

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

Not Restricted

S ECI 2021 00930

ZOEY ANDERSON-VAUGHAN

Plaintiff

v

AAI LIMITED (ACN 005 297 807)

First Defendant

TAL LIFE LIMITED (ACN 050 109 450)

Second Defendant

MTA INSURANCE PTY LTD (ACN 070 583 701)

Third Defendant

JUDGE: Stynes J
WHERE HELD: Melbourne
DATE OF HEARING: 4 August 2023
DATE OF RULING: 8 August 2023
CASE MAY BE CITED AS: Anderson-Vaughan v AAI Limited
MEDIUM NEUTRAL CITATION: [2023] VSC 465

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 proposed percentage appropriate or necessary – Principles to be applied – *Supreme Court Act 1986, s 33ZDA* – *Allen v G8 Education Ltd* [2022] VSC 32, *Fox v Westpac; Crawford v ANZ* [2021] VSC 573, *Gehrke v Noumi Ltd* [2022] VSC 672, applied – Application granted.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	L Armstrong KC	Maurice Blackburn
For the Defendants	J A Findlay	King & Wood Mallesons

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HER HONOUR:

A Introduction

1 This is a group proceeding (a consumer class action) issued under Part 4A of the *Supreme Court Act 1986* (Vic) ('**Act**').

2 It relates to add-on insurance products which were sold to consumers by motor vehicle dealers acting on the insurers' behalf. The insurers are the defendants.

3 This proceeding is an 'open class' representative proceeding on behalf of all persons who, between 1 May 2006 and 30 June 2018:

(a) purchased or leased a motor vehicle or motorcycle from a dealership under a finance loan, and in conjunction with the purchase or lease, purchased add-on insurance products; and

(b) made payments to the defendants for the add-on insurance.

4 The plaintiff on her own behalf and on behalf of group members alleges that:

(a) she purchased motor vehicles under finance and was told that add-on insurance was a precondition of finance, which was allegedly false;

(b) the add-on insurance products had a number of exclusions and exceptions that significantly limited the protection offered, had a low claims loss ratio, were not suitable, incurred her unnecessary costs, and were based on incomplete information about her personal circumstances; and

(c) accordingly, the defendants:

(i) engaged in conduct that was misleading in contravention of s 1014H of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and ss 12DA and 12DB of the *ASIC Act 2001* (Cth);

(ii) breached their personal advice obligations in contravention of ss 961B

and 961J of the *Corporations Act*; and

- (iii) became unjustly enriched by receipt of the payments for the add-on insurance products at the expense of the plaintiff and group members, and it is unconscionable for the defendants to retain those payments.

5 The plaintiff's solicitors are Maurice Blackburn Pty Ltd (**'Maurice Blackburn'**).

6 While the proceeding was commenced in March 2021, it is still at a relatively early stage. Pleadings have closed, discovery orders have been made but a large proportion of discovery is yet to be provided,¹ and expert evidence has not been exchanged.²

7 The plaintiff seeks a Group Costs Order (**'GCO'**) pursuant to s 33ZDA of the Act in the following terms:

- a. the legal costs payable to the solicitors for the Plaintiff and group members, Maurice Blackburn, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, that percentage being (subject to further order) 25% inclusive of GST; and
- b. liability for payment of the legal costs referred to in paragraph (a) be shared among the Plaintiff and all group members.

8 In addition to counsel's written and oral submissions, the plaintiff relies on:

- (a) the affidavit of the lead plaintiff;³ and
- (b) three affidavits of Andrew Watson,⁴ a Principal partner of Maurice Blackburn and the solicitor with overall carriage of this proceeding.

9 Pursuant to orders made by me on 1 and 4 August 2023, some of the plaintiff's material was redacted on the basis of confidentiality. It was provided to the Court in

¹ Affidavit of Andrew Watson sworn 12 December 2022 (**'Watson Affidavit'**), [21]-[27].

² Ibid [52].

³ Being the affidavit of Zoey Anderson-Vaughan affirmed 12 December 2022 (**'Anderson-Vaughan Affidavit'**).

⁴ Being the affidavit **Watson Affidavit** and its exhibit, the confidential supplementary affidavit and exhibit of Andrew Watson sworn 22 May 2023 (**'Second Watson Confidential Affidavit'**), and the further confidential affidavit of Andrew Watson sworn on 3 August 2023 (**'Third Watson Confidential Affidavit'**).

unredacted from but not to the defendants.

10 In order to sufficiently set out my reasoning, it has been necessary for me to refer to some parts of this confidential material. I have done so in a way that does not disclose the confidential material.

11 The defendants have only a narrow interest in this application. They did not make any submissions on whether a GCO should be made.

B Summary of decision

12 For the reasons set out below, I am satisfied that it is appropriate to make the GCO in the form proposed by the plaintiff to ensure that justice is done in this proceeding.

C Legal principles

13 Section 33ZDA provides as follows:

- (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 cost 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) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

(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).

14 The principles governing the application of s 33ZDA are not in dispute and have been clearly laid out in a number of decisions of this Court.⁵ In particular, I refer to and repeat the summary of applicable principles set out in paragraphs 15 to 20 of my reasons for the ruling in *Lieberman v Crown Resorts Ltd*.⁶

15 The following principles and matters are relevant to, and have been considered by me, as a part of my broad evaluative assessment in this case:

- (a) The questions of whether to make a GCO and if so, at what rate, are intertwined.⁷
- (b) The Court must be astute to protect the interests of group members. The effect on group members of a proposed GCO must be a primary consideration in forming the evaluation required by the section.⁸
- (c) A GCO that is appropriate to ensure that justice is done in the proceeding will require fairness and equity, and must not unjustly affect the interests of any party to the proceeding.⁹
- (d) The price, or the costs that group members are likely to pay under a proposed GCO.¹⁰
- (e) Whether a proposed GCO is more advantageous to group members than under another funding arrangement. However, this consideration is not a substitute

⁵ *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 (Nichols J) (*'Fox/Crawford'*), *Allen v G8 Education Ltd* [2022] VSC 32 (Nichols J) (*'Allen'*), *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 (John Dixon J) (*'Bogan'*), *Nelson v Beach Energy* [2022] VSC 424 (Nichols J) (*'Beach Energy'*), *Lay v Nuix Ltd* [2022] VSC 479 (Nichols J) and *Gehrke v Noumi Ltd* [2022] VSC 672 (Nichols J) (*'Noumi'*).

⁶ 2022 VSC 787.

⁷ *Allen* (n 5) [20], citing *Fox/Crawford* (n 5) [33].

⁸ *Allen* (n 5) [21], citing *Fox/Crawford* (n 5) [34].

⁹ *Allen* (n 5) [22], citing *Fox/Crawford* (n 5) [36].

¹⁰ *Allen* (n 5) [24], citing *Fox/Crawford* (n 5) [8(a)].

- for the statutory test.¹¹
- (f) An outcomes based analysis which employs predictive modelling to demonstrate that a GCO can be expected to provide a better financial outcome to group members than another funding model. However, the relevance of the modelling may be limited particularly where it is undertaken early in the life of the proceeding and recognising that predictive modelling will be riven with significant uncertainty.¹²
 - (g) The assumption of financial risk by the law practice.¹³
 - (h) Considerations of proportionality and reasonableness. That is, the question of whether the return to the law practice under a GCO is or is likely to be reasonable, and whether it bears a proportionate relationship to the assumption of risk, may be considered prospectively and may be relevant. However, its relevance may be limited having regard to the real limitations on the Court's ability to make an informed assessment.¹⁴ It is appropriate to apply the *prima facie* threshold when considering proportionality and reasonableness.¹⁵
 - (i) The power in s 33ZDA(3) to amend a GCO. The existence of this power is significant. A review under that subsection, of a percentage fixed at an earlier time, will facilitate the Court ensuring that the percentage to which the law practice is ultimately entitled remains appropriate.¹⁶ The time at which a Court might amend an order and the basis for doing so are not constrained by the statute, but an obvious use of the provision would be the adjustment of the percentage specified in an order, at the time of the settlement of the proceeding, having regard to the recovery achieved by the plaintiff, among other relevant

¹¹ *Allen* (n 5) [25], citing *Fox/Crawford* (n 5) [51].

¹² *Allen* (n 5) [26], citing *Fox/Crawford* (n 5) [22]; *Bogan* (n 5) [12(h)].

¹³ *Allen* (n 5) [28], citing *Fox/Crawford* (n 5) [20].

¹⁴ *Allen* (n 5) [29], citing *Fox/Crawford* (n 5) [145]-[148].

¹⁵ See *Allen* (n 5) [86]-[89]; *Noumi* (n 5) [48]-[54].

¹⁶ *Allen* (n 5) [30]; *Fox/Crawford* (n 5) [148].

considerations.¹⁷

D Current funding arrangement

16 Maurice Blackburn is retained by the plaintiff pursuant to a retainer and costs agreement.

17 The original 'no-win-no-fee' retainer and costs agreement was amended after the proceeding was commenced (and after the plaintiff obtained independent legal advice) in order to reflect the plaintiff's intention to apply for a GCO in the proceeding.¹⁸ I refer to the amended version of the retainer and costs agreement as the '**Current Costs Agreement**'.

18 The amendments had the effect of making the 'no-win-no-fee' arrangement operative for an interim period only, being the period before the Court decides the plaintiff's application for a GCO. If a GCO is not made, Maurice Blackburn may elect to continue acting on a conditional basis, procure litigation funding or terminate the agreement.

19 The plaintiff deposes that she understood that the Current Costs Agreement specifically recorded her intention to apply for a GCO, and the different options that would occur if a GCO is not made.¹⁹ That intention was set out in the funding information summary statement and group proceeding summary statement filed with the Court and published on Maurice Blackburn's website.²⁰

20 In summary, the Current Costs Agreement provides (with capitalised bolded terms having the meaning denoted in clause 15 of the Current Costs Agreement) that:²¹

(a) Maurice Blackburn has a reasonable belief that a **Successful Outcome** is reasonably likely in the proceeding.

(b) Maurice Blackburn will prosecute the class action on behalf of the plaintiff on

¹⁷ *Allen* (n 5) [30], citing *Fox/Crawford* (n 5) [23].

¹⁸ *Watson Affidavit*, [39].

¹⁹ *Anderson-Vaughan Affidavit*, [8].

²⁰ *Watson Affidavit*, [33]-[37].

²¹ Exhibit AJW-3 to the *Watson Affidavit*, 59-78.

a 'no-win-no-fee' basis. Insofar as it acts on this basis, it will only recover its **Disbursements** at cost, and will only be paid its **Professional Fees** to which an **Uplift Fee** of 25% together with interest applies, if there is a **Successful Outcome**.

(c) It is intended that the costs of the **Proceeding** will be subject to a GCO. The Current Costs Agreement records that:

(i) 'If the Court makes a GCO, the amount that [Maurice Blackburn] will be paid will be subject to the Court's orders, which to the extent of any inconsistency will supersede this **Agreement**';

(ii) 'In contemplation of a GCO being made [Maurice Blackburn] will act on a wholly conditional basis, provide an indemnity to the **Representative** in relation to adverse costs and provide any security for costs until a GCO application is determined'; and

(iii) 'If a GCO is not made [Maurice Blackburn] may in its sole discretion seek alternative funding arrangements for the conduct of this Proceeding including any negotiating on behalf of the **Representative** and other **Claimants** with third party litigation funders, or alternatively may terminate this **Agreement** pursuant to clause 12.1(f)'.

(d) In other words, if a GCO is *not* made, Maurice Blackburn may elect to:

(i) continue to conduct the proceeding on a wholly conditional basis, in which case the Current Costs Agreement will continue to be operative;

(ii) procure litigation funding; or

(iii) terminate the Current Costs Agreement.

(e) Maurice Blackburn may reasonably change the terms of the Current Cost Agreement, including to secure third party litigation funding, and will provide

30 days' written notice to the plaintiff of any such change. The plaintiff is presumed to agree to the change unless they give written objection to Maurice Blackburn prior to the date the change takes effect.

- (f) If the plaintiff objects to Maurice Blackburn changing the terms of the Current Cost Agreement, Maurice Blackburn may terminate the Current Cost Agreement.
- (g) The Current Costs Agreement may otherwise be terminated by Maurice Blackburn if, among other things, Maurice Blackburn forms the opinion that a **Successful Outcome** resulting in a substantial benefit to the plaintiff is no longer reasonably likely.

21 Mr Watson deposes that if a GCO is not made in this proceeding, then Maurice Blackburn would need to carefully consider the options contemplated in the Current Costs Agreement, and at this stage he cannot say which option it would elect to pursue.²²

22 The Current Costs Agreement contains a confidential estimate of the total legal costs to be incurred in conducting the proceeding up to, and including, a full trial of common issues, if calculated on the basis of its hourly rates. Major variables affecting the total legal costs are set out, which include, among other things, the complexity of the issues, the strategy or tactics adopted by the defendants and other unexpected problems.

23 The Current Costs Agreement does not contain an indemnity by Maurice Blackburn in favour of the plaintiff in respect of any adverse costs order that may be made against the plaintiff in the proceeding. However, Mr Watson deposes that on 11 April 2022, Maurice Blackburn gave security for costs in the form of a deed poll for the benefit of the Court and the defendants.²³

²² Watson Affidavit, [108].

²³ Ibid [38].

E Evaluative assessment – The categorisation of issues

24 The plaintiff submitted that it would be appropriate or necessary to make its proposed GCO to ensure that justice is done in this proceeding, in substance because:

- (a) the plaintiff and group members will receive a fixed proportion of any award or settlement that is offered, subject only to variation by a Court order, thereby allowing them to eradicate any risk that their compensation will be eroded by legal costs in excess of that specified proportion. The value of this certainty is significant and is a real and substantial benefit to group members;²⁴
- (b) costs will be equitably shared among the plaintiff and group members. The Act has this effect without the need for the plaintiff to seek an order at a later stage;²⁵
- (c) a GCO will provide simplicity, certainty and transparency to the plaintiff and the group members in respect of funding and costs arrangements, from the outset. This is because:
 - (i) there is present uncertainty as to the future conduct of the proceeding, which creates a potential risk of delay while such matters are resolved. The granting of a GCO will remove this risk;²⁶
 - (ii) how costs and funding are to be calculated under a GCO are simpler to explain to group members than the mechanism of a common fund order. In Mr Watson’s view, based on his experience, group members are more likely to understand that under a GCO, a single percentage of the final sum will be deducted for legal costs if the case is successful, regardless of other arrangements or events arising in the proceeding;²⁷ and
 - (iii) the plaintiff herself deposes that the proposed GCO is important to the

²⁴ Plaintiff’s Submissions, [27(a)].

²⁵ Ibid [27(b)].

²⁶ Ibid [28].

²⁷ Plaintiff’s Submissions, [29]; Watson Affidavit, [106].

her because it provides certainty, protection, simplicity and clarity.²⁸ Granting the plaintiff's wishes would ensure justice is done in the proceeding;²⁹

- (d) the Court's power to amend the GCO at any time is important, and acts as an additional safeguard for group members' interests;³⁰
- (e) a GCO can reasonably be regarded as promoting the alignment of the interests of lawyers and the interests of the plaintiff and group members in maximising recoveries and conducting the proceeding efficiently;³¹ and
- (f) modelling prepared by Mr Watson reveals that a GCO 'in every realistic scenario [produces] financially the best outcome for the class members'.³² A price comparison between the proposed GCO and different funding arrangements is a relevant consideration and may inform the evaluation as to whether what is sought satisfies the statutory test.³³

25 Having regard to the applicable principles, the evidence adduced and submissions made, I have identified the following issues to be significant to my assessment of whether the statutory criterion has been satisfied:

- (a) The certainty to be conferred by the proposed GCO.
- (b) Other benefits to be conferred by the proposed GCO.
- (c) The appropriateness of the proposed percentage rate for the GCO.

26 I have addressed each of these issues in turn.

F Issue 1 – The certainty to be conferred by the proposed GCO

²⁸ Plaintiff's Submissions, [31]; Anderson-Vaughan Affidavit, [11]-[13].

²⁹ Plaintiff's Submissions, [32].

³⁰ Ibid [30].

³¹ Ibid [33].

³² Transcript of Application, *Anderson-Vaughan v AAI Limited* (Supreme Court of Victoria, Stynes J, 4 August 2023) 39 ('**Application Transcript**').

³³ Plaintiff's Submissions, [34].

27 The proposed GCO guarantees that the plaintiff and group members will receive a fixed percentage of 75% of any award or settlement that is achieved. The consequence is that legal costs payable, which will include disbursements, will be confined to a fixed percentage of 25%.

28 The plaintiff, Ms Anderson-Vaughan, understands that '[e]ven if the final outcome is lower than I had hoped for or expected, the group members and I will still get to share 75% of the final amount and legal costs will not take up the majority of the amount'.³⁴

29 The plaintiff submitted that such certainty cannot be achieved through the alternative funding options, which will need to be explored if a GCO is not made. Maurice Blackburn cannot presently say which of the three funding options it would pursue in the event that a GCO is not granted. The uncertainty about the alternative funding options might, at first blush, appear to have been generated by the plaintiff and Maurice Blackburn – that is, as a result of their choice not to agree and commit to a particular alternative. In fact, the uncertainty stems from the difficulties faced by the parties to assess and fix upon an alternative funding arrangement pending the determination of the application for a GCO. These difficulties were addressed by counsel during the course of the hearing and included the difficulty in approaching a litigation funder for information about available funding absent an intention to proceed with it.³⁵

30 Mr Watson deposes that:³⁶

(a) in his experience, settlements or awards that are lower than anticipated, along with costs blowouts or overruns due to unexpected or complicated issues arising during the course of a proceeding, are not uncommon in group proceedings;

(b) various strategic and financial factors which complicate group proceedings are

³⁴ Anderson-Vaughan Affidavit, [11].

³⁵ Application Transcript (n 31) 19-22.

³⁶ Watson Affidavit, [96]-[98].

specifically relevant to this proceeding. Those factors are confidential and are not set out here; and

- (c) in those circumstances, a GCO is in the interests of the plaintiff and group members because it effectively transfers the risk of disproportionate legal costs away from them to their lawyers.

31 Since 2004, Mr Watson's principal area of practice has been representative proceedings. In his role as a Principal Lawyer and the head of Maurice Blackburn's Class Actions division, he has conducted, assisted in or supervised more than 50 representative proceedings. On behalf of clients, he has negotiated many litigation funding arrangements with third party litigation funders, sought adverse costs order insurance or After the Event insurance, and prepared financial modelling. He is also a director of Maurice Blackburn's wholly-owned subsidiary, Claims Funding Australia Pty Ltd, a litigation funder which provides funding in matters in which lawyers other than Maurice Blackburn act for the funded litigant.³⁷

32 Having regard to Mr Watson's extensive experience and the fact that his evidence is uncontested, I accept it.

33 The evidence of the plaintiff, Ms Anderson-Vaughan, is also significant. She deposes that:³⁸

- (a) it was important to her that Maurice Blackburn agreed to cover the risk of any adverse costs order before she committed to being the representative plaintiff as she did not want to take on this risk and would not have the funds to pay any costs;
- (b) she considered that a GCO would be beneficial to her and the group members because it provides them with certainty and protection about how legal costs will be deducted from any final amount. She understands that under the 'no-

³⁷ Watson Affidavit, [12]-[13].

³⁸ Anderson-Vaughan Affidavit, [11], [14].

win-no-fee' arrangement that she currently has with Maurice Blackburn, the amount of legal costs depends on how much time is spent by Maurice Blackburn working on the case, which can depend on many different factors, and that the higher the legal costs are, the more they will 'take up' the final amount for her and the group members; and

- (c) she understands that if a GCO is not granted, Maurice Blackburn will need to consider the other options under the Current Costs Agreement, which she believes will create uncertainty for her and the group members about how the case will progress.

34 Having considered the evidence, I am satisfied that a GCO will confine the exposure of the plaintiff and group members to legal costs from the outset and that such a confinement, and the consequential certainty as to the percentage of recovery, is objectively and subjectively important to the plaintiff and group members in this case.

G Issue 2 - Other benefits to be conferred by the proposed GCO

35 It was submitted that a GCO is easier to understand than typical third party funding arrangements, because it is simpler to explain to group members the manner in which legal costs and fundings costs are to be calculated and charged under a GCO, and there is no need to explain the mechanisms of a common fund order.³⁹

36 In Mr Watson's experience in taking instructions from clients, plaintiffs and group members in class actions often become confused or overwhelmed by the different components of legal costs which are (or may be) payable in the proceeding. In his view, they are more likely to understand that under a GCO, a single percentage of the final sum will be deducted for legal costs if the case is successful, regardless of other arrangements or events arising in the proceeding.⁴⁰

37 The plaintiff deposes to believing that a GCO arrangement is simpler and clearer than

³⁹ Plaintiff's Submissions, [29].

⁴⁰ Watson Affidavit, [106].

other kinds of legal costs arrangements, which can have various different components that can be difficult to understand. She says that she believes this would be the same for many group members, who like her, likely do not have a strong understanding of legal costs requirements and terms used to describe them.⁴¹

38 Mr Watson states,⁴² and I accept, that the simplicity of the GCO model assists plaintiffs and group members to understand their rights in the proceeding, specifically that ‘a single percentage of the final sum will be deducted for legal costs if the case is successful, regardless of other arrangements or events arising in the proceeding.’

39 A further benefit of a GCO is the liability imposed on the law practice to pay any adverse costs order or to give any security for costs of the defendant in the proceeding that the Court may order the plaintiff to give. While similar protection is afforded in this case to the plaintiff and group members by the deed poll that is in place, there is some comfort to be gained by the group members having that protection enforced by statute.

40 Finally, the plaintiff submitted that Court’s power to amend the GCO is an important power and acts as an additional safeguard for group members’ interests. This was specifically recognised by Ms Anderson-Vaughan as being reassuring.⁴³

41 I am satisfied that simplicity, transparency, and additional protection for group members are all more readily obtainable by the making of a GCO than alternative funding arrangements contemplated by the Current Costs Agreement should a GCO not be made.

H Issue 3 – Appropriateness of the proposed rate

42 The question of whether or not a GCO should be made is intertwined with the appropriateness of the proposed rate.

⁴¹ Anderson-Vaughan Affidavit, [12].

⁴² Watson Affidavit, [106].

⁴³ Anderson-Vaughan Affidavit, [13].

43 The plaintiff proposes that the legal costs payable by the group members be fixed at 25% of any award or settlement that may be recovered in the proceeding.

44 The Court must be satisfied that the proposed rate of 25% is *prima facie* reasonable and proportionate.⁴⁴

45 It was submitted that there is sufficient evidence for the Court to be satisfied that 25% of the expected settlement or awarded sum does not result in a windfall return to Maurice Blackburn. To the contrary, it was submitted that the proposed rate results in a relatively modest return to Maurice Blackburn. In support of those submissions, the plaintiff relies on the confidential evidence of Mr Watson addressing:

- (a) the expected settlement or awarded sum in this proceeding.⁴⁵ Obviously there is some uncertainty involved with estimating the quantum of the plaintiff and group members' claim at this early stage in a group proceeding. However, the evidence given by Mr Watson has been of assistance to the Court in its assessment of the proposed rate;
- (b) Maurice Blackburn's modelling comparing legal costs that may be payable under the GCO with legal costs that may be payable under the current 'no-win-no-fee' funding arrangement and a traditional funding arrangement; and
- (c) the risk to be assumed by, and the potential return to, Maurice Blackburn.

46 I have had regard to this confidential evidence to inform my assessment of the *prima facie* reasonableness and proportionality of the proposed rate. I address the modelling and risks to Maurice Blackburn in the following paragraphs.

H.1 Modelled outcomes

47 The modelling prepared by Mr Watson, including the specific inputs and estimated returns, is confidential. The relevant evidence is set out in paragraphs [101] to [103]

⁴⁴ *Allen* (n 5) [86]-[89]; *Noumi* (n 5) [48]-[54], [93(b)]; see also *Beach* (n 5) [109], [113(c)].

⁴⁵ *Watson Affidavit*, [54]-[70].

of the Watson Affidavit and paragraphs [13] to [23] of the Third Watson Confidential Affidavit.

48 At a high level, the modelling shows that in almost all of the outcomes that were modelled, the proposed GCO results in the best outcome for group members. The outcomes are made up of three different claim resolution values (low, medium and high), three different funding scenarios (the proposed GCO, the 'no-win-no-fee' arrangement and the traditional litigation funding arrangement) and two potential exit points in the proceeding - i.e., the time at which the proceeding resolves.

49 I am mindful that any modelling will only be as good as the input data. In relation to the specific inputs selected by Mr Watson, I have two concerns:

- (a) First, if the legal costs estimate adopted for the purposes of the modelling is too high, then the outcome will tend to suggest that group members will be better off under the proposed GCO than they will be if the legal costs estimate is more moderate. I am mindful that my ability to scrutinise the cost estimate that underpins each scenario is very limited; and
- (b) Second, the number of exit points used in the modelling is limited, and the two that were selected have resulted in a relatively high estimate of legal costs.

50 However, as uncontroverted evidence was adduced in support of both the estimated legal costs and exit points employed in the modelling, I accept that at this early stage in the proceeding, the modelling supports the following propositions:

- (a) assuming the legal cost estimates are reasonable, the modelling shows that in almost all outcomes that were modelled, the proposed GCO results in the best outcome for group members;
- (b) more significantly, the modelling shows that the GCO will serve to protect the plaintiff and group members from disproportionately high legal costs where the sum recovered is low.

51 Further, I am satisfied that in relation to the potential for windfalls in favour of
Maurice Blackburn, sub-s 33ZDA(3) provides adequate protection to group members.

H.2 Risk and reward

52 Section 33ZDA(2) provides that a law practice the subject of the GCO will be made
liable to pay the defendants' adverse costs and to give any security for the defendants'
costs. It follows from the text that the calculation of legal costs in the manner
permitted by s 33ZDA may properly take into account not only the value of legal
services performed, but the assumption of financial risk by the law practice.⁴⁶

53 The plaintiff submitted that the 25% rate represents a reasonable return to Maurice
Blackburn for the legal and financial risks it has assumed in prosecuting the
proceeding.⁴⁷

54 Confidential (and therefore unchallenged) evidence was adduced identifying and
describing a range of risks in relation to the group members' claim in the proceeding.
The relevant evidence is set out in paragraphs [74] to [81] of the Watson Affidavit.

55 Having regard to that evidence, I am satisfied that there are risks confronting the
plaintiff's claim that are relevant to the question of whether the return to Maurice
Blackburn under the proposed GCO is reasonable and whether it bears a
proportionate relationship to the assumption of the risk of adverse costs and the
provision of security for costs.

56 For the purpose of assisting my assessment of whether the proposed rate is
proportionate to the risk to be assumed by Maurice Blackburn, my attention was
drawn to:

- (a) the settlement sums of the other consumer class actions conducted by Maurice
Blackburn;⁴⁸

⁴⁶ *Fox/Crawford* (n 5) [20].

⁴⁷ Plaintiff's Submissions, [38].

⁴⁸ *Ibid* [42].

(b) legal costs and third party funding costs that have been historically approved at the time of class action settlements in Australia;⁴⁹ and

(c) Group Costs Order rates ordered to date.⁵⁰

57 The plaintiff also relied on Mr Watson's confidential evidence relating to Maurice Blackburn's return on investment to demonstrate that the rate is prima facie reasonable in the sense that Maurice Blackburn is not anticipating more than a modest return.⁵¹

58 I am satisfied that Mr Watson has first-hand knowledge of the specific claims in this class action, as well as Maurice Blackburn's historical business practices specifically in relation to class actions and the litigation funding market. His evidence in relation to Maurice Blackburn's return on investment, particularly that set out in paragraph [93] of his affidavit, tends to support the proposition that a rate of 25% is not excessive for an investment attended by the risks to be assumed by Maurice Blackburn in this case.

I Conclusion

59 As may be apparent from my analysis set out above, based on the evidence available to me, I am satisfied that a GCO in the proposed form is appropriate to ensure justice is done in the proceeding for the following reasons:

(a) It provides a level of certainty as to the legal costs to be incurred.

(b) It engenders simplicity and transparency to the costs payable and returns recoverable by the plaintiff and group members.

(c) It will likely serve to protect the group members, where the sum recovered is low, from disproportionately high legal costs.

(d) The proposed rate is appropriate having regard to the risks confronting the

⁴⁹ Ibid [37(a)].

⁵⁰ Ibid [37(b)].

⁵¹ Watson Affidavit, [82]-[94].

claims made, the risks to be assumed by Maurice Blackburn under the proposed GCO, and the reward it might reasonably expect in return for the assumption of those risks.

60 Finally, it is significant to my reasons that any order now put in place may be subject to review under s 33ZDA(3) in order to ensure that the 25% remains appropriate.

J Orders

61 Subject to hearing from the parties as to the form of order, I propose make the following orders:

- (a) Pursuant to section 33ZDA of the *Supreme Court Act 1986* (Vic):
 - (i) the legal costs payable to the solicitors for the plaintiff and group members, Maurice Blackburn, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, that percentage being (subject to further order) 25% inclusive of GST; and
 - (ii) liability for payment of the legal costs payable pursuant to paragraph (a) be shared among the plaintiff and all group members.
- (b) The plaintiff bears her own costs of and incidental to this application.
- (c) The defendants' costs of and incidental to this application be reserved.

CERTIFICATE

I certify that this and the 19 preceding pages are a true copy of the reasons for ruling of Justice Stynes of the Supreme Court of Victoria delivered on 8 August 2023.

DATED this eighth day of August 2023.



.....
Associate