

Future of common fund orders in doubt

BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45

By Christina Trahanas

In *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45, the High Court held by a majority of 5-2 that s 33ZF of the *Federal Court of Australia Act 1976 (Cth)* (FCAA) and s 183 of the *Civil Procedure Act 2005 (NSW)* (CPA) do not, respectively, empower the Federal Court of Australia (Federal Court) and the Supreme Court of NSW (Supreme Court) to make a 'common fund order' (CFO).

What are common fund orders?

Common fund orders are a type of court order made in representative proceedings, usually at an early stage. A named party to the court proceedings, who is in a contractual relationship with a third-party litigation funder, applies for the order. The order requires the party and all group members to pay the litigation funder, from moneys obtained in the proceedings either through settlement or judgment, (a) the costs of conducting the representative proceeding and (b) a funding commission. The order also provides for the funder's commission to be paid as a first priority.

Background

The case before the High Court arose from two proceedings – the Westpac proceedings in the Federal Court and the BMW proceedings in the Supreme Court.

Westpac proceedings

In the Federal Court, four named applicants initiated representative proceedings, on behalf of group members, against Westpac Banking Corporation and Westpac Life Insurance Services Ltd (together, Westpac). The proceedings were initiated under Pt IVA of the FCAA (Pt IVA). They relate to advice given to purchase insurance policies from Westpac.

Each of the four named applicants had signed a funding agreement with JustKapital Litigation Pty Limited (JKL). In June 2018, they sought a CFO.

Subject to an undertaking by JKL to be bound to the funding terms, the primary judge (Lee J) made a CFO pursuant to ss 23 and 33ZF of the FCAA. Section 33ZF(1) of the FCAA (s 33ZF) states: 'In any proceeding (including an appeal) conducted under this



Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'.

The Full Court (Allsop CJ, Middleton and Robertson JJ) dismissed the appeal from the orders of Lee J.

BMW proceedings

In the Supreme Court, representative plaintiffs commenced several representative proceedings against car manufacturers under Pt 10 of the CPA (Pt 10). The proceedings relate to the recall of vehicles fitted with defective airbags. Mr Brewster is the representative plaintiff in proceedings against BMW Australia Ltd (BMW).

In August 2018, Mr Brewster applied for a CFO.

On the application of BMW, Sackar J removed into the Court of Appeal a separate question, namely, whether the Supreme Court had the power to make the CFO sought by Mr Brewster.

The Court of Appeal (Meagher, Ward and Leeming JJA) answered the question posed for separate determination in the affirmative, holding that the Supreme Court could make the CFO under s 183 of the CPA (s 183). Section 183 is identical to s 33ZF.

Proceedings before the High Court

The question of whether s 33ZF/s 183 empower the court to make a CFO was resolved by well-settled principles of construction. These principles require consideration of the text

of these provisions, read in context and having regard to the purpose of Pt IVA/Pt 10 (at [43], [48]).

The judges in the majority (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) and those dissenting (Gageler and Edelman JJ) differed in how they interpreted the contextual and purposive features of Pt IVA/Pt 10, and how they used these features to inform their construction of the text of s 33ZF/s 183. One member of the majority, Justice Nettle, recognised that there were cogent arguments either way (at [122]).

Reasoning of the majority

In a joint judgment, Kiefel CJ and Bell and Keane JJ recognised that the power conferred by s 33ZF/s 183 was broad (at [46]-[47]). However, their Honours emphasised that the words of limitation in s 33ZF/s 183 – the Court must think the order 'appropriate or necessary to ensure that justice is done in the proceeding' – could not be ignored (at [46]; see also [19], [70]).

Their Honours stated that, having regard to the ordinary and natural meaning of the words used in the sections, s 33ZF/s 183 authorise orders apt to advance the just and effective determination of the pleaded issues between the parties to the proceeding (at [21], [50]-[51]). As CFOs are orders in favour of a third party intended to encourage the continuation of proceedings, they are outside s 33ZF/s 183 (at [50]; see also [47], [49], [53]-[54]). Their Honours stated that CFOs do not assist in (i) determining any issue in dispute between the parties; (ii) preserving the subject matter of the dispute; (iii) ensuring the efficacy of any final judgment in the proceedings; (iv) assisting in the management of proceedings in order to resolve them; or (v) doing justice between the group members in relation to the costs of the proceedings (at [51]).

In support of their construction, their Honours pointed to several features of the legislative scheme for representative proceedings, including:

- Section 33ZF/s 183 is a 'supplementary' source of power (at [46], [60]). It could not have been intended that this section could be used to meet circumstances not contemplated by Pt IVA/Pt 10 (at [60]).

- Part IVA/Pt 10 contains specific provisions regarding the role of the court in determining whether or not representative proceedings should proceed (at [62]-[65]). The provisions recognise that representative proceedings should be halted when the cost of identifying group members is too high or too difficult compared to the value of the claims (at [65]).
- Part IVA/Pt 10 provides no criteria to guide the court in determining whether to establish a relationship between all group members and a litigation funder, where none otherwise exists, and the terms on which such a relationship should be established (at [59], [66]). In particular, there are no criteria for fixing a rate of remuneration of the litigation funder (at [66]-[67]). Such an exercise is speculative (at [67]; see also [68]).
- Part IVA/Pt 10 provides for the making of orders distributing the proceeds of a representative proceeding at its conclusion (at [59], [68]-[69], [73]-[81]). At that stage, the value of the litigation funder's support to the group members can be assessed and apportioned among group members through a fund equalisation order under s 33ZJ(2) of the FCAA and s 184(2) of the CPA. These provisions prevent 'free riding' and allow the costs of a representative proceeding to be equitably spread among group members (at [68]-[71], [74]-[75], [81], [85]-[90]).
- The objectives of Pt IVA are to improve access to justice for claimants and to increase the efficiency of the administration of justice by a common binding decision. They do not include providing a sufficient incentive for litigation funders to fund litigation (at [83]-[84]).

In separate judgments, Nettle and Gordon JJ also found that s 33ZF/s 183 did not empower the court to make a CFO. Their Honours relied on similar features of the legislative scheme as the plurality.

Justice Nettle found that, in the context of Pt IVA as a whole, the 'broad generality' of s 33ZF(1), compared to the detail and specificity of other provisions, suggests that s 33ZF(1) is 'a supplementary power to do what is necessary or incidental to achieve the objectives at which those other more detailed, specific provisions are aimed' (at [124]-[127]). None of the provisions of Pt IVA expressly or impliedly contemplate CFOs nor the issues to which they are addressed (at [125]). The legislative history confirms this (at [126]-[127]).

Justice Gordon had regard to Pt IVA as a whole, in a similar manner to the plurality and Nettle J ([146]-[147]). Her Honour stated that the more specific provisions of



Pt IVA did not envisage a court making a CFO (at [147]-[148]). Nor did they envisage the court crafting a relationship between unfunded group members and a litigation funder, who is not a party to the proceeding (at [149]-[152]). In addition, her Honour observed that the outcomes of a CFO – for example, putting the proceeding on a more stable funding foundation or reducing risk to the funder – were not appropriate or necessary to ensure that justice was done in the proceeding (at [153]-[165]).

Dissenting judgments

In separate judgments, Gageler and Edelman JJ noted the generality and breadth of s 33ZF/s 183. Their Honours also observed that what the Court might think appropriate or necessary in the interests of justice was not fixed in time, but would develop through time (at [98]-[102], [116] (Gageler J), [171]-[172], [181], [205], [206] (Edelman J)).

Justice Gageler found that the notion of 'ensur[ing] that justice is done in the proceeding' is not confined to ensuring that justice is done in the resolution of the disputed matters between the representative party / group members and the defendant. It extended to ensuring that procedural and substantive justice is done between the representative party and the group members (at [109]). His Honour had regard to the nature of representative proceedings, to which s 33ZF is specifically directed and the fact that s 33ZF could be exercised by the court of its own motion or on application by any party or any group member (at [108]-[109]). His Honour found that the making of a CFO fell within s 33ZF, to the extent that it enabled orders to be made ensuring procedural and substantive justice between the representative party and the group members (at [110]-[113]).

Justice Edelman found that the rationale in justice for CFOs could be illuminated by reference to long-standing orders for remuneration of work made by courts, such as an award for unrequested intervention in the law of maritime salvage. These other remuneration orders are based on well

accepted principles of justice and made in circumstances where the work has not been requested and where remuneration depends upon success (at [188], [193]-[202]).

Constitutional objections

The appellants raised constitutional objections to the making of CFOs. They argued that if s 33ZF/s 183 permitted the making of CFOs, this involved the exercise of a power which was not judicial or involved an acquisition of property other than on just terms.

The majority did not decide the constitutional objections. Justices Gageler and Edelman dismissed them (at [119]-[120], [223]-[230]).

Conclusion

The practical effect of the High Court's decision is that the Federal Court and NSW Supreme Court cannot make CFOs under s 33ZF/s 183. This is likely to extend to other jurisdictions with equivalent provisions.

It will be interesting to observe whether the High Court's decision pauses representative proceedings and whether the Commonwealth and State legislatures change the FCAA and CPA to provide expressly for the making of CFOs.

In addition, following the High Court's decision, on 19 December 2019, the Federal Court updated the Class Actions Practice Note. In relation to settlement procedure, [15.4] of the Practice Note states that the Court 'will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action'. This provision suggests that, at settlement, an order that is intended to achieve the same outcomes as a common fund order may be available. Whether and how this provision in the Practice Note is applied, and whether other courts adopt a similar approach, remains to be seen. **BN**