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

Not Restricted

S ECI 2020 03924

DAIMIN NATHAN and TANIA NATHAN — Appellants

v

MACQUARIE LEASING PTY LTD (ACN 002 674 982) — Respondent

JUDGE:	Delany J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 November 2024
DATE OF RULING:	18 December 2024
CASE MAY BE CITED AS:	Nathan & Anor v Macquarie Leasing Pty Ltd
MEDIUM NEUTRAL CITATION:	[2024] VSC 794

PRACTICE AND PROCEDURE – Leave to appeal against decision of Associate Justice - *Supreme Court Act 1986* (Vic) s 17(3) – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 77.06 – Group Proceeding – Group Costs Order – Security for costs required from a law practice – *Supreme Court Act 1986* (Vic) ss 33ZDA(1), 2(b) – Two part test for leave to appeal - *Fei v Hexin Pty Ltd* [2024] VSCA 158, applied – Substantial injustice not demonstrated if decision left undisturbed – No *House v R* (1936) 55 CLR 499 error demonstrated – No jurisdictional error - Determinative factor what the interests of justice require - *Supreme Court Act 1986* (Vic) s 33ZF – Inherent jurisdiction of the Court to order security of costs – *Stuart v Said* (2021) 65 VR 50, applied – *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377, discussed – Appeal dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	William Edwards KC, Tom Rawlinson	Maurice Blackburn
For the Defendant	Justin Williams SC, Sam Gerber	Gilbert and Tobin

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HIS HONOUR:

Overview

1 This is an application for leave to appeal a decision in a group proceeding requiring a law practice in whose favour a group costs order ('GCO') has previously been made pursuant to s 33ZDA(1) of the *Supreme Court Act 1986* (Vic) ('SCA') to provide security for the defendants' costs in the sum of $5,976,773.00 ('appeal').

2 The Order the subject of the appeal was made by Gobbo AsJ on 9 October 2024 ('Order'):

> 1. Pursuant to s 33ZDA(2)(b) of the *Supreme Court Act 1986* (Vic) and/or Order 62 of the Rules and/or the Court's inherent jurisdiction, Maurice Blackburn Pty Ltd ('**Maurice Blackburn**'), solicitors for the plaintiffs, give security for the defendant's costs of this proceeding in the sum of $5,379,096.00 (excluding GST) by 4:00pm on 11 October 2024.
>
> 2. The security provided pursuant to paragraph 1 above is to be provided by way of:
>
> (a) payment in to Court; or
>
> (b) unconditional bank guarantee from an Australian bank in a form acceptable to the Senior Master of the Supreme Court of Victoria.

3 Pursuant to s 17(3) of the SCA and r 77.06.1 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules'), Maurice Blackburn applied for leave to appeal against the Order. The Order gives effect to reasons delivered by the Associate Justice on 30 September 2024 ('the Reasons').[1]

4 The application for leave to appeal relates to an interlocutory judgment on a matter of practice and procedure. In *Fei v Hexin Pty Ltd*[2] the Court of Appeal summarised the principles to be applied in these circumstances:[3]

> [67] Like any civil appeal, [the applicants] must, respectively, obtain leave to appeal and such leave will only be granted if there is a real as opposed to fanciful prospect of success.[4] Even where such prospects are

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1 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 ('the reasons').
2 [2024] VSCA 158 ('*Fei*').
3 See also in the context of a group proceeding, *Kajula v Downer EDI* [2024] VSCA 236 [82].
4 *Supreme Court Act 1986* (Vic) s 14C.

shown, the court retains a residual discretion to refuse leave.[5] Factors which bear upon the exercise of the residual discretion include that the matter in question is one of practice and procedure and whether the applicant would suffer any substantial injustice if the decision was left to stand.[6]

…

[68] Being an order of a discretionary nature, it was also not in dispute that any appeal against the order must be determined upon principles as laid down in *House v R*.[7] That is, it must be shown that the decision was made in error by acting on a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight to relevant considerations or making a mistake as to the facts. In addition, the result may be so unreasonable or plainly unjust that the appellate court may infer that there has been some failure to properly exercise the discretion. …

[69] It has been held in numerous cases over many years that to succeed in obtaining leave to appeal an interlocutory order made in the exercise of a discretion, the applicant must not only show that the decision may have been made in error in a House sense, but must also show that they would suffer a substantial injustice if the decision was left undisturbed.[8] For policy reasons, this two-fold test is to be applied stringently.

[70] In the context of an application for leave to appeal against an order for security for costs, the effect of these authorities was conveniently stated in *Livingspring Pty Ltd v Kliger Partners*[9] by Maxwell P and Buchanan JA as follows:

> As applicant for leave, LS has several hurdles to clear. First, there is a clear legislative policy against interlocutory appeals. In Niemann, the Full Court adopted and applied — as an earlier Full Court had done in *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* — the following statement of principle from the 1901 judgment of the Full Court in *Perry v Smith*:
>
> Parliament evidently desired to cut down these appeals from interlocutory orders as much as possible, and with that object have made this provision [that there be no appeal from such an order except by leave] … We think that the object which Parliament had should be recognised by this Court in a liberal

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5 *Molonglo Group (Australia) Pty Ltd v Cahill* [2018] VSCA 147 [96] (Maxwell ACJ, Whelan and Kyrou JJA); *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2018] VSCA 260 [110] (Kyrou and McLeish JJA).

6 *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2018] VSCA 260 [110]–[113] (Kyrou and McLeish JJA), citing *Bodycorp Repairers Pty Ltd v GDG Legal Pty Ltd* [2018] VSCA 32 [19] (Ferguson CJ, Whelan and McLeish JJA).

7 [1936] HCA 40; 55 CLR 499 , 504–5 (Dixon, Evatt and McTiernan JJ).

8 *Perry v Smith* (1901) 27 VLR 66; *Darrel Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* (1969) VR 401, 407–410 (Winneke CJ, Pape and Starke JJ); *Niemann v Electronic Industries* [1978] VR 431, 433 (McInerney J), 437–9, 441 (Murphy J), 444–5 (Gillard J) ('Niemann').

9 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 (Maxwell P and Buchanan JA) ('*Livingspring*').

manner, and not begrudgingly.

In *Niemann*, Murphy J added:

> It is plain, as [the Full Court] said, from the terms of the section that the legislature was expressing an intention in the words used that appeals from interlocutory orders should not be permitted except in special circumstances.

Secondly, the power to order security for costs is discretionary. An appeal from such a decision is subject to the well-known limitations identified by the High Court in *House v R* . Thirdly, the exercise of this particular discretion does not determine substantive rights, but concerns a matter of practice and procedure. That being so, we are guided (as was the Full Court in Niemann) by what Sir Frederick Jordan said in *Re Will of Gilbert*:

> [I]f a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal.

The Full Court drew on these earlier authorities to articulate the two-part test for leave to appeal which has been applied ever since:

> We ought to address ourselves to the question whether the order … is attended with sufficient doubt to warrant its being reconsidered on appeal and secondly whether substantial injustice will be caused to the applicant if the order … is allowed to stand.

These are, as Murphy J said in Niemann, stringent requirements. Given that modern litigation takes longer and costs more than those earlier Full Courts could ever have imagined, there is a case for even greater stringency today. ...

If appellate intervention in interlocutory decision-making is to become truly exceptional, as Parliament intended, the tests to be applied at first instance must be as clear and straightforward as possible, to minimise both the scope for error and the scope for argument about whether error has occurred.[10]

[71] In summary, there is a clear legislative policy against interlocutory appeals; appeals from discretionary decisions are determined by the principles in House; a tight rein is to be applied to appeals on matters of practice and procedure so that, in addition to demonstrating sufficient doubt concerning the original decision, to obtain leave to appeal the applicant must show that substantial injustice will be caused if the decision is allowed to stand; and these requirements are to be

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10 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [6]–[9] (Maxwell P and Buchanan JA) (citations omitted).

> regarded as 'stringent'. The 'tight rein' is mediated through the exercise of the residual discretion to refuse leave even if a real prospect of success in establishing error is demonstrated.

5 Turning first to the second limb of the twofold test referred to in *Fei*,[11] for the reasons discussed below, I am not satisfied the applicants for leave to appeal have shown that they will suffer substantial injustice if the Order is left undisturbed. For that reason, the appeal must be dismissed.

6 If I am wrong in relation to the second limb of the twofold test, the appeal must be refused for the separate reason that the applicants have failed to establish error in accordance with the principles laid down in *House v R*.[12]

The applications for leave to appeal

7 The respondent, Macquarie Leasing Pty Ltd, ('Macquarie') opposed both the application for leave to appeal and, should leave be granted, the substantive appeal. It did not oppose Maurice Blackburn being given leave to bring the application.

8 The application to appeal relies on three grounds. Ground 1 asserts that the Associate Justice erred in finding that there was reason to believe that Maurice Blackburn will be unable to pay Macquarie's costs of $5,976,773 if so ordered.

9 Ground 1 asserts an erroneous finding based on errors set out in subparagraphs 1.1-1.9 of the application to appeal. Those subparagraphs were grouped together and summarised as follows in Maurice Blackburn's written submissions:

(a) the Associate Judge erred in giving no (or inadequate) weight to the fact that Maurice Blackburn's exposure was around $3m (grounds 1.2, 1.8);

(b) the evidence regarding Maurice Blackburn's assets disclosed no reason to believe it would be unable to meet an adverse costs order (grounds 1.1, 1.3); and

(c) the evidence regarding Maurice Blackburn's cash flow disclosed no reason to

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11 *Fei v Hexin Pty Ltd* [2024] VSCA 158 [69] (Kennedy, Macaulay and Lyons JJA).

12 *House v The King* [1936] HCA 40; 55 CLR 499 ('*House v R*').

believe it would be unable to meet an adverse costs order (grounds 1.4-1.9).

10 Ground 2 alleges that the Associate Judge erred in finding that the interests of justice require Maurice Blackburn to give security for the defendant's costs, having made the erroneous findings stated under ground 1. Ground 3 alleges the Order requiring Maurice Blackburn to give security for the defendant's costs was unreasonable or plainly unjust, having made the erroneous findings stated under ground 1.

11 Both grounds 2 and 3 depend for their success upon Maurice Blackburn establishing the Associate Judge made erroneous findings under ground 1. Little attention was directed to grounds 2 and 3 in the conduct of the appeal.

12 Macquarie filed a Notice of Contention ('Notice'). Macquarie contended the Order should be affirmed on grounds of law relating to the proper construction of s 33ZDA(2)(b) of the SCA which Macquarie contended were either not decided or were erroneously decided.

The application for security for costs

13 The application for security for costs was made by summons dated 25 August 2023 ('application'). The application was expressed to be made pursuant to s 33ZF of the SCA, r 62 of the Rules and the inherent jurisdiction of the Court.

14 Section 33ZF of the SCA provides:

> In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

15 Rule 62.02 relevantly provides:

> 62.02(1) where —
>
> (a) …
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> (b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues, not for the plaintiff's own benefit, but for the benefit of some other person, and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
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> …

(f) under any Act the Court may require security for costs —

the Court may, on the application of a defendant order that the plaintiff give security for costs of the defendant of the proceeding…

16 In *Stuart v Said* the Court of Appeal held the inherent jurisdiction of the Court to order security for costs may be exercised whenever the interests of justice require.[13] In summary:[14]

(a) The inherent jurisdiction to order security for costs may be exercised whenever the interests of justice require, in all the circumstances of the case.

(b) The Court has a discretion which is not otherwise fettered or confined by reference to specified categories.

(c) The inquiry when the Court's jurisdiction is invoked involves the single issue of what the interests of justice require and it is not necessary to satisfy any additional precondition to enliven the jurisdiction.

(d) The power is not usually exercised against an impecunious plaintiff unless there is something in addition to the plaintiff's impecuniosity to justify making the order.

(e) There is no requirement that the defendant establish 'exceptional circumstances', or that the case is 'ill-pleaded', lacks prospects of success, or is harassing or vexatious. Each of those matters may be relevant in a given case, but they do not constitute conditions to be satisfied before an order can be made.

(f) The absence of a properly pleaded case may likewise be relevant to the exercise of the discretion.

The evidence

17 The substantive evidence relied on at the hearing of the application to appeal is the same as the evidence relied on below. In addition, Maurice Blackburn relied on the affidavit of Rebecca Gilsenan affirmed 23 October 2024.

18 The evidence considered in this appeal concerned the position of Maurice Blackburn as at November 2023, the time of the Associate Justice's decision. No evidence was led before me about any changes in the financial position of Maurice Blackburn or its financial outlook between the time of that hearing and the hearing of this appeal.

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13 [2021] VSCA 226 [5]-[6], [13], [22]-[25], [35].
14 [2021] VSCA 226 [35].

19 At the initial hearing of the application and the hearing of the application to appeal, Maurice Blackburn relied on the following evidence:

(a) affidavit of Thomas John McDonald, a director of Vannin Capital Investments (Australia) Pty Ltd ('Vannin') and exhibit TJM-1 affirmed 25 October 2023 ('McDonald affidavit');

(b) expert report of Geoff Atkins, an expert actuary, dated 26 October 2023 ('Atkins Report');

(c) affidavit of Rebecca Gilsenan, principal of Maurice Blackburn, affirmed 13 November 2023 and exhibit RG-1 ('Gilsenan affidavit'). Ms Gilsenan gave evidence concerning the financial position and risk profile of Maurice Blackburn. She exhibited audited financial statements for FY2018-FY2023 and the cost sharing agreement relating to the group proceeding with Vannin;

(d) supplementary expert reports of Mr Atkins dated 14 November 2023 and 27 November 2023; and

(e) affidavit of Patrik Valsinger, the CFO of Maurice Blackburn, affirmed 27 November 2023 ('Valsinger affidavit').

20 Macquarie relied on the following evidence, both at the initial hearing of the application and at the hearing of the application to appeal:

(a) paragraph 117 of the redacted affidavit of Andrew John Watson dated 20 May 2021;

(b) paragraph 35 of the redacted affidavit of Andrew John Watson dated 26 August 2022;

(c) affidavit of Philippa Sally Hofbrucker affirmed 25 August 2023 and exhibit PSH-8;

(d) report of Mr Nicolaides, forensic accountant, dated 22 November 2023

('Nicolaides Report');

(e) Portfolio Adverse Costs Insurance Policy underwritten by AMTrust Europe Limited dated 27 September 2023;

(f) Syndicated Facility Agreement dated 28 July 2023;

(g) Class Action Facility Agreement dated 21 August 2023; and

(h) a printout of the Maurice Blackburn website in respect of the Roundup Class Action proceeding dated 23 November 2023 which ran in the Federal Court from September 2023 to October 2023 ('Roundup litigation').

21 At the hearings before the Associate Justice and before me, none of the persons who gave evidence on affidavit and neither of the experts were cross-examined.

22 The sequence of the evidence below was that Mr Atkins provided his report and his first supplementary report. Mr Nicolaides responded to those reports. Mr Atkins then provided his further supplementary report. The Valsinger affidavit was provided on the day before the hearing, after service of the Nicolaides Report.

23 On appeal Maurice Blackburn put particular emphasis on its financial position recorded in its audited financial statements. Those statements recorded Maurice Blackburn's financial position in each of the financial years FY2018-FY2023 as follows:

Financial year	Revenue	Net operating profit	Statutory profit	Net assets	Cash/ equivalents
2018[33]	215,049	28,660	(15,714)	96,648	13,717
2019[34]	223,702	52,070	39,816	184,901	15,869
2020[35]	234,014	39,810	21,658	205,231	66,247
2021[36]	224,335	20,777	1,042	204,512	6,160
2022[37]	243,580	38,866	12,909	210,891	11,937
2023[38]	248,557	34,399	5,144	216,035	11,377

24 The Associate Justice found there was no basis for Macquarie to undermine Maurice Blackburn's audited financial statements and that Macquarie did not seek to do so.

The same was the position before me.

25 As at 30 June 2023 approximately 80% of the total assets of Maurice Blackburn comprised 'no win no fee' work in progress ('WIP'). Macquarie did not suggest that the WIP was not properly recorded or that Maurice Blackburn's audited accounts did not comply with the accounting standards.

26 Parts of the evidence relied on below were the subject of confidentiality orders.

27 The Valsinger affidavit exhibited confidential and commercially sensitive material regarding the funding, costs and exposures of the class actions conducted by Maurice Blackburn's Class Actions Practice Group.

28 It is unnecessary to refer to confidential aspects of the evidence in these reasons.

The Reasons

29 By its summons Macquarie sought security for its costs of $5,976,773, by way of payment into Court or bank guarantee, or in such other amount or form as the Court thought fit.

30 While Maurice Blackburn resisted the application, it offered an undertaking to the Court to pay adverse costs and contended that such an undertaking was sufficient.

31 The Associate Justice identified three issues requiring determination:

(a) whether the interests of justice require an order for security;

(b) if so, is an undertaking proposed by Maurice Blackburn sufficient security?

(c) if not, what amount and form of security should be ordered?

32 The Associate Justice noted that '[s]ecurity for costs is generally ordered in class actions involving a litigation funder' and that lawyers benefiting from a GCO stand in an analogous position to a funder.[15] She held 'the relevant risk assessment is …

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15 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [21].

that of the law practice's ability to meet an adverse order for costs'.

33 The Associate Justice did not accept Maurice Blackburn's submission that the very fact of there being a GCO obviates the need for security. She found the fact that s 33ZDA(2)(a) of the SCA makes Maurice Blackburn liable for Macquarie's costs does not transfer the risk of the litigation falling to Maurice Blackburn in the same way that an order for security for costs transfers that risk to, for example, a litigation funder. All it creates is an unsecured risk.

34 Section 33ZDA(2)(b) specifically contemplates the making of an order for security for costs notwithstanding that s 33ZDA(2)(a) has transferred liability for those costs to the law practice. The relevant question to be determined was Maurice Blackburn's ability to meet an adverse costs order.

35 In *Livingspring*, the Court of Appeal said the threshold required to be established as the basis for a finding there is 'reason to believe' a plaintiff, or in this case Maurice Blackburn, will be unable to pay the costs of the defendant if successful in its defence of the proceeding is 'necessarily a low threshold'.[16]

36 The Associate Justice held 'reason to believe', in this context, requires 'a rational basis for the belief and no more' and 'the Court must consider whether there is a risk that a costs order will not be paid'. Quoting from the decision in *Livingspring*, her Honour referred to the need to take a 'practical, common sense approach to the examination of the corporation's financial affairs'.[17]

37 Having considered the evidence and the submissions, her Honour found the risks associated with Maurice Blackburn's financial position, assessed at the 28 November 2023 date of hearing, exceeded the *Livingspring* threshold.

38 Having reached that conclusion her Honour determined the interests of justice required an order for security for Macquarie's costs.

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16 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [15] (Maxwell P and Buchanan JA).
17 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [15] (Maxwell P and Buchanan JA).

39 The Associate Justice determined the undertaking proposed by Maurice Blackburn did not satisfy the principles raised by Hargrave J in *DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors* ('*DIF III*').[18] That being the case, security was required to be provided by way of bank guarantee or payment into court.

40 As to quantum, taking a broadbrush approach, her Honour discounted the amount claimed by Macquarie by a further 10% with the result that security was fixed in the sum of $5,379,096 (GST exclusive).

The principles to be applied on an appeal under r 77.06

41 An appeal from a decision of an Associate Judge under r 77.06 is an appeal by way of rehearing.[19] In *Re Sleeping Duck Pty Ltd*, Matthews J said: [20]

> 13 An appeal brought under r 77.06 of the SC Rules is to be conducted by way of rehearing, but it is not a *de novo* rehearing. This means that before appellate power can be exercised by this Court to overturn the Ruling, the Fourth Defendant must demonstrate that a factual, legal or discretionary error was made by the primary judge. As stated in *Oswal v Carson* (citations omitted):
>
> Such appeals are no longer by way of rehearing de novo. Instead, they are rehearings which, in the absence of further evidence or a change in the law, ordinarily require the appellant to show error on the part of the Associate Judge before appellate power may be exercised. In addition, if the orders from which an appeal is brought relate to a matter of practice and procedure ... an appellate court will exercise particular caution in reviewing the decision.

42 A clear statement of the principles to be applied on the hearing of such an appeal is found in *Fei,*[21] the relevant passages from which are reproduced above. In determining the application, I have proceeded in accordance with those principles.

No substantial injustice shown

43 Macquarie submitted that no substantial injustice will be suffered by Maurice Blackburn or by the plaintiffs and group members if the Order were permitted to stand.

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18 *DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401 ('*DIF III*') [40].
19 *Weber v Deakin University (No 2)* [2016] VSC 147; 51 VR 272 [24] (Zammit J).
20 [2023] VSC 541 [13].
21 [2024] VSCA 158 [67] (Kennedy, Macaulay and Lyons JJA).

44 Maurice Blackburn did not address the question of substantial injustice in its written submissions. During the hearing it submitted there is 'no absolute rule' that unless substantial injustice is shown, an appellate Court will not interfere with the decision below.[22] It referred to *Adam P Brown Male Fashions v Philip Morris Inc*, where Gibbs CJ, Aickin, Wilson and Brennan JJ said: [23]

> It is safe to say that the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration.

45 Maurice Blackburn submitted that if substantial injustice must be shown, it sustained such injustice because it was required to pay money because of a plainly wrong decision. In addition, it was ordered to pay the costs of the summons.

46 Macquarie submitted that Maurice Blackburn's liability to provide any security for costs is a matter specifically contemplated under the GCO legislation. Given that the cost of providing security is marginal relative to the economics of the proceeding as a whole, there would be no substantial injustice if the appeal were dismissed, even supposing the decision below to be wrong.

47 Maurice Blackburn took issue with the proposition that the monetary consequences of the Order were a business risk, a consequence of the GCO. It submitted the fact it promptly provided the security pursuant to the Order without prejudice to its right to contend the decision was wrong so that the trial which was imminent could proceed should not be used against it when 'substantial injustice' is assessed.

48 When seeking a GCO in 2021, and at all relevant times Maurice Blackburn has maintained that it is able to provide security for costs in any form that is required. It made good that proposition by complying with the Order, by providing a bank guarantee within two days of the Order being made. The trial has now concluded with judgment reserved.

49 If the Order is allowed to stand the evidence establishes that the expense to Maurice

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22 *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* [2021] QCA 198; 9 QR 141 [13] (Bond JA).

23 [1981] HCA 39; 148 CLR 170, 177.

Blackburn of compliance will be around $230,000 per year, comprised of facility fees of about $26,000 and net interest of around $204,000. However, the trial judge is unlikely to take as much as a year to deliver his decision. As a result the actual cost to Maurice Blackburn of providing security pursuant to the Order is likely to be less than $230,000.

50 Macquarie submitted the expense to Maurice Blackburn must be weighed against the profits it stands to make from any success in the proceeding. The lead plaintiffs' claim damages of more than $3,396. Maurice Blackburn represents around 193,900 class members. If the case is successful, damages may exceed $500m. Maurice Blackburn is entitled to claim 24.5% of damages awarded under the existing GCO – many multiples of its possible outlay on security for costs.

51 Macquarie submitted that because Maurice Blackburn is remunerated by a GCO, the grant of security and the expense of providing it can have no effect on the entitlements of the plaintiffs and group members.[24] Pursuant to the GCO the plaintiffs and group members must sacrifice 24.5% of any settlement or judgment to Maurice Blackburn, regardless of the costs Maurice Blackburn actually incurs.

52 The decision in *Fei* by which I am bound was not referred to by either party to the application. In *Fei*, as had earlier been the case in *Niemann v Electronic Industries*,[25] the Court of Appeal was guided by what Sir Frederick Jordan said in *Re Will of Gilbert*.[26] Namely, that it is necessary to keep a tight rein on appeals which concern matters of practice and procedure. In *Fei* the Court of Appeal referred to the 'two-part test for leave to appeal which for policy reasons 'is to be applied stringently'.[27] The Court said: [28]

> to obtain leave to appeal the applicant must show that substantial injustice will be caused if the decision is allowed to stand.

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24 *Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd* (2021) 9 QR 141 [57]-[60] (Bond JA, Fraser JA and Wilson J agreeing).
25 [1978] VR 431, 441-442 (Murphy J) ('*Niemann*').
26 (1946) 46 SR (NSW) 318.
27 *Fei v Hexin Pty Ltd* [2024] VSCA 158 [69] (Kennedy, Macaulay and Lyons JJA).
28 *Fei v Hexin Pty Ltd* [2024] VSCA 158 [71] (Kennedy, Macaulay and Lyons JJA).

53 I am not satisfied that Maurice Blackburn or the plaintiffs will suffer substantial injustice if the Order remains in place.

54 Section 33ZDA(2)(b) expressly provides that a law practice must give any security for the costs of the defendant in a proceeding that the Court may order the plaintiff to give. The Order sought to be appealed is the type of order expressly contemplated by the statutory scheme. That an order might be made against a law practice with the benefit of a GCO made pursuant to s 33ZDA(1) cannot itself be unjust. An order requiring security to be provided is the product of the statutory scheme and represents the crystallisation of a business risk willingly undertaken by the law practice.

55 In the Victorian Law Reform Commission's Access to Justice - Litigation Funding and Group Proceedings Report, in response to which s 33ZDA was introduced, the Commission observed: [29]

> Class actions are an appropriate forum for lawyers to absorb the risks of litigation… Security for costs is generally ordered in class actions involving a litigation funder and the Commission considers that lawyers should similarly relieve the representative plaintiff of this risk if they stand to receive a percentage share of the settlement or judgment amount.

56 In this case the effect of the particular order for security for costs is not to visit substantial injustice upon Maurice Blackburn. The potential reward for Maurice Blackburn, should the action be successful is currently 24.5% of hundreds of millions of dollars. While that percentage may later be amended pursuant to s 33ZDA(3)[30] if the action is successful, any revision to the GCO percentage would likely take into account the cost to Maurice Blackburn of providing security, if the cost of doing so were shown to be a material cost.

57 However, I do not consider the cost to Maurice Blackburn of providing security for costs in accordance with the Order is material when assessed against the potential benefit to be enjoyed by the law practice should the proceeding be successful. If $250m, rather than $500m, is recovered as damages and if the GCO rate remains at

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29 Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Final Report, March 2018) 63[3.67], 65 [3.80].

30 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 (Watson J).

24.5%, Maurice Blackburn stands to recover $61.25m for its work and for its assumption of risk.

58 In that scenario $230,000 being the likely maximum cost of providing security over 12 months represents less than 5% of the potential upside for the law practice. In that scenario $230,000 being the likely maximum cost of providing security over 12 months represents less than 5% of the potential upside for the law practice.

59 While there can be no certainty either about success in the proceeding or about the quantum of damages that may be awarded following the trial or pursuant to a settlement, I am not persuaded the effect of the Order is to occasion substantial injustice to Maurice Blackburn.

60 I also consider that no substantial injustice is likely to flow to the plaintiffs and group members should the decision below be permitted to stand. The making of the Order is unlikely to have any impact on the entitlements of the plaintiffs and group members. The GCO currently operates to fix the percentage of any settlement or judgment to which Maurice Blackburn is entitled. As I do not consider the cost of the provision of security as material, it is unlikely any application by Maurice Blackburn to increase the percentage pursuant to s 33ZDA(3) on account of the cost associated with compliance with the Order would be successful.

61 There being no substantial injustice should the Order be permitted to stand, applying *Fei*, leave to appeal is refused.

62 In case I am wrong, I will deal with the substantive issues raised by the proposed grounds of appeal and by the Notice. It is convenient to begin with the issues raised by the Notice and then, to turn to the proposed grounds of appeal.

The proper construction of s 33ZDA

63 The issue of the proper construction of s 33ZDA(2)(b) is the subject of the Notice. Section 33ZDA relevantly provides:

> **33ZDA Group costs orders**

(1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—

(a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and

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

(2) If a group costs order is made—

(a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a)…

64 In her Reasons the Associate Justice identified and determined the construction issue as follows:

16. Determining whether an order for security should be made requires a risk assessment. It is on this point that the parties diverged as to the party to whom that risk assessment should be directed.

17 Senior Counsel for Macquarie submitted that the relevant assessment was for the Court to consider the ability of the plaintiffs to meet an order for security. It was said that the relevant impecuniosity was that of the plaintiffs which it was contended was uncontroversial and effectively admitted…

18. Conversely, Senior Counsel for the plaintiffs and Maurice Blackburn submitted that the position advanced by Macquarie was illogical and fundamentally misconceived. They submitted that a careful reading of s 33ZDA(2)(a) of the SCA made it clear that any liability for costs rests with the law practice not the group members in addition to the law practice. On this basis, the plaintiffs and Maurice Blackburn contended that the relevant risk assessment must be directed to Maruice Blackburn's ability to meet any adverse costs order. To accept the analysis suggested by Macquarie would, it was submitted, virtually remove any discretion from the Court, a submission which I accept, particularly having regard to the terms of s 33ZF of the SCA.

The Notice of Contention

65 Macquarie submitted the issue of principle arising from the Reasons is, when an application for security is brought against a plaintiff in a proceeding in which a GCO has been made, is the relevant inquiry into the plaintiffs', or the law practice's ability to meet an adverse costs order?

66 Macquarie submitted the Associate Justice erred in holding the relevant risk assessment must be directed to Maurice Blackburn's ability to meet any adverse costs order. It submitted the Associate Justice should have considered only whether it was appropriate to require the plaintiffs to provide security for costs.

67 Macquarie submitted the Associate Justice correctly held that Maurice Blackburn stood to benefit from litigation in much the same way as a commercial funder would. Macquarie submitted that where a litigation funder is involved, an order for security is usual. In cases where an impecunious plaintiff is funded by a commercial litigation funder the defendant is not required to prove a material risk that the litigation funder would not be able to meet an adverse costs order. It is only the impecuniosity of the plaintiffs that is relevant to the discretion to order that security be provided. The same should be the approach in cases such as the present.

68 Macquarie submitted s 33ZDA(2)(b) does not create a discretion to order a law practice to give security for costs. The section assumes the exercise of the usual discretion to order security. That assumption is important because an order for security only has significance if it is not complied with and the consequence of non-compliance (stay or dismissal) is borne by the plaintiffs.[31]

No error of statutory construction

69 The issue underlying the Notice raises a question of statutory construction.

70 The text of s 33ZDA(2)(b) is unambiguous. As appears from its concluding words, the subsection provides a jurisdictional basis to make an order for security for costs

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31 *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194; 283 FCR 123 [15] (Allsop CJ, Middleton and White JJ).

against a plaintiff and not against anyone else.

71 However, to construe the subsection in the manner contended for by Macquarie, while supported by the concluding words, fails to have regard to the balance of the text of the subsection. To adopt the construction contended for would also ignore and be contrary to both the context and purpose of the subsection.

72 There is more to the text of s 33ZDA(2)(b) than the concluding words. Read as a whole it is clear that the text expressly provides that it is the law practice representing the plaintiff and group members that must give any security for the costs of the defendant that the Court may order the plaintiff to give. The risk assessment required is a risk assessment concerning the person required to provide the security, the law practice which has the benefit of a GCO pursuant to s 33ZDA(1).

73 Context is important. Subsection (2)(a) provides that if a GCO is made, it is the law practice that is liable to pay any costs payable to the defendant in the proceeding. While subsection 2(a) does not in terms say that the lead plaintiff and group members are not liable to pay any costs payable to the defendant, that is its intent.

74 Concerning purpose, the Associate Justice referred in her Reasons to the judgment of Nichols J in *Fox v Westpac Banking Corporation*.[32] Her Honour relied on the following passages from *Fox* which I also endorse:

> 20 By incorporating the elements it does, s 33ZDA implicitly permits the linking of risk and reward in the calculation of a group costs order. I say that because the section provides that a legal practice the subject of a group costs order will be made liable to pay the defendant's adverse costs and to give any security for the defendant's costs. 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. The policy reflected in the risk-reward model was discussed in the Victorian Law Reform Commission's *Access to Justice – Litigation Funding and Group Proceedings* Report in response to which s 33ZDA was introduced, in these terms –
>
> Class actions are an appropriate forum for lawyers to absorb the risks of litigation and be rewarded for this, because the representative plaintiff has a disproportionate exposure to the financial risk of an

[32] [2021] VSC 573; 69 VR 487 ('*Fox*') (citations omitted) [20]-[21], [37]-[38].

unfavourable outcome, compared to both the value of their own claim and the exposure of other class members. The risk is a significant disincentive to taking on the role and is only partly mitigated when lawyers act on a 'no win, no fee' basis.

21 Class actions are an appropriate forum for lawyers to absorb the risks of litigation and be rewarded for this, because the representative plaintiff has a disproportionate exposure to the financial risk of an unfavourable outcome, compared to both the value of their own claim and the exposure of other class members. The risk is a significant disincentive to taking on the role and is only partly mitigated when lawyers act on a 'no win, no fee' basis. The reference in the VLRC Report to *disincentives* to a person becoming a plaintiff is a particular manifestation of the broader purpose of s 33ZDA, which was described in the second reading of the Bill introducing the provision, as enhancing access to justice in Victoria "by reducing potential barriers to commencing class actions in the Supreme Court". Section 33ZDA sits within Part 4A of the Supreme Court Act which permits and governs the conduct of group proceedings in this Court. The principal object of that part of the Act is enhancing group members' access to justice. Section 33ZDA then, builds on the existing provisions of Part 4A of the Act by conferring on the Court the power, in an appropriate case, to facilitate access to justice for group members by making a GCO, subject to the statutory pre-conditions to the exercise of the discretion being met….

37 … the requirement that the position of all parties be considered will not apply as generally or as directly in the case of s 33ZDA as it does for the purposes of s 33ZF, because the subject matter of s 33ZDA concerns the plaintiff's liability in respect of legal costs. I accept the contradictor's submissions that evidence of the nature and extent of the risk that the legal practice would be prepared to accept might inform the fixing of an appropriate percentage, but the interests of the law practice are not directly in issue. Whether or not a defendant has a legitimate interest in an application for a group costs order (or in aspects of that application) is a question to be decided on a case by case basis. Questions as to the capacity of the law practice to give security may well legitimately concern a defendant. Because these applications were the first of their kind, I indicated to the parties at an early stage that I would receive submissions from all parties on matters relevant to their interests, including as to the principles that should govern the interpretation of s 33ZDA.

38 …s 33ZDA is a provision of the kind that reflects a legislative intention to confer on courts the widest possible power to do what is appropriate to achieve justice in the circumstances, and it is inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

75 Because subsection (2)(b) requires a risk assessment of the law practice's ability to meet an adverse order for costs, previous cases that deal with the provision of security

for costs by third party litigation funders may provide guidance on the general approach to be adopted. That is consistent with the statements in the VLRC Report to which Nichols J referred in *Fox*. However, there is an important distinction between a risk assessment involving a third party litigation funder in a class action and a risk assessment involving a law practice in respect of whom a GCO has been made pursuant to s 33ZDA(1).

76 Upon a GCO being made, subsection (2)(a) imposes a liability upon the law practice to pay any costs payable to the defendant in the proceeding. In the case of a third party litigation funder absent a GCO, a court order is needed to impose liability for costs on the litigation funder.

77 Contrary to what appeared to be Macquarie's contended for approach, the fact subsection (2)(b) contemplates the provision of security even though by reason of subsection (2)(a) the law firm is already liable does not mean that in every case or only in cases where the individual plaintiffs themselves do not have sufficient assets to meet an adverse costs order, should the discretion be exercised. Subsection (2)(b) confers a discretion upon the Court to require security for costs. The subsection does not constrain the circumstances in which the discretion may be exercised.

78 The summons relied on s 33ZF of the SCA, r 62 of the Rules and the inherent jurisdiction as the basis for the orders for which Macquarie contended. Both s 33ZF and the inherent jurisdiction of the Court contemplate that security for costs may be ordered wherever the interests of justice require. I agree with the Associate Justice that the determinative factor in this case is what the interests of justice require.

79 Section 33ZF provides that in any proceeding (including an appeal) the Court may make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding. In *Kajula Pty Ltd v Downer EDI* the Court of Appeal described s 33ZF as:[33]

> a broad power that provides the Court with a means to regulate its processes and manage cases before it, and therefore encompasses decisions that may be characterised as discretionary.

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[33] [2024] VSCA 236 [74] (Macaulay, Lyons and Orr JJA).

80 An order for security for costs relying on the inherent jurisdiction of the Court is not conditioned upon the applicant showing there is reason to believe the plaintiff will be unable to pay costs if ordered to do so, although if that is the position, the interests of justice may require that security for costs be provided. As the Court of Appeal held in *Stuart v Said*, 'the inherent jurisdiction to order security for costs may be exercised whenever the interests of justice require, in all the circumstances of the case'.[34]

81 Where the plaintiff is a corporation (here the law practice is a corporation) r 62.02(1)(b) directly, and r 62.02(1)(f) indirectly, provide a jurisdictional basis to order security for costs relying on s 1335(1) of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

82 While the language of r 62.06(1)(b) concerning a corporation and that of s 1335(1) of the *Corporations Act* are not identical, as the Court of Appeal noted in *Livingspring*, the principles that have been developed, have been developed and applied on the assumption they apply equally to both.[35]

Ground 1: No error in the *House v R* sense

83 Ground 1 asserts that the Associate Justice erred in finding there was reason to believe that Maurice Blackburn will be unable to pay the defendant's costs of $5,976,773 if so ordered.

84 Maurice Blackburn submitted that finding constitutes jurisdictional error. In support of that proposition it relied on *Livingspring*, where the Court of Appeal identified the question of whether there was reason to believe as 'the jurisdictional question'.[36]

85 Macquarie submitted the reliance on the finding below concerning reason to believe as a basis for jurisdictional error is misconceived. It submitted the decision below was not required to be and was not founded on the existence of a jurisdictional fact. Section 33ZDA(2)(b) is at large. It assumes a security for costs application relying on the inherent jurisdiction of the Court or s 33ZF. Section 1335(1) of the *Corporations Act* was

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34 [2021] VSCA 226; 65 VR 50, 52 [7] (Maxwell P and McLeish JA).
35 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [10] (Maxwell P and Buchanan JA).
36 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [53] (Maxwell P and Buchanan JA).

not relied on in the summons as a ground for security for costs. Even if the summons had relied on s 1335(1), the threshold for 'reason to believe' is very low and was satisfied in this case.

No 'jurisdictional fact' error

86 Contrary to the submissions by Maurice Blackburn, the 'reason to believe' finding is not a finding of a jurisdictional fact for the purpose of s 33ZDA(2)(b). The section involves a discretion which may be exercised in any case where an GCO has been made pursuant to s 33ZDA(1). The existence of a GCO is the only jurisdictional requirement for the exercise of the power. The making of an order for security for costs is not otherwise conditioned on the existence of a jurisdictional fact.

87 As well as not being in conformity with the statutory scheme the Maurice Blackburn jurisdictional fact submission disregards the clear statement in her Honour's Reasons that 'the determinative factor is what the interests of justice require' and fails to grapple with the basis for the relief sought in the summons.

88 As her Honour found, the inherent jurisdiction, upon which specific reliance was placed in the summons, permits the making of an order for security for costs where that is necessary in the interests of justice. Section 33ZF, also relied on in the summons, permits an order for security for costs where the court thinks it is appropriate or necessary to ensure that justice is done in the proceeding.

89 The Associate Justice found that the interests of justice required that such an order be made, noting that determining whether security should be ordered pursuant to by s33ZDA(2)(b) required a risk assessment. The Associate Justice undertook that assessment by reference to the evidence, including the expert opinion evidence. Having done so, she concluded that the risks associated with Maurice Blackburn's financial position exceed the *Livingspring* threshold from which it followed that the interests of justice required an order for security for costs.

90 The conclusion by her Honour that there was 'reason to believe', applying the 'low threshold' in *Livingspring*, was open on the evidence before her but it was not a finding

upon which jurisdiction to make an order depended.

91 Even if the 'reason to believe' finding concerned a jurisdictional fact, which it did not, there was no error. Her Honour arrived at her conclusion that there was reason to believe Maurice Blackburn would be unable to pay Macquarie's costs following a careful and considered analysis of the evidence and submissions before her.

No error concerning 'reason to believe'

The submissions

92 When it comes to the detail in the application to appeal, nearly all of the asserted errors in grounds 1.1-1.9 are errors of fact. The submission by Maurice Blackburn is that the Associate Justice should have made different factual findings. However, for an error in the *House v R* sense to be made out, the mistake of fact must be both clearly wrong[37] and to have caused or contributed to the result.[38] Those circumstances are not present here.[39]

93 In support of ground 1 Maurice Blackburn submitted two aspects of the evidence were critical. First, as the Associate Judge correctly found, there was no basis upon which Macquarie could undermine the audited financial statements. Secondly, the effect of the Cost Sharing Agreement was that Vannin would meet 50% of an adverse costs order that Maurice Blackburn was required to pay. Maurice Blackburn submitted that meant that only half of the potential adverse costs of $5,976,773 (that is, $2,988,386.50) would be required to be met from the balance sheet of the law practice.

94 It submitted the financial position of the law practice combined with the effect of the Cost Sharing Agreement, meant there was no real risk that it would not have the ability to pay (or finance) an adverse costs order.

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37 *Re IPO Wealth Holdings (No 2) Pty Ltd* [2022] VSC 199 [57(2)] (Elliott J) citing *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194, 241–242 [119] (Callinan J), citing *Turnbull v NSW Medical Board* [1976] 2 NSWLR 281, 297E (Glass JA).

38 *FNH United Petroleum Pty Ltd (Appeals Security for Costs)* [2024] VSC 522 [4] citing *Millsave Holdings Pty Ltd v Connective Group Pty Ltd* [2023] VSCA 326 [988] (McLeish and Macaulay JJA), citing *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25, 40 [53] (Jagot, Yates and Bromwich JJ).

39 *FNH United Petroleum Pty Ltd (Appeals Security for Costs)* [2024] VSC 522 [4].

95 Maurice Blackburn submitted that in light of those basic facts, the question for the Associate Justice was, was there was reason to believe that a firm with more than $248m in revenue, $216m in net assets operating profits of some $34.4m in FY23, and available cash and debt facilities of some $80m would be unable to meet a liability of around $3m in around 2024 or 2025?

96 It submitted the financial accounts showed stable revenues, $248.5m in 2023, $243.5m in 2022 and that results from operating activities (before finance costs and member remuneration) were also stable at $34.4m in 2023 and $38.8m in 2022. The financial accounts show a fairly constant realisation of WIP to cash with $242m in new WIP in the 2023 financial year and $224m of old WIP converted to cash in the same year.

97 During the hearing Maurice Blackburn drew attention to the fact that total current assets in 2023 at $305.8m were approximately 3.8 times the total current liabilities of $79.6m. It submitted there was a need to focus on the financial position of Maurice Blackburn as a whole and not only on its class action practice. The primary source of revenue in both the 2022 and 2023 financial years was personal injuries work with class actions work comprising approximately 20% of revenue.

98 The evidence from Mr Valsinger was that finance facilities had been extended after the financial reporting date and that $50m was available in a general facility with a further $30m available in a specific facility relating to class actions.

99 Maurice Blackburn submitted there was no materiality analysis in the Reasons. That is, whether the costs order was $5.9m or, taking into account the Costs Sharing Agreement approximately $3m, compared to the financial position of the law practice.

100 Maurice Blackburn submitted the purpose of Mr Atkins' evidence was to evaluate the risk of whether adverse costs orders against the law practice in other cases would render it unable to meet an order in this case. It pointed to Mr Atkins' actuarial estimate that the risk that 'Maurice Blackburn's class actions group would sustain adverse costs liabilities of more than $25m across all of its matters' was around 2%. It was Mr Atkins' opinion that the law practice would be able to meet an order to pay

$75m from readily available resources and to continue to operate after withstanding a liability of up to $75m.

101 Concerning the Nicolaides Report, it was submitted that while Mr Nicolaides criticised some aspects of Mr Atkins' analysis, he did not himself assess the capacity of the law practice to pay any particular amount at any particular time. He did not, for example, prepare a financial forecast suggesting any scenarios in which a liability of $3m (or any other amount) would render the law practice insolvent, or the probability of any such scenarios occurring in coincidence with an adverse costs order in this case.

102 In response to these arguments Macquarie submitted that ground 1 is misconceived and that there was no inconsistency between the finding of 'reason to believe' and the financial statements as at 30 June 2023. It submitted that, as the Associate Justice found, 'the risk assessment which must be undertaken is not limited to, or properly informed by a simple consideration of the net assets of Maurice Blackburn'.

103 It submitted the focus of the Associate Justice's consideration was not Maurice Blackburn's (largely intangible) asset balances as at 30 June 2023, but upon its ability to satisfy, in cash, an immediately enforceable costs order at such time in the future as that order may be made. The Associate Justice took into account detailed expert evidence concerning the relationship between Maurice Blackburn's assets and its ability to realise cash and her Honour considered matters including the timing and recoverability of Maurice Blackburn's WIP and the impact of write-off of WIP (in the event of a case being lost) on Maurice Blackburn's debt facilities. Her Honour concluded 'the evidence of Mr Nicolaides identified realistic scenarios and a [rational] basis for belie[f] that Maurice Blackburn may be unable to meet an adverse costs order in the future'.[40]

104 Macquarie submitted that Mr Atkins' report presented an 'actuarial model' which included a 'probabilistic assessment' in which he assessed of the likelihood of cash

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40 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [115].

outflows due to adverse costs orders. It was his opinion that the likelihood of an adverse costs liability of $22.5m or more in any one year at 0.05% or 1 in 2000. He assessed the chance of an adverse cost liability of $75m in any one year at 13%. However Maurice Blackburn's exposure to an adverse costs outcome in the Roundup litigation was at least $22.5m in the event of a loss.

105 Macquarie was critical of Mr Atkins' evidence. It submitted that Mr Atkins' logic implied that Maurice Blackburn had a 99.95% chance of avoiding an adverse costs order in the Roundup litigation which was not realistic. At the time of the hearing before the Associate Justice the Roundup litigation was listed for trial imminently. In addition to its exposure to an adverse costs order, Maurice Blackburn was carrying a similar level of WIP and disbursements for that case. There was no evidence and no submissions as to the prospects of success in the Roundup litigation. In those circumstances the Associate Justice was justified in not being prepared to accept Mr Atkins' analysis.

106 Macquarie drew attention, as noted by her Honour, that Maurice Blackburn had had five unsuccessful outcomes in 42 class actions over the decade to August 2023. As her Honour found, that number of unsuccessful outcomes 'was not negligible' and when taking into account adverse the impact of losses on costs exposure and WIP 'sufficient to give rise to a risk in the *Livingspring* sense'.[41]

107 Macquarie submitted that as the Associate Justice accepted, Mr Atkins' 'probabilistic assessment' was not a substitute for considering each of the class actions Maurice Blackburn then had on foot, and the likelihood, timing and financial impact of its possible failure. It referred to the observation by her Honour that '[t]he artificiality and limited applicability of the probabilistic model developed by Mr Atkins and his approach are amplified by considering … the Roundup litigation'.[42]

108 Relying on the evidence of Mr Nicolaides[43] concerning the financial statements

41 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [109].
42 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [108].
43 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [63].

Macquarie submitted that Maurice Blackburn's asset balances (mostly comprising 'no win no fee' WIP) and accounting profits did not bear directly on the *Livingspring* question. Maurice Blackburn submitted below and the Associate Justice accepted that any adverse costs order would need to be settled promptly in cash. Macquarie submitted, as was open on the evidence, that her Honour found there was a risk, a risk that met the low *Livingspring* threshold, that Maurice Blackburn would not have the required cash when needed.

109 Macquarie submitted below and the Associate Justice accepted that Maurice Blackburn's cash balances, its operating cash flow (negative over four of the past five years), its highly leveraged business model (in which cash inflows were used to pay down debt rather than be retained), the direction of travel of its business model (which involved an increasing debt burden coupled with greater reliance on self-funded class actions advanced under GCOs) and the availability of its debt facilities to finance any adverse costs orders combined to satisfy the *Livingspring* criteria.

Findings

110 I do not accept that by reference to the evidence before her it was not open to the Associate Justice to make a finding that as at November 2023 there was reason to believe that, in the future, the law practice, if called upon to do so, would be unable to pay the costs of Macquarie if Macquarie was successful in the proceeding.

111 Her Honour made that finding based on her review of the evidence applying the 'low threshold' in *Livingspring* as she was bound to do. As the Court of Appeal observed in *Livingspring*:[44]

> The phrase "reason to believe" is the touchstone of jurisdiction. It requires a rational basis for the belief — and no more. The wording adopted may be contrasted with other familiar formulations such as "if the court is satisfied that" or "if in the view of the court it is likely that". The section requires the making of a judgment, a risk assessment: is there a risk that the corporation will be unable to pay? (It adds nothing, in our view, to say that it must be a "real risk".) A risk assessment is, of necessity, imprecise. The section calls for a practical, commonsense approach to the examination of the corporation's financial affairs.

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44 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [15]-[16] (Maxwell P and Buchanan JA).

> It may be said, with justification, that this is a low threshold. But the test simply reflects the policy of the provision, which is to protect a defendant against the risk of the plaintiff corporation's impecuniosity. The provision equips the court with the means to require that the defendant be secured against that risk.

112 Maurice Blackburn has not established that her Honour reached her conclusion concerning 'reason to believe'' applying the wrong test or based on factual findings that were ''clearly wrong''.

113 Reference to the FY18-FY23 financial statements provides no support for a finding that the Associate Justice reversed the onus of proof as was asserted to be the case by Maurice Blackburn.

114 As the financial statements upon which Maurice Blackburn placed great store show, in four of the previous financial years, including FY23, operating cash was negative. The then current business model involved increasing levels of debt to self-fund class actions. Actual cash as at 30 June 2023 was $11.4m. The evidence was that the in the event of an adverse costs order in the Roundup litigation, potential costs exposure well in excess of the actual cash. That is in addition to WIP attributable to that case being unrecoverable. The Associate Justice took these facts into consideration. The Associate Justice found there was a 'live chance' of such an adverse costs order in the Roundup litigation. There was no challenge to the validity of those factual findings.

115 The Associate Justice found the probabilistic model developed by Mr Atkins was artificial and of limited applicability. She made that finding by reference to the potential costs exposure of the law practice in the Roundup litigation. There was no error in that finding, whether in the *House v R* sense, or otherwise.

116 The effect of the Costs Sharing Agreement with Vannin upon which Maurice Blackburn relied cannot be viewed in isolation from the fact this proceeding was to be heard and determined at the same time as two other class actions. The Associate Justice referred to the Costs Sharing Agreement and to the submission by Maurice Blackburn that it would only be required to fund approximately $3m, being half of any adverse costs order from its balance sheet. Her Honour also referred to the submission from Macquarie that a loss in this proceeding would likely coincide with

a loss in the other two proceedings with the significant risk that the law practice would be required to pay 50% of $18m in adverse costs.

117 Contrary to the Maurice Blackburn submissions, the Associate Justice was not required by legislation or otherwise to undertake a 'materiality analysis' by reference to the Cost Sharing Agreement. Her task, and the task she undertook, was a risk assessment in order to determine whether in circumstances where the legislation expressly contemplated an order for the provision of security for costs, the interests of justice required the making of an order. Guided by *Livingspring*, her Honour undertook that risk analysis adopting a 'practical commonsense approach to the examination of the corporations' financial affairs'.[45]

118 A practical commonsense approach is not one that only directs attention to the balance sheet as at 30 June 2023, the net assets of the law practice and its most recent operating profit. While as submitted by Maurice Blackburn, the results from operating activities before finance costs and member remuneration were stable at $34.4m in 2023 and $38.8m in 2022, after taking into account finance costs and member remuneration profit before tax was $17m in 2022 and approximately $8m in 2023. That is, after allowing for net finance costs of $11.6m in 2022, increasing to $13.2m in 2023.

119 Of necessity the risk assessment to be undertaken was required to be forward-looking. Was there a reason to believe that, in the future, the law practice would be unable to meet an adverse costs order? To undertake that assessment required her Honour to consider, as she did, both the past financial performance of the law practice (the overall operating cash flow was and had been negative for the past three years) and that Maurice Blackburn was funding its new business model from borrowings. The Associate Justice did not have evidence of future cash flows. She was bound to determine the application on the basis of the evidence before her. As her Honour observed, as borrowings increase, so to do the lending costs which in turn impacts upon cash flow.

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45 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [15] (Maxwell P and Buchanan JA).

120 There was evidence of substantial headroom in existing facilities available to Maurice Blackburn. However looking to the future, it was open to her Honour to accept and to act on the expert evidence of Mr Nicolaides that a write-down of the WIP would constrain Maurice Blackburn's borrowing capacity.

121 During the hearing of this application before me it was submitted that the WIP relating to particular class actions recorded in the confidential exhibit to the Gilsenan affidavit did not correspond to the value of WIP reflected in the financial accounts where provision had already been made for the risks associated with class action litigation. That submission misses the point that if a particular class action were to be unsuccessful, the WIP after provision for that class action would need to be reduced to nil. It also ignores the fact there was no evidence before the Associate Justice or before me of the relationship between the value of WIP in the confidential exhibit and the value of WIP in the financial statements after provisioning that underpinned the assets of the law practice in its balance sheet.

122 While during the hearing Maurice Blackburn referred to evidence of a recent class action settlement from which $26m was 'going to come in', there was no evidence about whether that soon to be received cash injection was already accounted for, as might reasonably have been expected in the regularly updated figure for WIP.

123 On the evidence before her, for the reasons discussed at paragraphs 98 – 110, it was open to her Honour to find as she did, that there was a real risk in each of the sources of payment of adverse costs, cash and the two debt facilities.

124 No error is made out concerning ground 1.

125 It is appropriate to deal briefly with the subparagraphs of the application as dealt with in Maurice Blackburn's written submissions.

Grounds 1.2, 1.8: giving no (or inadequate) weight to the fact the costs exposure was around $3m

126 Grounds 1.2 and 1.8 concern the consideration by the Associate Justice of the Cost Sharing Agreement. I have already addressed this topic when dealing with ground 1.

127 In addition to the matters earlier discussed, I accept the submission by Macquarie that the weight given by her Honour to the Cost Sharing Agreement was a matter for her Honour as the decision maker, and was not open to challenge on appeal unless it gave rise to factual error.[46] Her Honour's consideration of the Agreement was not 'clearly wrong' and no factual error was demonstrated.

Grounds 1.1, 1.3: Evidence regarding the assets of the law practice

128 These sub-grounds have already been discussed as part of the consideration of ground 1.

129 To that discussion may be added the submission by Macquarie, which I accept, that ground 1.3 misapprehends the evidentiary effect of the historic financial statements of the law practice on an application for security for costs. Maurice Blackburn's financial statements evidence its belief that, as at the reporting date, its net asset balances were recoverable in the future, in the sense required by the accounting standards.[47] However that does not prove that there was no risk the balances would become irrecoverable.

130 So much is recognised by note 2.5 to the financial statements to which Macquarie drew attention. That note reads in part:

> **2.5 Significant accounting judgements, estimates and assumptions**
>
> The preparation of the financial statements requires management to make judgements, estimates and assumptions that affect the reported amounts in the financial statements. Management continually evaluates its judgements and estimates in relation to assets, liabilities, contingent liabilities, revenue and expenses. Management bases its judgements, estimates and assumptions on historical experience and on other various factors, including expectations of future events, management believes to be reasonable under the circumstances. The resulting accounting judgements and estimates will seldom equal the related actual results. The judgements, estimates and assumptions that have a significant risk of causing a material adjustment to the carrying amounts of assets and liabilities (refer to the respective notes) within the next financial year are discussed below.

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46 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; 237 CLR 66 [138] (Gummow A-CJ, Kirby, Hayne and Heydon JJ).

47 *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93; 20 VR 377 [37] (Maxwell P and Buchanan JA).

131 As submitted by Macquarie, when the Associate Justice was determining whether there was a *risk*, in the *Livingspring* sense, it was appropriate for her to take the cautionary contents of note 2.5 into account. It submitted, and I agree, that the Associate Justice did so did so correctly, finding that 'in the event of an unsuccessful outcome, there would be impacts to Maurice Blackburn's financial position, such as write-off of relevant WIP for that matter'.[48]

Grounds 1.4–1.9: The cashflow evidence

132 I have not previously discussed some aspects of grounds of appeal 1.4 - 1.9.

133 Ground 1.4 contends the Associate Justice erred in finding there were realistic scenarios posited by Mr Nicolaides which established that there was a risk that Maurice Blackburn may not be able to meet an adverse costs order given that the expert report did not posit any scenarios of that nature.

134 The reasons relied on by the Associate Justice in support of her conclusion regarding 'realistic' scenarios were submitted by Maurice Blackburn to be as follows:

> 27.1 there were "realistic scenarios" said to be posited by Mr Nicolaides that provided "comparative forward-looking projections of litigation outcomes";
>
> 27.2 possible constraints on MB's borrowing capacity;
>
> 27.3 the stated irrelevance of Mr Atkins' evidence regarding the probabilities of adverse outcomes in class actions; and
>
> 27.4 the stated irrelevance of Mr Atkins' analysis of MB's ability to withhold profit distributions or raise further capital.

135 Maurice Blackburn submitted these findings contributed to a finding that there were 'risks associated with its financial position' which 'exceed the *Livingspring* threshold' and that each strand of the Associate Judge's reasoning was erroneous.

136 In response Macquarie submitted the reference to 'realistic scenarios', involved an embrace of Mr Nicolaides' evidence, and a finding by her Honour that Mr Atkins' probabilistic approach was 'not a substitute for forward looking projections and a

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48 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [110].

financial assessment of each matter in Maurice Blackburn's actual class action portfolio to individually assess the probability of success/failure and the resulting timing of conversion of WIP, cash inflows and outflows that would impact Maurice Blackburn's capacity to pay an adverse costs order'.[49]

137 Macquarie submitted one realistic scenario posited by Mr Nicolaides involved the loss of a class action with WIP of $4m, which it submitted would cause the leverage covenant on Maurice Blackburn's Syndicated Facility Agreement to be breached. It submitted the confidential evidence revealed several class actions with WIP and disbursements in excess of $4m, and that loss in the Roundup litigation alone would involve the write-off of millions of dollars in WIP and disbursements. Macquarie submitted there was no error in accepting this evidence.

138 I accept in substance the submissions on behalf Macquarie concerning this ground. I find that it was open to the Associate Justice to conclude as she did concerning the evidence of Mr Nicolaides.

139 I have earlier referred to the substance of ground 1.5. That ground alleges an error in the finding that Mr Atkins' opinion evidence that Maurice Blackburn faced a low probability of incurring an adverse costs exposure of greater than $7.5m in a given year was irrelevant.

140 Macquarie submitted and I agree that the Associate Justice was correct to conclude that Mr Atkins' evidence to the effect that Maurice Blackburn faced a low probability of incurring adverse costs exposure of greater than $7.5m in a given year was irrelevant. That is because of the evidence of actual potential exposure to which I previously referred concerning the Roundup litigation.

141 Ground 1.6 concerns the finding at paragraph 110 of the Reasons concerning Maurice Blackburn's capacity to draw on its finance facilities to meet an adverse costs order. I have previously discussed this topic. The finding represented an acceptance of Mr Nicolaides' evidence that 'a write down of the WIP would constrain Maurice

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49 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606 [78].

Blackburn's borrowing capacity'. It was open to the Associate Justice to both accept that expert evidence and to make such a finding.

142 Ground 1.7 complains of the finding at paragraph 113 of the Reasons that Maurice Blackburn's Class Actions Facility was unavailable to be drawn upon to meet an adverse costs order in this case.

143 At the outset it is important to note, as submitted by Macquarie, that the facility was not Maurice Blackburn's facility. Maurice Blackburn was the Guarantor under the facility. The Borrower was Special Purpose Vehicle ('SPV'). There was no evidence that funds made available to the SPV were available to Maurice Blackburn. There was no evidence that an adverse costs order in this case, if made, was a purpose for which the SPV was entitled to apply funds borrowed by it under the facility.

144 Ground 1.8 asserts the Associate Justice 'erred in finding that there was a likelihood that a loss by the plaintiffs in this proceeding would coincide with losses by the plaintiffs in two other class actions, against different defendants, regarding 'flex commissions'.

145 I have previously referred to this issue. I accept the submission by Macquarie that in circumstances where the pleadings in the three proceedings were materially identical, and the proceedings were to be heard concurrently by the same trial judge, there was no error in this finding.

146 Ground 1.9 asserts that the Associate Justice erred 'in finding that raising capital or reducing distributions to shareholders were unrealistic means of satisfying an immediately enforceable adverse costs order'. Macquarie submitted the Associate Justice was correct to find, that raising capital or reducing distributions to shareholders were unrealistic means of satisfying an immediately enforceable adverse costs order.

147 Her Honour described relying on this potential source of funds to meet a future liability for costs as 'unrealistic'. It was open to her Honour to make that finding.

Disposition

148 For the reasons previously discussed, the applications for leave to appeal by notice by the plaintiffs and by Maurice Blackburn, dated 23 October 2024 are refused.

149 I order Maurice Blackburn to pay Macquarie's costs of and incidental to the applications, including any reserved costs.

150 The Court made confidentiality orders regarding evidence and submissions prepared in relation to the summons dated 25 August 2023 ('Summons'), on 1 November 2023, 8 November 2023, 17 November 2023 and 29 November 2023 ('Confidentiality Orders'). On 17 December 2024, my Chambers emailed a confidential draft of these reasons to the parties and requested they consider whether any matters in the ruling were required to be removed before publication. A response was received from Maurice Blackburn on 18 December 2024 following which minor adjustment was made to the confidential draft to ensure confidentiality is preserved.

151 For the avoidance of doubt, without an order of the Court, the following documents are to remain confidential and not be published or made available to any persons, other than the defendant, which shall, include the defendant, the defendant's legal representatives and any expert retained in relation to the Summons on behalf of the defendant:

(a) the unredacted affidavit of Andrew Watson filed on 26 October 2023;

(b) the unredacted exhibit AJW-20 of the affidavit of Andrew Watson filed on 26 October 2023;

(c) the unredacted affidavit of Richard Erle Ryan dated 8 November 2023;

(d) the affidavit of Rebecca Gilsenan affirmed 13 November 2023;

(e) the unredacted exhibit RG-1 of the affidavit of Rebecca Gilsenan affirmed 13 November 2023;

(f) the affidavit of Rebecca Gilsenan affirmed 23 October 2024;

(g) the affidavit of Patrik Valsinger affirmed 27 November 2023;

(h) the redacted affidavit of Andrew John Watson dated 20 May 2021;

(i) the redacted affidavit of Andrew John Watson dated 26 August 2022;

(j) the redacted copy of the Syndicated Facility Agreement dated 28 July 2023;

(k) the redacted copy of the Facility Agreement dated 21 August 2023; and

(l) any submissions filed before Associate Justice Gobbo and the submissions filed at the hearing for the applications for leave to appeal.

CERTIFICATE

I certify that this and the 35 preceding pages are a true copy of the reasons for ruling of Delany J of the Supreme Court of Victoria delivered on 18 December 2024.

DATED this eighteenth day of December 2024.

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Associate