

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

Not Restricted

S ECI 2024 06051

Laricchia, Mark

Plaintiff

v

WiseTech Global Limited (ACN 065 894 724)

Defendant

JUDGE: Croft J
WHERE HELD: Melbourne
DATE OF HEARING: 29 July 2025
DATE OF JUDGMENT: 12 August 2025
CASE MAY BE CITED AS: Laricchia v WiseTech Global Ltd
MEDIUM NEUTRAL CITATION: [2025] VSC 482

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 rate proportionate and reasonable – 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; DA Lynch v Star Entertainment Group [2023] VSC 561; 5 Boroughs NY Pty Ltd v Victoria (No 5) [2023] VSC 682; Warner v Ansell Ltd [2024] VSC 491.*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms M Szydzik SC and Mr T Chalke	Phi Finney McDonald
For the Defendant	Mr K Loxley and Ms A Martyn	Jones Day



HIS HONOUR:

Introduction

- 1 This is a group proceeding (class action) issued by Writ endorsed with a statement of claim under pt 4A of the *Supreme Court Act 1986* on 12 November 2024 against the defendant, WiseTech Global Limited (ACN 065 894 724) (**‘WiseTech’**). The proceeding arises from the acquisition of shares and long exposure equity swaps in WiseTech between 21 August 2019 and 18 February 2020 (the **‘relevant period’**).
- 2 The group members claim that WiseTech’s downgrade of its FY20 EBITA forecast published to the market on 19 February 2020, which had previously been forecasted on 21 August 2019, and reaffirmed on 23 October and 19 November 2019, amounts to misleading or deceptive conduct, in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth); s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth); and s 18 of the Australian Consumer Law, being sch 2 to the *Competition and Consumer Act 2010*. The group members also allege that WiseTech contravened the ASX Listing Rules by failing to disclose information material to the price or value of its shares, and by failing to notify the ASX of the likelihood that its FY20 earnings before interest, tax depreciation and amortisation (**‘EBITDA’**) would be materially below its previous forecast guidance. They say further that, as a consequence of the alleged conduct, the group members suffered loss as a result of a decline in WiseTech’s share price, being approximately 36.14%, which is calculated as the difference between the share price immediately before the corrective disclosure (close of trading on 18 February 2020) and the closing price on 20 February 2020.
- 3 By summons filed 2 May 2025 (**‘summons’**), Mark Laricchia, the plaintiff in this proceeding, is seeking a group costs order (**‘GCO’**) pursuant to s 33ZDA of the *Supreme Court Act 1986* (**‘the Act’**). The plaintiff’s proposed GCO seeks to fix the legal costs payable to Phi Finney McDonald Proprietary Limited (ABN 59 618 727 905) (**‘PFM’**), solicitors for the plaintiff, at 35% of the amount of any award or settlement that may be recovered in the proceeding, and that liability for payment of the legal costs be shared equally among the plaintiff and all group members.

SC:



4 The plaintiff also seeks confidentiality orders over parts of the affidavits filed in support of this GCO application. It submits that the proposed confidentiality order is consistent with the Supreme Court of Victoria's Commercial Court Practice Note Gen 10, and is the usual practice for applications of this kind. The plaintiff says further that the confidentiality orders are required to protect material that the plaintiff relies on to establish the necessity and appropriateness of the GCO as, absent confidentiality, the materials would confer a forensic advantage upon the defendant.

5 In support of this application, the plaintiff relies on the following materials:

- (a) his affidavit, affirmed on 1 May 2025 (with redactions for confidentiality);
- (b) the first affidavit of Timothy Finney, Director and Principal Lawyer of PFM, affirmed on 2 May 2025 (with redactions for confidentiality); and
- (c) the second affidavit of Timothy Finney, affirmed on 26 May 2025 (with redactions for confidentiality).

6 WiseTech neither consents to nor opposes the GCO application brought by the plaintiff, save as to an order that its costs relating to this application be reserved. The matter of WiseTech's reserved costs was consented to by the plaintiff at the outset of the hearing and, accordingly, is no longer a matter requiring resolution by this Court.

7 WiseTech acknowledges, consistent with the body of established authority, that its function with respect to the plaintiff's GCO application is limited to issues which may affect its own interests.¹ WiseTech also correctly identifies that its ability to oppose the GCO application is heavily limited by the redacted material it received. Accordingly, in its brief submissions, WiseTech raises two issues:

- (a) whether the proposed GCO rate (35%) is too high; and
- (b) whether a contradictor should be appointed.

¹ *Fox v Westpac Corporation (No 2)* [2023] VSC 95, [40] (Nichols J), citing *Allen v G8 Education Ltd* [2022] VSC 32 ('*Allen*'), [11] (Nichols J).



WiseTech relies upon the affidavit of Daniel Moloney, Partner of Jones Day, affirmed on 16 May 2025, in support of these submissions.

8 A further issue relating to the security of WiseTech’s costs was the subject of disagreement in the parties’ written submissions, however, during the hearing, the parties acknowledged that this matter is subject to ongoing conferral and therefore is not an issue required to be determined in this application.

Relevant legal principles

Power to make GCO

9 The Court’s power to make a GCO is governed by s 33ZDA of the Act, which provides:

- (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).

[emphasis added]

10 As the authorities make clear, the Court must, in exercising the power to make a GCO, be satisfied that it is ‘appropriate or necessary’ to ensure that justice is done in the



proceeding. This requires the Court to determine whether it is ‘suitable, fitting or proper’ in the circumstances to make the GCO.²

11 Relevant also to the Court’s determination is s 24 of the *Civil Procedure Act* 2010 (*CPA*). This provision binds the lead plaintiff, Mr Laricchia, and his solicitors, PFM, as persons to whom the overarching obligations under the *CPA* applies, and provides:

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

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.

12 The relevant legal authorities, having been first enumerated by Nichols J in *Fox v Westpac Banking Corporation; Crawford v ANZ (Fox)*,³ have established that, in determining a GCO application, the Court is to have regard to a twofold question:

- (a) is it appropriate or necessary to ensure that justice is done to make such an order; and
- (b) what is the proportionate and reasonable rate to be fixed so that justice may be done.

It has been said that this twofold question is necessarily intertwined,⁴ as determination as to the reasonableness and proportionality of the rate is referable to whether the Court determines a GCO is appropriate or necessary to ensure justice is achieved. Section 33ZDA(3) of the Act confers on the Court the power to review and vary the GCO rate set, at any time during the proceeding, including at the settlement approval stage.

13 In determining whether to make a GCO, the Court is to undertake a ‘broad, evaluative assessment of the relevant facts and evidence’.⁵ The interests of the group members

² *Fox v Westpac; Crawford v ANZ* (2021) 69 VR 487, [30].

³ (2021) 69 VR 487.

⁴ *Fox*, [33]; *Allen*, [20]; *Gawler v FleetPartners Group Ltd* [2024] VSC 365 (*Gawler*), [20].

⁵ *Fox*, [8(a)].



are the Court's primary, but not only, consideration. Whilst the statutory requirements pursuant to s 33ZDA do not require the plaintiff to positively establish that a GCO will deliver a better financial outcome to group members than some other funding model,⁶ evidence of alternative funding arrangements and their respective costs to group members nonetheless forms an important aspect of the Court's consideration. Relevant also to the Court's determination of the reasonable GCO rate to be set is an assessment of the proportionality of such rate, against the risk borne by PFM in funding this proceeding. In *Gehrke v Noumi Ltd*, Nichols J established the following principles:

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.

... 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.⁷

- 14 Important also to the Court's determination are the policy rationales underpinning the enactment of s 33ZDA. In *Fox*, Nichols J referred to the purpose of enhancing access to justice underpinning s 33ZDA, and said:

The reference in the VLRC Report to *disincentives* to a person becoming a plaintiff is a particular manifestation of the broader purpose of s 33ZDA, which was described in the second reading of the Bill introducing the provision, as enhancing access to justice in Victoria 'by reducing potential barriers to commencing class actions in the Supreme Court'. Section 33ZDA sits within Part 4A of the Supreme Court Act which permits and governs the conduct of group proceedings in this Court. The principal object of that part of the Act is enhancing group members' access to justice. Section 33ZDA then, builds on the existing provisions of Part 4A of the Act by conferring on the Court the power, in an appropriate case, to facilitate access to justice for group members

⁶ *Fox*, [135].

⁷ [2022] VSC 672, [53] (emphasis added).



by making a GCO, subject to the statutory pre-conditions to the exercise of the discretion being met.⁸

15 Similarly, in *Allen v G8 Education Ltd*, her Honour said:

[T]he purpose of s 33ZDA may be broadly described in the terms expressed in the second reading of the Bill introducing the provision, namely, to enhance justice by reducing potential barriers to commencing class actions in the Supreme Court of Victoria. Section 33ZDA sits within Part 4A of the Act, which permits and governs the conduct of group proceedings in this Court. The principal object of that Part is enhancing group members' access to justice.⁹

16 In *Gehrke v Noumi Ltd*, her Honour recognised the inherent benefit of achieving simplicity and transparency of outcomes for group members achieved through a GCO, and observed:

I also accept, as set out in earlier cases, that a Group Costs Order engenders simplicity and transparency about funding and legal costs from the time at which a GCO is made. Making costs liability transparent and simple is in the interests of group members. It must be recalled that solicitors acting for a plaintiff in a class action are expected, in discharge of their professional obligations, to give sufficient and comprehensible information to group members regardless of the funding model in place, which objective is assisted by Court-ordered processes involving notice to group members. Simplicity and transparency are likely more readily obtainable, however, by the fixing of a GCO than by disclosures addressing time-based legal costs plus funding commission.¹⁰

17 Finally, in undertaking this evaluative assessment, regard may be had to the following, non-exhaustive, considerations:

- (a) the complexity of the proceeding;
- (b) the likely amount to be recovered in the proceeding;
- (c) the quantum of legal costs and disbursements likely to be incurred in the proceeding;
- (d) the potential for and quantum of adverse costs ordered against the plaintiff's solicitors; and

⁸ *Fox*, [21] (citations omitted).

⁹ *Allen*, [23] (citations omitted).

¹⁰ *Gehrke v Noumi Ltd* [2022] VSC 672, [31].



- (e) the prevailing economic landscape, including the interest rates and rate of investment returns that an investor may expect to receive in return for funding a group proceeding.¹¹

Power to appoint contradictor

18 The Court's power to appoint a contradictor is provided for by s 33ZF of the Act, and also exists under the Court's inherent jurisdiction.¹² The function of a contradictor is to represent the interests of group members whose interests would otherwise be unrepresented. An appointed contradictor must represent those interests in a manner which assists the Court.¹³

19 In *Bolitho v Banksia Securities Ltd (No 6)*, John Dixon J summarised the contradictor's role as follows:

The contradictor is 'the person with whom the applicant for relief is in dispute'. He or she 'has a true interest to oppose the declaration sought'...

...

... The contradictor's role should be fundamentally understood as ensuring there is a real contest between conflicting interests where the outcome will be a *res judicata*.¹⁴

20 In *Allen v G8 Education Ltd*, Nichols J described the value of appointing a contradictor where there may be a conflict of interest between that of the plaintiff and the plaintiff law firm:

As to the construction question, by way of further context, s 33ZDA requires that an application for a Group Costs Order be made by a plaintiff (and not the law firm itself). The practical reality is, however, that in applications of this kind the plaintiff's solicitors (in the language of s 33ZDA, the law practice the calculation of whose fees will be the subject of a GCO if made) are in effect likely to be joint protagonists with the plaintiff. The prospect of circumstances of that kind arising on applications of this kind point to a natural role for a Contradictor. Senior Counsel for the plaintiffs properly acknowledged that there was a tension (if not a conflict) between the position of Slater and Gordon and that of the plaintiffs, her clients, in respect of this issue.¹⁵

¹¹ *Warner v Ansell Ltd* [2024] VSC 491 ('*Warner*'), [59]-[60].

¹² *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291, [79] ('*Banksia (No 6)*').

¹³ *Banksia (No 6)*, [73].

¹⁴ *Banksia (No 6)*, [96], [110].

¹⁵ *Allen*, [52].



21 As costs incurred from the appointment of a contradictor are ordinarily borne by the collective group members, the Court must be satisfied that it will be 'significantly assisted' by the appointment. This requires an assessment as to whether the additional costs and delay to the proceeding resultant from the appointment of the contradictor would be disproportionate to the assistance the Court expects to derive.¹⁶

22 In *5 Boroughs NY Pty Ltd v Victoria (No 5)*, Keogh J helpfully set out the matters which the Court may consider in determining whether to appoint a contradictor:

The following matters may favour appointment of a contradictor. First, there is a potential conflict of interest between plaintiffs and group members on the one hand and lawyers and financiers on the other that is inherent in a GCO application. Second, the defendants have appropriately adopted a neutral position in relation to the GCO application. Further, the defendants have not had access to, and can therefore make no comment on, confidential material relied on in support of the application.¹⁷

23 Following the enactment of s 33ZDA, this Court appointed contradictors for the first four GCO applications made under that provision.¹⁸ Since then, around 15 GCO applications have been heard, with a contradictor having been appointed in only one of those applications.¹⁹ That proceeding involved the resolution of a complex multiplicity dispute involving four competing proceedings, where the plaintiff in three of those proceedings sought a GCO.²⁰ On this basis, the plaintiff submits that the present application involves less complexity than in *DA Lynch v Star Entertainment Group*²¹ and, having regard to the extensive jurisprudence which has developed over the last four years, it is not necessary for the Court to appoint a contradictor.

¹⁶ *5 Boroughs NY Pty Ltd v Victoria (No 5)* [2023] VSC 682, [77] (Keogh J) ('*5 Boroughs*').

¹⁷ *5 Boroughs*, [78] (citation omitted).

¹⁸ *Fox* (Nichols J); *Allen* (Nichols J); *Bogan v The Estate of Peter John Smedley (deceased)* [2022] VSC 201 (John Dixon J).

¹⁹ *DA Lynch v Star Entertainment Group* [2023] VSC 561.

²⁰ *DA Lynch v Star Entertainment Group* [2023] VSC 561, [5], [8], [215]–[216].

²¹ [2023] VSC 561.



Comparison of GCO rates

24 Whilst recognising that no two group proceedings are the same, an assessment of prior GCO rates in comparable group proceedings may be a useful exercise in determining the proportionate and reasonable rate to be fixed.²²

25 Since the inception of s 33ZDA of the Act, a GCO has been made in 22 proceedings. In those proceedings:

- (a) the highest GCO rate was set at 40%;
- (b) the lowest GCO rate was set at 14%;
- (c) the median GCO rate was 25%; and
- (d) the most commonly set (mode) GCO rate was 24.5%.

Accordingly, the rate the plaintiff seeks (35%) is considered high. In only two cases before this Court has a fixed GCO rate higher than what is presently being sought been ordered. Those cases are considered in this context.

26 In *Bogan v Estate of Peter John Smedley (deceased)*, John Dixon J set a 40% fixed GCO rate, having regard to the evidence that any lower rate would likely lead to abandonment of the proceeding; the absence of realistic alternative funding; and the complexity and risks involved in that proceeding.²³

27 In *Gawler v FleetPartners Group Ltd*, Waller J set a 39% fixed GCO rate, having acknowledged that this rate was 'at the very upper end of the range of GCOs made by the Court'.²⁴ Paramount to his Honour's decision to fix this rate was the evidence before the Court of the plaintiff solicitor's inability to secure acceptable alternative third-party funding arrangements; their refusal to continue funding the case on a 'no win, no fee' basis; and the risk-reward basis to the plaintiff's solicitors.²⁵

²² *Norris v Insurance Australia Group* [2024] VSC 76, [49] (Nichols J).

²³ [2022] VSC 201, [105].

²⁴ [2024] VSC 365, [44].

²⁵ *Gawler*, [45]-[48].



28 Finally, in *Warner v Ansell Ltd*, Garde J employed a ‘tiered’ or ‘ratchet’ rate which would allow the solicitors for the plaintiff to recover 40% for a resolution sum under \$50 million, and a 25% rate for amounts above \$50 million.²⁶ In coming to this conclusion, his Honour observed:

I do not intend any criticism of SG or any party or deponent, but it is plain that a high percentage rate such as 40% (or \$400,000.00 for every \$1 million recovered by the plaintiff and group members) may have untoward or unexpected consequences depending on the magnitude of the resolution amount. Added to this is the welcome possibility that the proceeding may settle before trial or at a mediation with the result that the actual costs incurred would be less than the full costs that would be incurred if the proceeding were tried.

While I accept that a 40% rate of return may be considered proportionate or reasonable on a *prima facie* basis for a resolution amount of up to \$50 million in the circumstances of the present case, I consider that a more conventional rate of 25% is appropriate for any part of the resolution amount that is above \$50 million. Such a rate of return is still substantial, and in my view reflects a more proportionate and reasonable rate of return in the circumstances of the present case when looked at on a *prima facie* basis.²⁷

Plaintiff’s submissions

29 The plaintiff’s written submissions are subject to substantive redactions over confidential information which they say would, if publicly disclosed, confer a forensic advantage on the defendant. Accordingly, discussion of the plaintiff’s submissions and its corresponding affidavit evidence contained in these reasons is limited to matters not subject to the confidentiality claim and, otherwise, is expressed in general terms.

Funding arrangements

30 The plaintiff and PFM are currently parties to a conditional legal costs agreement entered into on 4 October 2024. This agreement provides that PFM is to fund the proceeding on a ‘no win, no fee’ basis until the plaintiff’s GCO application is determined, and is only entitled to recover its fees plus a 25% uplift if the plaintiff is successful. The conditional costs agreement further provides that, if the Court declines to make a GCO, the agreement will terminate within seven days unless PFM

²⁶ [2024] VSC 491.

²⁷ *Warner*, [69]–[70] (citation omitted).



notifies the plaintiff of its intention to seek alternative funding arrangements. Accordingly, the plaintiff submits, and I accept, that the existing 'no win, no fee' agreement is not a fall-back position which would allow for the proceeding to continue if I decline to make a GCO.

Mr Finney's evidence

31 Mr Finney, Director and Principal Lawyer of PFM, deposes of the various efforts that PFM has made to secure alternative, appropriate funding arrangements. His evidence indicates that considerable effort was undertaken by himself and other lawyers of PFM to engage in and negotiate with corresponding representatives from third-party litigation funders. This affidavit evidence is subject to a confidentiality claim and, accordingly, it suffices to say that I am satisfied that PFM has engaged in sufficient, but unfruitful, attempts to source third-party funding on acceptable terms for the plaintiff in this proceeding.

32 Mr Finney's affidavit evidence also details the reasons why a 35% GCO rate is sought. Based on his considerable experience, he provides various figures explaining, on his calculation, what he believes to be the hypothetical total quantum of loss, group member participation rate and estimated value of the claim. He further deposes the increased risk and uncertainty in shareholder class actions and, in particular, the further risks involved in this proceeding as a 'guidance case'. As a consequence of the increased proportion of class action proceedings to judgment and, accordingly, the increased fees involved in preparing for trial, he deposes that PFM is required to harbour additional financial burden, compared to proceedings decided shortly after the enactment of s 33ZDA.

33 Finally, Mr Finney provides a thorough comparison between the rate sought in this proceeding and GCO rates ordered in the past. The comparisons particularly relevant to this proceeding are those against past 'guidance cases' and those which PFM has or had carriage over. On the basis of these comparisons, whilst noting that no two proceedings are the same, I accept the foundational basis upon which the 35% GCO rate is sought by the plaintiff.



Mr Laricchia's evidence

34 Mr Laricchia deposes to having instructed PFM to apply for a 35% GCO, having been properly informed as to the potential outcome and consequence of an order on the terms sought being made. He further deposes that, as the GCO provides a simple method of assessing costs, he considers that it will deliver transparency, certainty and simplicity for himself and the other group members, and recognises that the costs are to be equally shared amongst group members.

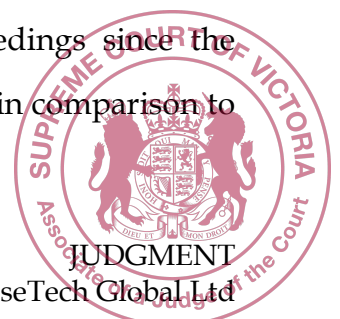
35 Finally, Mr Laricchia says that he will be unable to afford PFM's fees and the estimated disbursements over the life of the proceeding without suitable funding. The existence of adverse costs protection and provision for security of costs is a matter of significant importance to him and, he deposes that, without these protections, he would be unable and unwilling to take this risk.

36 Accordingly, on the evidence of Mr Laricchia and Mr Finney, I am satisfied that there exists an unsatisfactory level of risk that alternative, appropriate funding arrangements may not be available and the proceeding would likely not be able to continue.

Defendant's submissions

37 WiseTech makes brief written and oral submissions in relation to the plaintiff's GCO application. It recognises that unless particular circumstances of the plaintiff's proposed GCO would be likely to unjustly affect its interests, its role in this application is inherently limited. As I said during the hearing, WiseTech is in a necessarily difficult position as it is not privy to much of the material relied upon by the plaintiff in support of the GCO application. Accordingly, in the absence of material indicating that the application would affect WiseTech's interests, it makes three brief submissions as to the possible appointment of a contradictor.

38 *First*, WiseTech submits that the plaintiff's proposed rate of 35% is high, when compared to the mean, median and mode rate in group proceedings since the enactment of s 33ZDA. It says further that the rate is not only high in comparison to



all group proceedings, but also high relative to the sub-category of securities or 'guidance' class actions.

39 *Second*, WiseTech says that the relevant counterfactual, as it appears to WiseTech, lacks sufficient clarity. It raises a number of, what it says are, inconsistencies in the plaintiff's application. As WiseTech recognises, this submission is made on the basis of the redacted affidavit evidence provided to it. For the reasons which follow, I am satisfied that the confidential, unredacted copies of the affidavit evidence provided to the Court, adequately answers the relevant counterfactual.

40 *Third*, the absence of any financial analysis with respect to PFM's anticipated internal rate of return or anticipated net positive cash flow from the proposed rate, it says is a significant omission which is relevant for the Court's determination of the proposed GCO rate. Accordingly, on the evidence available to WiseTech, it takes issue with the plaintiff's reliance on comparison rates with other GCOs to support the reasonableness of the proposed rate, and says that the utility of this comparison is limited on the basis of the novelty, complexity and risks of each proceeding.

41 Whilst it acknowledges that the appointment of a contradictor is ultimately a matter for the Court, it submits that these three reasons are compelling factors for such an appointment to be made.

42 Finally, WiseTech raises the power of the Court to employ a 'tiered' or 'ratchet' GCO rate, involving a separate percentage rate of recovery dependant on the ultimate recovery amount. This method was first considered by Nichols J in *Nelson v Beach Energy*, where her Honour said:

An order of the kind proposed, incorporating a sliding scale which stipulates that a nominated percentage of the recovery amount will apply up to a certain threshold with a different percentage or percentages applying beyond that, will produce, in any given case, a sum of costs that has been calculated as a percentage of the recovery amount...

... An order that sets out graduated percentages dependent upon the recovery amount is in no less a sense the fixing of a percentage than an order which specifies only a single percentage applicable to any settlement amount.²⁸

43 It is important, at this juncture, to note that this power exists notwithstanding the plaintiff not having made an application to employ a tiered rate.²⁹ The Court may, as a matter of its own discretion, determine that a tiered rate is proportionate and reasonable in all the circumstances. Indeed, in *Warner v Ansell Ltd*, notwithstanding a 40% simpliciter rate sought by the plaintiff, Garde J determined that a 40% rate was only reasonable and proportionate up to a settlement amount of \$50 million, but that, in excess of this amount, a 40% rate would not be appropriate. His Honour observed:

If a 40% rate is accepted, and a resolution amount of \$50 million is obtained, SG would receive \$20 million for its legal work, for disbursements, expenditure, capital investment, and financial risk assumed in this proceeding. Undertaking a broad evaluative judgment of all of the relevant factors, I accept that this is a proportionate and reasonable outcome on the material that I have.

Assuming however that the proceeding attracts a resolution amount of \$80 million, SG would receive \$32 million on a 40% rate. Having regard to the evidence before me, it is my view that this exceeds a proportionate or reasonable return on a *prima facie* basis in the circumstances of this proceeding.

I do not intend any criticism of SG or any party or deponent, but it is plain that a high percentage rate such as 40% (or \$400,000.00 for every \$1 million recovered by the plaintiff and group members) may have untoward or unexpected consequences depending on the magnitude of the resolution amount. Added to this is the welcome possibility that the proceeding may settle before trial or at a mediation with the result that the actual costs incurred would be less than the full costs that would be incurred if the proceeding were tried.

While I accept that a 40% rate of return may be considered proportionate or reasonable on a *prima facie* basis for a resolution amount of up to \$50 million in the circumstances of the present case, I consider that a more conventional rate of 25% is appropriate for any part of the resolution amount that is above \$50 million. Such a rate of return is still substantial, and in my view reflects a more proportionate and reasonable rate of return in the circumstances of the present case when looked at on a *prima facie* basis.³⁰

44 The possibility of ordering a tiered rate GCO is subject to considerable opposition by the plaintiff, who says that this order would not be appropriate in all the

²⁸ [2022] VSC 424, [92], [95]. This approach has also been endorsed in *Lieberman v Crown Resorts Ltd* [2022] VSC 787, [52]-[53] (Stynes J) and *Warner*, [70] (Garde J).

²⁹ See *Warner*, [70] (Garde J).

³⁰ *Warner*, [67]-[70] (citation omitted).



circumstances. The plaintiff refers again to its comparative settlement estimates, and submits that, broadly speaking, having regard to these estimates, a tiered rate is economically unviable for PFM. The plaintiff also points to the Court's power to amend the GCO rate at a later stage if it perceives a 'windfall gain' may end up flowing to the firm.³¹ Whilst this power may alleviate some of the Court's concerns regarding 'reasonableness' and 'proportionality', in particular, having regard to the inherent uncertainty surrounding an application made at the early stages of the proceeding, it is important also to heed the words of Garde J in *Warner v Ansell Ltd*, where his Honour said:

In determining this application I am also fortified by the power given to the Court in s 33ZDA(3) to amend a group costs order during the course of, or on settlement of a proceeding. This important power will permit a court at a later time to amend any order that I may make. The power in s 33ZDA(3) is a crucial safeguard as any assessment of the rate made at this early stage of the proceeding is inevitably very difficult.

Nonetheless the Court's discretionary power in s 33ZDA(1) stands to be exercised and requires the Court to be satisfied that the order to be made is appropriate or necessary to ensure that justice is done in the proceeding. I am required to be astute to protect the interests of group members, and to take into account considerations of proportionality and reasonableness in setting a percentage rate. The fact that an order as to the percentage rate can be amended later is not a reason to act arbitrarily or to depart from the requirements of s 33ZDA, noting that a considerable degree of tolerance in setting a rate at the present early stage of the proceeding is appropriate in order to cater for unknowns, uncertainties, and risks.³²

Consideration

45 For the reasons which follow, I will make a GCO at the 35% rate sought by the plaintiff. I accept the plaintiff's submission that a GCO is appropriate or necessary, and that the proposed rate is proportionate and reasonable to ensure that justice may be done. On the unredacted material provided to the Court, which I regard, at this stage of the proceeding, as a fulsome account of the hypothetical quantum in dispute, participation rate, and risks, I do not consider that the appointment of a contradictor

³¹ The Act, s 33ZDA(3).

³² *Warner*, [62]-[63] (emphasis added).



would provide 'significant assistance' to the Court.³³ Accordingly, no order for the appointment of a contradictor will be made.

46 It must also be noted that this GCO application has been made at a very early stage of this proceeding, less than 12 months after the Writ and Statement of Claim was filed by the plaintiff. Accordingly, unlike at a later stage in the proceeding when these issues, including progress and costs already incurred, become clearer, inherent difficulties surround the present exercise of risk assessment and prediction. The Court's power, under s 33ZDA(3), to revisit the conditions of the order if it deems necessary, is therefore an essential instrument which protects against windfall gains by the plaintiff firm. At a later stage, this assessment is likely to be less predictive, as there is already a history of the nature; extent; risks; and costs structure in the proceeding.

Should a contradictor be appointed?

47 Having proper regard to the submissions made by the plaintiff, and having had the benefit of reviewing all of the unredacted confidential affidavit material provided to the Court, I am satisfied that the appointment of a contradictor would not significantly assist, or at all, the decision of this Court. The evidence available to this Court has allowed me to understand and properly assess the relevant issues required to determine the plaintiff's GCO application without the assistance of a contradictor.

48 *Firstly*, the plaintiff says, and I accept, that this Court's appointment of contradictors in the past occurred in a period where the jurisprudence regarding s 33ZDA and the Court's power to make a GCO was in its infancy.³⁴ It was relevant, at that period in time, for the Court to have the ability to regard a contrary or opposing view as to the proper construction of the provision, the evidence required to properly support a GCO application, and any other matters the Court ought to have regard to in its assessment. This application, which does not concern any novel interpretation of the provision and is not the subject of any complexity over the proposed rate nor

³³ *Levy v State of Victoria* (1997) 189 CLR 579, 605, 650-1 (Kirby J).

³⁴ See above, [23].



involving a multiplicity dispute, is therefore not one which, on its face, requires the assistance of a contradictor.

49 *Secondly*, on the unredacted confidential evidence provided to the Court, I am satisfied that many of the concerns raised by WiseTech are appropriately addressed by the plaintiff. As WiseTech noted, its ability to raise any concerns with the plaintiff's application is inherently limited by the redacted material before it. Many of those concerns, relating to what it describes as inconsistencies in the redacted material, are the subject of further explanation in the unredacted material. Accordingly, on the evidence before the Court, I am satisfied that the plaintiff's application and its supporting material properly addresses the relevant counterfactual to the proposed GCO, and the likely consequences if the GCO is not made at the proposed rate, or at all. For reasons which are discussed below,³⁵ I am not of the view that the absence of financial analysis of PFM's anticipated internal rate of return or net positive cash flow arising from the proposed GCO rate is justification for the appointment of a contradictor. I am satisfied that, whilst financial analysis may be useful, it is not a pre-requisite for the Court's determination of a GCO application. This is, in particular, having regard to the early stages of this proceeding.

50 *Finally*, the Court's appointment of a contradictor should always be weighed against the additional costs and delay which would necessarily be caused by the appointment.³⁶ Whilst this application has been brought at any early stage of the proceeding, and no date for trial has been fixed, I am conscious not to unnecessarily delay the progress of the proceedings and ensure a timely and efficient outcome for the group members. In light of what I view as the minimal, if any, assistance which would be afforded by the appointment of a contradictor, these factors strongly tend against any such appointment.

³⁵ See below, [58]–[60].

³⁶ *5 Boroughs*, [78].

Should a GCO be ordered?

51 I turn now to the central question of this application: whether a GCO should be ordered. I am satisfied that, in all the circumstances, my decision to make a GCO is appropriate or necessary to ensure that justice is done in the proceeding. I am also satisfied that it is in the interests of the group members that a GCO be made.

52 A GCO will allow simplicity and transparency to group members by ensuring that funding and legal costs liability is a simple proportion of the ultimate settlement or judgment amount. Mr Laricchia deposed that he understood the consequences of the GCO, and that the simplicity and transparency it provided was of significant importance to him. He further deposed of the benefit of adverse costs protection and provision of security of costs, and stated that he would not be able to continue the action without those protections.

53 I am also satisfied that, on the evidence available, there exists an unsatisfactory level of risk that alternative, appropriate, funding arrangements may not be available and the proceeding could be discontinued. If a GCO is not made, this may have the consequence of preventing the group members from prosecuting their claims against WiseTech and, accordingly, would be entirely inconsistent with the very purpose of enhancing access to justice.³⁷

54 These factors are, in accordance with the established authority, paramount in my decision to make a GCO. In light of PFM being unwilling to act on a 'no win, no fee' basis as a fall-back position, and the potential absence of appropriate third-party funding, there is a real prospect of the group members in this proceeding obtaining a worse outcome if a GCO is not made.

What is the reasonable rate?

55 Considerable attention was made by WiseTech to the 'high' 35% proposed GCO rate. The plaintiff did not 'shy away' from the reality that this proposed rate was higher than the mean, median and mode in group proceedings, as well as in the sub-category of securities or 'guidance' class actions. Whilst I raised this matter during the hearing

³⁷ Fox, [21].



as potentially being a 'red flag' or an 'orange flag', it is important to note that a surface-level comparison between two group proceedings provides little utility in the Court's assessment of what the 'proportionate and reasonable rate' is in each proceeding. Rather, as was set out by the plaintiff, it is important to consider Mr Laricchia's affidavit evidence that, having been properly informed, he understands the effect of a GCO being made, and says that he believes that it is in his, and other group members', bests interests.

56 Further, having regard to the evidence of the risk involved to PFM, both with respect to the likelihood of success in a 'guidance case' and the possible quantum of adverse costs against PFM if the plaintiff's case is ultimately unsuccessful, I find that the proposed rate is reasonable and proportionate to the risk undertaken by PFM. I am also satisfied that, on the extensive financial figures provided in Mr Finney's affidavit, which is created with his considerable knowledge in prosecuting plaintiff class actions, the proposed rate represents a figure that is reasonable and proportionate when considering the likely quantum of settlement or judgment.

57 On this basis, I am also satisfied that a 'tiered' or 'ratchet' rate is not appropriate in this proceeding. Without divulging the contents of the plaintiff's material, which is subject to a confidentiality claim, it is enough to say that, on the financial figures regarding the likely class size and estimated value of the claim, the likely range of resolution sums does not give rise to a tiered approach. This is not, however, to say that these figures are perfect and will not be later affected by the progress of the proceeding, whereby available information to both parties and their understanding of their respective positions will invariably increase. It is important to recognise that the GCO has been sought at a very early stage of this proceeding and, accordingly, is naturally fraught with a level of uncertainty. In coming to this conclusion, I am fortified by the Court's power to amend a GCO during the course of or during settlement of the proceeding. It would be appropriate, in my view, for a Court armed with new or more up-to-date information at a later stage of this proceeding to, if it deems necessary, amend the terms of the rate ordered as it sees fit.



58 Finally, the matter of PFM's failure to provide this Court with financial analysis of its anticipated internal rate of return or net positive cashflow is not one I regard as being a barrier to making the plaintiff's proposed GCO.

59 In response to this matter, the plaintiff drew my attention to Watson J's decision in *Dawson & Anor v Insurance Australia Ltd & Anor* ("*Dawson*"),³⁸ where a GCO percentage was sought at a rate above the median or mean, and the plaintiff did not lead any financial investment analysis evidence to support to imposition of this rate. Instead, Watson J undertook a comparative approach between the various GCOs made to determine whether the rate sought in that case was justified.³⁹ This basis is the conduct which the plaintiff has followed during this proceeding, and it submitted that the Court has the appropriate means to determine its application in the absence of any financial analysis.

60 Whilst the existence of financial analysis can be of assistance to the Court's decision, it is not necessarily required for the Court to exercise its power under s 33ZDA.⁴⁰ Mr Finney deposed that this financial investment analysis has not been prepared by PFM, and explained that an internal rate of return analysis would not be appropriate given the nature of PFM being a law firm, its employment methods and employees' varied internal responsibilities. Accordingly, I am satisfied that it would not be appropriate to order a financial investment analysis to be carried out prior to a GCO being made, and am of the view that, even if such analysis was conducted, it would have little utility and provide little assistance to the Court. The evidence adduced by the plaintiff is sufficient, without a further financial investment analysis to be conducted, to determine the plaintiff's application. It must also be said that, given the early stage of the proceeding which has been the subject of considerable discussion above,⁴¹ any financial analysis conducted at this stage will necessarily contain a significant amount of uncertainty and imprecision.⁴² In my view, the settlement

³⁸ [2024] VSC 808.

³⁹ *Dawson*, [37].

⁴⁰ *Gehrke v Noumi Ltd* [2022] VSC 672, [53(f)].

⁴¹ See above, [46], [50], [57].

⁴² *Mumford v EML Payment Ltd* [2022] VSC 750, [54]-[61].



approval stage will provide a better forum for such analysis to be conducted, if the Court so determines.⁴³ At that stage, many of the inherent limitations which presently exists will have been resolved.

Conclusion and orders

- 61 I find that a GCO is appropriate or necessary, and that the proposed rate is proportionate and reasonable so that justice may be done. Accordingly, I will make an order that a group costs order at the proposed rate of 35% be made. I am also satisfied that the confidentiality orders sought by the plaintiff are required to preserve material which may otherwise confer a forensic advantage upon the defendant, and a corresponding forensic disadvantage on PFM in this, and other matters. On that basis, I will also make an order for confidentiality on the terms sought by the plaintiffs. Finally, as agreed between the parties, I will order that the plaintiff bear its costs, and the costs of the defendant be reserved.
- 62 The parties are to confer and provide my chambers with a draft form of orders which give effect to these reasons.


⁴³ *Mumford v EML Payment Ltd* [2022] VSC 750, [54]-[61].



CERTIFICATE

I certify that this and the 21 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Croft of the Supreme Court of Victoria delivered on 12 August 2025.

DATED this twelfth day of August 2025.


**Associate to the
Honourable Justice Croft**

