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

Not Restricted

S ECI 2022 03869

BETWEEN:

DOMINIC MAGLIO — First Plaintiff

and

MOLEDINA TRANSPORT SERVICES PTY LTD (ACN 622 411 025) — Second Plaintiff

and

HINO MOTOR SALES AUSTRALIA PTY LTD (ACN 064 989 724) — First Defendant

and

HINO MOTORS LTD — Second Defendant

S ECI 2023 01521

BETWEEN:

JAMES KENDALL McCOY — Plaintiff

and

HINO MOTORS LTD — First Defendant

and

HINO MOTOR SALES AUSTRALIA PTY LTD (ACN 064 989 724) — Second Defendant

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JUDGE:	M Osborne J
WHERE HELD:	Melbourne
DATE OF HEARING:	21 November 2023
DATE OF JUDGMENT:	15 December 2023
CASE MAY BE CITED AS:	Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 757

PRACTICE AND PRODCEDURE - Group proceedings – Multiplicity of proceedings – Competing carriage applications – Overlap between claims and common defendants – Experience of legal teams – Funding and available resources – Which arrangement is in the best interests of the group members - *Lay v Nuix Ltd* [2022] VSC 479.

GROUP PROCEEDINGS - Costs – Application for a group costs order – Costs to be calculated as a percentage of the amount of any award or settlement recovered – Whether proper evidentiary basis to make proposed group costs order – Principles applied - *Supreme Court Act 1986* (Vic) s 33ZDA – *Gehrke v Noumi Ltd* [2022] VSC 672 – Application granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs in the Maglio proceeding	Dr P K Cashman with Dr D J Townsend	Gerard Malouf & Partners
For the Plaintiff in the McCoy proceeding	C Moore SC with R May	Maurice Blackburn Lawyers
For Hino Motor Sales Australia Pty Ltd and Hino Motors Ltd	C Winnett with L Mills	Clayton Utz

HIS HONOUR:

Introduction

1 On 30 September 2022, Dominic Maglio and Moledina Transport Services Pty Ltd (the 'Maglio plaintiffs') commenced a proceeding in this Court on their own behalf and on behalf of persons who, or which, purchased or leased or otherwise acquired a legal interest in Australia in certain Hino branded motor vehicles against the manufacturer, Hino Motors Ltd ('Hino' and its wholly owned subsidiary Hino Motor Sales Australia Pty Ltd ('Hino Australia') (the 'Maglio proceeding'). The solicitor on the record for the Maglio plaintiffs is the firm Gerard Malouf & Partners ('GMP').

2 On 9 November2022, Maurice Blackburn Lawyers ('MB') wrote to GMP advising that it was in the advanced stages of an investigation into a potential class action against Hino Australia in relation to similar matters to those the subject of the Maglio proceeding. MB advised that it expected to be in a position to provide GMP with an update on the likely timeframes for commencing any proceedings arising from the investigation prior to the upcoming directions hearing on 18 November 2022 which had been convened in the Maglio proceeding.

3 On 17 November 2022, MB wrote a further letter to GMP advising that the firm was not yet in a position to indicate a date by which they expected to commence any proceedings, and in the meantime requested that GMP bring the letter to the attention of the Court at the directions hearing the next day.

4 Subsequently, on 17 April 2023, James Kendall McCoy (the 'McCoy plaintiff') commenced an open class proceeding on his own behalf and on behalf of persons who, by 17 April 2023 have purchased, leased or otherwise acquired an interest in Australia in a Hino branded vehicle fitted with a diesel engine manufactured during the period from 1 January 2003 to 22 August 2022 against Hino and Hino Australia (the 'McCoy proceeding'). MB is the solicitor on the record.

5 It is common ground that the causes of action advanced in the Maglio proceeding and the McCoy proceeding arise from the same factual matrix and involve common

defendants.

6 On 15 March 2023, the defendant in the Maglio proceeding filed and served a defence, and on 19 May 2023, the plaintiffs filed and served a reply. The Maglio plaintiffs also served a notice to produce which was the subject of production by the defendants on 20 April 2023 and 10 May 2023.

7 On 10 May 2023, the Maglio plaintiffs sought to file a summons seeking leave to intervene in the McCoy proceeding and to seek orders in that proceeding that the McCoy proceeding be struck out, stayed or de-classed. The summons was not accepted for filing without a fixed hearing date.

8 Subsequently, the Court constituted by the Honourable Justice Nichols made orders by consent on 8 September 2023 (the '8 September 2023 Orders') which included the following:

> 1 By **4.00pm on 5 September 2023**, the plaintiff parties exchange on a confidential basis their costs and retainer agreements, and any litigation funding agreements.
>
> 2 By **4.00pm on 12 September 2023**, each plaintiff party file and serve a statement of position in the form of a document not exceeding 5 pages, which sets out in summary form the position and the substance of the expected evidence in respect of each of the matters listed in the List of Issues at Annexure A (**Statement of Position**). The Statement of Position must meet the following requirements:
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> (a) the information contained in it should be succinct, but sufficient to allow the reader to understand the essence of the plaintiffs' carriage proposal;
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> (b) on the question of funding and legal costs, it should contain sufficient detail to allow the reader to meaningfully compare the plaintiffs' competing proposals. It should not set out arguments as to why a plaintiffs' proposal is to be preferred. It should only address the plaintiff's proposal;
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> (c) the topics must be addressed in the order in which they appear in the List of Issues; and
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> (d) the plaintiffs must address each issue but should concentrate on those issues most likely to be significant in the carriage contest. If the plaintiffs consider that an issue will be of little relevance, the key facts may be stated very briefly.
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> 3 By **4.00pm on 19 September 2023**, each plaintiff party may file and

serve any Revised Statement of Position in response to the material filed pursuant to order 2. Any Revised Statements of Position must:

(a) conform with the requirements set out in order 2;

(b) not exceed 5 pages; and

(c) must, in respect of substantive changes only, be marked up against the original Statement of Position, so that changes are readily apparent.

4 By **10.00am on 22 September 2023**, the parties must submit to the chambers of Gitsham JR, a draft Costs and Funding Document completed in accordance with the template attached at Annexure B to these orders.

5 The matter be listed for a case management conference before Gitsham JR at **10.00am on 26 September 2023**.

6 By **4.00pm on 6 October 2023**, each plaintiff party file and serve:

(a) their proposed orders and any evidence in respect of the multiplicity of proceedings in this proceeding and the McCoy Proceeding (**Carriage Applications**); and

(b) any application and supporting evidence for an order pursuant to section 33ZDA of the Supreme Court Act 1986 (Vic) (**GCO Applications**).

7 Any evidence filed in accordance with order 6 must:

(a) be limited to the issues in contest between the plaintiff parties, identified in the List of Issues and the Costs and Funding Document (described in order 4);

(b) address those issues in the order in which they appear in the List of Issues (and any evidence concerning the Costs and Funding Document to be addressed in topic 5 of the List of Issues), and be set out under each heading of that List;

(c) not contain argument or submissions; and

(d) not be repetitious.

8 By **4.00pm on 17 October 2023**, the first defendant and second defendant file and serve any evidence upon which they intend to rely on in relation to the Carriage Applications and any GCO Applications, such evidence to be limited to any matters affecting the interests of the defendants.

9 No evidence in reply may be filed by any party except by leave of the Court.

10 By **4.00pm on 24 October 2023**, the plaintiff parties are to jointly provide the Court (via email to chambers) with a "**Redacted-from-Defendants**" e-court book and an "**Unredacted-from-Defendants**" e-

court book containing the Carriage Applications, GCO Applications and evidence in support, which should each:

(a) be a single fully text searchable document in portable document format (**PDF**);

(b) contain embedded bookmarks (being a short-form name of the document) for each document;

(c) have matching stamped sequential page numbers that correspond with the display page numbers of the PDF document; and

(d) include a hyperlinked index identifying the date, description and starting page number of each document in the PDF document.

11 By **4.00pm on 31 October 2023**, each plaintiff party file and serve an outline of submissions in relation to the Carriage Applications and any GCO Applications. The outlines of submissions should deal with each application separately and must, in respect of carriage, be set out in the order of the List of Issues.

12 By **4.00pm on 13 November 2023**, the first defendant and second defendant file and serve an outline of submissions in relation to the Carriage Applications and any GCO Applications, such submissions be limited to the issues affecting the interests of the defendants.

13 By **4.00pm on 20 November 2023**, each plaintiff party may file and serve submissions in response to the submissions filed by any other plaintiff party, limited to 3 pages.

14 The Carriage Applications and any GCO Applications be listed for hearing on **5 December 2023** with an estimated duration of 1 day.

9 The 8 September 2023 Orders therefore, inter alia, required the service by each plaintiff of a short statement of position which set out the position and substance of expected evidence in respect of the matters listed in the list of issues annexed to the order. The issues enumerated in the list, in summary form, comprised the following:

- carriage;
- practitioners;
- nature and scope of the causes of action advanced (and relevant case theories);
- group membership;
- the state of preparation of the proceedings;
- funding and legal costs;

- proposals for security;
- extent of any book build;
- other; and
- relief.

10 In accordance with the 8 September 2023 Orders, each plaintiff party filed and served a statement of position on 12 September 2023. Relevantly, in relation to the proposed funding arrangements, the Maglio plaintiffs referred to their group costs order ('GCO') application filed 16 June 2023 which sought a GCO in the amount of 25% of the amount of any award or settlement. The McCoy plaintiff, in his statement of position, advised that he had instructed MB to apply for a GCO to the effect that legal costs payable to MB likewise be calculated as a percentage of any award or settlement of no more than 25%.

11 Subsequently and in compliance with the 8 September 2023 Orders, the Maglio plaintiffs and the McCoy plaintiff each then filed a revised statement of position on 19 September 2023. Relevantly, in the revised statement of position Mr McCoy submitted a revised GCO proposal which provided for a stepped rate such that the maximum applicable GCO rate was 25%, then reducing to 22.5%, 20% and 17.5% depending on the quantum of any award or settlement that is recovered. The fee proposal of the Maglio plaintiffs remained unchanged.

12 The 8 September 2023 Orders required that each plaintiff party file and serve any evidence upon which they sought to rely in the carriage applications or the GCO applications by 6 October 2023 with the defendants to file and serve any evidence upon which they intended to rely, limited to any matters which affected their interests, by 17 October 2023.

13 Evidence in reply could only be filed with leave of the Court.

14 Within the strictures of the 8 September 2023 Orders, the Maglio plaintiffs filed and rely upon four affidavits of the solicitor employed by GMP with day-to-day carriage of the matter, Matthew Yan Ho Lo affirmed 17 November 2022, 20 April 2023, 16 June

2013 and 6 October 2023, as well as an affidavit made by David Stellings, a partner in the United States firm Lieff Cabraser Heimann & Bernstein ('LCHB') affirmed 21 June 2023 (the 'Stellings affidavit'), and an affidavit of Andrew Mitchell, a chartered accountant of CBC Partners Pty Ltd, affirmed 3 August 2023. Mr Mitchell's affidavit exhibited an expert report dated 2 August 2023 (the 'Mitchell report').

15 The McCoy plaintiff filed and rely upon an affidavit of James Kendall McCoy affirmed 6 October 2023 and two affidavits of Rebecca Gilsenan, a principal of MB affirmed 6 October 2023.

16 The defendants filed and rely upon four affidavits of Gregory John Williams, a partner of Clayton Utz, the firm on the record for the defendants, sworn 20 April 2023, 26 June 2023, 25 September 2023 and 17 October 2023.

17 I have had regard to each of the affidavits filed. To the extent that I have not referred to parts of the affidavits, it does not mean that I have not had regard to them.

18 Parts of the affidavits were filed on a confidential basis and orders have been made accordingly. It has not been necessary to set out the confidential material in these reasons.

19 Notwithstanding the filing of the earlier summons on 16 June 2023 which sought a GCO in the amount of 25%, and the position maintained in both the statement of position and the revised statement of position, on 9 October 2023, the Maglio plaintiffs filed a second summons in relevantly identical form and effect, save that it replaced the reference to a GCO in the sum of 25% with a stepped rate which now matched that proposed by the McCoy plaintiff in his revised statement of position.

20 In addition, on 16 November 2023, the Maglio plaintiffs served and foreshadowed an intention to rely on a further affidavit from Mr Lo affirmed 16 November 2023 (the '16 November 2023 Lo affidavit') and an affidavit of Dianne Chapman affirmed 16 November 2023 (the 'Chapman affidavit'). Ms Chapman is a consultant solicitor retained by GMP on 24 October 2023 to assist GMP with the conduct of the proceeding

(and other class action matters being conducted by GMP).

21 These affidavits are objected to by the McCoy plaintiff. Under cover of that objection and in the event that the Court gives leave to rely upon the 16 November 2023 Lo affidavit, and the Chapman affidavit, the McCoy plaintiff seeks to rely upon a further affidavit of Ms Gilsenan affirmed 20 November 2023 (the 'third Gilsenan affidavit'). In the third Gilsenan affidavit, Ms Gilsenan addresses the prejudice that would apply to the McCoy plaintiff if leave was given to the Maglio plaintiffs to rely upon the 16 November 2023 Lo affidavit and the Chapman affidavit, and otherwise deposes to matters concerning Ms Chapman's alleged experience and involvement in class action matters.

Governing principles

22 As noted above, the Maglio plaintiffs seek orders that the McCoy proceeding be struck as being vexatious and/or an abuse of process. They argue that Mr McCoy was fully aware of the substantial similarity between the Maglio proceeding and what was to become the McCoy proceeding and of the substantial progress which had been made in the Maglio proceeding, at the time of commencement of the McCoy proceeding. In the alternative, the Maglio plaintiffs seek leave to intervene in the McCoy proceeding and an order that the McCoy Proceeding be stayed. In respect of the latter alternate relief only, the relief sought by the Maglio plaintiffs is substantially to the same effect as that sought by the McCoy plaintiff in his summons filed 9 October 2023.

23 The submission that the McCoy proceeding should be struck out as being vexatious and/or an abuse of process was not the subject of detailed submissions. Notions of abuse of process with respect to the commencement of a representative proceeding second in time are problematic in the context of the resolution of multiplicity disputes and competing group proceedings.[1] There is no presumption favour of the first in time commenced proceeding lest it give rise to a race to the court and notions of abuse or process have been largely eschewed in favour of an inherently evaluative approach where the task of the Court is to determine which arrangement is in the best interests

1 *Wigmans v AMP Limited* (2021) 270 CLR 623, [51]-[52], [69], [75], [86], [99]-[107].

of group members including which proceeding should go ahead if one is stayed. The evaluative task is undertaken having regard to all of the relevant considerations which will vary from case to case, but ultimately must be undertaken with a view to determining what is in the best interest of group members.

24 As Nichols J observed in *Lay v Nuix Ltd* ('*Nuix*'),[2] 'the principles governing applications of this kind are well settled'.[3]

25 Her Honour then proceeded to summarise those principles in the following way:[4]

> 11 There is no provision in Part 4A of the *Supreme Court Act* that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. A foundational element of the design of Part 4A is that a representative plaintiff has a choice as to whether to bring proceedings on behalf of some or all persons who have claims arising out of the same, similar or related circumstances, and group members may opt-out of proceedings. The result is that overlapping representative proceedings may be commenced against the same defendant. The commencement of a subsequent *bona fide* class action against the same defendant on overlapping subject matter is not of itself, vexatious, oppressive or an abuse of process.
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> 12 That proposition must be understood in light of an equally foundational principle, which is that a multiplicity of proceedings is not to be encouraged. Competing representative proceedings may be inimical to the administration of justice.
>
> 13 Accordingly, while multiple representative proceedings against the same defendant on overlapping subject matter do not constitute an abuse of process, they present a "problem for courts to solve". As the High Court said in *Wigmans*, the legislation poses, but does not answer, the multiplicity question.
>
> 14 Courts deploy a range of tools in answering the question, including the staying of one or more proceedings, consolidation of proceedings, the closing of one class and running closed and open classes in parallel and adopting a "wait and see" approach. Consolidation is the tool most commonly deployed to address the problem of multiplicity. The question of whether the solicitors for the plaintiffs in consolidated proceedings should be permitted to jointly appear on the record is discussed below.
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> 15 It is apparent from this list of possible approaches that in fashioning a solution the Court is not required, come what may, to eliminate all

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2 [2022] VSC 479.
3 Ibid [10].
4 Ibid [11]-[19] (citations omitted).

consequences of the fact that multiple proceedings have been issued against the same defendant. As the Full Court of the Federal Court said in *Perera v GetSwift Ltd*, the object of the legislation is facultative, not restrictive, and in permitting a more efficient dispute resolution through group proceedings, Part IVA "does not insist on the *most* efficient means of dispute resolution".

16 The Court's task is to ensure that justice is done in the proceedings, being astute to protect the interests of group members. It is necessary for the court to determine which arrangement, including which proceeding should go ahead if one is to be stayed, would be in the best interests of group members.

17 As the New South Wales Court of Appeal said in *Wigmans*, there are various permutations and there is, and should be, an inherent flexibility as to how the vice of multiplicity should be handled. Each solution may be unsatisfactory in one way or another. As the Full Court of the Federal Court has observed, there is no one right answer to questions that arise in this context and no "silver bullet" solution to a problem that may require weighing incommensurable and competing considerations, about which judges may take different views. As Lee J said in *Klemweb Nominees Pty Ltd*, fastening upon a remedial response to competing class actions involves "an evaluation, and not a calculus", and it is inevitable that different judges may weigh different considerations differently.

18 The judicial task in this context has been described as applying a multifactorial analysis by reference to all relevant considerations. Previous cases have identified a number of factors which may be relevant to a greater or lesser extent in resolving a multiplicity problem by comparing sets of competing proceedings, namely:

(a) the competing funding proposals, costs estimates and net hypothetical returns to group members;

(b) proposals for security;

(c) the nature and scope of the causes of actions advanced (and the relevant case theories);

(d) the size of the respective classes;

(e) the extent of any book-build;

(f) the experience of legal practitioners (and funders) and the availability of resources;

(g) the state of progress of the proceedings;

(h) the conduct of the representative plaintiffs to date;

(i) the degree of expedition with which the respective parties have approached the proceedings;

(j) the order of filing (although there is no rule or presumption that

> the proceeding filed first in time should necessarily be preferred, and this consideration is less relevant where the competing proceedings have been commenced within a short time of each other).
>
> 19 Lists such as this are useful tools for organising concepts and categories of information, provided they do not detract from the essential nature of the exercise for which they are employed. The exercise is an evaluative one, in which all relevant considerations should be weighed. As the High Court emphasised in *Wigmans*, the factors that might be relevant to managing competing group proceedings cannot be exhaustively listed and will vary from case to case. In some cases, a significant distinguishing feature might by comparison render some or all other factors irrelevant or insubstantial. In other cases, there will be little to distinguish between the proceedings. The inquiry in each case will be highly fact-sensitive.

26 Consistent with her Honour's observations in *Nuix*, the regime imposed by the 8 September 2023 Orders sets out a process for the efficient and expeditious resolution of the parties' competing carriage applications by reference to those factors commonly considered in the resolution of applications of this type.

27 Carriage applications have formed an increasing part of the business of this Court and the Federal Court in the last 12-18 months. In this Court, the number of class actions commenced has increased markedly, no doubt contributed to by the facility afforded by s 33ZDA(1) of the *Supreme Court Act 1986* (Vic) (the 'Act') for a plaintiff in any group proceeding to apply to this Court for the making of a GCO.

28 The resolution of competing carriage proposals requires the determination of a dispute which is ancillary to the substantive matters in dispute between the plaintiffs and the defendants. Moreover, the pending carriage applications inevitably have the effect of delaying the prosecution of the substantive action. Because of the impediment to the prosecution of the substantive action and the increased incidence of such disputes, it is important that courts be astute in their management so as to ensure that ancillary disputes as to carriage are determined in a manner which seeks to give effect to the overarching purpose of facilitating the just, efficient, timely and cost-effective resolution of the real issues in the substantive dispute. The need to ensure the efficient conduct of the business of the court, the efficient use of judicial and administrative resources and the minimisation of delay between the

commencement of a civil proceeding and trial all militate in favour of an approach to management of carriage applications which facilitates their prompt resolution in an expeditious fashion.

29 The regime imposed by the 8 September 2023 Orders is entirely concordant with such requirements.

30 It follows therefore that caution is required in allowing any party to rely upon evidence or advance submissions, otherwise than by elaboration of points previously raised, which traverse beyond the regime embodied by the 8 September 2023 Orders. Where the orders contemplate as an initial step that each plaintiff party shall serve statements of position which set out in summary form the position and substance of expected evidence to be given and which expressly allows for each plaintiff party to file and serve any revised statement of position in response to the statement of position, there will be a heavy burden on any party seeking to rely upon evidence filed otherwise than in accordance with the 8 September 2023 Orders and in securing leave to file reply evidence.

31 If those strictures are not observed, then the disposition of carriage applications runs the risk of becoming exactly that which ought not occur, in effect mini trials in themselves, with a consequential deleterious effect on the prompt resolution of the substantive action.

32 Against the background of those observations as to general principles and as to the appropriate manner of determining these applications, I shall turn to the positions of the parties advanced with respect to the matters largely set out in the list of issues annexed to the 8 September 2023 Orders.[5]

Experience of practitioners

33 The McCoy plaintiff is represented by MB which is one of the largest national plaintiff law firms in Australia with 33 permanent offices and 31 visiting offices throughout all

[5] The headings below largely match those used in the list of issues save that for convenience some have been truncated or dealt with in a different order.

mainland States. MB was the solicitor on the record for 15 of the 20 largest class action settlements achieved in Australia in the period up to on or around April 2023. It has substantial experience in product liability and consumer class actions, including those which relate specifically to vehicle defects. In 2015, the firm filed a series of class actions in the Federal Court against vehicle manufacturers Volkswagen AG, Audi AG and Skoda Auto in relation to alleged devices designed to cheat diesel emission tests.

34 Ms Gilsenan is a principal lawyer and the head of the Sydney Class Actions Division of MB. She has senior oversight of the McCoy proceeding and has practised in representative proceedings since 1999. Ronald Koo, a principal lawyer based in the Melbourne office, has the day-to-day carriage of the McCoy proceeding. Mr Koo has over 14 years' experience as a solicitor and has practised almost exclusively in class actions for that period. Given the size of MB's class actions team, the firm has significant capacity and flexibility to make necessary and available appropriate resources according to the demands of the case.

35 The McCoy plaintiff has retained an experienced counsel team including Cameron Moore SC who acted as senior counsel, retained by MB, in the Volkswagen, Skoda and Audi class actions.

36 GMP is a firm with substantial general litigation experience, particularly in relation to personal injury law. It has 41 solicitors and 60 administration staff. It has established a class actions department which is overseen by the chairman of GMP and has filed two class actions in the Supreme Court of Victoria. Mr Lo has the day-to-day carriage of the Maglio proceeding. The Maglio plaintiffs do not attest to any practitioner experience in class actions either on the part of Mr Lo or the chairman of GMP. The Maglio plaintiffs have retained Dr Peter Cashman as lead counsel. Dr Cashman has substantial experience in the conduct of class actions.

37 In addition, GMP has entered into a co-counsel arrangement with the United States law firm Lieff Cabraser Heinmann & Bernstein ('LCHB'). LCHB has more than 125 attorneys with offices in New York, San Francisco, Nashville and Munich. It has

substantial class action experience including, relevantly, in relation to a class action against Hino and its US subsidiaries in the US District Court for the Southern District of Florida. In this action, the plaintiffs allege that Hino defrauded US purchasers of Hino trucks in various ways including by misrepresenting emission test results. The US Hino proceeding bears substantial similarities to the Maglio proceeding and the McCoy proceeding.

38 Subject to leave being granted to rely on the 16 November 2023 Lo affidavit and the Chapman affidavit, the Maglio plaintiffs also rely upon the recent retainer by GMP of Ms Chapman to assist with the conduct of the Maglio proceeding and other class action matters. Ms Chapman deposes to considerable class action experience including in relation to consumer and production liability class actions which relevantly extend to actions against Volkswagen, Ford and Toyota.

39 A complication arises with the reliance on the additional expertise provided by LCHB. In the Stellings affidavit, Mr Stellings deposes to regular consultation between GMP and LCHB undertaken since October 2022 but which is subject to any applicable confidentiality constraints which extends to, inter alia, 'other evidence that is not rendered confidential by [a] Protective Order'.

40 This is a reference to a Stipulated Protective Order made in the US Hino proceeding which contains a prohibition on disclosure by any party to the Stipulated Protective Order of 'confidential material' and 'highly confidential material' which is defined as constituting information designated by any producing party as warranting protection in those terms. The order prohibits the disclosure of such material to any third person or entity which extends to GMP. Whilst the Maglio plaintiffs have deposed to preliminary steps having been taken to seek a variation to the Stipulated Protective Order, those steps are not identified and, in any event, as at the day of the hearing of this application the order remains in place.

41 In those circumstances, it is not appropriate to speculate as to the fate of any application to vary the Stipulated Protective Order.

42 It follows therefore that the extent of the assistance which can be provided by LCHB is uncertain and somewhat less substantial than might otherwise appear. Further, where the Stipulated Protective Order remains in place, the defendants have adverted to the potential for disputes between the defendants and the Maglio plaintiffs as to whether the Maglio plaintiffs have obtained documents or information from LCHB covered by or derived from information covered by the Stipulated Protective Order.

43 As such, I do not consider that the co-counsel arrangement with LCHB materially assists the Maglio plaintiffs.

44 Insofar as the Maglio plaintiffs seek to rely upon the additional expertise provided by Ms Chapman, they must first obtain leave to rely upon her affidavit and the 16 November 2023 Lo affidavit, which were filed outside the boundaries of the regime set out in the 8 September 2023 Orders.

45 In support of the application for leave, GMP argue that Ms Chapman was not retained until 24 October 2023 which was after the last date for the filing of evidence (aside from late filing permitted by leave).

46 Relevant evidence which relates to events which have taken place after the last date prescribed by order may, in the ordinary course of events, represent a paradigm example of the type of evidence in respect of which leave for the late filing should be given (particularly if it was not reasonably anticipated when the evidence was filed in accordance with the orders). However, the grant of leave must also take account of the prejudice that results to the receiving party in the event that evidence is filed otherwise than in a timely manner.

47 The Chapman affidavit and the 16 November 2023 Lo affidavit were not served until 16 November 2023, two business days before the hearing.

48 In those circumstances, the McCoy plaintiff submits that the Chapman affidavit is prejudicial as it has not allowed the McCoy plaintiff sufficient time to investigate Ms Chapman's asserted considerable experience in conducting class action matters.

49 In my view, leave should be given to the Maglio plaintiffs to rely upon the Chapman affidavit and the 16 November 2023 Lo affidavit. GMP advised MB of its retainer of Ms Chapman and its intention to rely on Ms Chapman's expertise by letter dated 6 November 2023. The reason why the affidavit was not served until 16 November 2023 was due to an attempt by GMP to limit the matters in dispute by seeking to obtain MB's agreement to accept the relative class action experience of the two firms as a neutral factor in this application. Such an attempt, whilst unsuccessful and with hindsight, ambitious, was a good faith attempt to narrow the issues. In any event and more pertinently, I consider that there is no undue prejudice given the notification provided on 6 November 2023.

50 It follows that I also grant leave to the McCoy plaintiff to rely upon the third Gilsenan affidavit.

51 However, I do not consider that the evidence of Ms Chapman's involvement materially assists the Maglio plaintiffs. First, whilst Ms Chapman deposes to her 'considerable experience in conducting class action matters in Australia', she does not set out in any detail what that experience in fact extended to save for listing various class action proceedings that she attests to having been 'closely involved as a solicitor'. Her evidence does not condescend to such matters as when she was admitted, save that it was presumably prior to 2014 when the Pizza Hut class action was commenced, and, it does not contain any detail of the extent of her involvement in any of the class actions listed. Moreover, the affidavit does not set out the terms of her engagement with GMP, nor the manner in which it is envisaged that she will be deployed.

52 Whilst I accept that counsel retained by both parties have considerable experience, the level of experience of the practitioners who will have the day-to-day conduct and oversight of the McCoy proceeding and the level of support and resources that each has is particularly important.[6] The experience and resources of MB substantially outweighs that which can be provided by GMP. The difficulties and uncertainties that presently relate to the position with LCHB are such that the co-counsel arrangement

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6 *Greentree v Jaguar Land Rover Australia Pty Ltd (Carriage Application)* [2023] FCA 1209, [72].

with LCHB does not materially alter this assessment, and nor does the recent arrangement which has been entered into by GMP with Ms Chapman.

53 The experience and resources available to the McCoy plaintiff is a factor which strongly favours carriage being determined in favour of the McCoy proceeding.

54 The question of resourcing insofar as it relates to the financial capacity to sustain the prosecution of the action is more conveniently dealt with at the same time as the evaluation of the parties' proposal for security for costs.

Nature and scope of the causes of action advanced, relevant case theories and group membership

55 It is common ground that the causes of action advanced in both proceedings arise from the same factual matrix and involve common defendants. The causes of action advanced in the McCoy proceeding however include allegations of a breach of the fitness for purpose consumer guarantee contained in s 55 of the *Australian Consumer Law* (the 'ACL'), an allegation that the breach of the consumer guarantee constitutes a major failure within the meaning of s 260 of the ACL as well as claims for unconscionable conduct in contravention of s 51AB of the *Trade Practices Act 1974* (Cth) and s 21 of the ACL, a claim in equitable misrepresentation and claims for accessorial liability which are not included in the Maglio proceeding. The claim for equitable misrepresentation is relied upon in support of a gain based remedy in the form of an account of profits. Further, the McCoy plaintiff asserts that the plea in relation to deceit contained in the Maglio proceeding is deficient.

56 The relevant period in the McCoy proceeding is approximately six months longer than that in the Maglio proceeding by virtue of the respective commencement dates and the class in the Maglio proceeding is confined to particular vehicle models, unlike that in the McCoy proceeding.

57 For the purposes of this application I regard these issues as neutral. Given the divergence of views between the parties, it is not possible to form any view as to the respective advantages of the additional causes of action or disadvantages, much less

the slightly broader group without a more detailed analysis of the merits of the cause of action. That is neither possible nor appropriate in an application of this nature. Further, any deficiencies in the deceit pleading in the Maglio proceeding can likely be addressed in the event that carriage is given to the Maglio plaintiffs. Whilst a gain based remedy may be advantageous, this will be dependent on the elements of this cause of action being made out and sounding in such a remedy. This cannot be properly assessed at this stage in an application of this nature.

The state of preparation of the proceedings

58 Having regard to its earlier commencement, the Maglio proceeding is more advanced. Pleadings are now closed. Some document production has occurred in response to notices to produce. The Maglio plaintiffs complain that such delays as have occurred in the prosecution of the Maglio proceeding have been due to interlocutory disputes, pursued for the most part unsuccessfully by one or both of the defendants, and interruption to the existent timetable by virtue of the belated filing of the McCoy proceeding.

59 I do not consider that it is appropriate to revisit the interlocutory disputes as have passed between the Maglio plaintiffs and the defendants to now determine which party's conduct was unreasonable or delayed the Maglio proceeding. Even allowing for the fact that a defence was not filed in the McCoy proceeding due to these pending applications, it suffices to say that the Maglio proceeding is more advanced than the McCoy proceeding and that accordingly this is a factor which weighs in favour of carriage being determined in favour of the Maglio proceeding.

Proposed funding arrangements including funding terms and conditions and percentages

60 GMP submit that the funding terms disclosed by the parties' respective GCO applications are identical and as such this is a neutral factor between the two proceedings. Such a contention is premised on the Court permitting the Maglio plaintiffs to revise their GCO rate after the date for the filing and service of the parties' revised statements of position so as to match that of the McCoy plaintiff.

61 In support of that application, the Maglio plaintiffs argue that the effect of granting such leave is advantageous to the group in the event carriage is afforded to the Maglio plaintiffs because it provides group members with the benefit of a lower rate depending on certain resolution outcomes.

62 Whilst that is so, leave should not be given. The 8 September 2023 Orders contemplated in the first instance a blind tender so as to obtain the best funding terms for group members. As Delany J described in *Lidgett v Downer EDI Ltd*,[7] such a process is 'designed to encourage each party to put forward their best proposal, the proposal that would best advance the interests of group members'.[8]

63 The orders further contemplated that after seeing the 'tender' proffered by the other each plaintiff party would then have the ability to submit a further tender in response. The process therefore includes a competitive element with the possibility that one or the other could submit a second proposal more advantageous to group members.

64 That is exactly what occurred in the present case. The McCoy plaintiff submitted a revised statement of position which is more advantageous to group members by providing for the stepped model outlined above. Unlike the McCoy plaintiff, the Maglio plaintiffs chose to maintain their initial tendered proposal.

65 To now allow the Maglio plaintiffs to seek to match a funding proposal advanced by the McCoy plaintiff in accordance with an agreed regime imposed by court orders would have the effect of substantially undermining the open 'conditions of tender' agreed upon by the parties and reflected in the 8 September 2023 Orders. It would permit one party alone the opportunity of in effect obtaining the valuable right to make the last bid. Although not the case here, if such a practice is encouraged, it is not difficult to imagine that in other cases, such late bids may then prompt the other party to seek a like indulgence and so on. Such a course substantially undermines the process the subject of the 8 September 2023 Orders.

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7 [2023] VSC 574 ('*Lidgett*').
8 Ibid [34].

66 It follows therefore that I would not grant leave to the Maglio plaintiffs to revise their funding proposal downwards. As such, given that the funding terms contained in the McCoy plaintiff's revised proposal are superior to that of the terms contained in the Maglio plaintiffs' revised proposal, this is a factor in favour of carriage being determined in favour of the McCoy proceeding.

Financial resourcing and proposals for security

67 Both the Maglio plaintiffs and the McCoy plaintiff have filed GCO applications. Accordingly, in the first instance it is convenient to approach the question of security for costs on the assumption that a GCO will be made and assume the firm granted carriage will have to provide security for costs.

68 In that context, it is convenient to consider the question of comparative proposals for security at the same time as considering the financial capacity of the funding parties to sustain the prosecution of the proceeding.

69 As Nichols J stated in *Nuix*, it is for the party who seeks a GCO in the context of a carriage motion to 'demonstrate that the funders who sought to invest in the proceeding, and make a return they judged adequate, could sustain their end of the bargain by supplying adequate resources'.[9] The Maglio plaintiffs do not seek to engage an external funder. In the McCoy proceeding, MB has entered into a cost sharing arrangement with CF FLA Australia Investments 3 Pty Ltd ('Vannin') where Vannin has agreed to pay a percentage of MB's professional fees and disbursements as well as a percentage of the total amount of security ordered in the McCoy proceeding. Vannin has significant resources and its capacity to make the contributions the subject of the costs sharing agreement with MB is not in issue.

70 In support of GMP's capacity to fund the Maglio proceeding to its conclusion and provide any security for costs which may be ordered, the Maglio plaintiffs rely upon the Mitchell report. Mr Mitchell was retained by GMP to provide a report as to GMP's financial capacity to conduct the proceeding to conclusion and to meet any order that

9 *Nuix* (n 2) [83].

GMP pay the defendants' costs.

71 Mr Mitchell's instructed assumptions include the estimated total amount of expenses to be incurred for the conduct of the litigation as likely to be in the range of $2.5-3 million per annum over a four year period and that if any adverse costs order was made where GMP was required to pay the costs incurred by the defendants, on a party/party basis, that amount was unlikely to exceed the range of $3-4 million per annum. These estimates translate to estimated expenses in total of $10-12 million with respect to the prosecution of the proceeding, and an estimated adverse costs liability of $12-16 million.

72 Mr Mitchell was also provided with two documents, the '2022 Financial Report of Gerard Malouf & Partners Pty Limited' and the '2023 Management Accounts of Gerard Malouf & Partners Pty Limited' (collectively, the 'financial report and management accounts').

73 The Mitchell report is brief and the relevant parts read as follows:

> 4 Our findings are that:
>
> a. The revenue of $35 million has grown in excess of 20% during the financial year (FY2022-2023) compared to the previous financial year (FY2021-2022)
>
> b. The current assets have been over $100 million for the past 2 years
>
> c. The net assets have been over $60 million for the past 2 years.
>
> 5 Our summary is that:
>
> a. GMP is expected to have the current financial capacity to conduct the class litigation to its conclusion; and
>
> b. GMP is likely to have the financial capacity to meet any adverse costs order which the court may order GMP to pay for the other side's costs.

74 The financial report and management accounts were not exhibited to Mr Mitchell's affidavit, or annexed to his report.

75 On 15 September 2023, MB wrote to GMP requesting copies of the financial report and

management accounts. On the same day, GMP responded stating that 'such documents are, if anything, a matter of evidence' and that the 8 September 2023 Orders required evidence to be served on 6 October 2023 but not earlier. When the documents were not provided on 6 October 2023, MB made a further request for the documents by letter dated 18 October 2023 asking for copies to be provided by 19 October 2023. There was no response to that letter.

76 Unsurprisingly, in those circumstances at the hearing, the McCoy plaintiff objected to the admissibility of the Mitchell report on the ground, inter alia, that the basis for Mr Mitchell's conclusion had not been proved because of the failure to produce the financial report and management accounts, and that as a consequence I could not take any comfort from the report.

77 In response, counsel for the Maglio plaintiffs submitted that the report was admissible notwithstanding that the factual basis for the opinion expressed was not established by admissible evidence and justified the failure to provide the financial report and the management accounts on the basis that they were commercially sensitive. Further, counsel for the Maglio plaintiffs submitted that the complaint of the McCoy plaintiff sat uneasily with the claim of confidentiality advanced with respect to MB's own financial information. Counsel also submitted that if I considered that it was unfair for the McCoy plaintiff, leave should be granted to the Maglio plaintiffs to produce the financial information after the hearing had concluded and for the McCoy plaintiff to be able to make any submission in writing. I did not consider this course was a satisfactory one; the parties had ample time to put on the necessary evidence and the Maglio plaintiffs had made a deliberate choice not to produce the material. If the request was acceded to, it would give rise to the filing of further evidence well outside the timeframe prescribed by the 8 September 2023 Orders and further delays, depending on the response of the McCoy plaintiff. Accordingly, I declined to give such leave and received the report subject to the objection and informed the parties that I would determine the question of admissibility in these reasons.

78 The claim of confidentiality sits uneasily with the open disclosure of the net asset and

current asset position and in any event could have been dealt with by the giving of undertakings. Nor was it previously raised by GMP as an impediment to the provision of the information. Further, and contrary to the submission, MB did not in fact follow the same course. Ms Gilsenan's first affidavit of 6 October 2023 includes as an exhibit unredacted audited financial statements of MB for the financial year ending 30 June 2022 and the statement to the effect that the management accounts for the financial year ending 30 June 2023 were of similar magnitude.

79 The failure to adduce evidence of the contents of the financial report and management accounts, and more particularly to provide copies of that material to the McCoy plaintiff or indeed the Court, substantially undermines the weight of Mr Mitchell's evidence. The basis for Mr Mitchell's conclusion is not established and his conclusion cannot meaningfully or at all tested or critiqued by the McCoy plaintiff, or evaluated by the Court.

80 The constituent components of the current assets is not identified. Nor are the current liabilities. Whilst a healthy net asset position is disclosed, neither the total assets themselves or the total liabilities are disclosed, much less their nature identified. It is possible that the net asset position may be attributable to non-current assets such as property holdings or goodwill, the utility of which in the context of assisting in the funding of the prosecution of the action or meeting any adverse costs order may warrant further enquiry. Whilst the Mitchell report discloses the revenue figure for the current year and it is possible to work out the previous year's revenue, the expense are not disclosed and hence profitability cannot be determined. Moreover, whilst the current financial position of GMP is informative of the likelihood of it having the capacity to fund the proceeding over the next 3-4 years and to meet any adverse costs order that may be made against it, the relevant enquiry requires an assessment to be made which is forward looking. In circumstances where the Mitchell report does not contain any reasoning as to the basis on which he expects that GMP will have the relevant capacity, the absence of detail as to the make-up of the current assets, current liabilities, non-current assets, non-current liabilities and any information at all as to

the current or expected profitability, or expected work flow assumes greater importance.

81 It follows therefore that even if I were to admit the Mitchell report (which I do), the absence of the underlying financial information on which the Mitchell report is based, the inability to test the report coupled with questions prompted by its brevity mean that the evidence that has been adduced as to whether the funder, here GMP, has the capacity to fund the action to its conclusion or alternatively meet any adverse costs order, is deficient.

82 I accept that Mr Lo has given evidence in conclusionary terms to the effect that the firm does have such capacity and one suspects that a firm of GMP's size and expertise and experience (albeit largely in the personal injury space) would not have started this proceeding and Mr Lo would not have given evidence to that effect without a reasonable basis for belief in the firm's capacity to both fund the proceeding and meet any adverse costs order. For whatever reason, a matter that ought to have been easily established, has not been and it is inappropriate to further speculate. The size of MB's balance sheet and its relationship with Vannin is such that there is no doubt as to its capacity. Accordingly, this factor too weighs in favour of carriage being determined in favour of the McCoy proceeding.

Extent of any book build

83 As of 12 September 2023, 920 putative group members have signed retainers for GMP to act for them in the Maglio proceeding.

84 In contrast, 439 claimants have registered in the McCoy proceeding in respect of 935 vehicles.

85 Whilst there are a greater number of putative group members who have signed retainers for GMP, I do not regard this as a significant factor in circumstances where both parties are seeking to conduct an open class action and are seeking a GCO (as opposed to, for example, a funding equalisation order).

86 Further, the significance of a greater number of group members having signed

retainers for GMP does not attract significance in circumstances where it is unclear whether those persons did so before or in ignorance of the McCoy proceeding.

87 Accordingly, I do not regard the comparative book build as being a factor of significance.

Analysis

88 Having regard to the above matters, the course which is in the best interest of group members is for the Maglio proceeding to be stayed and for the McCoy proceeding to proceed.

89 First and most significantly, there is a substantial difference in the relative expertise and experience of the respective law firms in the two actions. The greater expertise and experience of MB in class actions, including those the subject of these competing class actions, is a factor which is strongly supportive of the view that the best interests of the group favour carriage being given to the McCoy proceeding. For the reasons set out above, I do not consider that the experience gap is narrowed in any meaningful way by GMP's co-counsel arrangement with LCHB or its retainer of Ms Chapman.

90 Secondly, the funding terms advanced in the McCoy proceeding within the confines of the regime imposed by the 8 September 2023 Orders are superior to those that were advanced by the Maglio plaintiffs.

91 Thirdly, there is an absence of appropriate evidence about the capacity of GMP to conduct the proceedings and to meet any adverse costs order which may be made in the proceeding and which is likely to prompt a security for costs application. This is in contrast to the evidence as to the capacity of MB and Vannin to fund the proceeding.

92 Further and relatedly, the fact that the Maglio proceeding is more advanced is not sufficient to outweigh the factors in favour of carriage being given to the McCoy proceeding. Even allowing for the fact that pleadings have closed in the Maglio proceeding but not the McCoy proceeding (which itself is in part a product of the interlocutory steps being put on hold pending the disposition of the carriage application), both proceedings are at a comparatively early stage given that discovery

has not occurred nor the filing of lay and expert evidence. This is especially so when one assesses the current status of each proceeding against the likely trial date of each proceeding. Given that the defendants have filed a defence to the Maglio proceeding and the similarity in the causes of action, there is no reason why the McCoy proceeding cannot be brought up to the same state of readiness as the Maglio proceeding in short order, and I intend to make directions for the filing and service of a defence and a reply in that proceeding as part of the disposition of this application.

93 A stay of the Maglio proceeding will have the effect that GMP will have to bear sunk costs incurred by it to date. Whilst one has a degree of sympathy for GMP, the risk of sunk costs is not a burden borne by the plaintiffs of the class. It is a risk assumed by GMP in circumstances where it has entered into the field of commercialising litigation and should therefore be regarded as part of the risk associated with the commencement of class actions where the prospect of a competing class action being commenced cannot be discounted.[10] That is particularly so here, where MB had informed GMP of the prospect of a competing class action within six weeks of the commencement of the Maglio proceeding, well before the defence had been filed and document production had occurred.[11] A portion of the costs were incurred therefore after GMP was on notice of the likely commencement of that which became the McCoy proceeding.

94 I turn now to the GCO application.

Group costs order application

95 As noted above, the McCoy proceeding seeks a GCO at the following rates:

(a) up to $75 million at 25%;

(b) between $75,000,001 to $150,000,000 at 22.5%;

(c) between $150,000,001 to $255,000,000 at 20%; and

10 *Klemweb Nominees Pty Ltd v BHP Group Ltd* [2019] FCAFC 107, [45].
11 See above [2]-[6].

(d) over $225,000,000 at 17.5%.

96 Section 33ZDA(1) of the Act provides that on application by a plaintiff in a group proceeding, the Court may make a group costs order 'if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding'.

97 A GCO is in effect a statutory common fund order for the benefit of the law practice.[12]

98 Section 33ZDA is a law regulating, for the purpose of group proceedings, the liability to pay, and manner of calculation of, legal costs by the plaintiff and group members to the law practice representing them and the liability to pay adverse costs orders or to post security for adverse costs.

99 The principles relevant to the application of s 33ZDA(1) were recently summarised by Nichols J in *Gehrke v Noumi Ltd*,[13] which were endorsed by Delany J in *Mumford v EML Payments Ltd*.[14] The relevant considerations are as follows:[15]

> (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.

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12 *Bogan v The Estate of Peter John Smedley (deceased)* [2022] VSC 201.
13 [2022] VSC 672 ('*Gehrke*').
14 [2022] VSC 750, [14].
15 *Gehrke* (n 13) [53](a) – (f) (citations omitted).

(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 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.

100 In support of the application, the McCoy plaintiff relied upon:

(a) his affidavit affirmed 6 October 2023;

(b) the affidavit of Ms Gilsenan affirmed 6 October 2023; and

(c) the second affidavit of Ms Gilsenan affirmed 6 October 2023.

101 Parts of Ms Gilsenan's second affidavit were the subject of claims of confidentiality which have been addressed in orders now made. It is not necessary for the purposes of the disposition of this application to refer to that confidential material which relates to matters such as a high level assessment of the prospects of success and matters relating to MB's cost of capital and internal rates of return across a portfolio of historical class actions.

102 Mr McCoy registered his interest with MB on 22 December 2022 after having read about the Hino class action investigation on MB's website.

103 Subsequently, he met with MB's Mr Koo and another employee of MB on 13 April 2023 to discuss the lead plaintiff role. Mr McCoy was provided with a letter and a retainer costs agreement. In that letter, he was advised that MB intended to make an application for a GCO in the amount of 25%. The letter further stated that in the event that a GCO was not made, MB may seek alternative funding arrangements for the conduct of the proceeding including negotiating on behalf of the lead plaintiff and group members with Vannin, or that MB could continue to conduct the proceeding on a no win/no fee basis but with an uplift in the event of success or could otherwise elect not to continue with the proceeding.

104 Ms Gilsenan deposed to her opinion, based on experience in conducting group proceedings, that GCOs offer a number of significant protections to group members with respect to the calculation of legal costs including that legal costs are proportionate to any settlement or award and are capped as a proportion of the final

settlement sum or award. She otherwise deposed that clients often become confused or overwhelmed by the various components of legal and funding costs which are or may be payable in the proceeding and that the simplicity of a GCO model assists the plaintiff and group members in understanding their rights in the proceeding in relation to costs.

105 In determining the appropriateness of the proposed rate, I have had regard to percentages which have been ordered in 11 other proceedings where a GCO has been made, which are set out in the below table.

	GCO Percentage Ordered
G8 Education class action [2022] VSC 32	27
Bogan v Smedley (dec'd) [2022] VSC 201	40.0
Beach Energy class action [2022] VSC 424	24.5
Noumi class action [2022] VSC 672	22.0
Mumford v EML Payments Ltd [2022] VSC 750	24.5
Lieberman v Crown Resorts Ltd [2022] VSC 787	16.5-27.5
Fox v Westpac Banking Corporation [2023] VSC 95	24.5
Anderson-Vaughan v AAI Ltd [2023] VSC 485	25.0
Star Entertainment Group class action [2023] VSC 561	14.0
Lidgett v Downer EDI Ltd [2023] VSC 574	21.0
Five Boroughs NY Pty Ltd v State of Victoria & Ors (No 5) [2023] VSC 682	30.0

106 I accept that a price comparison between the proposed GCO and the most likely alternative funding model is a relevant consideration but it is not a proxy for the statutory test. The present case is one where the evidence is such that at this stage, any assessment of the alternative funding model is inherently speculative given the early stage of the proceedings and the uncertainty as to the cost of obtaining third party funding, which is the most likely alternative funding model.

107 The authorities make it clear that the plaintiff is 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. Nevertheless, I note Ms Gilsenan's evidence to the effect that she anticipates that a GCO is likely to provide a better outcome for group members than if third party litigation funding was secured at the current prevailing rates.

108 Whilst MB is currently conducting the proceeding on a no win/no fee basis, potential group members including Mr McCoy were informed of its intention to apply for a GCO from the outset. Further, the GCO foreshadowed in the communications between MB and Mr McCoy was one which involved application for a GCO in the amount of 25%.

109 As noted above, as a result of the competitive processes associated with the carriage applications, the proposed rate has been revised in a manner which is more beneficial to class members. The proposed rate therefore has been the product of a quasi-tender process given the carriage application. This process gives comfort as to the lowest market price available to fund the proceedings.[16]

110 Having regard to the competitive process which has informed the application for the GCO at the rate now sought and its prima facie reasonableness having regard to rates imposed in other cases, I am satisfied that the proposed rate is prima facie reasonable and proportionate.

111 In any event, upon any settlement or award of damages, the appropriateness of the rate can be reviewed lest it give rise to a disproportionate return to the solicitors and the funder.

112 In the circumstances, I am satisfied that it is appropriate to make such an order to ensure that justice is done in the proceeding. In particular, I am satisfied that the order should be made having regard to the following:

(a) it provides certainty to the plaintiff and group members that they would be guaranteed to receive a percentage of any recovered amount;

(b) it provides transparency to group members in respect of funding and legal costs;

(c) it would fairly distribute the burden of legal costs incurred for the benefit of

16 *Lidgett* (n 7).

group members across all group members;

(d) the proposed rate is prima facie reasonable and proportionate; and

(e) in the event that the rate gives rise to a disproportionate return to the solicitors and the funder, it can be reviewed at a later stage.

Conclusion

113 The Maglio proceeding will be permanently stayed. A GCO will be made in the McCoy proceeding in the form sought.

114 Subject to hearing further from the parties, my preliminary view is that the plaintiffs should bear their own costs of the carriage applications and the GCO application and that the defendant's costs should be reserved. I will make directions in the McCoy proceeding for the filing of a defence and a reply.

CERTIFICATE

I certify that this and the 30 preceding pages are a true copy of the reasons for judgment of Justice M Osborne of the Supreme Court of Victoria delivered on 15 December 2023.

DATED this fifteenth day of December 2023.

Katherine Clements

Associate