

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 Respondent



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REGENCY FUNDING PTY LTD ACN 619 012 421

Second Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

PART 1: PUBLICATION ON THE INTERNET

1. This outline is in a form suitable for publication on the internet.

PART 2: PROPOSITIONS TO BE ADVANCED

Effect of proposed Order 1

2. Order 1 requires every group member to pay from any judgment or settlement legal costs and a 25% funding commission. In substance, Order 1 – like other common fund orders (CFOs) – effects an immediate (albeit possibly defeasible) partial assignment or charge over each group member’s chose in action for the benefit of the funder: AS [18]-[24]; Reply [3]-[4].

10 **Statutory construction**

3. An order under s 183 must be “appropriate or necessary to ensure that justice is done in the proceedings”. Textually, a CFO is not concerned with justice “in the proceedings”: AS [25]-[29]; Reply [5].

4. There is nothing in the text, history or purpose of s 183 to suggest that it creates a right to an “appropriate” or “commercial” reward for litigation funders: AS [12], [27], [29]; Reply [2], [6].

- *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307

5. The principle in *Owners of Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 (see CA [56]-[58]) is of limited assistance in determining the scope of the express words of limitation in s 183: AS [30]; cf CA [56]-[58]. The text must be construed in light of its context and purpose and having regard to other principles of construction, including the principle of legality.

6. A CFO substantially interferes with group members’ property rights. There are no clear words authorising that interference. Contrary to CA [58]-[61], the principle of legality is not irrelevant because Parliament in s 159 of the CPA has authorised a limited interference with group members’ choses in action: AS [37]-[39].

7. The principle of legality applies in construing the powers and jurisdiction of courts: Reply [9] and the cases cited there.

8. The context created by other provisions of Part 10, particularly ss 177, 178 and 184, indicates that save for expressly defined exceptions, only group members are entitled to receive a monetary award in class action proceedings. Consistently with the principle of construction underlying *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied*

Trades Union of Australia (1932) 47 CLR 1, s 183 cannot be used to circumvent that limitation: AS [31]-[35].

9. A CFO made prior to judgment or settlement has a fundamentally infirm factual foundation, and at best seeks to pre-empt a later exercise of power under a different provision: AS [41]-[43]. It is unlikely that Parliament intended to authorise such an infirm order.

Judicial power

10. The inherently infirm nature of CFOs points to their being both premature and hypothetical: AS [47].

10 • *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334

11. CFOs do not involve the determination of existing legal rights. A power to make a CFO involves the creation of legal rights in a third party funder: AS [48]-[50].

12. For a discretionary power to create rights to be an exercise of judicial power the nature and extent of the rights must be delineated by “legal principle or be reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature”: AS [48]; Reply [11].

 • *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 191

13. The criterion of determining what is appropriate or necessary to ensure justice in the proceeding does not provide any strictly judicial criterion to guide the quantification of a commission rate. The factors relevant to commission rate setting are policy matters. Further, the process involved in rate setting is non-judicial: AS [49], [52]-[53]; Reply [13]-[14].

 • *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144

 • *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 297-298

 • *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 396, [90]-[92]

14. The making of a CFO does not enable, support or facilitate the exercise by the Court of its judicial functions. It is not incidental to the exercise of judicial power.

30 **Acquisition of property**

15. BMW relies on the oral submissions of Westpac concerning the operation of s 51(xxxi) and otherwise makes the following short points:

- a. It is contrary to basic principle in Australian constitutional law to adopt a single characterisation approach: AS [57]; cf CA [108].
- b. It is not a necessary or characteristic feature of doing justice that property be acquired without just terms. The exercise of judicial power does not lie outside the protection of the guarantee created by s 51(xxxi): Reply [17]-[19].

Judiciary Act, s 79

10 16. Section 183 can only apply in a proceeding in federal jurisdiction if, and to the extent, it is picked up by s 79 of the *Judiciary Act 1903* (Cth). Section 79 does not pick up a State law to the extent it would, if enacted as Commonwealth law, infringe Ch III or s 51(xxxi): AS [46], [54]; Reply [22].

- *Rizeq v Western Australia* (2017) 262 CLR 1, [16], [21], [24], [28], [84], [87], [89], [103]
- *Masson v Parsons* (2019) 93 ALJR 848, [30].

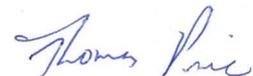
17. Queensland's attempt to distinguish between laws which "govern or regulate the exercise of federal jurisdiction" (Qld [22]) and laws conferring powers on courts exercising federal jurisdiction (Qld [23]) is both contrary to authority and illusory.

- *Rizeq v Western Australia* (2017) 262 CLR 1, [16], [21], [24], [28], [84], [87], [89], [103]

20 13 August 2019



J K Kirk



T O Prince