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The High Court of Australia Turfs Common Fund Orders

In a decision that will doubtless have wide-ranging ramifications in the funded class action space, the High Court has ruled that courts have no power to make common fund orders.

Westpac Banking Corporation & Anor v Lenthall & Ors (**Lenthall**); *Brewster v BMW Australia Ltd* (**Brewster**) *[2019] HCA 45*

The High Court has somewhat surprisingly (depending on where you're standing) determined that Federal and Supreme Court judges have no power under section 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) nor section 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**) to make common fund orders (**CFO**), which until now, had the effect of obliging unfunded group members to meet a proportion of a litigation funder's commission out of their share of the settlement.

Quick recap [1]

The primary issue for determination by the High Court was whether, on the proper construction of s 33ZF and s 183, the court has power to make a common fund order to ensure that justice is done in a representative proceeding.

- The Appellants argued that the lower courts erred in allowing CFOs. They submitted that an order granting a funder a share of any fruits of the litigation, in advance of determining the proceedings, is not capable of being seen as appropriate or necessary to ensure that justice is done in the proceeding. Their central thesis was that a CFO cannot be supported by the scope and purpose of the provisions, and that it is a 'great leap' to say that they envisaged redistributing group member entitlements in order to maintain a proceeding.
- The Respondents argued that representative proceedings necessarily assume that someone will bear the risk of the action and justice requires that said person be reimbursed for their costs and the risk they subsumed. In that light, Parliament must have intended that the Court would, over time, in individual cases, develop new procedures in form and contour as it responded to the practical and economic circumstances in which the legislation was to work. The Respondents said that the parliamentary intention of the provisions included to resolve unforeseen difficulties.

A series of ancillary issues arose in the context of the primary issue, including questions of legality, judicial conferral of interests on third parties, absence of practical guidelines, separation of powers and incidental power, and acquisition of property otherwise than on just terms. For reasons that follow, none of these ancillary issues ultimately fell for determination by the High Court.

Judgment

Chief Justice Kiefel, Bell and Keane JJ (**the Plurality**) determined that, on the proper construction of section 33ZF of the FCA and section 183 of the CPA, the Courts have no power to order a CFO. Considerations of text, context and purpose concluded that it is neither appropriate nor necessary to promote the prosecution of a proceeding by the making of a CFO.

The Plurality concluded that while the power conferred by section 33ZF is broad, it is necessarily supplementary. The Plurality emphasised that the relevant provisions are concerned with *how* an action ought proceed in order to achieve justice rather than whether an action *can* proceed at all. A court's promotion of the representative proceeding to be heard and determined does not necessarily result in justice. The making of an order at the initial stages of the proceeding to assure a litigation funders support is beyond the scope of the legislation.

Justice Nettle, cites the Plurality in a separate judgment but took the view that while representative proceedings supported by a litigation funder are no longer seen to be adverse to public policy, this does not mean that Parliament could ever have

intended that the relevant sections could be used to improve the commercial interests of those funders.

Gageler J and Edelman J dissented, also in separate judgments. They reasoned that CFOs can be appropriate or even necessary to ensure that justice is achieved in the proceeding, and that both law and equity should have the power to order fair apportionment of expenses in order to permit justice between a party and the beneficiaries of the litigation. On a contextual analysis of the provisions, Edelman J held that where the Court thinks a CFO is appropriate or necessary to ensure justice is done in the proceeding, the Court has the power to make that order.

What does this mean for class actions moving forward?

This decision will almost certainly have a dampening effect on what has been a fiercely competitive class action space, particularly in securities class actions. CFOs enabled litigation funders to back open class proceedings while at the same time proffering a basis for estimating returns at an early stage of the litigation. Funders and plaintiff firms will now return to the practice of bookbuilding to record interest in a class action, this will have the effect of slowing down the burgeoning of actions. Time will tell whether there will be less filing overall.

While a number of uncertainties arise from the High Court's decision, a few points spring to mind:

- First, whether existing CFOs are now likely to face challenge, and if so, where those challenges will come from and in what form. It is at least theoretically possible that a challenge will come from a claimant, a group member, a defendant, or even a funder, where for example funding rates pursuant to a CFO have been aggressively negotiated in order to win a carriage motion.
- Secondly, it will be interesting to see if (and if so, how) the jurisprudence will be deployed to temper other examples of judicial intervention *via* s 33ZF and s 183, for example, in challenging any attempt by the court to alter contractually agreed funding rates.
- Thirdly, if this decision does indeed have a dampening effect on competition and multiplicity, whether an unintended consequence of the decision will be to release some of the downward pricing pressure on funding rates that has been enjoyed by group members as a result of the competitive class action market.
- Fourthly, will there be a parliamentary response?

This is a significant decision in the class action space, the full ramification of which is unlikely to be known for some time.

In summary:

- Courts have no power to make common fund orders.
- Chief Justice Kiefel, Bell and Keane JJ emphasised that the relevant provisions are concerned with how an action ought proceed to ensure justice rather than whether an action can proceed at all.
- Gageler J and Edelman J dissented for different reasons, but considered that CFOs can be appropriate or necessary to ensure justice is achieved.
- The likely effects include: a reduction to multiplicity motions; a return to the practice of book building; increased funding rates; and a possible legislative response.

[1] The *Lenthall* and *Brewster* appeals were heard concurrently, and raised similar issues regarding the construction of all but identical provisions in the *Federal Court Act of Australia 1976* (Cth) and the *Civil Procedure Act 2005* (NSW). In view of this, and the interests of brevity, shorthand and abridged references are used throughout this note. We encourage you to read the High Court's judgment for yourself (here).