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

Not Restricted

S ECI 2020 4339

Paul Allen — First plaintiff

Monika Allen — Second plaintiff

v

G8 Education Ltd — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	26 November 2021
DATE OF RULING:	7 February 2022
CASE MAY BE CITED AS:	Allen v G8 Education Ltd
MEDIUM NEUTRAL CITATION:	[2022] VSC 32

GROUP PROCEEDINGS – Costs - Application for a Group Costs Order – Costs to be calculated as a percentage of the amount of any award or settlement recovered – Judicial discretion in open-textured legislation – Principles to be applied – Application granted – *Supreme Court Act 1986*, s 33ZDA.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Fiona Forsyth QC Dion Fahey	Slater and Gordon Lawyers
For the Defendant	Robert Craig QC Jennifer Findlay	MinterEllison
As Contradictor	Claire Harris QC James Page	

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HER HONOUR

Part A: Introduction

1 The **plaintiffs**, Mr Paul Allen and Ms Monika Allen, bring this group proceeding or class action under Part 4A of the *Supreme Court Act 1986* (the **Act**), on behalf of persons who, between 23 May 2017 and 23 February 2018, acquired shares in the defendant **G8** Education Ltd (an ASX-listed company) and have suffered loss or damage because of conduct by G8 said to be in breach of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Act 2001* (Cth). G8 provides childhood education services, operating early learning centres throughout Australia. The plaintiffs[1] allege that in its disclosures to the market G8 understated the effect on its earnings potential of regulatory changes that would require it to engage an increased number of staff in its childcare centres, and did not properly disclose the sensitivity of its earnings projections to the added costs of these changes and to competitive pressures in the childcare market. G8 is defending the proceeding.

2 The plaintiffs seek a Group Costs Order (or **GCO**) under s 33ZDA of the Act that:

> 1. The legal costs payable to the solicitors for the plaintiff and group members, Slater and Gordon Lawyers, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, that percentage being 27.5% inclusive of GST (subject to further order); and
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> 2. Liability for payment of the legal costs pursuant to paragraph 1 be shared among the plaintiff and all group members.

3 In support of the application the plaintiffs relied upon the evidence in an affidavit of Mr Allen himself, affidavits of Mr Andrew Paull, a senior solicitor and practice group leader in the class actions department of Slater and Gordon, and evidence compiled by Mr Greg Houston concerning the legal costs incurred and commission rates offered in respect of third party litigation funded class actions in Australia.

4 G8 did not oppose the application, but took issue with two aspects of the plaintiffs'

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[1] After this application was issued and heard, Paul Allen and Monika Allen (Mr Allen's wife) applied by consent for the joinder of Ms Allen to the proceeding on the grounds that the shares in issue were discovered to be owned jointly. Orders were made to that effect. The plaintiffs' personal evidence in support of the application was given by Mr Allen.

submissions. I appointed a Contradictor[2] who submitted that I should refuse the application.

5 At the time at which the application was heard, pleadings had closed and orders had been made fixing a date by which group members may opt out of the proceeding. Some discovery had been given and the parties had agreed to participate in an early mediation.

6 On 1 December 2021 I granted the application and made orders to the effect sought by the plaintiffs. I did so on the plaintiffs proffering an undertaking to the effect that they would not apply for an order under s 33ZDA seeking any greater percentage than 27.5%, the purpose of which was to give effect to the plaintiffs' stated intention that legal costs be capped at 27.5% of the amount of any award or settlement that may be recovered in the proceeding, such that any future adjustment will not result in the fixing of a higher percentage.[3]

7 These are my reasons for having granted the plaintiffs' application. They are summarised at paragraph 93 below.

8 By orders made 26 November 2021, some of the material on which the plaintiffs relied was redacted on the basis that it was properly characterised as confidential to the plaintiffs. That material was provided to the contradictor but not to the defendants. In the circumstances it has sufficed to describe the relevant evidence in such as way as does not disclose the confidential parts of it.

Part B: Submissions

9 Relevant part of the parties' arguments are considered in part D, but in summary, the parties' submissions were as follows.

Plaintiffs

10 The plaintiffs submitted that the making of a Group Costs Order in the terms sought

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2 Ms Claire Harris QC who appeared with Mr James Page

3 As to the undertaking, see the discussion at paragraphs 37-38 below.

would, in the circumstances, satisfy the statutory criterion because:

(a) If the proceeding is funded by the Court making a Group Costs Order, the plaintiffs and group members can participate in the proceeding knowing that their legal costs cannot exceed 27.5% of any damages recovered. They will, in other words, received a guaranteed return of 72.5% of any recovered amount. Certainty of outcome in that sense is a very significant benefit.

(b) Furthermore, fixing the funding mechanism by making a GCO will provide certainty as to how the proceeding will be funded and will avoid delay. The evidence establishes that if a Group Costs Order were not made the plaintiffs and Slater and Gordon will seek third party funding, which will likely cause a delay the proceeding while funding is sought. For that purpose the plaintiffs anticipate seeking a stay of the proceedings. There is also uncertainty inherent in the fall-back funding position, namely funding by Slater and Gordon on a conditional basis.

(c) A Group Costs Order is a funding mechanism that is simple and transparent, and will ensure equity between group members in relation to their liability for legal costs. Group members can be assured of those benefits on and from the date on which the GCO is made. These characteristics are inherent features of a Group Costs Order. They are relevant to the overall evaluative assessment required by s 33ZDA when considering whether the making of a GCO is appropriate or necessary to ensure that justice is done in the proceeding.

(d) Outcomes-based analyses directed to whether group members will achieve a better financial outcome under a GCO or under a different funding model, should not be determinative of an application of this kind. A proper reading of s 33ZDA does not support a requirement that the plaintiff positively prove that the proposed GCO will deliver a better financial outcome to group members than an alternative or counter-factual funding mechanism. Too great an emphasis on a comparison between the effect of a proposed Group Costs

Order and a hypothetical alternative funding arrangement is liable to set the bar too high, with the effect that the legislation will not achieve its intended purpose. It may be relevant to assess the proposed Group Costs Order against alternatives, but the primary consideration is whether in and of itself, the proposed GCO is reasonably adapted for the purposes of seeking or obtaining justice in the proceedings.

(e) That said, the contractual arrangement between the plaintiffs in their representative capacity and their lawyers Slater and Gordon (the **Retainer Agreement**), expressly contemplates that a Group Costs Order will be sought and, in the event it is refused, third party litigation funding will be sought. On the evidence, the most likely outcome in the event that the present application were refused, is that the plaintiff would seek and obtain third party litigation funding.

(f) Compared with third party funding, the proposed GCO would likely deliver a better financial outcome to group members. The comparison is informative notwithstanding that it is not feasible to produce proposed or indicative terms on which a particular litigation funder would fund this proceeding.

(g) Slater and Gordon are currently conducting the litigation on a "no win no fee" (**NWNF**) basis. They are doing so pursuant to the Retainer Agreement. It was submitted that under the Retainer Agreement Slater and Gordon's commitment to funding the action on a NWNF basis is, in effect, a fall-back arrangement subject to rights of termination, and contemplated by both the parties as a third alternative, ranked behind obtaining a GCO or third party litigation funding. Accordingly, the likely financial outcome for group members under the NWNF arrangement was not the most relevant comparator by reference to which the outcome for group members under a GCO might be evaluated.

(h) An outcomes-based comparison of returns to group members achievable under

the GCO and NWNF funding models could only be advanced on a tentative and uncertain basis given the number of assumptions it would be necessary to make for the purposes of that comparison. Subject to that uncertainty, depending on the settlement or judgment result achieved, in some circumstances the financial outcome would be better for group members under a GCO and in some circumstances it would be better under a NWNF arrangement. That is not a sound reason to refuse the application in this case.

(i) The proposed percentage is reasonable on the available evidence and does not appear to be disproportionate to the risks to be assumed by the lawyers in conducting the proceeding. A number of the considerations that should inform assessments of reasonableness and proportionality are best addressed at a later point in time, most relevantly at the conclusion of the proceeding, when the court can adjust the percentage fixed at this time, exercising the power conferred for that purpose under s 33ZDA(3).

Defendant

11 G8 did not oppose the making of the proposed GCO. It accepted, appropriately, that s 33ZDA is a provision that concerns the plaintiff's liability in respect of legal costs and does not directly concern the defendant, subject to the proviso that if in particular circumstances a Group Costs Order were likely to unjustly affect the interests of the defendant, it could not be said to be an order the making of which was "appropriate or necessary to ensure that justice is done in the proceeding".[4]

12 G8 did take issue, however, with two aspects of the plaintiffs' submissions. It contested the proposition that in the event a GCO were refused the plaintiff might obtain a stay of the proceedings while alternative funding was put place, submitting that there would be no principled basis for the grant of a stay on that basis. G8 also disputed the contention that Slater and Gordon would be at liberty to terminate the Retainer Agreement in the event that a GCO were not made and third party funding

[4] See *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (***Fox/Crawford***) [15],[16], [37].

not obtained.

13 The defendant did not submit that the resolution of those questions should determine the outcome of this application which, as I have said, it did not resist. The defendant's targeted approach to the issues informing the application was constructive and helpful.

Contradictor

14 The gravamen of the Contradictor's argument in opposition to the Group Costs Order was as follows.

(a) The plaintiffs' existing funding arrangement, whereby Slater and Gordon was conducting the proceeding on a NWNF basis, was not "interim" or "conditional", and included protection to the plaintiffs in the form of enduring indemnities. Accordingly, should a Group Costs Order be refused the plaintiffs would not be assuming a material or disproportionate financial risk in acting as the plaintiffs. On the proper construction of the Retainer Agreement there was no material barrier to the proceeding continuing on a NWNF basis unless the plaintiffs' solicitors positively decided to terminate the existing funding arrangement. The evidence does not disclose a present intention on the part of Slater and Gordon to so act, and it was not possible to determine the likelihood of the present arrangements being terminated. The making of a Group Costs Order could therefore not be described as *necessary* to ensure that justice is done in the proceeding. The Contradictor accepted that in the statutory criterion *necessary* and *appropriate* may have separate work to do, and that an order that was not *necessary* to ensure that justice is done in the proceeding might nevertheless be *appropriate* to achieve that end.

(b) By comparison with the existing NWNF arrangement, the available modelling indicates that the a GCO may in certain "plausible scenarios" provide a better return to group members and in other plausible scenarios, the existing arrangements would produce a better return. There is insufficient evidence to

draw a conclusion with any certainty about which outcome would be better. As the Contradictor put it, either outcome was equally likely.

(c) The Contradictor accepted that the evidence established that the plaintiffs and their lawyers would seek third party funding if a GCO were not made, and that Slater and Gordon reasonably expected to obtain a suitable offer of third party funding for this proceeding. The Contradictor also accepted that the evidence before me was to the effect that a Group Costs Order would be likely to provide a better return to group members than they would achieve in the event that third party litigation funding was obtained, and that a GCO would provide greater certainty to group members as to the potential financial outcome of the litigation than third party funding would allow. However, the Contradictor said, it was not possible to identify a *particular funding arrangement* that would constitute a likely or "real" alternative to a Group Costs Order, and accordingly the third party funding alternative to a GCO was affected by a considerable degree of speculation.

(d) There was a real question whether a hypothetical third party funding arrangement was the most likely or realistic alternative considered. In fact, the most realistic comparator was the NWNF arrangement under which the proceeding was presently being conducted. In respect of that arrangement, the plaintiff could not demonstrate that a GCO would produce a better financial outcome for group members. A better result may eventuate, but a worse result may be achieved. Neither outcome could be shown to be more likely to eventuate than the other.

Part C: Governing Principles

15 Section 33ZDA provides as follows:

> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order –
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> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of

the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and

(b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

(2) If a group cost 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).

16 In *Fox/Crawford*[5], the first case in which an application for an order under s 33ZDA has been considered by a Court, I set out some essential principles informing the application of s 33ZDA. Those principles are relevant to the disposition of the present application, and are elaborated upon in the context of the present facts. The following propositions, among others, were set out in *Fox/Crawford*.

17 *First*, s 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 three things, namely, 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); who shares in the liability for the costs of having brought the proceeding, when a recovery is made (the plaintiff and all group

5 [2021] VSC 573.

members); and who bears the financial risks of bringing a group proceeding (the law practice representing the plaintiff and group members).[6]

18 *Second*, specifying as it does the criterion for the exercise of power as that the Court may make an order if *satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding*, s 33ZDA is an example of an open textured legislative provision that "leave[s] courts with a large measure of significant unguided discretion in making orders considered to be appropriate to do justice in all the circumstances of a given case".[7] 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.[8]

19 *Third*, 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.[9]

20 *Fourth*, 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.[10]

21 *Fifth*, because of its subject matter and its place within Part 4A of the Act, s 33ZDA

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6 *Fox/Crawford*, [12]-[15].

7 *Fox/Crawford*, [24] citing *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] 374 ALR 627 (***Brewster***), [123] (Nettle J).

8 *Fox/Crawford*, [25] and the authorities there cited.

9 *Fox/Crawford*, [20]-[32].

10 *Fox/Crawford*, [33].

requires that in exercising the power to grant a Group Costs Order, 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.[11]

22 *Sixth*, 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.[12]

23 *Seventh*, the 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.[13] 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.[14]

24 *Eighth*, 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.[15] Its significance will depend on the facts and evidence relevant on the particular case in question.

25 *Ninth*, and relatedly, 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.[16] In *Fox/Crawford*, I rejected the proposition that a court must approach s 33ZDA by first identifying the relevant counterfactual funding scenario and then by determining whether the proposed GCO was proved to be more advantageous to group members than the counterfactual funding. As I said in *Fox/Crawford*:

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11 *Fox/Crawford*, [34].
12 *Fox/Crawford*, [36].
13 Victoria, Parliamentary Debates, Legislative Assembly, 28 November 2019 at 4586, 4590.
14 *Fox/Crawford*, [21].
15 *Fox/Crawford*, [8(a)].
16 *Fox/Crawford*, [51].

> To read the statutory test in that way is to read it down by implying into it conditions not present in the text. The statute requires that a Group Costs Order be appropriate or necessary to ensure that justice is done in the proceeding, but the statutory text, read in its context, does not require or suggest that a GCO is intended to be available only as a funding model of last resort. It does not require or suggest that a Group Costs Order may be awarded *only if* it can be positively proved that it would deliver a better financial outcome to group members than some other funding model. Whether or not that comparative assessment is a relevant consideration will vary from case to case. A comparative analysis may be relevant on the facts of a particular case. … construing the statute in that way is not a purposive reading. Reading into s 33ZDA a general threshold requirement to construct hypothetical counterfactual funding scenarios that the plaintiffs do not intend to take up, against which plaintiffs must positively prove that their proposed Group Costs Order compares favourably, would read into the statute conditions that do not sit comfortably with its overarching purpose of facilitating access to justice by securing the funding of group proceedings.[17]

26 *Tenth* (and also relatedly) outcomes-focused analysis which employs predictive modelling to demonstrate that a Group Costs Order can be expected to provide a better financial outcome to group members than another funding model 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 the proceeding, particularly when the question is asked at an early stage in the proceeding. It is significant in this context that s 33ZDA is intended to be capable of operation at an early stage in the proceeding.[18] That is not to say that an outcomes based analysis may not inform the statutory question.[19]

27 *Eleventh*, s 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.

28 *Twelfth*, by incorporating the elements it does, s 33ZDA implicitly permits the linking of risk and reward in the calculation of fees. It follows from the text that the calculation of legal costs in the manner permitted by s 33ZDA may properly take into account not

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17 *Fox/Crawford*, [135]-[136].
18 *Fox/Crawford*, [22].
19 *Fox/Crawford*, [120]-[121]; [131].

only the value of legal services performed but the assumption of financial risk by the law practice.[20]

29 *Thirteenth*, 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.[21]

30 *Fourteenth*, it is significant that s 33ZDA contains a power to amend a Group Costs Order. That power, in s 33ZDA(3), is generally expressed. 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 would be 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.[22]

31 I would add that because the statute invites a broad, evaluative assessment in exercising a largely unguided discretion conditioned in the terms specified, it is appropriate to evaluate the 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 set out 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.

Part D: Analysis

32 Before evaluating the whole of evidence and arguments said to inform the exercise of the power, it is necessary to consider each of the considerations raised by the evidence and the parties' arguments, in turn. The relevant considerations might have been grouped in numerous ways and, as I have said, they should be considered together, but very broadly described, they are these:

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20 *Fox/Crawford*, [20].
21 *Fox/Crawford*, [145]-[148].
22 *Fox/Crawford*, [23].

(a) The value of certainty said to be conferred by a Group Costs Order;

(b) Other benefits said to be conferred by a Group Costs Order (equity between group members, transparency);

(c) The plaintiffs' contractual position in relation to the provision of funding for the proceeding;

(d) The prospect of obtaining different funding in the form of third party litigation funding and how that alternative funding informs the question whether a GCO should be granted;

(e) How the availability of funding for the proceeding by the plaintiffs' solicitors acting on a conditional or NWNF basis informs the question of whether a GCO should be granted; and

(f) Whether the percentage rate proposed for the GCO is appropriate.

Group Costs Orders and the Value of Certainty

33 When a Group Costs Order is made it guarantees that the plaintiff and group members will receive a fixed proportion of any award or settlement that is offered, subject only to variation by Court order. It does so by stipulating that the legal costs payable to the law practice representing the group be calculated as a percentage of the amount of any award or settlement recovered. A corollary of the statutory model is that it permits the legal practice to benefit from the upside as the damages recovered increase proportionally to the costs incurred. By fixing the calculation of costs in this way it allows a plaintiff and group members to eradicate any risk that their compensation, if recovered, will be eroded by costs whose proportion to that compensation exceeds the specified percentage.

34 In this respect the GCO statutory funding model may be generally compared with those forms of conditional funding in which the plaintiff and group members will not pay any costs unless they are successful but are otherwise liable to pay their solicitor's

costs, meaning that the funding arrangement permits that moneys recovered for the represented class might still be substantially eroded by legal costs. It may also be generally compared with a litigation funding arrangement in which a funding commission is fixed as a proportion of moneys recovered (or spent) *in addition to* recovery by the funder of the legal costs expended. That is to describe other forms of funding only in general terms. Hybrid and indeed novel funding models that may emerge might not be so readily distinguishable in effect from this aspect of a Group Costs Order. Nevertheless, it may be accepted that the making of a GCO will confine the exposure of the plaintiff and group members to legal costs, from the outset.

35 In this case the plaintiff Mr Allen gave unchallenged evidence in relation to his assessment of the benefits of certainty, as follows:

(a) He understands that pursuant to the Retainer Agreement an application for a Group Costs Order may be sought, and also that if a GCO is not made that Slater and Gordon can and will seek third party litigation funding.

(b) He instructed Slater and Gordon to make the present application, seeking a GCO at 27.5% of the amount of any award of damages or settlement that may be recovered. That form of funding is attractive to him because the costs will be capped and there will be no other deductions for disbursements, legal or funding costs.

(c) He understands that there is no certainty that third party litigation will be available if it is sought or as to the precise terms on which it may be obtained, but that it is likely that it will be obtained if sought.

(d) He understands that the analysis of funding and legal costs in class actions in Australia undertaken by Mr Houston shows that in Australian class actions supported by third party funding the average funding commission is 25% of the amount recovered and the average quantum of legal costs is about 21% of the amount recovered such that the total average cost is about 46%. On the

basis that those figures are an appropriate estimate of the costs of litigation funding outcomes in Australian class actions, the proposed GCO rate of 27.5% will result in guaranteed return of 72.5% of any moneys recovered, which will likely provide the plaintiffs and the other group members with a better outcome. Mr Allen stated he is concerned that a third party funding arrangement will be overall more costly than a GCO, and will reduce the amount of any recovery that goes to himself and Ms Allen and group members.

(e) He understands that a Group Costs Order can be reviewed by the Court and later amended. He takes comfort from that fact.

(f) He was a group member in another class action issued in the Supreme Court of New South Wales in 2018, Findlay v DSHE Holdings (Receivers & Managers Appointed) (in Liquidation) & Ors, in connection with the management of his superannuation fund. That proceeding was funded by a litigation funder. It was settled in December 2020 for a total of $25m including costs. According to the court-issued notices almost 80% of the settlement amount was used to pay legal and other costs, with little over 20% of the settlement distributed to group members.[23] Having regard to that experience Mr Allen says,

> I would take great comfort from a Group Costs Order being made in this proceeding at the rate of 27.5%, as it would ensure that group members in this class action can have much greater certainty and transparency regarding the deductions from any resolution sum, and it would eliminate the risk that legal costs and funding costs might consume the majority of any return to group members. This is particularly so if the settlement sum or sum awarded by the Court is not very high.

36 This evidence revealed a thoughtful and rational approach by Mr Allen to the discharge of his responsibilities. More broadly, in the context of the evidence as a whole, the benefit of certainty in this respect that is sought the plaintiffs is significant. That I assess this factor and that evidence in this way reflects the particular facts of this case. In other circumstances, the fact of a guaranteed return on any recovery

[23] See *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* (2021) 150 ACSR 535; [2021] NSWSC 249.

might not be so significant. For example, a guaranteed return but at a proposed percentage that is on the evidence unsupportable, would warrant a different assessment. Similarly, my assessment of the plaintiffs' evidence in this case should not be read as endorsing a general rule that a plaintiff's preference should *prima facie* determine that the making of a Group Costs Order meets the statutory criteria in a given case.

37 The plaintiffs proffered, and I accepted, an undertaking "*not to apply in this proceeding for an order, under s 33ZDA of the [Act], setting out a percentage any greater than 27.5%*".

38 The purpose of the undertaking was to support the fixing of the rate at which legal costs are to be calculated as a cap on costs, the corollary of which is a guaranteed return to group members out of any recovery. The undertaking was proffered having regard to the fact that the percentage now fixed may be later varied by Court order under s 33ZDA(3). Plainly, the discretion reposed in a subsequent Court asked to exercise the power under s 33ZDA(3) could not be constrained by an earlier order made under s 33ZDA(1). There was force in the plaintiffs' point that it might be reasonably expected that any variation made under s 33ZDA(3) would be made taking into account the basis on which the original GCO was sought and made. Nevertheless, while recognising that in a different case it might thought that an undertaking was unnecessary, I considered it appropriate to make an order under s 33ZDA(1) on the giving of the plaintiffs' undertaking.

39 The plaintiffs submitted that a Group Costs Order would also provide certainty to group members in that it would remove what they described as "lingering uncertainty" about whether Slater and Gordon would in fact fund the proceeding on NWNF basis in the event that litigation funding were unavailable (a circumstance they also submitted was, on the evidence, unlikely to materialise). They separately submitted that the likely delay in obtaining third party funding would be avoided by the making of a GCO. Those points are considered below.

40 Mr Allen also said in his evidence that he would gain assurance from a Group Costs

Order by knowing that the interests of group members and those of Slater and Gordon were aligned in that if Slater and Gordon's fees were calculated as a percentage of the final outcome, any wasted costs would be borne by Slater and Gordon, with the result that they would be incentivised not to waste costs and to avoid delay, and further, that he would "know that in any settlement negotiation there is a positive incentive for the highest sum possible to be obtained". Although that evidence was of course a layperson's assessment about the likely effect of incentives, it reinforced Mr Allen's rational approach to his preference for a GCO-funded proceeding. Informed commentators have expressed the same point about the alignment of the interests of solicitors and clients.[24]

Transparency and Equity

41 The plaintiffs emphasised the simplicity and transparency of the GCO funding model. I accept the submission that a Group Costs Order engenders simplicity and transparency from the outset, which is in the interests of group members. I also accept the Contradictor's submission 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. That objective is assisted by Court-ordered processes involving notice to group members. I accept that those communications might be simplified somewhat by the fixing of costs-recovery percentage under a GCO.

42 Where a Group Costs Order is made s 33ZDA(1)(b) provides that the liability for costs (i.e., payment of the plaintiff's solicitors' legal costs calculated as specified) must be shared among the plaintiff and all group members. Once again, group members can be assured of this under a GCO. The statute has that effect without the need for the plaintiffs to seek an order to that effect at a later stage. That said, Court approval is required for the settlement of any class action[25] and Court approval invariably entails the equitable sharing of cost between group members. Where a judgment is obtained

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24 Michael Legg, "Contingency fees — Antidote or poison for Australian civil justice?" (2015) 39 *Australian Bar Review* 244, 250.

25 By s 33V of the Act.

the plaintiff may seek an order under s 33ZJ for reimbursement of their costs.

The Plaintiffs' Contractual Position

43 The Retainer Agreement provides relevantly and in substance, as follows:

(a) The document recording the agreement is said to constitute a disclosure statement and conditional costs agreement within the meaning of the *Legal Profession Uniform Law Application Act 2014* (Vic).

(b) The claimant (in this case Mr Allen) instructs Slater and Gordon to undertake such legal work as Slater and Gordon considers reasonably necessary to conduct the class action and protect the plaintiff's rights in relation to the subject claims. Slater and Gordon is also retained by other clients with an interest in the class action who have retained or will retain Slater and Gordon on substantially the same terms.

(c) In circumstances permitted by the Court, Slater and Gordon may seek to charge for work done through a Group Costs Order in which legal costs are calculated as a percentage of the amount of any award or settlement that may be recovered in the class action.[26] If a GCO is made, Slater and Gordon will be paid pursuant to an order of the Court following settlement or judgment.[27]

(d) Slater and Gordon will otherwise charge for work done by reference to the time reasonably and properly spent in accordance with the hourly rates set out.[28]

(e) The claimant agrees that, in circumstances where a Group Costs Order is not sought by Slater and Gordon or granted by the Court, Slater and Gordon may seek litigation funding to fund the legal costs and risk of adverse costs orders in the class action, including the need to provide security for costs. Any litigation funding arrangement will be subject to a litigation funding agreement between the claimant and the litigation funder. Slater and Gordon will be paid

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26 Clause 7.1.
27 Clauses 9.1; 11.1.
28 Clause 7.2.

in accordance with that agreement, by which:

(i) disbursements and some or all of the professional fees incurred prior to resolution of the class action will be paid by the litigation funder;

(ii) the litigation funder will receive a litigation funding fee, set out with reference to one or more of the amount of any award or settlement recovered, or the amount paid by the funder prior to the resolution of the class action.[29]

(f) Clause 10.5 of the Agreement provides as follows:

> Regardless of the outcome of the claim, provided You[30] comply with your obligations under this [legal costs agreement and any litigation funding agreement] you will not be required to meet any liability for legal costs and disbursements by making payment out of your own pocket at any stage. Your liability for legal costs and disbursements will be funded by a litigation funder or carried by us[31] on a no-win no-fee basis, and recovered by us and/or the litigation funder as applicable out of the compensation or damages received in the event of a successful outcome.

(g) Where Slater and Gordon's fees are incurred on a NWNF basis, its fees will only be recoverable out of the compensation or damages received in the event of a successful outcome.[32] A successful outcome is defined as receipt by the claimant of an amount of money after payment of all liabilities (including tax) that the claimant incurs in a matter to Slater and Gordon, and to any other person including the respondent, or where a reasonable offer of settlement is made that Slater and Gordon recommends the claimant accepts.[33] The Agreement does not guarantee any minimum return net of legal costs.

(h) Clauses 12.1 and 12.2 provide as follows:

> For all legal costs which are not charged pursuant to a Group Costs Order or have not been funded in accordance with clauses 9 and 11, we

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29 Clauses 9.1, 9.2.
30 "You" is a reference to the claimant, in this case Mr Allen.
31 "us" is a reference to Slater and Gordon.
32 Clause 12.6.
33 Clause 10.6

> will act for you on a conditional fee ("No-Win-No Fee") basis. This clause applies to legal costs which a litigation funder is not required and elects not to fund under the terms of the funding agreement and the terms of engagement, and includes any amount of our professional fees which are incurred on a conditional basis.
>
> This means that you will *not* be liable to pay those legal costs incurred on behalf of you and other clients, and not paid for by a litigation funder unless your case is successful.

(i) Funding "in accordance with clause 9 and 11" incorporates by reference, funding by a litigation funder (where a GCO is neither sought nor granted) and payment of Slater and Gordon's fees and disbursements either under a GCO (by Court order following settlement or judgment) or under a litigation funding agreement.

(j) In the event that Slater and Gordon has conducted all or part of the case on a conditional (NWNF) basis and the case is successful, Slater and Gordon is entitled, pursuant to the terms of the Uniform Law, to charge the claimant a success fee of up to 25% of professional fees incurred on a NWNF basis (i.e. an uplift fee).[34]

(k) Estimates for the total legal costs and disbursements estimated to be incurred in prosecuting the claims are given, as is the estimated uplift fee that will apply in the event that Slater and Gordon funds the proceeding on a NWNF basis.

(l) Slater and Gordon agrees to indemnify the plaintiff against adverse costs orders made by the Court in the class action subject to the plaintiff acknowledging that Slater and Gordon may insure against that risk (treating insurance costs as a disbursement in the class action), and related acknowledgements about recovery and priorities.[35]

(m) On the question of termination, clause 17.1(d) provides that,

> If you breach any of your obligations under this [Agreement] or if we become satisfied that … we believe that the Class Action does not enjoy

34 Clause 12.3.
35 Clause 13.

> sufficient Financial Support; then, we are entitled to terminate our Retainer having provided you first with reasonable written notice of our intention to do so and our reasons for doing so.
>
> "Financial Support" means one or more of the following:
>
> a) A Group Costs Order;
>
> b) A Litigation Funding Agreement between the [plaintiff] and a Litigation Funder;
>
> c) A decision by Slater and Gordon to conduct the Class Action on a 'No Win, No Fee' basis.

44 The plaintiffs on the one hand, and the Contradictor and the defendant on the other, were at odds in relation to the effect of the termination provision. The plaintiffs and the Contradictor were at odds as to its implication for the evaluation required on this application. Beyond that there was no real dispute on the question of construction of the Retainer Agreement.

45 The Retainer Agreement provides for the retainer of Slater and Gordon by the plaintiffs for the purpose of Slater and Gordon conducting the proceeding and anticipates the firm acting for other group members in the class action on the same terms.

46 The parties to the Retainer Agreement did not confine themselves to a single means by which Slater and Gordon's legal costs would be paid. Rather, the Retainer Agreement provides that legal costs and disbursements will be funded in one of three ways – by the plaintiffs seeking and the Court making a Group Costs Order; or in the event that no GCO is sought or obtained, by obtaining litigation funding (which will itself be subject to an agreement between the plaintiffs and the relevant funder); or by Slater and Gordon acting in the proceeding on a NWNF basis. The Retainer Agreement also contemplates[36] a hybrid or fourth alternative, namely that litigation funding might be obtained in respect of some but not all costs, in which case Slater and Gordon will act on a NWNF basis in respect of those costs.

47 Because it anticipates that funding may occur in these ways, the Retainer Agreement

[36] By clause 12.1.

sets out the different methods by which its costs may be charged and recovered, namely costs calculated as a percentage of the amount recovered (where a GCO is made); or on an hourly rate basis for solicitors' work and at cost for disbursements, with a funding fee (where litigation funding is obtained, subject to the relevant funding agreement), and with an uplift fee where Slater and Gordon acts on a NWNF basis.

48 The Retainer Agreement is evidently intended to operate irrespective of whether the proceeding is funded by a GCO, by litigation funding, or by Slater and Gordon bearing the costs on a NWNF basis, unless it is terminated in accordance with its terms. The Retainer Agreement expressly contemplates that the funding model for the proceeding may change in the respects specified, without the termination of the Retainer Agreement or the retainer between the plaintiffs and Slater and Gordon that it expresses. The Retainer Agreement will continue to govern the relationship between Slater and Gordon and the plaintiffs for the purposes of the proceeding upon a change of funding model, subject only to the parties' termination rights.

49 The plaintiffs described the Retainer Agreement as providing for a "three stage process" whereby Mr Allen has agreed that a GCO may be sought; next, if a GCO is neither sought nor granted, then third party litigation funding may be sought; and in the absence of those forms of funding, Slater and Gordon acts on a NWNF basis subject to its termination rights. A more accurate characterisation is that the Retainer Agreement provides for three alternative means by which the proceeding may be funded (or four, counting the hybrid NWNF/funding model). The Retainer Agreement does not itself provide a process by which funding options are to be considered. There is no requirement, for example, that the parties first seek a GCO before seeking litigation funding. What is clear, however, is that by the Retainer Agreement the parties have expressly agreed that they may seek a Group Costs Order or in the alternative, litigation funding. Litigation funding may be sought whether the parties decide not to seek a GCO or where the Court refuses a GCO. The plaintiffs submitted that the Retainer Agreement confers on Slater and Gordon a contractual

right to seek a litigation funding arrangement to fund the categories of costs set out in the Retainer Agreement,[37] in circumstances where a GCO is either not sought, or not obtained. I accept that submission.

50 Read together, clauses 10.5, 11, 12.1 and 12.2 make sufficiently clear that where a Group Costs Order is not obtained (because it has not yet been sought, is not sought or because it is refused) and where litigation funding has not been obtained, Slater and Gordon will act in the proceeding on a NWNF basis. Ultimately, Slater and Gordon and the plaintiffs accepted in the absence of the alternative funding mechanism, Slater and Gordon is bound to act on in the proceeding on a NWNF basis, but subject to its termination rights.

51 By way of context, the characterisation of Slater and Gordon's termination rights for the purposes of this application was said to go to the security, or lack thereof, of the plaintiffs' recourse to funding of the proceeding by Slater and Gordon acting on a NWNF basis. As the Contradictor put it, if Slater and Gordon were likely bound to act on that basis notwithstanding any termination rights, in evaluating the proposed GCO, the NWNF funding model would then be the most meaningful alternative funding model against which to compare the proposed GCO. Whilst I largely agree with the Contradictor's constructions of the Retainer Agreement, as discussed below, I do not accept the Contradictor's submissions in relation to the significance of the termination issue for the evaluation of the plaintiffs' application for a Group Costs Order.

52 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

[37] Clause 9.

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. Slater and Gordon's interpretation of the Retainer Agreement favoured their right to terminate, but the plaintiffs' counsel acknowledged that were a dispute between the plaintiffs and Slater and Gordon to arise on that issue in the future, the plaintiffs may take a different view. In this case, the plaintiffs and Slater and Gordon were *ad idem* in seeking the GCO on the basis and for the reasons explained by Mr Allen in his evidence and in the application more generally. In the circumstances, it is unnecessary to further consider the separate interests of the plaintiffs and Slater and Gordon.

53 In the plaintiffs' written submissions and in Mr Paull's evidence the position was put this way:

(a) Clause 17.1 of the Retainer Agreement provides that Slater and Gordon may terminate the retainer if it becomes satisfied that the class action does not enjoy sufficient "financial support", which is defined to mean a GCO, a litigation funding agreement in respect of the proceeding (between Mr Allen and the relevant litigation under), or "a decision by Slater and Gordon to conduct the Class Action on a 'No Win, No Fee' basis".

(b) It is accepted that under clause 17.1 Slater and Gordon would have to take a positive step to exercise its right of termination. Mr Paull's evidence was to this effect: first, Slater and Gordon *has not made a decision to conduct the proceeding on a NWNF basis* beyond the hearing and determination of the GCO application. If the GCO application were unsuccessful Slater and Gordon would seek third party litigation funding. In the event that litigation funding could not be obtained, Slater and Gordon would consider its rights and obligations under the Retainer Agreement. Slater and Gordon does not ordinarily act in class actions on a NWNF basis.

54 Slater and Gordon appeared to embrace two inconsistent positions, the first being that

it had not made any decision to act in the proceeding on a NWNF basis in the event that a GCO were refused and third party funding was not available; the second that if those circumstances arose it would *consider its termination rights*. The first proposition implicitly proceeded on the basis that Slater and Gordon would not be obliged by the terms of the Retainer Agreement to act on a NWNF basis; the second appeared to accept that unless the Retainer Agreement were terminated, it would be so acting. Ultimately though, it was accepted that it would be obliged to act unless it could lawfully terminate the Retainer Agreement. To be clear, Slater and Gordon did not say that it *would* terminate the Retainer Agreement in the circumstances discussed, only that it would consider its position on the facts prevailing at the time.

55 The right of the law firm to terminate is relevantly predicated on Slater and Gordon forming a belief that the class action does not enjoy "sufficient financial support". Read together with the relevant part of the definition of financial support ("a decision by Slater and Gordon to conduct the class action no a 'No Win No Fee' basis"), the Agreement provides that Slater and Gordon may terminate the Retainer Agreement if it has not made a decision to act on a NWNF basis. Read by itself, the termination provision might be construed as reserving to Slater and Gordon the unfettered right to decide whether or not to fund the proceeding on a NWNF basis, the corollary of which is that it is not otherwise obliged to do so, and the consequence of which is that it may terminate the Retainer Agreement in circumstances where neither a GCO nor third party funding is in place, and where it has declined to make a decision to provide NWNF funding (or positively put, it has decided not to fund the proceeding in that way). However, that provision must be read in context, by reference to which is apparent that there is a tension between that provision and clause 10.5, which positively provides that, "…provided you comply with your obligations … you will not be required to meet any *liability for legal costs and disbursements by making payment out of your own pocket at any stage. Your liability for legal costs and disbursements will be funded by a litigation funder, or carried by us on a No-Win-No Fee basis and recovered by us and/or the litigation funder as applicable out of the compensation or damages received*…".

56 The defendant submitted that the right to terminate is ordinarily subject to an implied requirement that the power be exercised reasonably.[38] The requirement applies in this case, and it is doubtful that an exercise of the termination power in clause 17.1 by Slater and Gordon deciding no longer to fund the action, would be a reasonable exercise of the power. One factor informing that assessment is that in the event that a Group Costs Order *is* made, Slater and Gordon will be assuming the burden of funding of the proceeding and paying any security for adverse costs, which it will only recover out of any award or settlement. So much follows from the terms of s 33ZDA. That being so, acting NWNF would not involve Slater and Gordon assuming a risk that it has not already agreed to assume.

57 In circumstances in which Slater and Gordon did not go so far as to say that it *would* be entitled to terminate the Retainer Agreement in the circumstances discussed (only that it would consider its position) and where there is no dispute before me between the contracting parties on a question of purported termination, it is not appropriate to decide the question based on a series of assumptions. I will say, however, that at the least, the right to terminate the Retainer Agreement in the event of Slater and Gordon deciding that it did not wish to continue to fund the proceeding on a NWNF basis, is subject to some uncertainty. The drafting of the Retainer Agreement in this respect leaves much to be desired. And as the Contradictor pointed out, if the circumstance arose there would be a question as to whether the firm's ability to terminate would be constrained by the firm's obligations more generally to the plaintiffs and group members. It is unnecessary to consider this question any further, and it would not be appropriate to do so in any event, without submission made upon the arising of a real controversy.

58 By emphasising the rights of termination the plaintiff sought to characterise the agreement by Slater and Gordon to act on a NWNF basis as an "interim" funding arrangement, albeit one that was governed by the Retainer Agreement which was not

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38 See, eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 255-271 (Priestley JA), 279-280 (Handley JA).

itself, an "interim" agreement. The plaintiffs' purpose is doing so was to support the point that the proposed Group Costs Order should not be refused on the grounds that another funding model (Slater and Gordon acting on a NWNF basis) should be preferred. Relatedly, the plaintiffs also pointed to the uncertainty inherent in the NWNF funding source, namely that if a GCO were refused and third party litigating funding were unavailable, the plaintiffs would be subject to the risk that Slater and Gordon would decide not to fund the proceeding and terminate the Retainer Agreement.

59 The Contradictor submitted it has not been established by the evidence and a consideration of the terms of the Retainer Agreement that there is real risk of the proceeding not continuing for lack of funding. The current NWNF arrangement is continuing. Should a GCO be refused and third party funding not be obtained (as to which, see below) Slater and Gordon would have rights of termination under 17.1, but whether those rights would be exercised would require consideration and a positive decision by Slater and Gordon. There is no evidence as to the likelihood of Slater and Gordon doing so. I accept that submission.

60 The labels "interim" and "not-interim" were not particularly illuminating of the real issues in the context of the Retainer Agreement in this case. To the extent that "interim" arrangements were discussed in *Fox/Crawford*, reference to them reflected the particular arguments advanced in that case.[39] As I have said, I accept that there is some uncertainty in respect of the termination provisions. As an argument in favour of making a GCO it is not entirely irrelevant, but it may cut both ways. There is merit in the Contradictor's cautionary note that arguments on contractual uncertainty, when presented by the contracting parties themselves, might be to some extent self-generated.

61 Finally, on the existing funding arrangements, as noted earlier, Slater and Gordon has agreed to indemnify the plaintiff against adverse costs, on an ongoing basis. Mr Allen

[39] See *Fox/Crawford*, [90], [139].

explained in his evidence that it is important in any arrangement that he is indemnified against the risk of paying the defendant's costs and that he would not have agreed to have assumed the role of plaintiff had he not been provided with an indemnity. As the plaintiffs put it, to the extent that the analysis is informed by a comparison between funding models, the proffering of an indemnity is a neutral factor in that it is or can be expected to be a feature of each funding model.

62 For completeness I note that it was accepted that Slater and Gordon was and would be in a position to meet the obligations that would be imposed by s 33ZDA, in respect of the defendant's costs. Slater and Gordon has already agreed by a deed poll in favour of the defendant to pay the defendant the amount of any adverse costs order made against the plaintiffs on the terms set out in the deed.

Third Party Litigation Funding

63 As discussed, the Retainer Agreement provides that the plaintiffs and Slater and Gordon may seek funding from a litigation funder as an alternative to a GCO, in which case the terms on which that funding would be provided would be set out in an agreement between the plaintiffs and the funder. The Retainer Agreement anticipates that any funding agreement would entail the funder receiving a litigation funding fee set by reference to the amount recovered in the proceeding or the amount paid by the funder in respect of the proceeding.

64 The plaintiffs' solicitor, Mr Paull, has practised exclusively in class actions and group litigation since 2012 and has a breadth of relevant experience. He is the senior legal practitioner responsible for the conduct of the proceeding for the plaintiffs and group members. Mr Paull gave unchallenged evidence about the prospect of the plaintiffs obtaining litigation funding for the proceeding in the event that their application for a Group Costs Order were refused. Some of that evidence was the subject of a redaction ruling as noted earlier, and is set out here only in general terms. In summary, Mr Paull's evidence was as follows:

(a) If a GCO is not granted, Slater and Gordon will seek third party funding for the

proceeding.

(b) Slater and Gordon ordinarily seeks third-party funding in proceedings such as this, unless there is a compelling reason not to do so, and indeed of the 19 shareholder class actions it had run since 2006, 18 were funded.

(c) Slater and Gordon is reasonably confident that litigation funding will be able to be obtained. Mr Paull sets out, by elaboration in the confidential parts of his evidence, the basis for his expectation that there would be sufficient interest amongst litigation funders known to Slater and Gordon for the plaintiffs to obtain a reasonable and suitable offer of litigation funding. The grounds for that conclusion include the particular experience of Slater and Gordon in negotiating with litigation funders; Mr Paull's knowledge of the market for third party litigation funding and specific dealings with litigation funders; Mr Paull's assessment of the strength and weaknesses of the claims of the plaintiffs and group members; and the estimated costs of the litigation.

(d) Mr Paull has assessed where, within the range of "market rates" for funding commissions, he expects the likely available funding offers to fall for this proceeding, providing his reasons for doing so. The evidence in relation to funding commission rates is discussed below.

(e) He has also estimated the total legal and funding costs should the proceeding settle at mediation within given ranges or resolve after trial, with the caveat that at this stage in the proceeding it is extremely difficult to give more particular estimates.

(f) Mr Paull expects that obtaining litigation funding will take about six months. Time would be required for steps including the identification of a funder, negotiation of terms, the registration of a managed investment scheme and any necessary book-build. In that case, he expects to make an application for a temporary stay of these proceedings.

(g) Mr Paull says that he does not believe that he could obtain details of a hypothetical funding arrangement for the purposes of this application – that is, a set of indicative terms on which one or more funders would be prepared to fund this proceeding. He sets out the reasons for that opinion which are based on his experience in dealing with litigation funders. His evidence was that litigation funding is negotiated and secured as a bespoke contract; it is not a standardised product. Before offering terms litigation funders typically perform an extensive due diligence process in respect of the proposed claim which requires the investment of significant time and cost by the funder. It is often the case that funds provided by a litigation funder are sourced from pools of investors who are separate entities from the funder. Where that occurs the decision to invest can and often does require a decision by more than one entity. Even were these practical difficulties met, the plaintiff would then be using the fruits of that work essentially in order to deny it, by presenting its concluded or in-principle deal to the Court as evidence for why another funding model (a Group Costs Order) should be preferred. Mr Paull's assessment is that making such an approach with a view to obtaining a funding proposal which is then abandoned would likely damage the relationships between the solicitors and funders, and that the provision of evidence of this kind in support of a Group Costs Order would be reasonably characterised as inconsistent with the commercial interests of the litigation funder who might be approached.

(h) Accordingly, Mr Paull explains that he cannot say with precision what terms would be offered by a third party litigation funder, although as noted earlier, he does provide his assessment of where in the range of likely funding commissions he considers an offer for funding in this case would sit.

65 On the question of the time likely to be required to obtain third party litigation funding in the event that it is required, Mr Allen's evidence was that:

> It is important for me that there is no delay in the conduct of the class action and there be certainty for myself and group members regarding the continuation of the proceeding and the terms on which the proceeding is to be

funded. I believe that a Group Costs Order will provide this certainty.

66 There is no application before me for a stay of the proceedings and therefore no question to decide as such. However, insofar as the delay point is relevant in assessing the plaintiffs' argument, I can say that I consider that there is force in the submissions of the defendant and the Contradictor, in particular the fact that, as they point out, under the Retainer Agreement, Slater and Gordon is carrying the funding risk and is, unless it terminates that agreement, bound to act for the plaintiffs on a conditional basis. Slater and Gordon will then continue to act in the proceeding, funding it on a conditional basis even while third party litigation funding is sought, subject only to its rights of termination.

Third party funding – Historical Rates

67 The plaintiffs relied upon a report prepared by Mr Houston**,** an economist who has conducted research on the funding of, and costs incurred in, class actions in Australia. Mr Houston's report assembled and analysed historical rates in litigation funding and legal fees from public material. The plaintiffs relied upon this analysis in support of their case that there is a real prospect that the proposed Group Costs Order would deliver a better outcome to group members than they would obtain via any third party litigation funding, which was the likely and available alternative funding regime contemplated by the Retainer Agreement.

68 Mr Houston's report was in this respect similar to his report on the same question in *Fox/Crawford.*[40] There, as here, it collated data from publicly available datasets, including that compiled by the Australian Law Reform Commission and the Law Council of Australia.

69 As I noted in *Fox/Crawford*, the ALRC's data was compiled from judgments in cases decided by the Federal Court under Part IVA of the Federal Court Act in relation to proceedings finalised by judgment or settlement approval. The data set contains 104 cases finalised during the period 1997 to 2016. Separately, the Law Council compiled

40 [2021] VSC 573.

a set of data for the period 2001 to 2020 which it described as a summary of most of the Australian class action proceedings resolved in that period and the distribution of settlement amounts among class members, legal representatives and third party funders. The Law Council noted that it had not been possible to capture all class action settlements in Australia with all of the required information during the relevant timeframe. However, the Council considered the information to be of value because it identified most settlement sums, legal costs and funding commissions where actions have proceeded on a third party funding basis. The results did not include cases settled for no compensation or those that had failed. The Council said that the work was not intended to be scientifically rigorous.

70 Mr Houston analysed and combined those data sets. He removed cases that appeared in both sets and those that did not disclose a funding fee or because a litigation funder was not involved, and identified a further nine cases from his own searches. His final data set compiled in that way comprised 54 cases, of which 34 were shareholder class actions.[41] Mr Houston noted that the available data reflects rates of commissions approved at the end of the process, with the benefit of after the fact assessments, and that the commission rates might have been adjusted by courts on settlement approval, but there was no evidence about that. He said that there were intrinsic challenges associated with the identification, collection and verification of those data. Many of the significant items were kept confidential. There were some discrepancies between the ALRC and Law Council data. Mr Houston attempted to verify the reported numbers by reference to published court orders and judgments, but in many instances he was unable to verify one or more components of the settlement. Where a discrepancy was identified, he adopted the minimum rate of funding commissions identified in conflicting sources. These difficulties were acknowledged as caveats to Mr Houston's report, which was appropriate.

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41 Mr Houston's dataset presented here differs from that presented in *Fox/Crawford,* primarily in a slightly greater number of cases excluded from the ALRC data set for relevant information being not disclosed or confidential. This apparent change in methodology does not meaningfully change the conclusions or robustness of Mr Houston's report.

71 The plaintiffs adduced Mr Houston's dataset as a summary of voluminous or complex documents, and to that end Mr Houston helpfully extracted his conclusions in a table in his affidavit annexing his report, which shows that:

(a) half of the commissions in all captured class actions fell within the range 23% to 30% of the gross settlement amount, while for shareholder class actions, this interquartile range was 22 to 29%;

(b) for all class actions, the mean and median commission rate was 25%, while for shareholder class actions, the mean and median was 24%;

72 From the data set Mr Houston further calculated the combined proportion of any award or settlement that allowed for both legal costs and litigation funding commissions by adding together those two data points, and found that:

(a) the interquartile range of combined legal and litigation funding fees in historical proceedings on that data set was 37% to 56%, and for shareholder class actions only the interquartile range was 37% to 53%; and

(b) for all class actions, the median proportion of an award or settlement deducted by funders in respect of legal and funding fees was 47%, while the mean was 46%, while in shareholder class actions the median was 46% and the mean 44%.

73 The plaintiffs submitted, on the basis of that material, that the proposed Group Costs Order, capped at 27.5% of any gross settlement or award, would self-evidently be better for group members than one which is likely, having regard to historical examples, to take 44% to 46%.

74 That argument may be accepted. The numbers are unambiguous, and as a matter of simple logic a funding agreement which includes a commission likely to be in the range of 21% to 29%, before the further deduction of legal costs, will almost certainly be more expensive than a single deduction of 27.5% in all cases but those resolved with very little legal work done, proportional to outcomes.

75 The figures relied upon by the plaintiffs are, necessarily, imprecise, in summarising known practice in a range of historical class actions which each must have had their own unique circumstances, and only where those figures were reported on publicly. Mr Houston recognised as much in his report. However, I accept that the analysis constitutes an informative compilation of commission rates and outcomes known in relation to the Australian market for litigation funding. It shows what has generally been accepted by litigants and funders in previous class actions,[42] and is logically something which could inform future actors in that same market. I accept the findings of Mr Houston as a general indication of the range of likely funding commissions, in any particular class action in which funding may be sought.

76 This evidence is, of course, general and by way of summary of existing or past practice only. However, in the circumstances of this case that evidence, together with the evidence of Mr Paull, is sufficient to establish that there is a real prospect that if third party funding is obtained it will be obtained on a commission plus costs basis, and with commission likely within the range identified in the Houston analysis. I have described Mr Paull's evidence in general terms, above. The evidence is that based on his experience, knowledge of third party funders, and his client's case, his assessment is that Slater and Gordon is likely to be successful in seeking that funding. He has given his confidential assessment as to where, within the range of historically available funding commissions, an offer for this case would likely fall. Any offer of funding would be subject to the plaintiffs' agreement, but it is significant that third party litigation funding is expressly permitted by the Retainer Agreement and accepted as a possibility by Mr Allen.

77 In the circumstances of this case it is not necessary to go further in requiring a higher standard of proof of available funding rates for this case. As Mr Paull said in unchallenged evidence, putting the plaintiff to proof of a specific alternative, would be to require it to negotiate a detailed and bespoke contract responsive to the particular proceeding, which process would be lengthy and costly and unlikely to

42 See, eg, the discussion in *Blairgowrie Trading v Allco Finance (No 3)* [2017] FCA 330 (Beach J).

yield a set of indicative terms to which a funder would be prepared to commit, for the reasons given by Mr Paull. Imposing that burden on a plaintiff in these circumstances, would not advance the statutory purpose.[43]

78 Importantly, the Contradictor accepted that in principle the proposed GCO would be likely to provide a better return to group members than third party funding, which invariably involves a funding commission to be paid on top of the law practice's professional fees. This view is supported by the analysis of historical funding rates. Although the Contradictor accepts the limitations of Mr Houston's analysis, the Contradictor nevertheless agrees in principle with its use as a basis on which a meaningful comparison can be made between a GCO at an identified proposed rate and the potential alternative funding by a third party litigation funder.

The "No Win, No Fee" Funding Alternative

79 As noted, the plaintiffs framed their case in terms that third party funding would be sought and obtained were a Group Costs Order not made, that this was an express part of the bargain between them and their solicitors in bringing the proceeding.

80 Upon receiving the plaintiffs' material the Contradictor suggested to the plaintiffs that it may assist the Court to consider a comparison between the proposed GCO and the NWNF arrangement in place under the Retainer Agreement. In response, the plaintiffs put on a further affidavit of Mr Paull, setting out a range of potential post-trial outcomes in the proceeding and how the return to group members may change under a GCO and the NWNF arrangement. They did so, properly, to assist the Court with further relevant material, but submitted that such a comparison lacked utility.

81 The modelling undertaken is properly confidential, going as it does to the plaintiffs' assessment of their own case as well as their exposure to costs. Mr Paull exhibited modelling of five potential quanta of awards, making deductions on the one hand for Slater and Gordon's estimated total costs for such an outcome with all necessary disbursements if conducting the matter NWNF, and of 27.5% for a Group Costs Order

[43] As to purpose see *Fox/Crawford*, [21].

on the other. What that modelling shows, unsurprisingly, is that returns to group members for poorer award outcomes were significantly worse under a NWNF arrangement than the return under a Group Costs Order, which difference diminished and then reversed for higher possible awards. On this comparative analysis, as noted, the third party funding model was always more expensive than either the GCO or third party funding. The Contradictor submitted in part that the Group Costs Order was not appropriate or necessary because there were plausible outcomes in which the NWNF model provided a greater return to group members. To that, a number of things may be said.

82 *First,* even accepting the utility of the modelling for the purpose of the analysis, the difference in outcomes is roughly in the order of 20%, and then only at the extreme high end of those projections. That is, if *and only if,* the most optimistic projection materialises, group members will better off by a margin of about 20% compared with the result under the GCO. The comparison of course takes the result in the case as a constant, and varies the quantum of legal costs. The evidence does not support the conclusion that the most optimistic projection is necessarily likely to materialise.

83 *Second*, as I said in *Fox/Crawford,* there are significant limits inherent in a direct comparison model for assessing a proposed Group Costs Order, relying as it does on forecast modelling in litigation in which all inputs to that model are attended by significant uncertainty. As I said in that case, the relevance of predictive modelling in a given case will depend on the subject matter to which the "appropriate or necessary" examination is directed.[44] The modelling in this case is limited to the outcomes in the event of an unqualified success at trial, and given the early stage to which the litigation has progressed, there was no utility in seeking further modelling. The Contradictor concluded that it is *possible* that a GCO would result in a better outcome for group members when compared to the existing NWNF arrangements, but *equally possible* that it may not. Framing of the submission in terms of equal possibilities was not meant to convey a probabilistic assessment, but that each possibility was attended by

44 *Fox/Crawford,* [118].

significant uncertainty.

84 *Third*, a more fundamental uncertainty undermines the utility of the comparative modelling. It is very far from certain that this case will be funded by Slater and Gordon on a NWNF basis, even leaving to one side its termination arguments. Evaluating the evidence as a whole , it is *more likely* that should the Group Costs Order be refused, Slater and Gordon will seek, and likely obtain, third party funding. It is sufficiently established, without relying on predictive modelling, that third party funding itself will be more expensive to the group than the Group Costs Order.

85 *Fourth*, in this context it should be recalled that while a Group Costs Order may provide greater returns to solicitors where there is a very positive outcome for group members than would occur in a traditional funding model, where a GCO is made the solicitors conversely bear the risk of lower outcomes. Both of those effects of the proposed Group Costs Order must be evaluated and weighed together with all of the evidence.

Reasonableness of the proposed rate

86 As noted at the outset, the plaintiffs sought a Group Costs Order at the rate of 27.5% to be set as a maximum rate, potentially subject to adjustment downward in the event a very positive outcome outstrips any proportionality to Slater and Gordon's risk or work performed.

87 On the evidence, the *prima facie* reasonableness of the rates may be gauged by reference to the third party funding rates generally available, noting the parameters of the evidence on that question and its limitations. The limitations inherent in comparing the NWNF and GCO models in terms of the financial outcome that they might deliver to group members, have been discussed.

88 The Contradictor accepted the *prima facie* reasonableness of the proposed rate, and setting a Group Costs Order at that rate was not opposed by the defendant.

89 In those circumstances, and also by reference to the matters set out in *Fox/Crawford* at

[149]-[155] concerning the approach to the fixing of fees in other jurisdictions, I consider that the proposed rate is appropriate subject to later review when appropriate.

90 As I said in *Fox/Crawford*, considerations of proportionality and reasonableness will assist in answering the statutory question raised by s 33ZDA, and because the statutory model engages with both risk and reward, it invites the question whether the costs allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceedings. That question is likely to assume significance on any review under s33DZA(3).[45]

91 Although it is appropriate to fix the proposed rate it by reference to the presently available measures, the plaintiffs and their solicitors in particular, must be mindful of the need to assist the Court when the occasion arises for scrutinising the appropriateness of the rate now fixed, in the future. When that occasion arises, other measures and other paradigms beyond the general evidence of the kind led on this application (determined as it is at an early stage in the litigation), might well be informative. As I said in *Fox/Crawford* (by way of example) an insurance-based actuarial calculation might assist in assessing why a proposed return is likely to be reasonable for an investor with the particular funder's characteristics.

92 The plaintiffs' solicitors should be mindful of the need to facilitate any future assessment on questions concerning the appropriate reward for the assumption of risk, which is by its nature a forward-looking decision made now, but which might be later evaluated by reference to the facts and assessments that informed the decision to assume the risk, made at this point in time. There may well be other measures of reasonableness and proportionality which will require reference to what will be past events, at the time at which any s 33ZDA(3) question arises.

Part E: Summary of Analysis and Conclusion

93 Drawing together the individual considerations discussed above (and without

[45] *Fox/Crawford*, [145]-[148].

repeating the detail of that analysis), in my view it is appropriate to make the proposed Group Costs Order. It is a suitable, fitting or proper way to ensure that justice is done in the proceeding in relation to the calculation of legal costs payable by the group to the solicitors conducting the proceeding, for these reasons:

(a) It is not in contest that the proposed Group Costs Order will confer on group members certainty of outcome in relation to the costs of litigation, in that they will be guaranteed to receive not less than 72.5% of any compensation recovered. That is a real and substantive benefit that is specifically sought by the plaintiffs and is protective of group members' interests. On the evidence in this case, the alternative funding models will not provide that benefit.

(b) The Group Costs Order will permit the assessment of costs at a *prima facie* reasonable rate by reference to practically available measures. The proposed rate may be varied by Court order in the future. The rate is subject only to the possibility of a downward revision in the event that it is shown, for example, to deliver a disproportionate return to the solicitors.

(c) It is not in contest that equity between group members (in respect of liability for costs), simplicity and transparency are inherent characteristics of the GCO statutory funding model. Separately, the Group Costs Order will secure the plaintiffs against the risk of having to pay adverse costs. It may be accepted that other funding models will achieve a measure of transparency (although perhaps not so readily), and that equitable distribution of legal costs and appropriate communication with group members are requirements in the conduct of class actions, irrespective of the funding model in play. It was also accepted that in this case, the alternative funding models would ensure the plaintiffs against the risk of meeting the defendant's costs. However, to disregard those characteristics of the proposed order simply on the grounds that they will occur in any case where a GCO is made, is to employ false logic. It is true that those features to do not establish the *necessity* of making a Group

Costs Order, but they are relevant to the overall assessment of the *appropriateness* of the order, to be considered in the context of all of the other relevant considerations.

(d) A number of things may be said about the price of funding, which remains an important consideration.

(e) "Price" may be assessed in a number of ways. A comparative measure of price is an appropriate inquiry in this context, provided the limits of the exercise for the purposes of the statutory inquiry are regarded.

(f) The evidence in this case is that the plaintiffs and their solicitors expressly intended that if a Group Costs Order were not granted, third party funding would be sought. There is no guarantee that they will obtain that funding but there is a real prospect that they will do so on terms that will deliver a worse financial outcome to group members than if a GCO were made. It is true that the plaintiffs do not have and have not put in evidence particular terms that a funder would be prepared to offer in this case. There was, however, persuasive evidence from the plaintiffs' solicitor that doing so would not be practically feasible.

(g) That the evidence establishes what I have described as a *real prospect* of group members obtaining a worse outcome in this case if third party funding is obtained, is sufficient in the circumstances to evaluate the significance of alternative funding regimes. So much is apparent from the analysis of the Contradictor's argument.

(h) The absence of third party funding terms specific to this case, and the fact that the plaintiffs' solicitors are obliged to continue to act in the proceeding on a NWNF basis unless they terminate their Retainer Agreement, where their rights to terminate are uncertain, have led the Contradictor to conclude that third party funding is not the relevant 'comparator'; and when regard is had to

the better comparator (NWNF funding) the plaintiffs have not shown that the financial outcome for group members will be better under a GCO.

(i) There are difficulties with that analysis. It is true that the evidence concerning third party funding is limited in the ways described. But the evidence in respect of the outcomes that NWNF funding might deliver is itself riven with uncertainty, and that uncertainty is inherent in the nature of predictive modelling undertaken at an early stage of proceedings. The Contradictor summarises that in some plausible scenarios group members will by comparison be better off under a GCO, but it is "equally likely" that they will be worse off. Even taken on their face, the projections show that a NWNF arrangement would deliver a relatively marginal improvement *if* an extremely positive outcome for group members were to eventuate. Such an outcome cannot be assumed with any degree of confidence, a fact which is unsurprising at the early stage which this defended proceeding has reached. Against the possibility of a "better outcome" the Contradictor's analysis trades the clear positive benefits of the proposed GCO (as already described) and engages the real risk that if in fact a GCO is refused, third party funding will be sought and obtained as is expressly permitted by the Retainer Agreement, with a worse result. An evaluation of the evidence as a whole points, in my assessment, to the appropriateness of making the proposed GCO rather than away from it.

(j) As I have said, assessment of price is certainly relevant, but it must be undertaken with an appreciation of its limits. Section 33ZDA is intended to be capable of operation early in a proceeding when predictive modelling will commonly be mired in uncertainty, as is the case on this application. It follows that comparative outcomes modelling must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA. In this case, refusing to make a GCO, in effect because the plaintiff has not positively proved that it would result in a better financial result than funding by a different model, accords to the counter-factual price comparison exercise more weight in the

evaluative exercise than it ought properly bear.

(k) Different facts might change the equation; on different facts a more exacting standard of proof in respect of alternative funding models might be appropriate, and in a different kind of case predictive modelling might be capable of producing a more certain comparative assessment. It must be recalled, however, that for the reasons explained in *Fox/Crawford*, there is no warrant for exercising presumptive caution in exercising the power conferred by s 33ZDA, or for characterising a Group Costs Order as a funding mechanism of last resort. As discussed in *Fox/Crawford*, there is nothing in the statutory text, read in its context and by reference to its purpose, that would warrant such a characterisation.[46]

(l) In the overall evaluation of the evidence, I place little weight on the plaintiffs' point that the awarding of a Group Costs Order would avoid delay in the proceeding. It is not readily apparent that the plaintiffs would have been entitled to a stay of proceedings in the circumstances. Separately, I accept that the Group Costs Order will ameliorate the uncertainty inherent in the risk that the Retainer Agreement might be lawfully terminated, but given the evidence (in which Slater and Gordon has declined to say whether or not it would seek to terminate the Retainer Agreement if both a GCO and third party funding were refused), I place little weight on that factor.

94 I wish to add that while I have not accepted the Contradictor's ultimate submission, that does not detract from the fact that I have been assisted by the thoughtful and careful analysis of the issues undertaken by the Contradictor.

95 Finally, it will be apparent to those who have an interest in this evolving jurisdiction that in generally similar circumstances a Group Costs Order has been granted in this case but refused *Fox/Crawford* (but on terms permitting the application to be re-agitated). All that need be said about that in this context is that this case and

46 *Fox/Crawford*, [38].

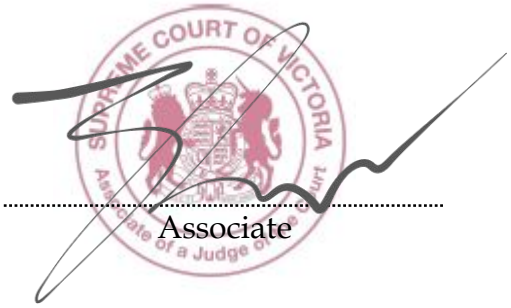
Fox/Crawford concerned different evidence, a different Retainer Agreement, and different submissions.[47]

[47] See for example, *Fox/Crawford* at [8(b),(f)], [63], [66], [67], [89], [110], [118], [120], [120], [121], [129], [131], [132], [143].

CERTIFICATE

I certify that this and the 43 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Nichols of the Supreme Court of Victoria delivered on 7 February 2022.

DATED this seventh day of February 2022.



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Associate