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Article Information

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Dark clouds loom over common fund orders

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A shadow has been cast over the seemingly well-accepted ability of courts to make common fund orders in third-party funded representative proceedings. The New South Wales Court of Appeal is to determine whether the Supreme Court has the power to make such orders. This determination coincides with a challenge by Westpac in its application for leave to appeal Justice Lee's decision in *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422.

Background

Justice Sackar in *Owen Brewster v BMW Australia Ltd* [2018] NSWSC 1602 considered an application by BMW to remove to the Court of Appeal a separate question whether the Supreme Court of New South Wales has the power to make a common fund order in representative proceedings.

On 14 August 2018, Mr Brewster filed a motion seeking a common fund order to the effect that 25% of any judgment or settlement (net of legal costs and expenses) be paid to the funder, Regency Funding Ltd.

A common fund order obliges all group members, even those who have not entered into a funding agreement with the litigation funder, to contribute to the funder's commission from the proceeds of a judgement or settlement. The objective behind such an order is to ensure all group members are treated equally and to prevent those 'piggy backing' on the claim from being in a better position to those who agreed to the funder's terms, on the basis that without the funder's financial support the proceedings may have never commenced.

A number of common fund orders have been made in the Federal Court and the Victorian Supreme Court.

The Supreme Court's power to make a common fund is said to arise from s 183 of the *Civil Procedure Act 2005* (NSW) or from the Court's inherent jurisdiction.

Section 183 provides:

183 General power of Court to make orders
In any proceedings (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 that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

Arguments

BMW submitted that the Court did not have the power to make a common fund order as:

- s 183, properly construed, does not authorise the making of a common fund order;
- the Court had no power to make the order in its inherent jurisdiction; and
- the claims in the substantive proceedings are made under a provision in the *Trade Practices Act* 1974 (Cth) and Schedule 2 of the *Competition and Consumer Act 2010* (Cth), both being Commonwealth legislation and involving matters of Federal jurisdiction. State laws cannot confer powers on a court exercising Federal jurisdiction unless that power is picked up by s 79 of the *Judiciary Act 1903* (Cth). Section 79 does not pick up any state law that would be contrary to the Constitution, and a common fund order involves an acquisition of property other than on just terms, contrary to s 51(xxxi) of the Constitution. It follows that s 79 does not pick up any law allowing the

Supreme Court to make a common fund order.

BMW challenges the Federal Court decisions in *Money Max Intl Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 and *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (no 3)* (2017) 343 ALR 476, stating that those cases do not sufficiently deal with the acquisition on just terms argument. BMW argues that a common fund order involves the purported exercise of a power by a court exercising general jurisdiction which is not within the judicial power of the Commonwealth, or incidental thereto, contrary to Chapter III of the Constitution.

Mr Brewster made no submission other than raising concerns that the determination of the separate question proposed would not promote the just, quick and cheap resolution of the common fund application. However if the Court became of the view that a separate question was appropriate, Mr Brewster submitted that it would be appropriate for the separate question to be removed to the Court of Appeal.

Conclusion

Justice Sackar, having reviewed the *Money Max* and *Allco* decisions, was satisfied that no authority presently exists that has determined definitively or on one view at all, the questions raised by BMW. His Honour was satisfied that the question is a discrete question of law of clear general public importance and that the question be should removed to the Court of Appeal for determination.

If the Court of Appeal does find that the Supreme Court has the power to make a common fund order (and subject to any appeal to the High Court of Australia), litigation funders funding representative proceedings in the Supreme Court (and other state courts) can breathe a sigh of relief.

Should the Court of Appeal find that the Supreme Court does not have power to make a common fund order, litigation funders funding representative proceedings will be left in an uncertain position and those funders may be required to do further “book building” to ensure that members of the class sign up to their funding agreements.

There is a similar challenge about to be brought by Westpac in an application for leave to appeal Justice Lee’s decision to make a common fund order in Lenthall v Westpac Life Insurance Services Limited [2018] FCA 1422. Westpac has stated that it will argue that the Federal Court of Australia Act 1976 (Cth) did not empower the Federal Court to make a common fund order, and alternatively if it did, then Justice Lee failed to consider whether the acquisition of class property in favour of the funder was on just terms.

It is possible that the Federal Court is found to have the power to make common fund orders but state Supreme Courts (including NSW, Victoria and Queensland) do not. This outcome would likely have a significant impact on the attractiveness of state Supreme Courts as a forum for funded representative proceedings involving claims under Commonwealth legislation.