

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S152 of 2019

BETWEEN:



BMW Australia Ltd ACN 004 675 129
Appellant

AND

Owen Brewster
First Defendant

Regency Funding Pty Ltd ACN 619 012 421
Second Defendant

No. S154 of 2019

Westpac Banking Corporation
First Appellant

Westpac Life Insurance Services Limited
Second Appellant

AND

Gregory John Lenthall
First Respondent

Sharmila Lenthall
Second Respondent

Shane Thomas Lye
Third Respondent

Kylie Lee Lye
Fourth Respondent

JustKapital Litigation Pty Limited
Fifth Respondent

**ORAL OUTLINE OF SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL
FOR WESTERN AUSTRALIA (INTERVENING)**

Date of Document: 14 August 2019

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1. These submissions are in a form suitable for publication on the Internet.

Construction of Sections 183 / 33ZF

2. **Text:** Sections 183 / 33ZF confer power upon a Court, and in respect of judicial proceedings. There are no words limiting these provisions. They confer plenary judicial power, but nothing more.
3. **Purpose:** Statutory opt out class actions permit the conduct of litigation on behalf of silent class members. A Court must supervise the conduct of proceedings to achieve justice for silent class members who do not make active choices about the litigation. The Court must ensure that the litigation both does not unfairly disadvantage, or advantage, silent class members, eg, imposing disproportionate costs on them (contrary to ss 166(1)(a) / 33N(1)(a)), or allowing them to escape legitimate costs. The purpose of ss 183 / 33ZF is to provide the Court with a general power to supervise opt-out proceedings.
4. **Context:** Other surrounding provisions do not alter the broad words of the sections and their purpose. Specific powers may allow particular supervision, but ss.183 / 33ZF provide a general power to ensure that justice is done. The principle of legality is irrelevant to construction. The relevant provisions embrace the principle by requiring orders "to ensure that justice is done in the proceedings".

Nature of Common Fund Orders

5. The common fund orders here require a funder to pay for representative litigation, regulate the future conduct of the funder, and set a risk premium for funding, when litigation risks have not crystallised. Class members avoid adverse litigation risks, including: (a) the risk of adverse costs orders; (b) the risk of recovering inadequate costs; and (c) the risk of outlaying capital for a lengthy period. A class member only has to pay for litigation risks out of their recoveries, once it is known that these risks were worth taking.
6. In principle, all costs (including the costs of litigation risk) should be borne equally by all class members. This has been long recognised by equity. See the discussion of *National Bolivian Navigation Co* in *Westpac FCAFC* at [103] (CAB pp 105-106).

7. That principle also underlies the statutory purpose of fund equalisation orders. These are apparently recognised by ss 184 / 33ZJ. These provisions allow such an application to be made, after an award of damages, where a lead representative's costs "are likely to exceed the costs recoverable from the respondent". The lead representative's costs should include funding costs.
8. In effect, common fund orders are pre-emptive orders for payment of the costs of the deferred risk by a class member. Pre-emptive costs orders are unusual, but the Federal Court probably has express power to make them: s 43(3)(a) of the *Federal Court of Australia Act*. They are made where representatives act on behalf of a general class eg, trustees. These representatives need certainty that they will be reimbursed. That is also similar to the pre-emptive and protective purpose of a *Beddoe* order. See *GDK Financial Solutions (No 4)* (JBA 2/16) at [8]-[10], [13]-[15], [21].
9. The new aspect of common fund orders is that they involve pre-emptively setting the payment for a different type of cost: the cost of all class members avoiding adverse costs risk in the litigation.
10. The pre-emptive nature of the order is always subject to the Court's supervision. If the litigation proves hopeless, the funder recovers nothing. If it succeeds, but has been conducted unreasonably, that can be corrected by adjusting the funder's share after the conclusion of the litigation. A similar adjustment may occur in statutory derivative proceedings brought for companies pursuant to ss237 and 242 of the *Corporations Act: Links Golf Tasmania Pty Ltd v Sattler (No 2)* [2012] FCA 1271 varying *Wood v Links Golf Tasmania Pty Ltd* [2010] FCA 570.

Common Fund Orders Involve Judicial Power

11. Costs orders made at the end of litigation undoubtedly involve judicial power. Interlocutory costs orders protecting parties prior to any final determination of costs are also common, eg, orders for security for costs. Equally, orders protecting the costs position of parties and enabling litigation to be pursued (which would otherwise be abandoned) should be possible. They preserve the subject matter of the litigation, similar to *Anton Piller* or *Mareva* orders.
12. The requirement that the Court should only make a common fund order when it is "appropriate or necessary to ensure that justice is done in the proceedings" both

permits and limits such orders. It permits orders that are necessary to achieve justice, by financing litigation which might otherwise not occur. It also limits an order from over-compensating a funder for conducting the litigation. The express aim of achieving justice sufficiently guides a Court exercising judicial power.

Common Fund Order Does Not Involve Any Compulsory Acquisition of Property

13. Common fund orders in opt-out class actions do not involve any immediate assignment or transfer of the causes of action to the lead class representative or the funder. The Court does not declare any proprietary effect as a result of its orders. There is simply a contingent and defeasible obligation pursuant to the court's orders for class members to pay to the funder an amount equal to a share of the overall costs, including the costs of a funder accepting the risk of conducting litigation on behalf of silent class members. This obligation only operates if: (a) the litigation succeeds; and (b) the amount of the funder's share is not subsequently altered by the Court in the exercise of its supervisory function after resolution of the litigation.

14. In any event, the statutory procedure allows an informed opt-out decision to be made. If a common fund order is made prior to the last date for opting out (notified pursuant to ss 175(1)(a) / 33X(1)(a)), silent class members who do not decide to opt out have made a choice based upon notifications made pursuant to the Court's supervision of the proceedings, and the presumed knowledge of class members of the terms of the order. Equally, even if a common fund order has not been made, silent class members know that if they remain in the action, they may have to pay a share of proceeds to a funder, either through an interlocutory common fund order or a fund equalisation order.

Common Fund Order is not an Acquisition Other than on Just Terms

15. A common fund order made for the payment of a risk premium ought to be set by reference to evidence of the market rate for such risks. Such evidence may consist of quotes from various funders. The Court does not need to engage in assessing the prospects of litigation success itself, other than in the same general way as for a *Beddoe* order.