

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

Not Restricted

S ECI 2021 03645

BETWEEN:

JAKE THOMAS and YUE XIAO

Plaintiffs

and

THE A2 MILK COMPANY LTD (ARBN 158 331 965)

Defendant

JUDGE: M Osborne J
WHERE HELD: Melbourne
DATE OF HEARING: 13 December 2023
DATE OF JUDGMENT: 19 December 2023
CASE MAY BE CITED AS: Thomas v The a2 Milk Company Ltd
MEDIUM NEUTRAL CITATION: [2023] VSC 768

CLASS ACTIONS – Costs – Application for Group Costs Order – Principles to be applied – Group Costs Order granted – *Gehrke v Noumi Ltd* [2022] VSC 672 – *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	R Doyle SC and A Folie	Slater and Gordon and Shine Lawyers
For the Defendant	C Withers SC, B Cameron and N Wootton	Herbert Smith Freehills

HIS HONOUR:

Overview

- 1 By summons dated 18 October 2023, the plaintiffs apply for a group costs order ('GCO') pursuant to s 33ZDA of the *Supreme Court Act 1986* (Vic) (the 'Act'). The terms of the GCO sought are that the legal costs payable to the solicitors for the plaintiffs and group members (Slater and Gordon and Shine Lawyers) be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, with such payment to be shared equally between the two firms of solicitors. Subject to further order, it is sought that the percentage fixed for the GCO be 24% inclusive of GST. Additional terms of the GCO include that the two firms are liable to pay any costs payable to the defendants, with each firm severally liable for 50% of such costs.
- 2 The plaintiffs submit that the Court can be satisfied within the meaning of s 33ZDA of the Act that an order making a GCO in the proposed form at the rate of 24% is appropriate to ensure justice is done in this proceeding.
- 3 The plaintiffs rely on the following:
 - (a) the affidavit of the first plaintiff, Jake Thomas, made on 23 October 2023 (the 'Thomas Affidavit');
 - (b) the affidavit of the second plaintiff, Yue Xiao, made on 18 October 2023 (the 'Xiao Affidavit');
 - (c) the affidavit of Emma Pelka-Caven, Head of Class Actions at Slater and Gordon, made on 18 October 2023 (the 'Pelka-Caven Affidavit'); and
 - (d) the affidavit of Craig Allsopp, Joint Head of Class Actions at Shine Lawyers, made on 18 October 2023 (the 'Allsopp Affidavit').
- 4 Parts of the Pelka Caven Affidavit and the Allsopp Affidavit were subject to claims of confidentiality and orders to that effect were made accordingly on 13 December 2023. It has not been necessary to set out the confidential material in these reasons.

Status of proceeding

- 5 This is a group proceeding issued under Part 4A of the Act. It is an ‘open class’ representative proceeding on behalf of all persons who at any time during the period of 19 August 2020 to 9 May 2021 acquired or held an interest in fully paid ordinary shares in the defendant (‘a2’), that was acquired by buying those shares on either the Australian Securities Exchange or the New Zealand Main Board.
- 6 The plaintiffs’ allegations include that a2 contravened continuous disclosure provisions in both Australian and New Zealand law, and contravened misleading or deceptive conduct provisions, in both Australian and New Zealand law. These allegations are founded upon the identical publications and alleged non-disclosures made by a2 to both stock exchanges.
- 7 The plaintiffs claim that they and group members suffered loss and damage because of a2’s contraventions. The plaintiffs allege that the laws of both countries give group members rights to recover from a2 the loss or damage they have suffered.
- 8 This is a consolidated proceeding, with Slater and Gordon and Shine Lawyers jointly named as the solicitors on the record.¹ Pursuant to a Cooperative Litigation Protocol and Consolidation Agreement between the law practices and plaintiffs, if a GCO is made, Slater and Gordon and Shine Lawyers will each be entitled to 50% of the legal costs recovered under the GCO and any order or agreement for provision of security for costs by the plaintiffs and/or the payment of adverse costs by the plaintiffs, shall be met by Slater and Gordon and Shine Lawyers each bearing responsibility for 50% of that liability.
- 9 The proceeding is at a relatively early stage. The Court gave judgment on a separate question in August 2022 regarding the Court’s jurisdiction and power to determine claims brought under New Zealand law.² Pleadings have now closed and a small amount of initial discovery has been given.³ No further orders have yet been made

¹ Orders of Justice Button dated 14 June 2022.

² *Thomas v a2 Milk Company Limited (No 2)* [2022] VSC 725 (Button J).

³ Orders of Justice Button dated 25 August 2022. To date, a2 has discovered 174 documents.

for discovery, and no orders have been made for provision of expert evidence.

- 10 On 21 November 2022, by consent, the Court made orders for security for costs. Further orders were made by consent on 5 December 2023 relating to the form of the security to be provided by Slater and Gordon.

Principles: application for GCO pursuant to s 33ZDA

- 11 The principles relevant to the application of s 33ZDA(1) were recently summarised by Nichols J in *Gehrke v Noumi Ltd*,⁴ which were endorsed by Delany J in *Mumford v EML Payments Ltd*.⁵ The relevant considerations are as follows:⁶

- (a) Considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform the setting of an appropriate percentage under s 33ZDA. One of the questions (but not the only question) that s 33ZDA invites in this respect is whether the costs to be allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceedings. Proportionality and reasonableness of costs in this context might be evaluated against numerous measures.
- (b) While that may be so, the statutory criterion for the exercise of the power is not whether the proposed percentage rate to be set by the GCO will produce a return to the plaintiff's solicitors that is proportionate to the risk undertaken by the assumption of the obligations imposed by s 33ZDA; it is broader than that. The statutory criterion – *that the court be satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding* – is open-textured and provides the Court with a large measure of significantly unguided discretion. 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 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.
- (c) Although the amount recovered will likely be a significant integer in any proportionality assessment, it must be recalled that the statutory funding scheme created by s 33ZDA is intended to be capable of taking effect early in the life of proceedings where the assessment of potential recovery sums is likely to be fraught with uncertainty. As was observed in *Fox/Crawford*, the question of whether the return to the law practice under a Group Costs Order is or is likely to be reasonable, and whether it bears a proportionate relationship to the assumption of risk or to any other relevant measure, may be considered prospectively, but there may be real limitations on the Court's ability to make an informed

⁴ [2022] VSC 672 (*'Gehrke'*).

⁵ [2022] VSC 750, [14].

⁶ *Gehrke* (n 4) [53](a)-(f) (emphasis in original) (citations omitted).

assessment of that question.

- (d) Much of what needs to be known to make such an assessment will not be known at the outset of a proceeding when a GCO is first fixed. The making of a Group Costs Order under s 33ZDA(1) serves the purpose of permitting the proceeding to be funded in a particular way (the law firm funding the proceeding and assuming the burden of meeting any adverse costs and security for costs liability, and group members sharing liability for payment of legal costs).
- (e) That is where s 33ZDA(3) assumes significance. Once information informing questions of proportionality becomes available, a review under sub-s (3) of a percentage fixed at an earlier time will allow the Court to ensure that the percentage to which the law practice is ultimately entitled remains appropriate. Subsections (1) and (3), then, operate in a complementary way. Section 33ZDA(3) complements s 33ZDA(1) by permitting a later adjustment to the percentage fixed at the outset. An adjustment may be made at any stage of a proceeding but will at least arise for consideration once a recovery amount has been achieved by settlement or judgment. In the ordinary course it can be expected that the appropriateness of a rate set on the making of the GCO would arise for consideration on the resolution of the proceeding, including on an application by a plaintiff for approval of a settlement under s 33V. That s 33ZDA makes provision for the amendment of a percentage in this way is consistent with its broader statutory context within which it sits, including the requirement in s 33V that no group proceeding may be settled without the Court's approval. The prospect that a percentage fixed upon the making of a GCO may be later amended *by the Court* does not detract from the relative certainty that is achieved by the making of a GCO.
- (f) That is not to exclude the possibility that some conclusions might be drawn early in the life of a proceeding about the prospect of the proposed rate resulting in a reasonable and proportionate quantification of legal costs. Whether that can be sensibly achieved will depend in large measure on the quality of the evidence directed to that question. In *Bogan*, John Dixon J made some observations to the effect that principles employed in other contexts to analyse returns on investment might inform a principled approach to the fixing of a percentage rate for a Group Costs Order. Where evidence of that kind is available, provided it is formulated on sufficient relevant instructions and assumptions, it might indeed be significant, but the return on the Funder's investment is far from the only relevant consideration. In the few decided cases considering s 33ZDA, including *Bogan*, it has been emphasised that keeping costs proportional to the complexity of the issues and the amount in dispute will be an important consideration.

Application of the principles to the evidence in this proceeding

12 The plaintiffs submit that making a GCO in this proceeding would be a '*suitable, fitting or proper*' way to ensure that justice is done in the proceeding, because:

- (a) the costs agreements between the two plaintiffs and their respective solicitors

- expressly contemplate the plaintiffs seeking a GCO, and those agreements do not provide for a more favourable costs arrangement absent a GCO;
- (b) a GCO would provide certainty and transparency to the plaintiffs and group members in respect of funding arrangements and legal costs;
 - (c) a GCO would fairly distribute across all group members the burden of legal costs incurred in determining common questions in the proceeding;
 - (d) a GCO would ensure alignment of the interests of the plaintiffs and group members with the law practices;
 - (e) a GCO would establish a framework for providing a reasonable return to the law practices in the event of a successful outcome for group members in return for the risks assumed and the legal work performed; and
 - (f) the proposed rate for this GCO is *prima facie* fair, reasonable and proportionate. It is in keeping with the rates ordered in GCO applications by this Court in 2022 in 2023. Indeed, the proposed rate of 24% is lower than the rate ordered in six of the 10 proceedings in which a GCO has already been ordered.

13 As noted above, a price comparison between the proposed GCO and the most likely alternative funding model is a relevant consideration, but not a proxy for the statutory test. In this proceeding, the evidence is that third party funding is the most likely alternative funding model which would be put in place in the event the GCO is not made. The authorities make clear that the plaintiffs are not required to satisfy the Court that the proposed GCO would result in a quantifiably more favourable financial outcome than the likely alternative funding model. Nonetheless, the available evidence is that in this proceeding a GCO is likely to provide a better outcome for group members than if third party litigation funding were secured at the currently prevailing market rates.

Current Funding Arrangements

Mr Thomas (First Plaintiff)

14 Prior to issuing the proceeding, Slater and Gordon informed potential group members about the proposed proceeding, stating that it proposed to act on the basis that the representative plaintiff would seek a GCO. Slater and Gordon was retained by the first plaintiff pursuant to a conditional legal costs agreement dated 29 September 2021 (the 'Thomas Costs Agreement'). The Thomas Costs Agreement relevantly provided that:

- (a) Slater and Gordon's offer to act on behalf of Mr Thomas in the foreshadowed proceeding was on the basis that:
 - (i) Mr Thomas would seek a GCO in the proposed proceeding, pursuant to which Slater and Gordon would be entitled to recover 28% (inclusive of GST) from the amount of any award or settlement that may be recovered in the proceeding (clause 7.1);
 - (ii) Slater and Gordon could, at its discretion, agree with Mr Thomas to seek a GCO at a lower rate (clause 11.1);
- (b) if a GCO was not sought by Mr Thomas or otherwise not granted by the Court, Slater and Gordon could seek third party litigation funding from a litigation funder, who would fund the legal costs and bear the risk of adverse costs orders (including by providing security for costs) in accordance with the relevant funding agreement (clauses 9.1 and 11.2);
- (c) Slater and Gordon agreed to indemnify Mr Thomas against any adverse costs orders made in the proposed proceeding for the duration of Slater and Gordon's retainer (clause 13.1); and
- (d) if Slater and Gordon forms the view that the class action did not enjoy sufficient 'Financial Support' (defined to include a GCO, litigation funding agreement with a third party, or a decision by Slater and Gordon to conduct the claim on a 'no win, no fee' basis), Slater and Gordon is entitled to terminate the retainer

(clause 17.1).

15 When the proceeding was issued, Slater and Gordon filed a Funding Information Summary Statement and a Group Proceeding Summary Statement, which both stated that Slater and Gordon was acting on the basis that the lead plaintiff would seek a GCO at a rate of 28%.

16 Since June 2021, Slater and Gordon has maintained a webpage on the Slater and Gordon website for the a2 proceeding (initially, the a2 investigation), which has included statements to the effect that Slater and Gordon was acting on the basis that it would seek a GCO.

Mr Xiao (Second Plaintiff)

17 Shine Lawyers is retained by the second plaintiff pursuant to a costs agreement dated 18 November 2021 (the 'Xiao Costs Agreement').

18 The Xiao Costs Agreement relevantly provides that:

- (a) Shine Lawyers will act for Mr Xiao, on behalf of himself and group members, on the basis that he will seek a GCO such that:
 - (i) the legal costs payable to Shine Lawyers will be calculated as a percentage (which must be approved by the Court) of the amount of any damages award or settlement that may be recovered in the Xiao Proceeding, the liability for that payment will be shared by the plaintiff and all group members (clause 39);
 - (ii) Shine Lawyers will be liable for any costs payable to a2 that the Court may order (clause 44); and
 - (iii) if any order for security for costs is made in favour of a2, Shine Lawyers will provide that security (clause 45);
- (b) up to and including the application for a GCO, Shine Lawyers will conduct the class action on a 'no win, no fee' basis (clause 6);

- (c) if a GCO is granted by the Court, Shine lawyers may enter into a costs sharing arrangement with a third party in relation to its costs of conducting the proceeding (clause 7); and
- (d) if a GCO is not granted by the Court:
 - (i) Shine Lawyers may seek third party litigation funding to fund the legal costs (clause 9);
 - (ii) If reasonable funding is not obtained, Shine Lawyers may terminate the Costs Agreement and cease acting (clauses 10 and 48(g)).

19 When the Xiao proceeding was issued, a Group Proceeding Summary Statement was filed, which relevantly stated that Shine Lawyers was acting on the basis that the plaintiff would seek a GCO. The Group Proceeding Summary Statement has been available on Shine Lawyers' website since November 2021.

20 No group member has objected to, or expressed concern about, the proposed application for a GCO.

21 This evidence demonstrates that it was contemplated from the outset of the plaintiffs' engagement of the law practices that a GCO would be sought in this proceeding. Further, neither Mr Thomas nor Mr Xiao are the beneficiary of an existing contractual arrangement which is more favourable to them than the proposed GCO.

Certainty and Transparency to Group Members

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 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.

23 In this proceeding, a GCO would provide certainty for the plaintiffs and group members. If an order is made, they will know that they will pay 24% of any sum recovered and that they will get a return of 76% (subject to further order of this Court).

While the amount, if any, to be recovered by group members cannot presently be known, the making of a GCO would provide certainty in respect of the total deductions for costs.

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.⁷ 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.

25 According to the plaintiffs, the certainty and transparency provided by a GCO are important along with the consideration that the return is likely to be better than pursuant to third party litigation funding model.

Equality of financial contribution by all group members

26 The GCO would also promote equality of outcome as between group members, by reason that the requirement to pay the two law practices would be shared among all group members.

27 In contrast, in the likely counterfactual scenario of third party litigation funding, there is a risk that different group members might receive different, and inequitable, outcomes. This might occur if funded group members (who sign funding agreements with a third party funder) subsidise recovery of unfunded group members (who have not signed a funding agreement).

28 The plaintiffs have deposed that it is important to them that the Court has control over the GCO rate, to ensure the interests of group members are being protected and to make sure it is fair and reasonable.

⁷ *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [87] (Kiefel CJ, Bell and Keane JJ); *Elliott-Cardé v McDonald's Australia Limited* [2023] FCAFC 162, [170] (Beach J), [404]–[412], [423] (Lee J), [504]–[508] (Colvin J).

Alignment of interests

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.

Financial protection for the plaintiffs

30 The plaintiffs have deposed that it is important to each of them that under a GCO the firms would be liable for any order requiring payment of the defendant's costs.

31 Slater and Gordon and Shine Lawyers have already given security on behalf of the plaintiffs, pursuant to a consent order. As noted above, on 5 December 2023, orders were by consent to the effect that Slater and Gordon provide security in varied form. Although the time for the provision of that varied security has not yet arisen, there is no reason to doubt that such security will be provided.

Proposed rate of 24% is fair, reasonable and proportionate

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

34 Section 33ZDA recognises a calculus as between reward and or risk.⁸ Both law

⁸ *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, [15]-[30] ('Bogan').

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.

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).⁹

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.¹⁰ 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.¹¹

37 This proceeding is complex and is likely to involve a substantial amount of legal work, most likely over a considerable period, drawing on the law practices' expertise in shareholder class action litigation.

38 The evidence filed in support of the plaintiffs' application addresses in detail the factors that informed the proposed rate, including:

- (a) assessment of the prospects of the group members' claims succeeding;
- (b) assessment of the prospects of a successful settlement;
- (c) detailed estimates of aggregate losses;
- (d) assessment of the potential range of resolution outcomes;
- (e) consideration of the risk of recovering any successful settlement or award;
- (f) assessment of the number of group members likely to participate in any

⁹ Ibid [25], [27].

¹⁰ *Nelson v Beach Energy* [2022] VSC 424, [49] ('*Beach*').

¹¹ Ibid [42], [49].

- settlement or award;
- (g) estimate of the plaintiffs' legal costs and disbursements; and
 - (h) estimate of the defendants' legal costs and disbursements.

The plaintiffs' evidence on these matters recognises the inherent uncertainty in assessments and estimations of this kind when undertaking at such an early stage in the proceeding. Such uncertainty, combined with the number of considerations relevant to the proposal of an appropriate rate, calls for 'a record of a rational and principled assessment process.'¹² As the authorities show, uncertainty of this kind is of itself no impediment to the grant of a GCO.

39 It is relevant to the question of reasonableness that competition (in the context of competing proceedings against a2 prior to their consolidation by order of this Court) served to drive down the GCO rate being sought by Slater and Gordon from 28% to 24%. The proposed rate was also informed by a comparison with third party funding arrangements. The proposed rate is also reasonable assessed in light of the GCO rates imposed over the last two years in this Court as shown by the below table:

	GCO Percentage Ordered
<i>Allen v G8 Education Ltd</i> [2022] VSC 32	27.0
<i>Bogan v The Estate of Peter John Smedley (deceased)</i> [2022] VSC 201	40.0
<i>Nelson v Beach Energy</i> [2022] VSC 424	24.5
<i>Gehrke v Noumi Ltd</i> [2022] VSC 672	22.0
<i>Mumford v EML Payments Ltd</i> [2022] VSC 750	24.5
<i>Lieberman v Crown Resorts Ltd</i> [2022] VSC 787	16.5-27.5
<i>Fox v Westpac Banking Corporation (No 2)</i> [2023] VSC 95	24.5
<i>Anderson-Vaughan v AAI Ltd</i> [2023] VSC 465	25.0
<i>DA Lynch v Star Entertainment Group</i> [2023] VSC 561	14.0
<i>Lidgett v Downer EDI Ltd</i> [2023] VSC 574	21.0
<i>Five Boroughs NY Pty Ltd v Victoria (No 5)</i> [2023] VSC 682	30.0

40 A rate of 24% is within the range of the rates ordered in group proceedings in this Court in 2022 and 2023 and is lower than the rate ordered in six of the 11 proceedings

¹² *Bogan* (n 8) [17].

in which a GCO has already been ordered.

41 Having regard to the comparison with likely third party funding rates; the nature and complexity of the proceeding; the amounts in dispute; and the plaintiffs' solicitors' considerations of risk and reward; I am satisfied that the proposed GCO rate of 24% is fair, reasonable and proportionate in the circumstances of this proceeding.

Comparison with Counterfactual Scenarios

42 As set out above, the statutory test does not require that a proposed GCO be more beneficial to group members than the current funding model, or that a GCO yield a better outcome than any posited counterfactual funding arrangement. That is particularly so in the present circumstances, where, pursuant to the terms of the Costs Agreements, each plaintiff expressly agreed from the outset that the law practices would act on the basis that the plaintiffs would seek a GCO. Nevertheless, the authorities recognise that it may be relevant to consider the most likely counterfactual scenario to the grant of a GCO for funding the proceeding.

43 Ms Pelka-Caven deposes that if a GCO is not made in this proceeding, she would seek instructions from Mr Thomas to negotiate an offer of third party litigation funding. She deposes, that, based on her experience, she considers that a reasonable offer of third party litigation funding would likely be obtained. However, her evidence is that the process of obtaining such funding can be expensive and time consuming. Mr Allsopp's evidence is to similar effect.

44 Ms Pelka-Caven has not yet sought to obtain an offer of litigation funding, given her belief that a funder is unlikely to enter into genuine negotiations to fund the proceeding before the GCO application has been heard and determined. However, based on her experience and review of publicly available information about funding commissions, Ms Pelka-Caven's evidence is that litigation funding could be obtained for which a funding commission of between 22-27% would be charged to group members.

45 Her evidence is that additional costs to group members are typically incurred when a

proceeding is funded by a third party funder, including costs borne by the funder for the provision of any security and potentially the costs of purchasing ATE insurance. Further, most third party funders only pay a proportion of professional fees, with the balance covered by the law practice and only covered by the solicitors in the event of a successful outcome. In those circumstances, the remaining costs would be charged on a conditional basis and would thus attract an uplift fee of 25% (pursuant to the costs agreements entered into with the plaintiffs).

46 Ms Pelka-Caven deposes that if third party litigation funding is not able to be obtained, then Slater and Gordon would need to consider its rights under the Thomas Costs Agreement, including regarding termination.

47 Similarly, Mr Allsopp's evidence is that if third party litigation fund could not be obtained, Shine Lawyers is unlikely to be willing to continue to act on a 'no win, no fee' basis. His evidence is that if a GCO was not granted, and third party litigation funding could not be obtained, Shine Lawyers would have to consider its position under the Xiao Costs Agreement.

48 In light of the above, the most likely counterfactual scenario (if a GCO is not made) is third party litigation funding. The terms of any third party litigation funding is necessarily speculative at this stage of the proceeding. Ms Pelka-Caven has conducted confidential modelling of predicted returns in the proceeding based on 48 possible outcomes, comparing the outcome with a GCO and with the probable basis of any third party litigation funding. In all but two of those scenarios, the proposed GCO results in a higher return to group members than would be the case under third party litigation funding. Both plaintiffs were motivated to seek the present GCO because it would likely lead to greater returns to group members, when compared with the likely rate at which third party litigation funding might be secured.

49 The cost of the funding commission plus legal costs is likely to be higher than a GCO set at 24%. As a result, I accept that obtaining third party litigation funding is not likely to be in the best interests of the plaintiffs and group members from the

perspective of 'price', because the return to group members is likely to be lower than if a GCO were granted.

Conclusion

- 50 I am satisfied that a GCO in the proposed form at the rate of 24% is appropriate to ensure justice is done in the proceeding and will make orders accordingly.
- 51 There will no order as to the plaintiffs' costs of this application. The defendant's costs will be reserved.

CERTIFICATE

I certify that this and the 14 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 19 December 2023.

DATED this nineteenth day of December 2023.

