 2023 05830

Jeremey Clarke — Plaintiff

v

JB Hi-Fi Group Pty Ltd (ACN 093 114 286) — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	24 April 2025 and 16 May 2025
DATE OF JUDGMENT:	23 May 2025
CASE MAY BE CITED AS:	Jeremey Clarke v JB Hi-Fi Group Pty Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 288

GROUP PROCEEDINGS – Costs - Costs to be calculated as a percentage of the amount of any award or settlement recovered - Application for a group costs order – Whether proper evidentiary basis to make group costs order – Whether group costs order fixed at 30 per cent appropriate or necessary – Principles to be applied – Application granted – *Supreme Court Act 1986* (Vic) s 33ZDA – *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 - *Allen v G8 Education Ltd* [2022] VSC 32 – *Dawson & Anor v Insurance Australia Ltd & Anor* [2024] VSC 808.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms Melanie Szydzik SC Ms Rachel Francois; Mr James Page	Maurice Blackburn
For the Defendant	Mr Robert Craig KC Mr Andrew McRobert	Herbert Smith Freehills

HER HONOUR:

1 This is a group proceeding issued under Part 4A of the *Supreme Court **Act** 1986* (Vic), brought on behalf of consumers who purchased so-called 'extended' warranties' on consumer goods purchased from the defendant, JB Hi-Fi Goup. The warranties, which were offered at the point of sale, are alleged to have been of little or negligible value, where consumers already had the benefit of statutory guarantees that the goods would be of acceptable quality. It is alleged (among other things) that JB Hi-Fi engaged in misleading or deceptive conduct and unconscionable conduct when offering its extended warranty products.

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

> Pursuant to section 33ZDA(1) of the *Supreme Court Act 1986* (Vic):
>
> > a. 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 **30**% (subject to further order); and
> >
> > b. liability for payment of the legal costs pursuant to paragraph 1(a) be shared among the plaintiffs and all group members.
>
> 2 Pursuant to section 33ZDA(2) of the *Supreme Court Act 1986* (Vic), upon the making of orders pursuant to paragraph 1, the solicitors for the plaintiffs and group members, Maurice Blackburn:
>
> > a. be liable to pay any costs payable to the defendant in the proceeding; and
> >
> > b. be liable to give any security for the costs of the defendant in the proceeding that the Court may order be given by the plaintiff.

3 The plaintiff, Mr Jeremey Clarke, relied on his affidavit affirmed 20 December 2024 and the affidavits of Ms Rebecca Gilsenan affirmed 22 December 2024, 28 February 2025, 13 May 2025, 15 May 2025 and 19 May 2025. Ms Rebecca Gilsenan is a Principal and executive director of Maurice Blackburn Lawyers (**MB**) and the head of the firm's Class Actions Division.

4 Much of the evidence on which the plaintiff relied was the subject of claims to confidentiality. I made orders under rule 28.05(4) *Supreme Court (General Civil*

Procedure) Rules 2015 (Vic), having been satisfied that most of the claims were well-founded. It is necessary to refer in these Reasons in broad terms to some of the evidence that was the subject of a claim to confidentiality. Doing so will not in my view afford the defendant a forensic or tactical advantage that it would not otherwise have.

5 For the reasons set out below, the application is granted.

Governing Principles

6 The statutory criterion for the exercise of the power to make a Group Costs Order 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. The principles governing the making of a group costs order under s 33ZDA have been given extensive consideration in previous decisions of this Court. I refer to what is said in *Fox v Westpac; Crawford v ANZ*,[1] *Allen v G8 Education Ltd*,[2] *Bogan v The Estate of Peter John Smedley (Deceased)*,[3] *Lay v Nuix Ltd*,[4] and *Mumford v EML Payments Limited*.[5] Among the relevant considerations are these:

(a) Group Costs Orders are recognised to possess inherent substantive structural benefits. The plaintiff and group members will receive a fixed proportion of any award or settlement (subject to any variation by Court order), and the law firm must assume the burden of meeting any adverse costs award and any security for costs. This engenders certainty and transparency. By fixing costs as a percentage of the recovered sum it eradicates for the plaintiff and group members any risk that their compensation, if recovered, will be eroded by costs beyond the fixed percentage. Traditional costs calculation methods present that risk of erosion of recoveries. Those benefits are real rather than illusory when

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1 [2021] VSC 573.
2 [2022] VSC 32, [15]–[31] (***Allen v G8***). Those paragraphs distil the principles articulated in *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***).
3 [2022] VSC 201, [6]–[14] (***Bogan***).
4 [2022] VSC 479, [74]–[77] (***Nuix***).
5 [2022] VSC 750, [13], [14].

the GCO rate is set at a level that is reasonable and proportionate.

(b) 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. Considerations of reasonableness and proportionality accordingly inform the setting of an appropriate GCO percentage. Determination of the reasonableness and proportionality of a proposed GCO rate may be evaluated against numerous measures, including whether it is proportional to the risk undertaken by the law firm in the proceedings, the likely amount to be recovered in the proceedings, and the legal costs and disbursements that are likely to be incurred in the proceedings (including the likely potential adverse costs). It is, however, also to be recognised that this evaluation occurs at an early state of proceedings where such assessments are likely fraught with uncertainty.[6]

(c) The appropriate rate must be determined with regard to the facts of the particular case but it is nevertheless appropriate to compare what is sought with the rates that have been fixed in decided cases. It may also be instructive to have regard to the principles employed in other contexts to analyse returns on investment.[7]

(d) At the time an initial GCO order is made, the Court is necessarily engaged in a forward-looking exercise with limited information. For this reason, s 33ZDA(3) provides an important safeguard allowing the Court to revisit the GCO rate in light of known facts regarding the proceeding. [8]

Submissions

7 The **plaintiff** submitted in summary that making the proposed order met the statutory

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6 *Gehrke v Noumi Ltd* [2022] VSC 672 ***(Gehrke)***at [53]; *Bogan* at [13(c)(iv)]; *Warner v Ansell Limited* [2024] VSC 491 at [55]-[58].

7 *Dawson & Anor v Insurance Australia Ltd & Anor* [2024] VSC 808 (***Dawson***), [18] and the authorities there cited.

8 *Dawson*, [18] and the authorities there cited.

criteria and should thus be granted because:

(a) The proposed GCO will provide certainty and transparency which are inherent structural benefits of fixing legal costs in this manner (for the reasons mentioned earlier) and are of real significance to the plaintiff, as he has said in his evidence;

(b) Maurice Blackburn has negotiated an alternative arrangement that will apply to this proceeding if the GCO is not granted. That arrangement (which is similarly structured to a Group Costs Order) is more favourable to group members than the median of the returns to group members achieved historically under 'traditional' third party litigation funding. The proposed GCO percentage is better again.

(c) The proposed rate will likely ensure that legal costs are proportionate to any final settlement or award. The statutory regime provides a safeguard at s 33ZDA(3) of the Act, pursuant to which the Court may review and vary the GCO percentage rate over the life of the proceeding.

8 The **defendant** neither consented to nor opposed the application, properly observing the limited role of the defendant on an application of this kind. It made some observations about the plaintiff's evidence which were addressed in the filing of further evidence in response to matters raised by the Court.

Existing and alternative contractual arrangements

9 The plaintiff and Maurice Blackburn have entered into a retainer and costs agreement, which provide that these proceedings will be funded on a "No Win No Fee" (**NWNF**) basis until the determination of the GCO application. Under those terms MB has a discretion, if the GCO is not granted, to continue on a NWNF basis, seek third party litigation funding, or to terminate the agreement. MB does not in fact intend to continue the proceedings on a NWNF basis if the GCO is refused. The plaintiff's evidence was that he entered into these arrangements on the express understanding

that a GCO would be sought.

10 Maurice Blackburn and the litigation funder CF FLA Australia Investments 4 Pty Ltd (**Fortress**) have entered a cost sharing agreement, certain parts of which are to take effect if the Court grants the proposed GCO. They will share the costs of conducting the proceeding and the proceeds obtained under the GCO.

11 One distinguishing feature of this case is that MB and the same funder (Fortress) have also agreed (by a term of the costs sharing agreement) that if the Court does not make the proposed Group Costs Order that they will fund the proceedings under an alternative arrangement, the substantive terms of which are set out in an annexure to the costs sharing arrangement. That agreement is subject to the plaintiff's instructions which would be sought in the event that the GCO were refused. The alternative funding arrangement is similar to the costs sharing arrangement. More particularly:

> Fortress will be the third party litigation funder.
>
> MB will perform work at hourly rates. It will defer 67.5% of its Professional Fees and charge an uplift of 25% on deferred Professional Fees.
>
> Fortress will pay to MB 32.5% of MB's Professional Fees, 50% of all Disbursements, and 50% of any adverse costs.
>
> Fortress will provide 50% of any security for costs ordered by the Court.
>
> Upon successful resolution of the proceeding, Fortress will seek a common fund order of 32.5% of the resolution sum in this Proceeding inclusive of all Legal Costs (but excluding amounts paid or provided by way of security for costs).
>
> MB and Fortress will agree that professional fees cannot be more than 25% of the Resolution Sum. Fortress will also consider seeking the cost of any adverse costs insurance that it purchases on top of the Common Fund Order percentage.

12 In substance then, at the conclusion of the proceeding MB and Fortress would seek a common fund order for 32.5% of the resolution sum, which sum would be inclusive of all legal costs. Under that arrangement MB will be paid its fees calculated on the hourly basis set out in its agreement with the plaintiff, subject to a cap (total professional fees not to exceed 25% of the resolution sum). As Ms Gilsenan said in her evidence, this form of order is more favourable to group members than a 'traditional'

funding arrangement (see further below).

13 Ms Gilsenan explained how the alternative funding arrangements came about. It was intended that an alternative funding arrangement be put in place so that if the Court declined to grant the proposed GCO the plaintiff and group members would be afforded stability in that they would be ensured that MB would continue to act for them, and on a basis that was structured as similarly as possible to the GCO, so as to afford them the benefits of certainty about legal costs. The higher rate sought in the alternative arrangement (32.5%) takes into account the higher risk arising from the uncertainty of the alternative funding arrangement deriving from the fact that a Common Fund Order is typically made at the conclusion of proceedings.[9] When this application was first listed for hearing the evidence did not explain how the alternative arrangements had come about. I raised with Senior Counsel for the plaintiff that I was concerned to understand whether or not the comparison between the proposed GCO and the alternative arrangement was self-referential, meaning that it had been arrived at to serve as support for the Court granting the proposed GCO, being set at a slightly higher rate than the GCO sought. I did not assume that to be the case but asked the question because the evidence was at that time limited and generally expressed, and because it behoves Courts on applications of this kind to interrogate the arrangements put forward and said to be interests of group members. The plaintiff sought and was granted leave to file further evidence. On the basis of the evidence I am satisfied that what was agreed was what MB could obtain and Fortress would agree to in the circumstances having regard to their own assessments of the proceedings.

14 The upshot is that the plaintiff seeks a Group Costs Order in preference to a funding arrangement that MB has negotiated as a specific alternative for this proceeding, which itself has very similar structural benefits to the proposed GCO but offers a higher rate, with a lesser return to group members. This is a meaningful reference

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9 See generally *Brewster v BMW Australia* [2020] NSWCA 272. *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89 in which the availability of common funds orders was considered, is presently reserved in the High Court of Australia.

point against which to assess the appropriateness of the proposed GCO rate.

Funding commission and legal costs comparators

15 Separately, the plaintiff relied on researched published by Professor Vince Morabito and published by Max Douglass of the McKell Institute which analyses the returns to group members under Group Costs Orders made by this Court so far, and under 'traditional' third party litigation funding. Relevantly:

(a) Professor Morabito's analysis published in February 2025 showed that for the twenty-two Common Funds Orders made since the introduction of the GCO regime in Victoria, the median and most common 'Common Fund Order' rate was 25%.[10] Those rates are typically awarded in addition to recovery of legal costs expended.

(b) The McKell Institute concluded that the available data over the period 2013 to 2018 showed that prior to the introduction of the GCO regime in Victoria the median return in funded class actions was 51% of the settlement amount.[11]

(c) Douglass also concluded that median *funding commission rates* (meaning commission paid in addition to recovery of legal costs expended) had reduced after the introduction of the GCO regime in Victoria. Prior to July 2020, there were 33 funding agreements and of those the maximum funding rate was 42.8% and the median funding rate was 24.9%. Since the introduction of the GCO regime in Victoria, there have been 33 funding agreements (as at the date of the data relied upon, being January 2024) in which the maximum funding rate is 35% and the median funding rate is 22.7%.

16 The Morabito and McKell Institute reports describe the outputs of data compilation and the sources of the data. To the extent that they contain opinions they were not

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10 Prof. Vince Morabito, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (4 February 2025), *Department of Business Law and Taxation Monash Business School, Monash University*.

11 Max Douglass, The McKell Institute, 'A Model for the Nation?' (May 2024).

relied upon for that purpose. I accept that the if legal costs are calculated according to the proposed GCO in this case the return to group members will be appreciably better than the median rate of return historically achieved where costs are charged on a traditional third party funded basis. It will also deliver a better return than under the alternative arrangement negotiated for this case. The proposed alternative 'common fund order' costs and funding charge is 108.33% of the proposed GCO percentage. This case shows movement in the litigation funding market. There is insufficient data on which to draw any conclusion that there is widespread or systemic change. But comparisons to outcomes obtained in 'traditional' litigation funding arrangements might become less informative on applications of this kind, depending upon how that market develops. The comparisons remain useful in this case.

17 Another relevant refence point is the GCO percentage rates ordered in other proceedings in this Court. The plaintiff and MB acknowledged at the outset that the rate sought is at the higher end of the spectrum of rates awarded thus far. The awards to date have been as follows:

Case	**GCO percentage**
Allen v G8 Education Ltd[12]	27.5
Bogan v the Estate of Peter John Smedley (Deceased)[13]	40.0
Nelson v Beach Energy; Sanders v Beach Energy[14]	24.5
Gehrke v Noumi Ltd[15]	22.0
Mumford v EML Payments Ltd[16]	24.5
Fuller v Allianz Australia Insurance Ltd; Wilkinson v Allianz[17]	25.0
Lieberman v Crown Resorts Ltd[18]	16.5 - 27.5
Fox v Westpac Banking Corporation (No 2)[19]	24.5
O'Brien v Australia and New Zealand Banking Group Ltd[20]	24.5
Nathan v Macquarie Leasing Pty Ltd[21]	24.5

12 [2022] VSC 32.
13 [2022] VSC 201.
14 [2022] VSC 424.
15 [2022] VSC 672.
16 [2022] VSC 750.
17 Ruling of Nichols J dated 1 November 2024, revised reasons provided 28 February 2025 in S ECI 2020 02853.
18 [2022] VSC 787.
19 [2023] VSC 95.
20 [2023] VSC 95.
21 [2023] VSC 95.

Anderson-Vaughan v AAI Ltd[22]	25.0
DA Lynch v Star Entertainment Group[23]	14.0
Lidgett v Downer EDI Ltd[24]	21.0
5 Boroughs NY Pty Ltd v Victoria (No 5)[25]	30.0
McCoy v Hino Motors Ltd[26]	17.5 - 25.0
Thomas v The a2 Milk Company Ltd[27]	24.0
Norris v Insurance Australia Group[28]	30.0
Kilah v Medibank Private Ltd[29]	27.5
Raeken Pty Ltd v James Hardie Industries Plc[30]	27.5
Gawler v FleetPartners Group Ltd[31]	39
Warner v Ansell Ltd[32]	25.0 – 40.0
Dawson & Anor v Insurance Australia Ltd & Anor[33]	27.5

18 Professor Morabito has correctly calculated that so far, the GCO rates awarded have been lower when awarded in the context of carriage disputes (a median percentage of 21.2%) than where there is no competition for representation of the class (a median percentage of 27.5%).

19 Maurice Blackburn is the solicitor on the record in other class actions in which this Court has made a Group Costs Order. Two (*Allianz* and *AAI*) are consumer class actions concerning 'add-on' insurance products. Three are consumer cases concerning 'flex-commissions' paid to car dealers in respect of car loans offer at point of sale. Two (*Crown* and *Downer EDI*) are shareholder actions. One (*Hino*) is a product liability case. The orders in *Downer EDI* and *Hino* were made in the context of carriage disputes. The evidence was that the GCO rates ultimately sought were reduced by reason of competitive pressure. Some of those cases have since settled but only in one case has the settlement been approved (*Allianz*). The other settled cases are yet to be heard for approval or are reserved.

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22 [2023] VSC 465.
23 [2023] VSC 561.
24 [2023] VSC 574.
25 [2023] VSC 682.
26 [2023] VSC 757.
27 [2023] VSC 768.
28 [2024] VSC 76.
29 [2024] VSC 152.
30 [2024] VSC 173.
31 [2024] VSC 365.
32 [2024] VSC 491.
33 [2024] VSC 808.

Factors specific to this case relevant to fixing the rate

20 Much of Ms Gilsenan's evidence was validly claimed to be confidential on the grounds that it contained assessments by Ms Gilsenan and Maurice Blackburn about the risks and prospects of this case and other cases, and also on the grounds that it disclosed highly commercially sensitive financial information about Maurice Blackburn. I have considered that evidence and taken it into account. I will not set out the confidential aspects here but will describe the nature of the analysis undertaken by Ms Gilsenan. The evidence was given in detail. Initially it was expressed at a high level of generality and did not address the differences, if any, between this case and the other cases in which MB had obtained a GCO. In response to my observations when the application was first fixed for hearing, the plaintiff was granted leave to file further evidence. I have set out certain aspects of the evidence relevant to my decision in a **confidential schedule** that will not be published with these Reasons, with a view to assisting a future court in considering any application for approval of a payment of costs in this case.

21 In relation to this proceeding in particular, the evidence was, or addressed:

(a) The estimated number of group members. Although there is considerable uncertainty about the size of the class, it is clear that it is potentially greater by an order of magnitude than the size of the class in any of the other class actions in which MB has acted (generally) and also than in those cases in which MB has obtained a Group Costs Order. MB has (for the reasons given in the evidence) estimated the class size at 8.5 million group members. For the reasons given, which appear reasonable to me, MB expects to communicate with up to about 3 million group members in relation to the proceeding, throughout its life. Ms Gilsenan correctly emphasised the importance of MB devising ways of streamlining communications with group members, and working with the Court to make that communication as effective and efficient as possible. It was put and I accept, that the size of the group is significant in two respects. First, it means that the estimated costs of taking certain steps in the proceeding are

greater than they would be for a materially smaller group. Second, the size of the group is a major determinant of the estimated recovery sum and, this being a case where there are very many small claims, the estimated recovery sum is subject to very significant uncertainty.

(b) The substantive claims advanced and Ms Gilsenan's assessment of the liability risks including on matters of law and evidence. I do not accept that this case should be regarded as an outlier in terms of risk (and it was not put that way). A number of the risks described are not different in magnitude or nature from those which are understood to have been present in the other matters in which MB has acted and in which it has obtained Group Costs Orders. The evidence went to demonstrate that this case, like those cases, could be fairly described as one entailing complexity and material risk. That is a description that could be reasonably applied to most large group proceedings. When referring to risk I include the consideration that the returns will not materialise within the estimated range for the reasons given in evidence. There are some factors that distinguish this case from others though, to which I refer below.

(c) The costs budget for this case and the inputs to it.

(d) MB's estimated internal rate of return. I will say more about that factor, below.

22 In comparing this case to the other cases in which MB has obtained a GCO, Ms Gilsenan described, for each case, the estimated number of group members, costs budgets, estimated adverse costs exposure, estimate of likely claim value and the GCO percentage proposed and awarded. The risk to MB (the investment of its costs and the assumption of risk in respect of adverse costs and security for costs) could then be compared with the potential return in each case, each element being a forward-looking assessment at the relevant time. Ms Gilsenan described, in some detail:

(a) The inputs to the budget for this case and how and why they are different from those in other cases;

(b) How the budget estimates made at the time of seeking Group Costs Orders in other cases compared with the actual costs expenditure in each case;

(c) The assumption of risks in this case that in MB's assessment are different from those in the other cases in which MB has been awarded a GCO, and the reasons for that assessment. Some factors reflected particular attributes or implications of the claims advanced and some reflected developments that have occurred more broadly, over time. I accept that MB considers that some risks in this case are of greater magnitude than the risks understood to be present in the other cases in which it applied for Group Costs Orders (assessed at the time at which those applications were made), for the reasons given in the evidence.

23 It is important in assessing what is a likely reasonable or proportionate rate at which to fix costs, that risk and rewards are not considered in isolation from one another. That is true generally and also when comparing cases one to another. As Watson J said in *Dawson v Insurance Australia Ltd*, '*if two class actions had exactly the same novelty, complexity and risk but one was likely to result in a much larger settlement than the other, a lower GCO percentage might be appropriate in the case with a higher anticipated settlement figure. If two cases had exactly the same novelty, complexity and risk but one required greater levels of expenditure by the legal practice, that might be a reason to consider a higher GCO percentage in the case with anticipated higher expenditure*.' [34]

24 One way of appreciating the relationship between risk and reward (among others) is by an investment analysis such as an internal rate of return (**IRR**). The evidence set out in detail MB's estimated IRR for this case which was modelled on three scenarios which I accept, for the reasons explained in the evidence, were appropriate models. The IRR was contextualised by comparing it with MB's IRR across its portfolio of class action cases. For the settled cases in which a GCO has been made, actual internal rates of return have not been calculated save for the one case for which settlement approval has been given. The return for that case was given. Although it should be obvious, it bears stating that where Group Costs Orders are made in different cases, a higher

[34] *Dawson*, at [35].

GCO percentage in one case does not necessarily translate into a higher IRR to the law-firm, compared with its return in the other case.

Plaintiff's evidence

25 Mr Clarke gave evidence in support of the application. Relevantly,

(a) Mr Clarke is an asset data analyst by profession.

(b) Before agreeing to act as plaintiff in the proceeding, giving instructions to MB to commence the proceeding and entering agreements with MB for its retainer and costs, it was explained to him that whether or not a GCO was made in the case, he would not be liable for costs under any of the proposed scenarios.

(c) Mr Clarke understood that if a GCO were not made, MB may decide to run the class action in accordance with a third party funding arrangement, continue to run the class action on a "no win no fee basis" or terminate the MB retainer and cost agreement.

(d) He understood that if the GCO were granted a higher proportion of the proceeds of the case would be paid to members of the class action, than if the case were funded on the alternative arrangements, and if compared to the returns available generally from third party litigation funders.

(e) Mr Clarke formed the view (explaining the basis on which he had done so) that the proposed GCO would be in his interests and the interests of group members. He said there were three major reasons why he had concluded that seeking the proposed GCO was the best way to proceed. First, it would result in more money being returned to group members than would be the case if Fortress was granted a Common Fund Order of 32.5%. Second, a GCO is a simple legal cost funding model which is easy to understand. It will be easy for group members to understand that they will receive at least 70% of any final sum, less any settlement administration costs. Third, he believes that a GCO is beneficial because it provides certainty at an early stage in the class action about

how legal costs will be deducted from any compesnation paid by the defendant.

26 Mr Clarke's evidence disclosed a considered and rational basis for his application.

Conclusion

27 My reasons for granting the application and making the Group Costs Order as sought can be shortly stated:

(a) The method of fixing costs afforded by the GCO structure provides certainty to the plaintiff and group members and guarantees that their returns (if any) will not be eroded by costs beyond the amount for costs represented by the GCO percentage. That is a real and substantial benefit.

(b) The proposed GCO rate in this case is appreciably better than the median rate of returns historically achieved where costs are charged on a traditional third party funded basis. At present, there appears to be downward movement in the litigation funding market, but that point of comparison remains relevant at this time in an assessment of what is reasonable.

(c) This case (unlike many others) is one in which an alternative funding arrangement has been agreed and will apply (subject to the plaintiff's instructions) if this application is refused. That arrangement itself will achieve a better return for group members compared to the median rate of returns historically achieved where costs are charged on a traditional third party funded basis, by an appreciable margin. It also has the substantive benefit that many 'traditional' common fund order arrangements do not have, of offering an all-inclusive rate. It is in that respect structured the same way as a Group Costs Order. The proposed GCO rate is comparatively lower by 8.33%, than the rate that would apply under the alternative arrangement.

(d) Notwithstanding the above-mentioned factors, I was given pause by the fact that the rate sought is at the higher end of the GCO rates awarded by this Court

to date.

(e) As I have said, a higher GCO rate does not necessarily translate into a greater *return on investment* to the law-firm compared with its return on investment in a different case where a GCO at a lower percentage was granted.

(f) If the proceedings were to result in an amount recovered at the high end of the estimated claim value range, the return to MB could be disproportionate.

(g) I am satisfied on the evidence that there is a basis on which to distinguish in particular, between this case and the cases which MB has previously obtained Group Costs Orders.

(h) On the basis of the present assumptions made about this case, the evidence as to the expected IRR supports the conclusion that the rate sought in this case is not likely to be disproportionate, including when contextualised against MB's returns in its portfolio of class-action cases.

(i) At this point I am satisfied that the rate sought is not, by comparison to those other cases in which MB has been awarded at GCO, disproportionate or unreasonable.

(j) I am of the view however, that the rate should be carefully reviewed at a later stage, in particular upon any application for approval of costs on the resolution of the proceeding. That course of action is preferable in my view to say, reducing the rate that is sought as a matter of impression, or putting in place a tiered or ratcheted rate to take effect when recovery at a nominated sum is reached, lowering the percentage at that point. That is an available course of action.[35] In this case, particularly because of the uncertainties injected by the class size issue, further interrogation of the return should occur at a later time.

[35] *Warner v Ansell Limited* [2024] VSC 491, [65]-[72].

CERTIFICATE

I certify that this and the 15 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 23 May 2025.

DATED this 23rd day of May 2025.