



HIGH COURT OF AUSTRALIA

4 December 2019

BMW AUSTRALIA LTD v BREWSTER & ANOR;
WESTPAC BANKING CORPORATION & ANOR v LENTHALL & ORS
[2019] HCA 45

Today the High Court allowed an appeal from a decision of the Full Court of the Federal Court of Australia and an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales. The principal issue in each appeal was whether, in representative proceedings, s 33ZF of the *Federal Court of Australia Act 1976* (Cth) ("the FCA") and s 183 of the *Civil Procedure Act 2005* (NSW) ("the CPA") empower the Federal Court of Australia and the Supreme Court of New South Wales, respectively, to make what is known as a "common fund order" ("CFO").

The first to fourth respondents in the Westpac matter (No S154 of 2019) commenced representative proceedings in the Federal Court of Australia alleging that Westpac's financial advisers breached their obligations to the respondents in relation to advice given regarding insurance policies. In the BMW matter (No S152 of 2019), the first respondent commenced representative proceedings in the Supreme Court of New South Wales against BMW Australia Ltd relating to the national recall of BMW vehicles fitted with defective airbags. Both proceedings were funded by litigation funders. In each proceeding, the litigation funder had entered into a litigation funding agreement with a small number of group members.

The representative parties applied to the court in each representative proceeding for a CFO. A CFO is an order characteristically made at an early stage in representative proceedings that provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered. Section 33ZF of the FCA and s 183 of the CPA each provide that in a representative proceeding, the court may make any order that the court thinks appropriate or necessary to ensure that justice is done in the proceeding. The Full Court of the Federal Court of Australia and the Court of Appeal of the Supreme Court of New South Wales held that s 33ZF of the FCA and s 183 of the CPA, respectively, empowered the court to make a CFO.

By grants of special leave, the appellants appealed to the High Court. A majority of the Court allowed the appeals, holding that, properly construed, neither s 33ZF of the FCA nor s 183 of the CPA empowers a court to make a CFO. Considerations of text, context and purpose all point to the conclusion that it is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding by the making of a CFO. Because the principal issue was resolved in favour of the appellants by a majority of the Court, the issues of whether the relevant provisions of the FCA and the CPA infringe Ch III of the *Constitution* and the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and whether the provisions are contrary to s 51(xxxi) of the *Constitution* did not arise for determination.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*