

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

Not Restricted

S ECI 2023 03566

MICHAEL GARY WARNER

Plaintiff

v

ANSELL LIMITED (ACN 004 085 330)

Defendant

JUDGE: GARDE J
WHERE HELD: Melbourne
DATE OF HEARING: 15 July 2024
DATE OF JUDGMENT: 22 August 2024
CASE MAY BE CITED AS: Warner v Ansell Limited
MEDIUM NEUTRAL CITATION: [2024] VSC 491

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 basis to make the proposed group costs order – Judicial discretion in open textured legislation – Principles to be applied – Whether 40% rate is proportionate and reasonable on a *prima facie* basis – Whether evidence sufficient to make an informed assessment as to whether proposed 40% rate is proportionate and reasonable – *Supreme Court Act 1986* (Vic), s 33ZDA – *Civil Procedure Act 2010* (Vic) s 24 – *Legal Professional Uniform Law Application Act 2014* (Vic) sch 1, s 172(1) – *Fox v Westpac Banking Corporation* (2021) 69 VR 487; *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173; *Bogan v Estate of Peter John Smedley (Deceased)* [2022] VSC 201; *Gehrke v Noumi Ltd* [2022] VSC 672.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms F Forsyth KC	Slater & Gordon
For the Defendant	Mr K Loxley with Ms E Delany	Herbert Smith Freehills



HIS HONOUR:

Introduction

- 1 This proceeding is a group proceeding (a class action) issued under Pt 4A of the *Supreme Court Act 1986* ('the Act') arising from the acquisition of shares in the defendant Ansell Limited (ACN 004 085 330) ('Ansell') over the period from 24 August 2021 to 28 January 2022 ('relevant period'). The group members allege that Ansell failed in its continuous disclosure obligations under s 674A(2) of the *Corporations Act 2001* (Cth) ('Corporations Act') and engaged in misleading and deceptive conduct, or conduct likely to mislead or deceive contrary to s 1041H(1) of the Corporations Act, s 18 of the Australian Consumer Law, and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act').
- 2 By a summons filed 15 May 2024 ('summons'), Michael Warner, the plaintiff in this proceeding, is seeking a group costs order pursuant to s 33ZDA of the Act to the effect that the legal costs payable to Slater and Gordon Limited (ABN 930 972 97400) ('SG') be determined at 40% of the amount of any award or settlement that may be recovered in the proceeding, and that liability for payment of the legal costs be shared among all group members.
- 3 The plaintiff relies on the affidavits of Mr Warner and of Nathan Rapoport, a solicitor employed by SG with considerable experience in class actions. It also relies on written and reply submissions. On 15 July 2024, I gave leave to the plaintiff to file redacted versions of the affidavits and submissions. Ansell relies on written submissions.

The plaintiff's claim

- 4 In the proceeding, the plaintiff alleges that Ansell engaged in misleading or deceptive conduct, and breached its obligations of disclosure as an ASX-listed company. In general terms, the plaintiff alleges that:
- (a) on 24 August 2021, Ansell published an announcement in its 2021 financial year results to the ASX, in which Ansell stated that its 2022 financial year earnings per share ('EPS') were expected to be in the range of US\$1.75 to US\$1.95



- (‘forecast range’);
- (b) by its ASX disclosures on 24 August 2021, Ansell represented among other things that it had a reasonable basis to consider that the EPS would be in the forecast range and there did not exist a material risk that the EPS for the 2022 financial year would be lower than the forecast range;
 - (c) on 11 November 2021, in further ASX announcements, Ansell maintained the forecast range and again represented that the forecast range was reliable;
 - (d) Ansell’s representations were misleading or deceptive, as at 24 August 2021 and 11 November 2021, there was no reasonable basis to consider the EPS would be in the forecast range, and there existed a material risk the EPS would be lower than the forecast range;
 - (e) on 31 January 2022, Ansell published a corrective statement to the ASX in which it downgraded its EPS forecast for the 2022 financial year to US\$1.25 to US\$1.45;
 - (f) this was an approximately 28% downgrade to its earlier EPS guidance, and Ansell shares fell in price;
 - (g) throughout the relevant period between 1 November 2021 and 28 January 2022, Ansell:
 - (i) engaged in misleading or deceptive conduct, contrary to s 1041H(1) of the Corporations Act, s 18 of the Australian Consumer Law and/or s 12DA(1) of the ASIC Act; and
 - (ii) contravened its obligations of continuous disclosure to the ASX, contrary to s 674A(2) of the Corporations Act; and
 - (h) as a result, the plaintiff and the other members of the group who purchased shares over the relevant period have suffered loss and damage.

Relevant statutory provisions

5 The plaintiff makes this application for a group costs order under s 33ZDA of the Act,



Section 33ZDA provides:

- (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).
- (4) ...
- (5) In this section –

‘group costs order’ means an order made under subsection (1);

‘legal costs’ has the same meaning as in the Legal Profession Uniform Law (Victoria).

6 Section 24 of the *Civil Procedure Act 2010* (Vic) (‘CPA’) is also relevant. Section 24 binds both the lead plaintiff and SG, as persons to whom the overarching obligations in the CPA apply. Section 24 provides:

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to –

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.

7 The expression ‘legal costs’ is defined in s 33ZDA(5) of the Act to have the same meaning as in the *Legal Professional Uniform Law* (Vic). This is found in sch 1 of the



Legal Profession Uniform Law Application Act 2014 (Vic) ('*Uniform Law*'). Section 169 of the *Uniform Law* includes the following relevant objectives of Part 4.3 of the *Uniform Law*:

- (a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; and
- (b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and
- ...

8 Section 172(1) of the *Uniform Law* is found in Part 4.3, and provides:

A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are:

- (a) proportionately and reasonably incurred; and
- (b) proportionate and reasonable in amount.

Mr Warner's evidence

9 Mr Warner signed a conditional legal costs agreement with SG on 27 June 2023, and a deed of amendment on 8 May 2024. He understands that:

- (a) the legal costs are to be calculated as 40% of any award or settlement that is obtained on the basis that there will be no further deductions for legal fees, disbursements, funding or other costs;
- (b) SG would only receive payment for legal costs if Ansell was required to pay money to group members as part of a settlement or judgment by the Court;
- (c) SG would be required to meet the costs of conducting the proceeding, including the costs of lawyers, barristers and expert witnesses; and
- (d) SG would be responsible for meeting any of Ansell's costs ordered by the Court if the proceeding was unsuccessful and for providing any security for those costs if ordered by the Court.

10 Mr Warner said that he considered that it was easier for group members to understand



the legal costs they would pay if they are set as a percentage of the amount paid by Ansell rather than calculated by the number of hours the solicitors spent working on the proceeding. If a group costs order was not ordered, he would instruct SG to seek third party litigation funding. It was important to him and the group that SG would be liable for any order requiring payment of Ansell's costs if a group costs order were made and the proceeding was unsuccessful. Ansell's costs would likely run into the millions of dollars if the proceeding were to go to trial, which Mr Warner could not personally afford to pay.

Mr Rapoport's evidence

11 Mr Rapoport provided detailed evidence. His affidavits were to a significant degree subject to client legal privilege and confidentiality. I will describe his evidence at a high level so as not to disclose privileged or confidential material. Nonetheless I have taken the whole of his evidence into account in reaching a decision.

Investigation and negotiations with litigation funders

12 Mr Rapoport provided details of the investigations undertaken by him and by other solicitors with SG. As a result of the investigations, the senior solicitor with carriage of the matter formed the view that there was a reasonable basis to make the allegations made by the plaintiff in the proceeding.

13 SG negotiated with two litigation funders in succession between August to December 2022 and November 2022 to April 2023. Their identity is confidential. Details of the confidential negotiations are set out in Mr Rapoport's affidavits.

Group costs order suitability and rates

14 Following the negotiations, SG found that it was unlikely that third party litigation funding would be secured for the proceeding on terms that were commercially acceptable to SG and in the best interests of group members having regard to the return to the funder relative to the amount of funding that would be likely to be offered.

15 After evaluating hypothetical settlement ranges and their implications for SG and



group members, SG decided that a maximum rate of 40% would be appropriate.

16 This decision was made with the understanding that the figure of 40% was a maximum, not the guaranteed final rate, and that if the Court did make a group costs order at the 40% rate it would retain the discretion to lower the ultimate amount awarded at any time.

17 Mr Rapoport said that it was unlikely that acceptable third party litigation funding could be secured for this proceeding. If a group costs order was not ordered SG would seek to have the matter funded by a litigation funder even though the litigation funding terms were disadvantageous to SG or group members when compared to a group costs order at a rate of 40%.

Estimate of the size of the class

18 Mr Rapoport said that the proceeding was being conducted on an open class basis. He was unable to say how many group members there were. Ansell's annual report for FY21 indicates that it had 36,259 registered shareholders as at 30 July 2021. Ansell's annual report for FY22 indicated that there were 46,758 registered shareholders one year later. These numbers were only a weak guide to the potential class size, as group members must have purchased an interest in shares over the relevant period. The registered shareholders include custodian or nominee shareholders who held shares on behalf of many underlying beneficial owners.

Estimate of class value

19 Mr Rapoport said that the estimation of claim value at this point of time was extremely difficult. Claim value was dependent on:

- (a) the class size;
- (b) the result of a bookbuild or concerted effort to encourage group members to register; and
- (c) the registration process ordered by the Court.

20 Mr Rapoport nonetheless provided very rough estimates of the claim value using the



value of shares traded in the claim period and the share price movement during the event window. The estimates assisted SG to form a view about whether the scale of losses potentially suffered by investors in Ansell were such as to make a claim economically viable.

21 Mr Rapoport observed that further developments can significantly affect the assessment of quantum. For example:

- (a) the number of shares acquired during the claim period by group members who register their claim can be high or low;
- (b) discovery from the defendant may, or may not, reveal evidence supportive of the plaintiff's case;
- (c) the filing of lay and expert evidence could reveal matters which significantly affect the pleaded claims;
- (d) new case law could cast doubts on group member's claims, or alternatively could make the prospect of proving those claims easier from an evidentiary perspective;
- (e) the financial circumstances of the defendant might change so that it is no longer capable of paying the entirety of group members' claims; and
- (f) there is a risk that any policy of insurance held by Ansell may not respond to the claims made in the proceeding.

22 Despite these uncertainties, Mr Rapoport gave his estimate of the likely quantum range if a negotiated settlement were to be achieved.

Prospects of success

23 Mr Rapoport noted that the proceeding was still at an early stage with limited discovery only. Lay and expert evidence had not been filed. Mr Rapoport highlighted the risks and challenges involved in the proceeding. Many of these risks were the common risks which accompany any complex piece of litigation.



24 Mr Rapoport noted that all shareholder class actions conducted by SG that have resolved since 2012 have concluded by way of settlement. However in the last five years, six shareholder class actions have run to trial. In all five cases in which judgment has been handed down to date, the defendants have been successful.

25 After considering relevant matters, Mr Rapoport concluded that there are reasonable prospects of the matter being resolved by way of negotiated settlement after discovery and group member registration before the commencement of trial. This was far from certain.

SG's estimated litigation budget

26 Mr Rapoport provided details of SG's current litigation budget representing its best estimate of the legal costs likely to be incurred in the matter. The budget included professional fees and disbursements, and was calculated on an ordinary time-costed basis without uplift for conditional fees, or any premium payable under any ATE insurance policy. The estimate was based on prior experience in other matters, and on the nature of the matter pleaded in the statement of claim. Mr Rapoport also made estimates of the total legal costs if the matter were to resolve at or shortly after an early mediation, or at a later mediation.

SG's position

27 Mr Rapoport stated that between 1 May 2007 and 28 April 2023, SG was listed on the ASX. In its FY23 financial reports, SG stated that as at 30 June 2023, SG had:

- (a) total work in progress of \$351.05 million;
- (b) total assets of \$489.51 million;
- (c) total current assets of \$210.44 million;
- (d) total net current assets of \$117.77 million; and
- (e) an overall net asset position of \$202.01 million.

28 At the same date, SG held debt facilities under a Super Senior Facility which had a

balance of \$87.4 million, and a \$30 million term loan extended in December 2021.

29 On 31 May 2023, Allegro Funds Pty Ltd ('Allegro') acquired all of SG's shares, and engaged in other transactions which substantially reduced SG's debts, and debt service obligations. SG is now owned by Allegro, an off-market entity, and is no longer listed on the ASX. The material does not disclose the ultimate beneficial ownership of Allegro.

Next stage if a group costs order is not made

30 Mr Rapoport said that if the present application was unsuccessful, he would seek instructions from the plaintiff to obtain third party litigation funding. He considered that there was a reasonable prospect that an offer of third-party litigation funding would be forthcoming. This was by no means certain. If funding were provided, it would be likely that the terms of the funding would be significantly less advantageous for group members.

Modelling

31 Mr Rapoport provided extensive modelling which was based on different scenarios including:

- (a) an assumed settlement at any early mediation;
- (b) an assumed settlement at a later mediation;
- (c) an assumed settlement at a later mediation but with time-based professional fees and disbursements 50% higher than budget;
- (d) an assumed settlement or award following a successful trial; and
- (e) an assumed settlement and an award following a successful trial but with time-based professional fees and disbursements 50% higher than budget.

32 The modelling prepared by Mr Rapoport contained the costs and returns to group members under the proposed group costs order and the costs and returns to members under a number of funding hypotheticals.

33 Having regard to the modelling and to his overall assessment of the circumstances, Mr Rapoport believed that a group costs order was significantly more likely to result in a greater return to group members than would be the case if third party litigation funding were obtained.

34 Mr Rapoport said that his belief was also based on the fact that the Court has an express power to vary the percentage set out under a group costs order. If a settlement or award were achieved that resulted in an unreasonable and disproportionate outcome, the Court had power under s 33ZDA(3) to vary the rate to reduce the amount payable under the order.

Appropriateness of a group costs order

35 Mr Rapoport listed the considerations which he considered were relevant to the Court's assessment of the plaintiff's proposed group costs order and 40% rate. They included:

- (a) the benefits that a group costs order offers to group members including the percentage of any award and settlement that would be available to group members is significantly greater than that available under a third party funding arrangement;
- (b) the estimated costs of the proceeding and the range of estimates that may affect the actual amount of costs incurred;
- (c) the prospects of success in the proceeding and the range of estimates of the potential outcomes of the proceeding;
- (d) the complexity of the proceeding;
- (e) the very significant capital cost to SG resulting from its liability to pay disbursements throughout the life of the proceeding, and perform legal work without payment, most likely for a number of years;
- (f) the significant costs to SG of the illiquidity of these capital costs in circumstances where the ultimate amount of those costs and the duration of the



- investment is unknown;
- (g) the significant risk borne by SG that it will not be repaid, either in full or at all in the event of an unsuccessful outcome from the proceeding or modest settlement;
 - (h) the risk to SG of providing any security for Ansell's costs that may be ordered;
 - (i) the significant risk borne by SG of bearing any adverse costs order that may be made against the plaintiff; and
 - (j) the uncertainties and unknowns associated with costs estimates including as to:
 - (i) the number of years that SG's investment will be outstanding;
 - (ii) the group proceeds of the investment; and
 - (iii) the ongoing and growing nature of the investment.

36 Mr Rapoport prepared a table which depicted the estimated net return in several different scenarios. He exhibited relevant documents including the conditional legal costs agreement between SG and the plaintiff, and tables showing the litigation budget and estimated return to SG.

Plaintiff's submissions

37 The plaintiff's submissions included:

- (a) what is required in determining whether to make a group costs order is a broad, evaluative assessment, in which the questions of whether to make an order, and the rate that ought be set by the order, will be intertwined;¹
- (b) the financial viability of both the existing funding agreements and the proposed

¹ *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173, [12] (M Osborne J) ('*Raeken*') citing *Fox v Westpac Banking Corporation* (2021) 69 VR 487, [8] (Nichols J) ('*Fox*') and *Allen v G8 Education Ltd* [2022] VSC 32, [20] (Nichols J) ('*Allen*').

- funding arrangement by a group costs order are relevant considerations;²
- (c) the prospect of termination of the existing funding arrangement in a proceeding directly affects the viability of the proceeding. The arrangements by which the law practice proposes to bear or share the financial risk are critical to the financial viability of the proposed group costs order and are thus relevant considerations to the Court in exercising its broad discretion;³
 - (d) considerations of reasonableness and proportionality in respect of legal costs ‘are not substitutes for the statutory test, but will assist in answering the statutory question when it comes to setting a percentage rate’;⁴ and
 - (e) the statutory criterion ‘is not whether the proposed percentage rate to be set at 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 ‘provides the Court with a large measure of significantly unguided discretion’.⁵

38 I accept these submissions.

Benefits of a group costs order

39 The plaintiff submitted that the recognised benefits of a group costs order include:

- (a) group costs orders offer simplicity and transparency in relation to funding arrangements, designating a simple and readily understandable method for calculating costs by a deduction from the plaintiff’s recovered sum;⁶
- (b) a group costs order also provides certainty. It guarantees that the plaintiff and group members will receive a fixed proportion of any award or settlement that

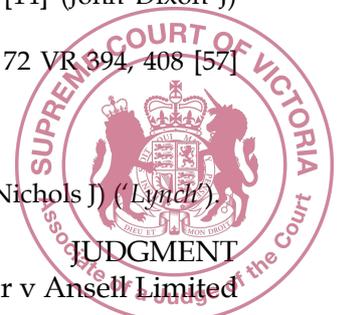
² *Raeken* [25]; *Bogan v The Estate of Peter John Smedley (deceased)* [2022] VSC 201, [14] (John Dixon J) (*‘Bogan’*).

³ *Raeken* [25]; *Bogan*, [14]; *Bogan v the Estate of Peter John Smedley (Deceased)* (2023) 72 VR 394, 408 [57] (Ferguson CJ, Niall and Macaulay JJA) (*‘Bogan (No 2)’*).

⁴ *Raeken* [21]; *Fox* [145]-[148] and *Allen* [29].

⁵ *Gehrke v Noumi Ltd* [2022] VSC 672, [53] (Nichols J) (*‘Gehrke’*); *Fox* [24].

⁶ *Raeken* [24]; *DA Lynch Pty Ltd v Star Entertainment Group Ltd* [2023] VSC 561, [31] (Nichols J) (*‘Lynch’*).



is offered, subject only to variation by Court order;⁷

- (c) by fixing costs as a percentage of any award or settlement, it also allows the plaintiff and group members ‘to eradicate any risk that their compensation, if recovered, will be eroded by costs whose proportion to that compensation exceeds the specified percentage’;⁸ and
- (d) the existence of s 33ZDA(3), by which the Court may amend a group costs order at any time, including amending the percentage, also provides an important safeguard for plaintiffs and group members against unanticipated unreasonable or disproportionate outcomes.⁹

40 I also accept these submissions.

Provisions of SG’s retainer relating to the proposal

41 The plaintiff highlighted the following provisions and features of his retainer of SG:

- (a) the plaintiff and his company entered into a conditional legal costs agreement (‘retainer’) with SG on 27 June 2023;
- (b) SG have agreed to act for the plaintiff on a ‘no win no fee’ basis until the hearing and determination of the group costs order application;¹⁰
- (c) following the initiation of the proceeding, SG will act on the basis of a group costs order of 40% or any lower rate agreed with SG;¹¹
- (d) if the Court declines to make a group costs order, or, if the Court vacates a group costs order made in the proceeding, SG is permitted to seek to obtain third party litigation funding for the proceeding;¹²
- (e) subject to complying with his obligations, the plaintiff will not be liable for any

⁷ *Raeken* [26].

⁸ *Raeken* [28].

⁹ *Fox* [147]–[148]; *Allen* [90]–[92]; *Bogan* [12]; *Raeken* [55].

¹⁰ Retainer, cl 5.4.

¹¹ Retainer, cl 5.1.

¹² Retainer, cl 6.1.



'out of pocket' costs if:

- (i) a group costs order is made;¹³
 - (ii) litigation funding is obtained;¹⁴ or
 - (iii) SG elects at its discretion to act on a 'no win no fee' basis;
- (f) if a group costs order is not made, or a group costs order is made and then vacated and within 90 days, a third party funding agreement is not entered into, SG has a right to terminate the retainer;¹⁵ and
- (g) if a group costs order is made and remains operative, SG will be paid pursuant to it.¹⁶

A 40% rate is reasonable and proportionate

42 The plaintiff submitted that the rate of 40% is proportionate and reasonable. Some non-confidential submissions were:

- (a) while 40% is at the top of the range, the exercise of discretion in s 33ZDA must be considered on a case by case basis;
- (b) this involves taking into account the value of legal work performed, and the value of a reasonable return for the financial risk assumed;
- (c) SG has offered a 40% rate. No other offer has been made;
- (d) the plaintiff has accepted that offer;
- (e) the 40% rate is better than any other option that can likely be obtained by the plaintiff and group members;
- (f) the rate is appropriate when analysed in the context of the class size and overall

¹³ Retainer, cl 5.5.

¹⁴ Retainer, cl 6.5.

¹⁵ Retainer, cl 6.4, 12.1(e).

¹⁶ Retainer, cl 5.2.



- claim value of the proceeding;
- (g) proportionality and reasonableness must be assessed in terms of the monetary return to a legal practice in dollar not percentage terms;
 - (h) SG will invest significant capital with illiquid capital costs. The duration and ultimate amount can only be estimated;
 - (i) while the risk and proportionality of the legal costs to the risk assumed informs the appropriate rate, proportionality is one of many factors in the broad evaluative assessment of all relevant factors; and
 - (l) the Court can amend a group costs order, including the rate at any time during the course of a proceeding, including when settlement approval is sought or an award of damages is made.

Ansell's submissions

43 Ansell acknowledged that it had a limited role in this application. The application does not directly concern it,¹⁷ and it only has access to redacted materials from the plaintiff. The redactions are extensive and include material critical to determining whether the discretion under s 33ZDA of the Act should be exercised in the plaintiff's favour. Ansell neither consented to nor opposed the plaintiff's application.

44 Ansell observed that the rate sought was unusually high. In *Raeken*, M Osborne J noted that the range of percentage rates was 14%-40%. The median rate across all cases was 24.5% and 24% in shareholder class actions.¹⁸ As at December 2023, 16 group costs orders had been made. In *Allen*¹⁹ and *Medibank*,²⁰ (both securities class actions) rates of 27.5% were granted. In only one case has a rate of 40% been awarded.²¹ Ansell provided a table of rates previously approved (to which I have added one later case) which is attached as Schedule 1 to this judgment.

¹⁷ *Fox* [15], [37].

¹⁸ *Raeken* [60].

¹⁹ *Allen* [86]-[89].

²⁰ *Kilah v Medibank Private Limited* [2024] VSC 152, [52] (Attwill J) ('*Medibank*').

²¹ *Bogan* [105].

45 Ansell submitted that the decision in *Bogan* should be distinguished as in that decision John Dixon J held that if a group costs order was made at a rate less than 40% there was a considerable risk that the funder would not enter into the proposed cost sharing agreement. No other viable method of funding had been identified. The proceeding was complex and difficult and there was risk not only in establishing liability but also in recovery of any judgment.²²

Plaintiff's reply submission

46 The plaintiff accepted that the rate of 40% was at the very upper end of the range of rates that have been ordered and was above the median rate for group costs orders made in shareholder class actions. He submitted that each case must be assessed on its own facts. There was not, and should not be, any going rate. The fact that the rate sought is itself higher than the median range was no reason to refuse the order if the rate was reasonable and proportionate in the circumstances of the case.

47 In *Gawler*,²³ Waller J noted that a 39% rate was high and had 'given me pause'.²⁴ Nevertheless after analysing the material, Waller J was satisfied that such an order was necessary and appropriate in order to ensure that justice was done in the proceeding. Without the order, there was a probability that no alternative funding would be available and that the proceeding would be discontinued.

48 The plaintiff accepted that unlike *Gawler* and *Bogan*, the evidence in the current proceeding did not rise as high as establishing that the most likely outcome if the group costs order is not made at the rate sought was that the proceeding would be discontinued. It was likely that a third party litigation funding would be sought. This was not certain, and it was unlikely that an offer of third party litigation would be on better terms than a 40% group costs order. If a group costs order is not made, the viability of the proceeding going forward would still be at some risk.

49 Finally, the plaintiff then submitted that like *Gawler* the Court could give attention to

²² *Bogan* [105].

²³ [2024] VSC 365.

²⁴ *Gawler v Fleet Partners Group Ltd* [2024] VSC 365, [34] ('*Gawler*').



exercising its power at a later date to reduce the rate under s 33ZDA(3) once it had further information as to the quantum of any award or settlement. A 40% group costs order would not make the case an outlier, but one of a small number of cases in which such an order was necessary or appropriate to ensure that justice was done in the proceeding.

Governing principles

50 The statutory criterion for the exercise of the power to make a group costs order under s 33ZDA is that 'the court be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding' to make such an order. The principles governing the application of s 33ZDA are not in dispute. They are fully set out in recent cases in this Court including *Fox, Allen, Bogan, Raeken, Gehrke* and *Gawler*. I will not repeat what is comprehensively set out in those authorities, as there is no real doubt that a group costs order is appropriate and necessary in this proceeding subject to the determination of a proportionate and reasonable rate at least on a *prima facie* basis so that justice may be done in the proceeding.

Findings as to a group costs order

51 I make the following findings as to a group costs order in this proceeding:

- (a) it is the best option for the plaintiff and group members;
- (b) a group costs order offers the plaintiff and group members recognised benefits;
- (c) group members have been informed about the proposed group costs order;
- (d) if no group costs order were granted, the likely outcome would be that third party litigation funding would be sought;
- (e) if third party litigation funding were not available, SG may seek to terminate the retainer;
- (f) a group costs order would allow the proceeding to continue with a certain and stable funding base;

- (g) the proposed group costs order would allow for an outcome that is better than any reasonably available alternative;
- (h) modelling suggests that the plaintiff and group members are financially better off with a group costs order in most circumstances; and
- (i) section 33ZDA(3) provides an important safeguard against a disproportionate or unreasonable outcome at the conclusion of the proceeding.

Applicable principles as to the proposed rate

52 Section 33ZDA(1) requires that, for the Court to make a group costs order, it must be satisfied that such an order is ‘appropriate or necessary to ensure that justice is done in the proceeding’.

53 The principles to be applied were summarised recently by Nichols J in *Gehrke*:

It is helpful at this juncture to recall the principles set out in earlier decisions on this issue, which are as follows:

- (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]*, a court should be satisfied, in order to make a Group Costs Order, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding; and for that purpose, a broad, evaluative assessment is required, and the statutory criterion permits a range of meanings and is capable of satisfaction in myriad ways.
- (c) Although the amount recovered will likely be a significant integer in any proportionality assessment, it must be recalled that the statutory funding scheme created by s 33ZDA is



intended to be capable of taking effect early in the life of proceedings where the assessment of potential recovery sums is likely to be fraught with uncertainty. As was observed in *[Fox]*, 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



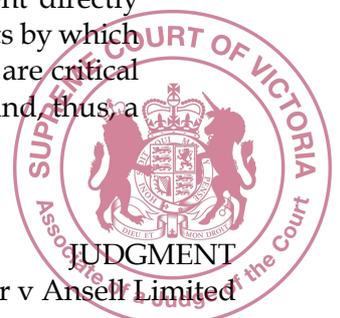
assumptions, it might indeed be significant, but the return on the Funder's investment is far from the only relevant consideration. In the few decided cases considering s 33ZDA, including *Bogan*, it has been emphasised that keeping costs proportional to the complexity of the issues and the amount in dispute will be an important consideration.²⁵

54 In *Bogan*, John Dixon J referred to the decision of Nichols J in *Fox* and said:

- (c) A group costs order must be construed in the factual context of the particular application, but the following general principles apply:
 - (i) The statutory criterion permits of a range of meanings and is capable of satisfaction in myriad ways;
 - (ii) The court should carry out a broad, evaluative assessment of whether a group costs order is appropriate or necessary to ensure that justice is done in the proceeding and is in terms that are reasonably adapted to that purpose;
 - (iii) In making that evaluative assessment the interests of group members are a primary consideration. The court must be astute to protect the interests of group members;
 - (iv) Price, or the costs that group members are likely to pay, is a relevant consideration, but not the only consideration; and
 - (v) Although the phrase 'justice is done in the proceeding' has been construed in the context of s 33ZF to require that any order made pursuant to that power must be fair and equitable, ordinarily involving a consideration of the position of all parties, because the subject matter of s 33ZDA concerns, *inter alia*, the liability of group members to pay the legal costs of the representative plaintiff, the context for other parties in the proceeding to participate in the application is narrow such that the legitimate interest of a defendant in an application for a group costs order will be confined. Defendants have put submissions to the court on each application for a group costs order so far determined and have been permitted to do so on the basis that whether a defendant has a legitimate interest in the application is a question to be decided on a case by case basis.

14 To her Honour's list I would add that the financial viability of both the existing funding agreements and the proposed funding arrangement by a group costs order are relevant considerations. In some circumstances, and this application is an example, both the existing and the proposed financial arrangements need to be considered. The prospect of termination of the existing funding arrangement directly affects the viability of the proceeding, while the arrangements by which the law practice proposes to bear or share the financial risk are critical to the financial viability of the proposed group costs order and, thus, a

²⁵ *Gehrke* [53] (citations omitted).



relevant consideration.

- 15 Considerations of proportionality and reasonableness will assist in answering the statutory question when it comes to setting a percentage rate. In this context, it is, I think, desirable to make some observations about the proper conceptual basis for identifying a proportionate and reasonable return to an investor (a law practice) in litigation because, self-evidently, access to justice by the mechanism of a group costs order will not be on offer if funds cannot be attracted to this form of investment, but rather flow to alternate investments offering an appropriate return for risk undertaken. ...²⁶

Assessment of the percentage rate

- 55 In making a group costs order, the Court is required to exercise a broad evaluative judgment, and determine whether it is satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding. This requires a percentage rate to be determined and involves a number of considerations.
- 56 Plainly the amount that may be recovered in the proceeding is the first important consideration. This is fraught with uncertainty as the ultimate number of group members and the losses that they may have suffered (if any) is unknown. Liability may not be established and the proceeding is heavily contested. In the present case, I have the assistance of Mr Rapoport as to a possible range of outcomes prepared on the basis of the information available to him.
- 57 A second important consideration is the amount of legal costs likely to be incurred by SG in conducting the proceeding assuming that a group costs order is ordered. Together with disbursements, SG will be required to invest substantial capital in the proceeding over a lengthy period of uncertain duration likely to extend over a number of years. Again I have the assistance of Mr Rapoport as to the level of costs likely to be incurred noting also the uncertainties associated with this estimate.
- 58 A third fundamental consideration is the risk that the plaintiff and group members may fail in the proceeding with the result that legal costs and disbursements will have to be borne by SG. Mr Rapoport has assisted me with an estimate of adverse costs which SG might have to bear if the proceeding were unsuccessful.

²⁶ *Bogan* [13]-[15].



59 The considerations that I have mentioned are affected by many other factors relating to the proceeding including the complexity of the case, the extent to which third parties are involved, and the stage that the proceeding may have reached when it is resolved.

60 The considerations that I have mentioned are also affected by external factors such as prevailing market conditions, interest rates and the amount of return that an investor investing in a high risk venture such as a contested group legal proceeding would expect to receive. These factors are informed to an extent by evidence as to the position of the litigation funders approached to fund the proceeding, and by the negotiations that ensued.

61 The plaintiff's material covers a wide range of matters. I have considered this material in detail.

62 In determining this application I am also fortified by the power given to the Court in s 33ZDA(3) to amend a group costs order during the course of, or on settlement of a proceeding. This important power will permit a court at a later time to amend any order that I may make. The power in s 33ZDA(3) is a crucial safeguard as any assessment of the rate made at this early stage of the proceeding is inevitably very difficult.

63 Nonetheless the Court's discretionary power in s 33ZDA(1) stands to be exercised and requires the Court to be satisfied that the order to be made is appropriate or necessary to ensure that justice is done in the proceeding. I am required to be astute to protect the interests of group members, and to take into account considerations of proportionality and reasonableness in setting a percentage rate. The fact that an order as to the percentage rate can be amended later is not a reason to act arbitrarily or to depart from the requirements of s 33ZDA, noting that a considerable degree of tolerance in setting a rate at the present early stage of the proceeding is appropriate in order to cater for unknowns, uncertainties, and risks.

64 In the following, I will use the expression 'resolution amount' to refer to the amount

obtained by the plaintiff and group members in a settlement or awarded by the Court in a judgment.

65 Taking into account all of the factors I have identified above, I am prepared to accept at this stage of the proceeding that 40% is an appropriate percentage rate of return if the plaintiff and group members are successful in the proceeding and the resolution amount is \$50 million or less.

66 The following calculations are made by simple arithmetic and do not require resort to privileged or confidential information.

67 If a 40% rate is accepted, and a resolution amount of \$50 million is obtained, SG would receive \$20 million for its legal work, for disbursements, expenditure, capital investment, and financial risk assumed in this proceeding. Undertaking a broad evaluative judgment of all of the relevant factors, I accept that this is a proportionate and reasonable outcome on the material that I have.

68 Assuming however that the proceeding attracts a resolution amount of \$80 million, SG would receive \$32 million on a 40% rate. Having regard to the evidence before me, it is my view that this exceeds a proportionate or reasonable return on a *prima facie* basis in the circumstances of this proceeding.

69 I do not intend any criticism of SG or any party or deponent, but it is plain that a high percentage rate such as 40% (or \$400,000.00 for every \$1 million recovered by the plaintiff and group members) may have untoward or unexpected consequences depending on the magnitude of the resolution amount. Added to this is the welcome possibility that the proceeding may settle before trial or at a mediation with the result that the actual costs incurred would be less than the full costs that would be incurred if the proceeding were tried.

70 While I accept that a 40% rate of return may be considered proportionate or reasonable on a *prima facie* basis for a resolution amount of up to \$50 million in the circumstances of the present case, I consider that a more conventional rate of 25% is appropriate for

any part of the resolution amount that is above \$50 million.²⁷ Such a rate of return is still substantial, and in my view reflects a more proportionate and reasonable rate of return in the circumstances of the present case when looked at on a *prima facie* basis.

71 It may well be that the percentage rate that I adopt on the material before me will require amendment under s 33ZDA(3) at a later time or when the resolution amount is known.

Conclusion

72 I will make a group costs order generally in the form of the summons but adopting a 40% rate for a resolution amount up to \$50 million and a 25% rate for any part of a resolution amount above \$50 million. Liberty to apply will be granted.

²⁷ A ratchet group costs order was also made in *Lieberman v Crown Resorts Ltd* [2022] VSC 787.

SCHEDULE 1

TABLE OF GROUP COSTS ORDER PERCENTAGE RATES ORDERED

Case	% ordered
<i>Allen v G8 Education Ltd</i> [2022] VSC 32	27.5
<i>Bogan v the Estate of Peter John Smedley (deceased)</i> [2022] VSC 201	40.0
<i>Nelson v Beach Energy</i> [2022] VSC 424	24.5
<i>Gehrke v Noumi Ltd</i> [2022] VSC 672	22.0
<i>Mumford v EML Payments Ltd</i> [2022] VSC 750	24.5
<i>Fuller v Allianz Australia Insurance Ltd</i> S ECI 2020 02853 (orders dated 13 December 2022)	25.0
<i>Lieberman v Crown Resorts Ltd</i> [2022] VSC 787	16.5-27.5
<i>Fox v Westpac Banking Corporation (No 2)</i> [2023] VSC 95	24.5
<i>Anderson-Vaughan v AAI Ltd</i> [2023] VSC 465	25.0
<i>DA Lynch v Star Entertainment Group</i> [2023] VSC 561	14.0
<i>Lidgett v Downer EDI Ltd</i> [2023] VSC 574	21.0
<i>5 Boroughs NY Pty Ltd v Victoria (No 5)</i> [2023] VSC 682	30.0
<i>McCoy v Hino Motors Ltd</i> [2023] VSC 757 ²⁸	17.5-25.0
<i>Thomas v The a2 Milk Company Ltd</i> [2023] VSC 768	24.0
<i>Kilah v Medibank Private Limited</i> [2024] VSC 152	27.5
<i>Norris v Insurance Australia Group Ltd</i> [2024] VSC 76	30.0
<i>Raeken Pty Ltd v James Hardie Industries PLC</i> [2024] VSC 173	27.5
<i>Gawler v Fleet Partners Group Ltd</i> [2024] VSC 365	39

²⁸ Also known as *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757.

CERTIFICATE

I certify that this and the 25 preceding pages are a true copy of the reasons for judgment of Garde J of the Supreme Court of Victoria delivered on 22 August 2024.

DATED this twenty second day of August 2024.

.....
Samuel Robert Gard

Associate

