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

Not Restricted

S ECI 2023 01227

ROBERT LAIRD KILAH — First Plaintiff

BRENDAN FRANCIS SINNAMON — Second Plaintiff

v

MEDIBANK PRIVATE LIMITED
(ACN 080 890 259) — Defendant

JUDGE:	Attiwill J
WHERE HELD:	Melbourne
DATE OF HEARING:	6 February 2024
DATE OF RULING:	7 February 2024 (oral reasons); 28 March 2024 (written reasons)
CASE MAY BE CITED AS:	Kilah & Anor v Medibank Private Limited
MEDIUM NEUTRAL CITATION:	[2024] VSC 152

GROUP PROCEEDINGS — Costs — Application for a group costs order — Costs to be calculated as a percentage of the amount of any award or settlement recovered — Whether a contradictor should be appointed — No contradictor appointed — Whether the Court should make the group costs order — Exercise of discretion — Principles to be applied — *Supreme Court Act 1986* (Vic) s 33ZDA – *Gehrke v Noumi Ltd* [2022] VSC 672, *DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group* [2023] VSC 561, *Thomas v The a2 Milk Company Ltd* [2023] VSC 768 applied — Application granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr A Hochroth with Mr H C Whitwell	Phi Finney McDonald Quinn Emanuel Urquhart & Sullivan
For the Defendant	Mr N P De Young KC with Ms J A Findlay	King & Wood Mallesons

HIS HONOUR:

INTRODUCTION

1 This is a group proceeding brought under Part 4A of the *Supreme Court Act 1986* (Vic) (the **Act**) by persons who allege they acquired an interest in shares in Medibank Private Limited (**Medibank**) between 1 July 2019 to 25 October 2022 (inclusive) and suffered loss or damage as a result of Medibank's conduct.

2 The plaintiffs seek a group costs order under s 33ZDA of the Act for legal costs payable to the solicitors representing the plaintiffs and group members, Quinn Emanuel Urquhart and Sullivan LLP (**Quinn Emanuel**) and Phi Finney McDonald Pty Ltd (**PFM**), to be calculated at 27.5% of any award or settlement that may be recovered in the proceeding, with the payment to be shared equally between the two firms. The plaintiffs also seek an order that they and the group members are liable to pay the legal costs payable to the plaintiffs' solicitors. Medibank did not oppose the application. Medibank did, however, identify certain matters upon which the Court may wish to hear from a contradictor.

STATUS OF THE PROCEEDING

3 On 28 March 2023, Mr Kilah commenced a group proceeding against Medibank (the **Kilah proceeding**). The solicitors representing Mr Kilah were Quinn Emanuel. On 29 June 2023, Dr Sinnamon commenced a group proceeding against Medibank concerning substantially similar issues (the **Sinnamon proceeding**). The solicitors representing Dr Sinnamon were PFM. On 6 September 2023, the Court ordered the Kilah proceeding and the Sinnamon proceeding be consolidated. Mr Kilah and Dr Sinnamon became the joint representative plaintiffs. Quinn Emanuel and PFM became the joint solicitors for the plaintiffs and are conducting this proceeding pursuant to a cooperative litigation protocol.

4 A consolidated writ and statement of claim was filed by the plaintiffs on 3 October 2023. On 22 November 2023, Medibank filed a defence. On 11 December 2023, the plaintiffs filed a reply. The plaintiffs allege there was a data breach of Medibank's network in 2022 during which hackers extracted the personal and health claims data

of Medibank customers and that some of the stolen data was publicly released via the dark web. The plaintiffs allege Medibank engaged in misleading or deceptive conduct and breached its continuous disclosure obligations by not disclosing information regarding alleged deficiencies in its cyber security systems, and that this caused the price of Medibank's shares to be greater than their true value, and/or their value if not for the alleged breaches. The plaintiffs and group members seek compensation for purchasing shares in Medibank at an allegedly inflated price due to the alleged conduct. Medibank denies the substance of the claims against it.

CURRENT ARRANGEMENTS

Mr Kilah

5 The relevant current arrangements are set out in:

(a) a legal costs agreement and disclosure statement (the **Kilah retainer**) which sets out the terms on which Quinn Emanuel acts for Mr Kilah. It was signed by Mr Kilah on 29 March 2023;

(b) a litigation collaboration agreement made between Quinn Emanuel and Regency VI Funding Pty Limited (**Regency**) on 13 April 2023; and

(c) a financing commitment agreement made between Quinn Emanuel and Regency on 27 March 2023.

6 Clauses 6 and 7 of the Kilah retainer are of particular relevance to the present application. In summary, they provide for, among other things:

(a) Quinn Emanuel is bearing the costs of its professional fees in the proceeding (cl 6.1);

(b) Quinn Emanuel and Regency have entered into financier agreements pursuant to which Regency agrees to pay the disbursements, satisfy any adverse costs order, and provide security in a form acceptable to the Court (cl 6.2);

(c) in the event that the proceeding is unsuccessful, neither Quinn Emanuel nor Regency will seek payment of professional costs or disbursements from Mr Kilah (cl 6.5);

(d) on Mr Kilah's instructions and at the earliest time practicable in the proceeding, subject to the Court's direction, Quinn Emanuel will file a summons for a group costs order in the following terms:

(i) the amount payable to Quinn Emanuel for their services in this proceeding will be calculated as a percentage of the amount recovered;

(ii) responsibility and liability for payment of the amount to Quinn Emanuel will be shared among Mr Kilah and group members;

(iii) Quinn Emanuel will seek to recover a rate which in its opinion would provide a more favourable return to Mr Kilah and the group members than if this proceeding was run by a third party litigation funder; and

(iv) if a group costs order is made, the Court would have determined whether the group costs order is appropriate or necessary to ensure that justice be done, and whether the percentage sought by Quinn Emanuel is reasonable (cl 7.1-7.2);

(e) in the event that a group costs order has been made and there is a successful outcome, the legal costs will be deducted as a single payment as the percentage of the resolution sum, as approved by the Court (cl 7.3);

(f) Quinn Emanuel may elect to take other courses of funding including approaching a third party litigation funder, in the event that the Court does not make a group costs order, or approves a percentage considered by Quinn Emanuel or Regency as not commercially reasonable (cl 7.4);

(g) if Quinn Emanuel is unable to secure a satisfactory litigation funding proposal with a third party litigation funder, then Quinn Emanuel may elect to take other courses of action, including not continuing to represent Mr Kilah, or acting on different bases (cl 7.5);

(h) if a group costs order is not made, and Quinn Emanuel is unable to secure a third party litigation funder, then Quinn Emanuel will consider whether or not it will continue to act for Mr Kilah (cl 7.6); and

(i) Mr Kilah is not liable for any adverse costs, or out of pocket costs, with respect to his engagement with Quinn Emanuel in this proceeding (cl 7.7).

Dr Sinnamon

7 On 30 May 2023, Dr Sinnamon and PFM entered into a conditional legal costs agreement (the **Sinnamon retainer**). The Sinnamon retainer provides at clause 7.2 that Dr Sinnamon instructs PFM to apply for a group costs order, and at clause 8.2 that if a group costs order is made, then the percentage amount will be the charge for the work done and costs incurred.

8 Clause 4.1 of the Sinnamon retainer is also of particular relevance to this application. In summary, it provides that the terms of the Sinnamon retainer apply only until the Court makes a determination in relation to this application. If the application is successful, then the Sinnamon retainer will continue to operate in conjunction with the group costs order. If the application is unsuccessful, then PFM will either within seven days notify Dr Sinnamon of its intention to seek alternative funding, or failing any notification, the Sinnamon retainer will automatically terminate.

9 Clause 11.1 of the Sinnamon retainer further provides that PFM and Dr Sinnamon agree that if a group costs order is made, then PFM will indemnify Dr Sinnamon against adverse costs orders in the terms of the group costs order, but prior to a group costs order being made, the Sinnamon retainer offers no indemnity in relation to adverse costs orders. I also refer to paragraph 11 of Dr Sinnamon's affidavit affirmed on 31 January 2024, which is confidential.

APPLICABLE LAW

10 This application is made under s 33ZDA of the Act, which provides:

> **33ZDA Group costs orders**
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> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
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> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> (2) If a group costs order is made—
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> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
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> (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.
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> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).
>
> (4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).
>
> (5) In this section—
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> ***group costs order*** means an order made under subsection (1);
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> ***legal costs*** has the same meaning as in the Legal Profession Uniform Law (Victoria).

11 In *Gehrke v Noumi Ltd*,[1] Nichols J said:

> The statutory criterion — *that the court be satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding* — is open-textured and provides the Court with a large measure of significantly unguided discretion. For the reasons discussed in *Fox/Crawford*, a court should be satisfied, in order to make a Group Costs Order, that doing so would be a

[1] *Gehrke v Noumi Ltd* [2022] VSC 672 [53] (citations omitted) ('*Gehrke v Noumi Ltd*'), which has been adopted on a number of occasions by judges of this Court, most recently by M Osborne J in *Thomas v The a2 Milk Company Ltd* [2023] VSC 768 ('*Thomas v The a2 Milk Company Ltd*'). This has since been adopted by Nichols J in *Norris v Insurance Australia Group Ltd* [2024] VSC 76 ('*Norris*'), though *Norris* was published after the oral reasons for this ruling were made, and therefore did not form part of the oral reasons for this ruling.

> suitable, fitting or proper way to ensure that justice is done in the proceeding; and for that purpose, a broad, evaluative assessment is required, and the statutory criterion permits a range of meanings and is capable of satisfaction in myriad ways.

12 I adopt the following recent observations of Nichols J in *DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group*:[2]

> 29 By incorporating the elements that it does, s 33ZDA implicitly permits the linking of risk and reward in the calculation of a GCO. It follows from the text that the calculation of legal costs in the manner permitted by s 33ZDA may properly take into account not only the value of legal services performed, but the assumption of financial risk by the law practice. 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.
>
> 30 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.

SUBMISSIONS

13 The plaintiffs submitted that if a group costs order is not made, it is "most unlikely" that either Quinn Emanuel or PFM would proceed to represent the plaintiffs on a "no win, no fee" basis.[3] They submitted that instead, Quinn Emanuel and PFM would firstly attempt to obtain third-party litigation funding which would likely be on materially worse terms for group members compared to a group costs order.[4] This, they submitted, is supported by their confidential comparative modelling.

14 The plaintiffs submitted that group members would be protected by the proposed group costs order at the lowest resolution sums, which is where group members require the most protection. They submitted that at higher resolution sums, the Court would have power to amend the group costs order rate pursuant to s 33ZDA(3) of the Act.[5]

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2 *DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group* [2023] VSC 561 [29]-[30] (citations omitted).

3 Plaintiffs' outline of submissions dated 5 December 2023, a redacted version of which was filed 9 February 2024 [38] ('*Plaintiffs' submissions*').

4 Ibid [41]-[42].

5 Ibid [49].

15 The plaintiffs submitted that disruption and delay may occur if a group costs order is not made as an alternative funding arrangement would have to be addressed. They submitted that if a group costs order is not made, there is a risk that the proceeding may come to an end if a satisfactory funding arrangement is not achieved, as a result of which justice will not be achieved.[6]

16 The plaintiffs submitted that a group costs order would ensure certainty for the plaintiffs and group members that no more than 27.5% of any proceeds of the litigation would be deducted by way of legal costs. They submitted that a third-party funding litigation model would fail to offer such certainty.[7]

17 The plaintiffs submitted that the proposed 27.5% rate was appropriate. They submitted Quinn Emanuel and PFM are taking on significant risks in conducting this proceeding,[8] that the rate is within the range of rates previously approved by this Court and may be revised down by the Court pursuant to s 33ZDA(3) of the Act if a windfall were to occur.[9]

18 Medibank did not oppose the group costs order. Medibank did, however, identify certain matters upon which the Court may wish to hear from a contradictor.[10] Medibank submitted that the features of this case add a further dimension to the potential conflict of interest between Quinn Emanuel and PFM and their duties to the plaintiffs.[11]

19 First, it referred to the involvement of Regency and submitted that Regency had no direct contractual agreement with Mr Kilah.[12] Medibank submitted that despite this, the financing arrangements provide Regency with some control over the proceeding, and it is unclear why this is in the best interests of group members.[13] It submitted that

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6 Ibid [46].
7 Ibid [53].
8 Ibid [51].
9 Ibid [52].
10 Defendant's outline of submissions filed 21 December 2023 [16] ('*Medibank's submissions*').
11 Ibid [18].
12 Ibid [19].
13 Ibid [21]-[23].

this arrangement may result in an abuse of process.[14] It referred to the lack of evidence that Mr Kilah received legal advice with respect to Regency's involvement which it submitted may call into question whether Mr Kilah's consent to the arrangement between Quinn Emanuel and Regency was fully informed.[15] In reply, the plaintiffs submitted that there is nothing unusual nor improper about a funding arrangement where a law firm receives financial support in respect of some of the costs of litigation.[16] They submitted that the provisions that Medibank pointed to as evidencing Regency's control over the proceeding are clear and commonplace and would not amount to an abuse of process,[17] noting further that Regency is subject to the *Harman* undertaking and will not have access to documents deemed by Medibank as confidential.[18] The plaintiffs further submitted that the way in which law firms choose to finance their obligations is not relevant to the group costs order application.[19] They submitted that the evidence showed that Mr Kilah reviewed the terms of the agreements between Regency and Quinn Emanuel before signing the Kilah retainer.[20]

20 Second, Medibank submitted that Dr Sinnamon's evidence suggested that he did not understand the contractual arrangements he entered into with PFM at the time he entered into those arrangements, including with respect to his exposure to the risk of being ordered to pay adverse costs.[21] In reply, the plaintiffs relied on the affidavit of Dr Sinnamon affirmed on 31 January 2024 which they submitted addresses this.[22]

21 Third, Medibank submitted that it may be appropriate to consider whether it is open to Quinn Emanuel and PFM to terminate their retainer agreements with the plaintiffs. It noted that Quinn Emanuel was entitled to terminate its retainer with Mr Kilah if Regency was not receiving sufficient remunerative return from this proceeding, and

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14 Ibid [27].
15 Ibid [25].
16 Plaintiffs' outline of reply submissions filed 1 February 2024 [19] ('*Plaintiffs' reply*').
17 Ibid [21]; [25].
18 Ibid [22].
19 Ibid [23].
20 Ibid [24].
21 Medibank's submissions (n 10) [28]-[33].
22 Plaintiffs' reply (n 16) [26].

submitted that this results in a heightened risk of termination for Mr Kilah.[23] In reply, the plaintiffs submitted that there is no rule that prevents a law firm from terminating a retainer pursuant to an express term, and that this is a counterfactual that has been considered and accepted by this Court in the past.[24]

22 Fourth, Medibank referred to the plaintiffs' submissions regarding difficulties that would arise from financing this proceeding with joint legal representation in the event that a group costs order is not made. The plaintiff submitted in reply that it no longer relied upon these difficulties.

23 Finally, Medibank made submissions on the appropriateness of the proposed 27.5% rate. It noted that ten of the fourteen group costs orders deposed to by Mr Benjamin Phi (the managing director of PFM) had a rate lower than 27.5%, as did two further group costs orders made following Mr Phi's affidavit.[25]

ANALYSIS

Contradictor?

24 I am not satisfied the appointment of a contradictor is appropriate or warranted. This is because the submissions and the evidence filed on this application enable the Court to understand and make an assessment of the relevant issues.[26] A contradictor is not required. I also refer to the reasons I give later in this ruling concerning the particular issues raised by Medibank.

Certainty, transparency and simplicity

25 In *Gehrke v Noumi Ltd*, Nichols J said:[27]

> I also accept, as set out in earlier cases, that a Group Costs Order engenders simplicity and transparency about funding and legal costs from the time at which a GCO is made. Making costs liability transparent and simple is in the interests of group members. It must be recalled that solicitors acting for a plaintiff in a class action are expected, in discharge of their professional obligations, to give sufficient and comprehensible information to group members regardless of the funding model in place, which objective is assisted

23 Medibank's submissions (n 10) [34].
24 Plaintiffs' reply (n 16) [27].
25 Medibank's submissions (n 10) [37].
26 See *5 Boroughs NY Pty Ltd v State of Victoria (No 5)* [2023] VSC 682 [77] (Keogh J).
27 *Gehrke v Noumi Ltd* (n 1) [31] (citations omitted).

by Court-ordered processes involving notice to group members. Simplicity and transparency are likely more readily obtainable, however, by the fixing of a GCO than by disclosures addressing time-based legal costs plus funding commission. Separately, 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. The statute has that effect without the need for the plaintiffs to make an application for the sharing of costs, at settlement or upon judgment.

26 Dr Sinnamon gave evidence in his affidavit affirmed 23 November 2023:

> 28 I believe a GCO will deliver transparency, certainty, and simplicity for the plaintiffs, including myself as the second plaintiff, and group members. I consider it important that group members are given the best opportunity to properly understand the costs of participating in the proceeding, and to have certainty as to the percentage of any recovered amounts that would be returned to group members by way of settlement or favourable judgment.
>
> …
>
> 34 Overall, it is my understanding that, in the absence of a GCO, a third party funding arrangement is likely to be a more costly and complex method of funding the proceeding.

27 Mr Kilah gave evidence in his affidavit affirmed 5 December 2023:

> 20 Based on my understanding of a GCO, this type of funding appears to be more beneficial to me and group members as Quinn Emanuel (and Regency) and PFM's costs will be 'capped' to a single amount, in the event of a settlement or successful judgment. I am also reassured by the fact that the GCO rate can be reviewed by the Court and amended later in the proceeding if the Court believes that this would be appropriate. Moreover, a single percentage is simple for me and class members to understand, and assess in the context of a return from a settlement. This provides me with a great deal of comfort.

28 In the event that the proposed group costs order is made it will clearly identify for the plaintiffs and the group members the proportion of any settlement or judgment that will be deducted for legal costs (subject to any further order of the Court). This gives certainty to the plaintiffs and group members. It is a very simple formulae. It may be readily explained and understood. The observations of M Osborne J in *Thomas v The a2 Milk Company Ltd*[28] are apt to the present case:

> 22 As is noted above, the proposed GCO consists of a single rate, which is readily understandable. This means that GCOs provide a degree of certainty to plaintiffs and group members, insofar as they allow

[28] *Thomas v The a2 Milk Company Ltd* (n 1) [22], [24] (citations omitted).

> plaintiffs and group members to mitigate any risk that their compensation (if recovered) will be eroded by costs calculated at a percentage greater than that specified in the order.
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> …
>
> 24 Under a third party litigation funding model, the terms pursuant to which the cost of such funding would be shared among group members is often not able to be known until a later stage of the proceeding, for example at the time of settlement or following judgment. In contrast, the transparency and simplicity of a GCO provides a considerable benefit to the plaintiffs and group members from an earlier stage and throughout the life of the proceeding.

29 In the event that the proposed group costs order is made, the plaintiffs and group members will know that they will pay 27.5% of any sum recovered for legal costs and that they will get a return of 72.5% (subject to any further order of the Court revising the percentage). The proposed group costs order also provides transparency to the plaintiffs and group members.

30 I accept the plaintiffs' submissions at paragraph 53 of their submissions (citations omitted):

> 53 The plaintiffs have deposed to the importance of this "cap" in the assessment of the benefits of a GCO as against other forms of funding. Whilst the cap is theoretically subject to any further order of the Court, the Court is most unlikely to revise the rate upwards. By contrast, under a third-party litigation funding model, the total legal costs deducted from the resolution sum would be subject to significant uncertainty and the maximum costs that might be deducted from the resolution sum could not be known until the end of the proceeding when legal costs were proffered to the Court for approval.

Timing and delay

31 Mr Kilah gave evidence in his affidavit affirmed 5 December 2023:

> 25 It is important to me that there is no further delay in the conduct of the class action and there be certainty for me, Mr Sinnamon and group members regarding the continuation of the proceeding and the terms on which the proceeding is to be funded.

32 In the event that a group costs order is made, then other important interlocutory steps may be taken. Granting a group costs order means that the proceeding is not delayed whilst the plaintiffs seek alternative funding.

Alignment of interests

33 The further observations of M Osborne J in *Thomas v The a2 Milk Company Ltd*[29] are also apt to the present case:

> 29 A GCO has the effect of aligning the economic interests of the solicitors with the interests of the plaintiffs and group members. While the law practices must, and will, always act consistently with their professional obligations and in their clients' interests, a GCO serves to further incentivise the lawyers to seek the highest achievable resolution sum. Equally, the GCO provides a disincentive for delay and wasted costs, thereby promoting group members' interests.

Distribution of costs

34 The proposed group costs order will fairly distribute the burden of legal costs incurred for the benefit of group members across all group members evenly.

No win no fee alternative?

35 I accept the plaintiffs' submissions that if a group costs order is not made then it is unlikely that the proceeding will continue on the current no win no fee basis or that the proceeding will go forward on a no win no fee basis with the provision of an uplift fee. I accept the plaintiffs' submissions at paragraphs 39(a)-(c) (citations omitted):

> (a) As to Quinn Emanuel, the Retainer does not require Quinn Emanuel to offer an alternative funding arrangement to the plaintiff if a GCO is not made. Indeed, as already noted, under the Retainer, if a GCO is not made, Quinn Emanuel is entitled to approach a third-party litigation funder and, if satisfactory funding cannot be secured, one of the courses of action Quinn Emanuel is entitled to take is to cease representing the plaintiff. Mr Scattini's evidence is that he would likely not recommend to Quinn Emanuel's Contingency Committee that Quinn Emanuel continue to prosecute the proceeding on a conditional fee basis beyond the hearing and determination of the GCO (and nor does he expect that such approval would be granted even if he did make such an approach).
>
> (b) Mr Wolden's evidence is that, in the event that the application for a GCO is unsuccessful, then he would likely recommend that Regency exercise its termination rights under the Financing Agreements.
>
> (c) As to PFM, the evidence is that it would first seek to determine whether the proceeding could be conducted pursuant to a funding model (likely a traditional "costs plus commission" third party funding arrangement) and unless a reasonably viable alternative funding arrangement could be agreed, then PFM would exercise its rights to terminate the CLCA.

[29] Ibid [29] (citations omitted).

PFM would not continue to act on a no win, no fee basis.

Risk

36 Dr Sinnamon gave evidence in his affidavit affirmed 23 November 2023:

> 20 I am not able to afford PFM's professional fees or its estimated disbursements over the life of the proceeding.
>
> 21 In light of the above, if the Court did not make a GCO, I would instruct PFM to expeditiously seek suitable third party funding for this proceeding on satisfactory terms. If suitable third party funding was acquired, I would enter into a new CLCA with PFM based on the new funding arrangements, as well as a Litigation Funding Agreement with the third party funder, so long as I considered those arrangements to be satisfactory to myself, Mr Kilah and the group members. I would endeavour to negotiate any new terms in good faith.
>
> 22 In the event suitable third party funding could not be arranged expeditiously, I would not have the benefit of protection from adverse costs orders following PFM's termination of the CLCA taking effect.
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> 23 If no adverse costs indemnity was provided to me, I would not be willing to shoulder the risk and burden of an adverse costs order. If I had known at the time of executing the CLCA that no costs order indemnity would be available to me on an ongoing basis, I would not have executed it.
>
> 24 If I did maintain the proceeding without the benefit of an adverse costs indemnity, which I have no intention of doing, I am informed by Ms Noonan and understand that her expectation is that PFM would not continue to act for me and would terminate the CLCA.
>
> 25 I am informed by Ms Noonan and understand that security for costs is usually provided by way of deed poll issued by a litigation funder or an unconditional deed of indemnity issued by an adverse costs insurer who has provided adverse costs insurance in respect of the litigation; alternatively, it is provided by way of cash or bank guarantee. I am not willing or able to obtain any of those forms of security in sufficient value to satisfy any such orders.

37 In the event that a group costs order is not made there is a risk that the proceeding will come to an end by being discontinued in the event that satisfactory funding arrangements cannot be achieved. This is not a likely scenario as it is likely that if a group costs order is not made that satisfactory funding arrangements will be obtained.

38 Medibank observed in its submissions[30] concerning the matters that the Court might want to take into account in relation to the appointment of a contradictor, that it may

[30] Medibank's submissions (n 10) [34].

be appropriate for the Court to consider whether it is in fact open to Quinn Emanuel and PFM to terminate their retainer agreements with the plaintiffs if a group costs order is not made and alternative funding arrangements cannot be obtained. In my view, it is not appropriate for the Court to seek to finally determine this issue in the circumstances of the application. This is because no decision has been made to terminate the retainer. The determination of that issue would be speculative as it would be based upon circumstances that have not eventuated and the precise nature of which are unknown. It is also not likely. I accept, however, given the terms of the retainers, there remains a risk that they may be terminated in the event that a group costs order is not made and alternative funding is not obtained. I otherwise accept the plaintiffs' reply submissions at paragraph 27 (citations omitted):

> Medibank then suggests that it might not be open to the law firms to terminate their retainers with the plaintiffs in the event that a GCO is not made. While no decision to terminate a retainer would be taken lightly, and while such a decision would only be taken as a last resort, there is no rule that prevents a law firm terminating a retainer pursuant to an express term thereof. Thus, this Court has on multiple occasions considered counterfactuals in which the relevant law firm ceases to act for the plaintiff, and the plaintiff and group members thereby likely lose the ability to vindicate their rights. For example, that was a counterfactual accepted by Keogh J in *5 Boroughs* and by Dixon J in *Bogan*. As to *Allen v G8 Education*, that was a case where the drafting of the termination clause was such that it was not clear, as a matter of construction of the retainer, that the failure to obtain a GCO was a basis to terminate, especially where third-party funding was a viable alternative means of funding the proceeding (as was the position in that case).

Third party funding alternative?

39 A comparison between the proposed group costs order and the most likely alternative funding model is a relevant consideration, but not a proxy for the statutory test under s 33ZDA. In *Gehrke v Noumi Ltd*, Nichols J said:[31]

> 37 As has been discussed in earlier cases, whether or not a proposed GCO is more beneficial to group members than an alternative funding model is not a proxy for the statutory test, and s 33ZDA does not, as a matter of construction, necessarily require that a GCO yield a better outcome than a counter-factual funding arrangement. As a matter of principle, a price comparison between the proposed GCO and the most likely alternative funding model must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA. It nevertheless remains a relevant consideration. In the evaluative inquiry, the particular

[31] *Gehrke v Noumi Ltd* (n 1) [37] (citations omitted).

> consequences or effects of the making of a GCO in the instant case should be considered wholistically. For example, the certainty in respect of legal costs engendered by the making of a GCO is readily appreciable as a tangible benefit, as is the insurance it affords against the erosion of recoveries by costs (in the manner explained earlier). However that benefit might be ephemeral if the proposed costs impost is demonstrably higher than other available funding for the proceeding in question. The relative significance of those considerations is fact-sensitive.

40 In the event that a group costs order is not made and satisfactory funding arrangements can be achieved, I accept the plaintiffs' submissions that the return to the plaintiffs and the group members under such arrangements are likely to be worse than under the proposed group costs order. I accept that the precise terms of the possible funding arrangements are presently uncertain. I refer to paragraphs 47 to 50 of the plaintiffs' submissions. In summary:

(a) I accept the plaintiffs' submissions that, upon the confidential modelling, if the proceeding resolves for rates at the upper range (the amount of which is confidential) the proposed group costs order produces the best return for group members; and

(b) I also accept the plaintiffs' submissions that upon the modelling, if the proceeding resolves for rates at the lower range, the proposed group costs order is the most protective of the interests of the group members.

The rate

41 In *Thomas v The a2 Milk Company Ltd*, M Osborne J said:[32]

> 32 The setting of the initial GCO rate is important in providing plaintiffs and group members with confidence in relation to expected returns (as a proportion of the recovered sum), and confidence that the law practices will be incentivised to work towards the best possible outcome and to keep costs proportionate (accepting that the initial rate made for any GCO may be the subject of a later order by the Court altering the rate).
>
> 33 The proposed initial rate, and the question of its reasonableness and proportionality in the circumstances of the proceeding at the time of the application, is an important consideration in the overall assessment of

[32] *Thomas v The a2 Milk Company Ltd* (n 1) [32]-[36] (citations omitted).

whether the making of a GCO is suitable, fitting and proper.

> 34 Section 33ZDA recognises a calculus as between reward and or risk. Both law practices have taken on, and will continue to take on the risk in carrying substantial legal costs and disbursements to the conclusion of the proceeding. Both law practices will incur adverse costs liability if a GCO is ordered.
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> 35 Justice John Dixon in *Bogan v The Estate of Peter John Smedley (Deceased)* ('*Bogan*'), recognised that it is both fair and reasonable for a law practice to seek a risk premium (including a pure risk premium).
>
> 36 The relationship between the assumption of financial risk and return on that investment is not the only consideration that will inform the appropriateness of a percentage rate ultimately fixed. As s 33ZDA is concerned with fixing the method of calculation of legal costs, considerations of the legal work involved in the conduct of the proceeding is also a relevant integer, as is keeping costs proportional to the complexity of the issues and amount in dispute.

42 I am satisfied that the rate of 27.5% is prima facie reasonable and proportionate. The rate of 27.5% is appropriate and necessary to ensure that justice is done in the proceeding.

43 First, this proceeding is complex and is very likely to involve a significant amount of legal work over a significant period of time. I accept the following submission of the plaintiffs at paragraph 51 of their submissions (citations omitted):

> *Thirdly*, a GCO at the particular rate of 27.5% inclusive of GST is appropriate having regard to the significant risks that Quinn Emanuel and PFM is taking on in conducting this proceeding. As noted above, s 33ZDA contemplates a risk-reward calculus in the determination of the appropriate rate and here the risk taken on by Quinn Emanuel and PFM is not immaterial. Mr Scattini sets out some of these risks in his affidavit at paragraphs [94], [96] to [102]. Mr Phi also sets out general and specific risks in his affidavit at paragraphs [31] to [34]. Given the extensive experience of both practitioners in litigation of this nature, those risks ought be considered by the Court as real risks.

44 Second, the rate is within the range of rates that have been approved by this Court. Medibank submitted:

> 37 ***Fifth***, the appropriateness of the proposed 27.5% rate. While, as deposed by Mr Phi, GCO rates have ranged between 14% to 40% across 14 cases, in 10 of those cases the rate was lower than what is proposed in the GCO Application. In addition, after Mr Phi's affidavit was affirmed:
>
> (a) on 15 December 2023, orders were made in the Hino class action for a further GCO at a rate lower than is sought in this

Proceeding, being a 'stepped rate' between 17.5% to 25%.

(b) on 19 December 2023, orders were made in the a2 Milk class action for a GCO at a rate lower than is sought in this Proceeding, being a rate of 24%.

38 Further, the risk-sharing under the financial arrangements between Quinn Emanuel and Regency may be a factor affecting that calculus as to the proposed rate. The question of the GCO rate is not a matter that it is appropriate for the Defendant to make further submissions on given that it pertains to the interests of group members and material relevant to its assessment is redacted from the Defendant.

45 I accept the following submission of the plaintiffs at paragraph 52 of their submissions (citations omitted):

52 *Fourthly*, and related to the first and third points, the evidence does not suggest that a rate of 27.5% inclusive of GST is apt to deliver what could fairly be characterised as a "windfall" to Quinn Emanuel and PFM having regard to the extent of the risks Quinn Emanuel and PFM are taking on. The rate is within a range of rates that have been approved by this Court. But if a windfall were to occur, as we have noted above, the Court could exercise its power under s 33ZDA(3) to revise *down* the rate. Each of Mr Sinnamon and Mr Kilah have deposed that this is a particular benefit of the GCO model that is important to each of them in their comparison of that model with other funding models.

46 Third, the plaintiffs have not, despite enquiry by the Court, undertaken that if a group costs order at 27.5% is ordered they would not apply under s 33ZDA of the Act to amend the group costs order to any greater percentage. In *Gehrke v Noumi Ltd*, Nichols J said:[33]

58 That said, I do not consider that without such an undertaking, the certainty as to legal costs and recoveries afforded by a Group Costs Order is substantially undermined. The rate fixed for the Group Costs Order will remain as fixed, subject only to Court order. In exercising its power under s 33ZDA(3), any future court will, of necessity, have regard to its role in protecting the interests of group members. Furthermore, any party (and that party's solicitors) applying for an upwards variation in a GCO rate would have to confront the basis on which the GCO was first sought and made.

…

59 While the provision of undertakings such as have been proffered and accepted in other cases is beneficial to group members, it is not a requirement fixed by the statute.

33 *Gehrke v Noumi Ltd* (n 1) [58]-[59] (citations omitted).

47 Senior counsel for the plaintiffs stated that there would need to be compelling reasons for any application to be made to increase the rate. I accept this submission. Further, the Court is able to deal with any such application, if it is made, at that time. In the circumstances, I will not require the provision of such an undertaking as a condition of the grant of a group costs order.

48 Finally, as accepted by the plaintiffs, upon any settlement or judgment, if a windfall were to occur the Court may exercise the power under s 33ZDA(3) and revise down the rate. For example, the Court may exercise this power if the rate gives a disproportionate return to the solicitors for the plaintiffs. As submitted by the plaintiffs at paragraph 49 of their submissions (citations omitted):

> … if there is a higher resolution sum in this proceeding, the Court has the power to reconsider and revise that percentage downward. It will be at that point of settlement or judgment that "critical integers" become certain or capable of being known including: (a) the resolution sum, (b) any recovery of costs from the defendant, (c) the quantum of investment by the law practice in the proceeding, (d) the extent of risk undertaken, such that the percentage in the Group Costs Order may be revised.

The firms' capacity to pay any costs to Medibank and to give security for those costs

49 I accept the plaintiffs' submissions at paragraph 54 of their written submissions:

> 54 *Finally*, the Court can be satisfied that Quinn Emanuel (and Regency) and PFM each has sufficient wherewithal to discharge the statutory liability it will assume, if a GCO is made, to pay any costs of Medibank and to give any security for those costs.

Additional matters raised by Medibank upon the issue of a contradictor

50 Medibank submitted that the Court may find that giving Regency a degree of control over the proceeding is not only unjustified but an abuse of process and that these circumstances call into question whether Mr Kilah was able to provide fully informed consent. I do not accept this submission. This is because I am not satisfied that the commercial arrangements with Regency give it such a degree of control that is unjustified or an abuse of process. I am satisfied that the plaintiffs' counsel and solicitors understand that the plaintiffs are the persons who have the right to provide the instructions to conduct the matter in this Court on behalf of themselves and group members.

51 Medibank also submitted that Dr Sinnamon's evidence suggests that he did not understand the contractual arrangements entered into between himself and PFM at the time he entered into those arrangements on 30 May 2023. Dr Sinnamon has now provided a further affidavit which, in my view, clarifies ambiguity in his earlier affidavit. I accept the plaintiffs' reply submissions at paragraph 26. I am satisfied, based upon the whole of Dr Sinnamon's evidence, that he did understand the contractual arrangements entered into between himself and PFM.

CONCLUSION

52 As a result of the matters I have addressed, I am of the view that I should exercise my discretion and grant the proposed group costs order at the rate of 27.5%. This is because this is appropriate and necessary to ensure justice is done in this proceeding. I will hear the parties on the precise form of order.

CERTIFICATE

I certify that this and the 19 preceding pages are a true copy of the reasons for ruling of Attiwill J of the Supreme Court of Victoria delivered on 28 March 2024.

DATED this 28th day of March 2024.