IN THE HIGH COURT OF AUSTRALIA

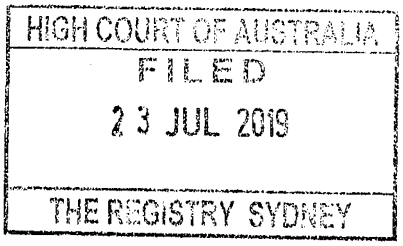
SYDNEY REGISTRY

No. S152 of 2019

BETWEEN:

BMW Australia Ltd ACN 004 675 129

Appellant



and

Owen Brewster

First Respondent

Regency Funding Pty Ltd ACN 619 012 421

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: STATEMENT OF ISSUES

2. There are three principal issues in this appeal.

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3. First, whether s 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**) empowers the Supreme Court of NSW to make Order 1 in the Common Fund Motion[1] (the **CFO**).

4. Secondly, whether, in making the CFO, the Supreme Court of NSW would be exercising a power which is not within the judicial power of the Commonwealth or incidental thereto.

5. Thirdly, whether, making the CFO would infringe the limitations contained in s 51(xxxi) of the *Constitution* (Cth).

Part III: SECTION 78B NOTICESs

6. The appellant has given notice in compliance with s 78B of the *Judiciary Act 1903* (Cth). The first respondent certifies that he does not consider that further notice is required.

Part IV: CONTESTED MATERIAL FACTS

7. There are no contested material facts. It should be noted however that the order of the Supreme Court referring the separate question of the power to make the CFO to the Court of Appeal was made in circumstances where the evidence in support of the application for the common fund order was incomplete.[2]

Part V: ARGUMENT

Background

8. The object of Part 10 of the CPA, like Part IV of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), is to "*provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high*

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[1] Core Appeal Book (**CAB**) 6-17

[2] *Brewster v BMW Australia Ltd* [2018] NSWSC 1602 at [16], CAB 25, where Sackar J recounted the Plaintiff's submission with implicit acceptance. His Honour noted at [20], only in respect of such evidence as there was, that such evidence was not contested for the purposes of the application.

cost of taking action"[3]. When Part 10 was enacted in 2010 the torts of champerty and maintenance had been abolished in NSW and litigation funding was lawful: CA[70], [81] (CAB 59-60). The benefits of litigation funding in promoting access to justice had been acknowledged by that time: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 [65]. As the ALRC noted, litigation funding largely filled the most significant lacuna in the original class action regime by providing a satisfactory mechanism to protect the representative plaintiff from the impact of adverse costs orders.[4] Third party funding was specifically contemplated by the CPA: see s 166(2) (which has no parallel in FCAA Part IV: CA[72] (CAB 60) and s 56 (4), (6) ("Overriding Purpose").

9. After the decision in *Fostif,* the majority of class actions were supported by litigation funding arrangements: in the Federal Court from March 2013 – March 2018, the rate was 64%.[5] Funding equalisation orders had been developed as a means of spreading the cost of funding, agreed to be paid by some group members, across the whole class, so as to achieve fairness between group members. But there remain cases which it may be difficult to fund by aggregating individual contracts with group members, in particular, where there is a large number of claimants with small claims, and the claim is costly to litigate.[6]

10. The acceptance of common fund orders since *Money Max*[7] makes it much easier for such claims to be funded.[8] It avoids the need for a "book build", described recently as

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[3] Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174 (Mr Duffy-Federal Attorney General).

[4] *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, ALRC Report 134, December 2018 (**ALRC Report 134**), [2.8], [2.9].

[5] ALRC Report 134, [2.66] and table 3.2.

[6] *Lenthall v Westpac Life Insurance Services Limited* (2018) 363 ALR 698; [2018] FCA 1422 [17]-[18]. The present is such a case: CA[3]-[6]. See also affidavit of Damian Scattini, [29], Appellant's Book of Further Materials (**ABFM**) at 52.

[7] *Money Max International Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

[8] The appellant's submission (at [16]) that a "critical" proviso to making such orders has been "discarded" since *Money Max International Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 overlooks the fact that it was two members of the court in that case who explained why the "proviso" was not essential to the reasoning in that case: *Blairgowrie Trading Ltd v Allco Finance Group Ltd*

"an endeavour conducive of wasted costs that the Court has sought to discourage since the advance of common fund orders".[9] It also increases competition between litigation funders.[10]

The Common Fund Order

11. The common fund order sought in these proceedings would oblige group members and the Plaintiff to be bound by the Funding Terms annexed to the notice of motion (CAB 9-17). The orders sought are on the basis of an undertaking by the funder, the Plaintiff and the Plaintiff's solicitors provided to the Court that they will comply with their obligations under the Funding Terms. The Funding Terms include obligations on all group members to pay to the funder 25% or such other percentage as the Court considers reasonable (in contrast to the 30% which those who have entered into a funding agreement have agreed to pay) of any judgment or settlement net of legal costs and expenses, in addition to legal costs and administration expenses (clause 8). They oblige the Funder to fund the proceedings to their conclusion (in circumstances in which they are otherwise not so obliged), including the payment of costs and administration expenses, the provision of security for costs, and the payment of adverse costs orders (clauses 7 and 8, CAB 12 and 13). The funder is also obliged to observe a "Conflicts Management Policy" (clause 10(b)). And there is a settlement dispute resolution process in clause 15: CAB 14.

12. Four aspects of the order sought in the present case should be noted. *First*, the order is interlocutory. It can be reviewed and varied in light of new circumstances: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 178. *Secondly*, the commission rate proposed in the order is expressly provisional. The obligation contained in the Funding Terms in this case is to pay "*25% of any Resolution Sum as remains after payment of the amount specified in 8(a) above,* ***or such other percentage***

(Receivers & Managers Appointed) (In Liq) (No 3) (2017) 343 ALR 476 at [103]-[105]; *Pearson v State of Queensland* [2017] FCA 1096 at [30].

[9] *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 [17]-[18].

[10] *Perera v GetSwift Ltd* (2018) 127 ACSR 1 at [29]. Recent decisions suggest that this has led to a substantial fall in funding costs: see *Lenthall v Westpac Life Insurance Services Limited* (2018) 363 ALR 698; [2018] FCA 1422 [22]-[24].

as Funder's commission as the Court considers reasonable *at the time of settlement approval under section 173 or judgment under section 177 of the Civil Procedure Act 2005 (NSW)*" [emphasis added]: CA[7] (CAB 39-40). *Thirdly*, the funder becomes bound by clauses 6 to fund the litigation until its conclusion (subject to a court sanctioned termination pursuant to clauses 24 and 25), in lieu of its existing contractual right to terminate without cause on 21 days' notice: CA [22] (CAB 44). *Fourthly,* it is not accurate to say that there would be an "*immediate pecuniary consequence*" if the Common Fund Order were made (cf Appellant's Submissions (**AS**) [21]). Choses in action are the personal property rights of the individual entitled to enforce the chose in action.[11] A common fund order does not operate to transfer any part of the chose in action. The CFO will operate on the proceeds, not the right of action. The funders' rights are not analogous to a charge or a partial assignment (cf AS [fn 28]), as the ability of the group member to avoid the impact of the order by opting out makes plain. The funder obtains only a contingent interest in the proceeds of group members' cause of action in exchange for incurring immediately the burdens and risks of being obliged to fund the proceedings.

Section 183 of the Civil Procedure Act

13. The appellant has four construction arguments. The first is that s 183 in its ordinary meaning does not extend to permit a common fund order: AS[24]-[30]. The second and third are that s 183 should be read down, either on account of the *Anthony Hordern* principle (AS[31]-[35]) or the principle of legality (AS[36]-[39]). The fourth is that the proposed order is so premature and uncertain that it could not be justified as an exercise of power under s 183: AS[40]-[45].

14. Some uncontroversial principles are applicable. *First,* as a provision which confers jurisdiction upon or grants powers to the court, s 183 should not be read as subject to implications or limitations not found in the words used: *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [11].

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[11] *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303, 304, 306, 311-2, 314, 319-20.

15. *Secondly,* the interpretation that would best achieve the purpose or object of the Act is to be preferred to each other interpretation: *Acts Interpretation Act* 1901 s 15AA. The object of Part 10 of the CPA has already been mentioned. The object of s 183 itself is common ground: to permit solutions to unforeseen issues in implementing a novel procedure, the only limitation being that the Court must think the order appropriate or necessary to ensure that justice is done in the proceeding: *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 at [85] (Westpac Core Appeal Book (**WCAB**) 99); AS [26].[12]

16. Turning to the text of s 183 the critical words are "*appropriate or necessary to ensure justice is done in the proceedings*". In this context "to ensure" will have its ordinary meaning: "make certain" or "make sure": *Mt Isa Mines Ltd v Peachey* [1998] QCA 400 at [15]. Insofar as the attainment of justice is not already *certain*, then section 183 authorises whatever is "appropriate or necessary" to achieve that certainty. Consistently with the principles in [13] above, there is no warrant for reading "or" as "and": *Lenthall* at [90] (WCAB 100-101). And "necessary" in a context such as this does not mean "indispensable": "*To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. ... [The word "necessary"] has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports*": *Thomas v Mowbray* (2007) 233 CLR 307 at [101] per Gummow and Crennan JJ, quoting *McCulloch v Maryland* 17 US 316 at 413-414 (1819); *Money Max International Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at [162]-[165].

17. *Thirdly,* in the present case a common fund order may be seen as appropriate or necessary to ensure justice is done in the proceedings, by reference to at least two considerations. *First,* an order such as this may assist to place the proceeding on a known

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[12] Referring to *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4; 156 ALR 257 at 260 per Wilcox J, one of the ALRC Commissioners responsible for Report 46, *Grouped Proceedings*.

and stable foundation by assuring funding to enable the plaintiffs' costs to be paid, to meet orders for security for coats, and to protect the plaintiff from the risk of an adverse costs order. In achieving those outcomes it may reduce or eliminate the risk of the action not proceeding at all: *Lenthall* at [91] (WCAB 101). *Secondly,* "justice in the proceeding" in the context of a class action will encompass justice as between the plaintiff and group members, and between group members *inter se*: *Lenthall* at [91] (WCAB 101); *Blairgowrie Trading Pty Ltd v Allco Finance Group Ltd* (2015) 325 ALR 539 ***(Allco No. 1)*** at [99], [226]. As the Full Court said in *Lenthall,* at [91], "*[i]f funding of an open class is seen as a legitimate, appropriate and in a broad sense, necessary, part of the framework for the vindication of the rights of group members, there is every reason in fairness and equity to have the cost of such funding shared equally*". It is, in substance, a "common enterprise".[13]

18. The arguments for the appellant in favour of a contrary view focus on distractions: whether the order creates rights and benefits for the funder (AS[26]), and whether it may facilitate the commencement of (other) proceedings (AS[29];CA[79])). The only question is whether such an order might, depending on the evidence finally adduced, be characterised as appropriate or necessary to ensure justice is done in the proceedings. The Court of Appeal was correct to answer that question in the affirmative.

Anthony Hordern

19. The question is whether "*the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power*".[14]

20. This requires attention to the "action" that is in question. Here it is the making of an interlocutory order, that has the effect of binding a third party to fund the proceedings in exchange for a contingent right to a share in the proceeds if the proceedings are

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[13] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, [2016] FCAFC 148 at [149].

[14] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [84], approving *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [59].

successful, on terms that are provisionally established. The short answer to the appellant's submissions is that nothing in the more specific powers on which they rely addresses such an "action". Sections 177, 178 and 184 only deal with orders made *after* a determination of liability. And they do not address how the rights and burdens of the plaintiff and group members should be adjusted on account of expenses (other than costs as defined in s. 3) incurred in bringing the common enterprise of the class action to fruition for the benefit of all group members. It follows that they are not apt to cut down, by a negative implication, a power otherwise available under s 183 to make a common fund order: CA [66], [67] (CAB 58-59); *Lenthall* at [96] (WCAB 102).

10 21. Otherwise the high point of the appellant's argument is section 177(2). It provides that "*[i]n making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled*". The appellant reads it as meaning "to and only to the group member entitled". However it need not be read so restrictively. "To" may readily be construed as "to, or as directed by". Even if it is read as the appellant contends, however, the section does not stand in the way of the group members being obliged, by orders earlier made under s 183, to deal with their entitlements in a particular way.

Principle of legality

22. The Appellant relies on the principle that legislation will not be construed to interfere
20 with fundamental valuable rights absent clear words. This principle does not assist the appellant. *First,* Part 10 of the CPA, properly characterised, is a statutory scheme that expressly deals with the adjustment of rights and obligations necessary to effect resolution of representative proceedings. Part 10 contemplates adjustments to the rights caught up in the proceedings, but in a scheme designed to ensure the more effective vindication of those rights. This was correctly recognised by the Court of Appeal at CA [59]-[60] (CAB 56-57), noting that persons may be made group members without their consent, and proceedings may be brought without group members' consent. Immediate effects of such inclusion of group members include suspension of time for limitation purposes and the prospect of group members being bound by a judgment or settlement.
30 One element of the scheme is the general power conferred by s 183. In those circumstances, as the Court of Appeal said ([58]-[63] (CAB 56-57)), the observations

of Gageler and Keane JJ in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] are applicable:

> *The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'.*

23. *Secondly,* it would be incongruous to rely on the principle of legality to cut down the operation of s 183. Part 10 of the Act is designed to give substantive content to rights to litigate, by making their enforcement practicable. In that context the general power in s 183 is conferred better to effect that purpose, the limitation being that any order is appropriate or necessary to *ensure justice* is done in the proceedings. An order which would satisfy that requirement, in the context of a regime with that object, requires no special scrutiny on the ground that it might interfere with fundamental rights.

24. *Thirdly,* the argument that fundamental rights are interfered with overlooks the possibility of opt out by group members who do not approve of the CFO.

25. *Fourthly,* it is not an interference with a fundamental right to require those who benefit from the efforts of a few to progress a common enterprise should contribute to the costs of those efforts. The power being exercised when a common fund order is made is based on the same principles which underlie the long established rules in equity concerning the distribution of common funds: see *Internal Imp. Fund Trustees v. Greenough* 105 US 527 (1881). So much was affirmed by the Supreme Court in *Boeing Co. v. Van Gemert* 444 US 472 (1988) at 478.

"Pre-emption and uncertainty"

26. The Appellant's arguments in respect of "pre-emption and uncertainty" properly understood, do not bear on the question of construction of s 183 or on the question of power. They may go to whether at the hearing of the motion an order should be made.

The appellant does not articulate any construction of s 183 that gives effect to the considerations on which they rely.

27. In any event, as the Court of Appeal pointed out, it is a common feature of interlocutory orders made by courts that they effect significant interference with peoples' rights on necessarily incomplete information: CA [78] (CAB 62). Such orders are supported by the general power of the court, following from the conferral of jurisdiction in s 23 of the *Supreme Court Act* 1970 (NSW) of "*all jurisdiction which may be necessary for the administration of justice in New South Wales*".

Judicial power

10 28. The short answer to the appellant's submission is that a common fund order is an interlocutory order made "for the purpose of the Court resolving a dispute about existing rights" (AS[50]) and so either part of, or more correctly, incidental to, the exercise of judicial power. The question has to be asked on the premise that the CFO is appropriate or necessary to ensure that justice is done in the proceedings, including because it facilitates the just resolution of extant litigation. So understood it is immaterial that it is provisional, does not finally resolve an existing dispute, affects a non-party to the substantive controversy, and creates new rights and obligations. It sits within a large category of other orders with cognate features: asset preservation orders; third party discovery; pre-action discovery[15]; orders for examination of witnesses[16]; security for
20 costs against third parties; search orders: CA [97], [98]; (CAB 68-9).

29. The following additional points should be made. *First* there is "*no single combination of necessary or sufficient factors which identifies what is a judicial power.*"[13] That is because "*it has never been found possible to frame a definition that is at once exclusive and exhaustive*": *R v Davison* (1954) 90 CLR 353 at 366. *Secondly*, the conferral of a power on a court to create or alter rights, and not merely declare and give effect to pre-existing rights, does not necessarily place those powers outside of the scope of judicial

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[15] *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1.

[16] *Palmer v Ayres* (2017) 259 CLR 478 at [30]-[31] per Kiefel, Keane, Nettle and Gordon JJ.

power.[17] *Thirdly,* the breadth of the discrimen employed by the statute is not decisive. It is in the nature of general powers that they provide general criteria. In *Cominos v Cominos* (1972) 127 CLR 588 the High Court held that the award of maintenance was a judicial power, notwithstanding that the provision "*contains neither expression of criterion...nor statement of the considerations to be taken into account.*[18] Examples could be multiplied.[19]

30. *Fourthly,* a federal law may validly confer a non-judicial function on a federal court, where that function is "*incidental*" or ancillary to the performance of a judicial function, that is, where it enables or supports or facilitates the exercise of judicial functions by a court.[20] The order sought here has that character.

31. *Fifthly,* that the order requires the court to assess an appropriate level of return for the funder does make this other than an exercise of power that is judicial or incidental to the exercise of judicial power. As the Full Court of the Federal Court said in the *Lenthall* proceedings, "*courts assess imprecise, and to a degree indeterminate, considerations such as risk, reward, danger and related benefits conferred in the proper exercise of judicial power. It could never be suggested that this task was non-judicial because of the indeterminacy of the commercial, physical and legal considerations*"[21]. And while the order here requires such matters to be assessed prospectively, a court does the same every time it assesses damages for lost economic opportunities.

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[17] *Cominos v Cominos* (1972) 127 CLR 588 at 599 – 600 (per Gibbs J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191; *Thomas v Mowbray* (2007) 233 CLR 307 at 327 per Gleeson CJ; CA at [97] (CAB 68).

[18] *Cominos v Cominos* (1972) 127 CLR 588 at 608.

[19] Eg, the various provisions empowering courts to vary trustee's powers when "expedient" (*Trustee Act 1925* (ACT) section 81(1); *Trustee Act 1925* (NSW) section 81(1); *Trusts Act 1973* (QLD) section 94(1); *Trustee Act 1936* (SA) section 59B(1); *Trustee Act 1898* (TAS) section 47(1); *Trustee Act 1958* (VIC) section 63(1); *Trustees Act 1962* (WA) section 89(1); a scheme of arrangement supported by the requisite majorities of members or creditors will be binding if "approved by order of the court" (no criteria at all being specified: *Corporations Act 2001* (Cth) section 411(4)(b)); and the court may grant its approval subject to such alterations or conditions as it "thinks just": section 411(6).

[20] *The Boilermakers Case* (1956) 94 CLR 254 at 269-272; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151.

[21] At [102] (WCAB 69).

32. *Finally,* there is no doubt that here there is a relevant "matter" in the constitutional sense, comprising the claims in federal jurisdiction by all group members against the defendant. A power to make provision for the costs (other than legal costs) of the litigation of the claims of group members, where necessary or appropriate to ensure justice in the proceedings, would aptly be described as being within the scope of the justiciable controversy constituted by that "matter".

Section 51(xxxi)

33. The s 51(xxxi) issue is also to be addressed on the footing that s 183 is a law authorising a common fund order if it is appropriate or necessary to ensure that justice is done in the proceedings.

34. The question whether s 183 is a law with respect to the acquisition of property on just terms within the meaning of s 51(xxxi) involves a question of characterisation: *Lenthall* at [108] (WCAB 107); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161; *ICM Agriculture Pty Ltd v Commonwealth* 240 CLR 140 at [138]; *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133 (***Airservices)*** at [332].

35. Two points should be made in that context. The first is that "*analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue*": *ICM* at [131], [138] per Hayne, Kiefel and Bell JJ; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at [49] *per curiam.* The second is that, as McHugh J pointed out in *Airservices,* the approach taken by the Court to s 51 (xxxi) is something of an exception to the general principle that a law can bear more than one character for the purposes of s 51: 202 CLR at [339]. This is a corollary of the principle that s 51(xxxi) abstracts from all other heads of legislative power the power to make laws for acquisition of property on just terms, taken with the fact that other heads of power may be a source of power for laws which effect an acquisition of property.

36. Turning to the first of those matters, the main features are that the order sought here would operate, on a contingent and provisional basis, to compel the plaintiff and group members to abide by the funding terms, and so contribute to the funders' expenses and

fee if and only if there is a favourable outcome to the litigation and then only from their share of the proceeds. By their undertaking to do the same, the funder and the lawyers also would also be obliged to abide by the funding terms. The funder would thereby be bound to fund the litigation and pay any adverse costs order and satisfy any order for security for costs: clause 6 (CAB 12-13). Its obligation to do so would be subject only to the provision for court ordered termination in clauses 24 and 25 (CAB 16-17). The bases on which such an order might be justified under s 183 are those addressed in [16] above: to reduce the risk the proceeding would not continue at all and to promote justice as between group members as regards the cost and risks of conducting the litigation.

37. In this case the order is sought in circumstances where there is an existing relation between the plaintiff, the funder and group members. As between the plaintiff and group members, he is responsible for the commencement and conduct of the group proceeding in the mutual interest of all. He is subject to adverse costs orders, but they are not: s 181. He is subject to adverse orders on the application of group members: s 171. He may only settle his individual claim with leave: s 174. He is responsible for giving certain notices to group members: s 175. His commencement of the proceedings has affected the operation of time bars on their individual claims: s 182. And it is his contract with the funder (and those of the few other group members who also have agreements) that has enabled the proceedings to commence.

38. There is also a relationship between the funder and group members. The funder has been funding the litigation to this point. The funder has provided security for costs: CA [6], CAB 39; ABFM 50. All this is for the common benefit of group members. Absent the funder's willingness to continue to do this, there is no reason to think the litigation could continue. And as has been noted above, the role of a funder is recognised by the CPA itself: s 56(4). Duties are imposed on them by that provision.

39. In these circumstances the order may be seen as providing for a fee for services, as was the case in *Airservices*. And as was the case in *Airservices*, the absence of explicit consent on the part the persons affected (in that case, the aircraft owners whose property was charged to secure the fees incurred by the aircraft lessee) should not be determinative of the characterisation question. As submitted above, the power here is an incident of the Federal judicial power, exercised with the object of achieving justice in

the proceeding by making the vindication, and so fructification, of the group members' causes of action more likely, and to permit it to occur on a just basis *inter se*.

40. So understood the conclusions of the majority in *Airservices* are applicable. According to Gleeson CJ and Kirby J, the analysis of Brennan J in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 180-181[22] was applicable, and the case of compulsory forfeiture of a vessel the owner of which was not complicit in the relevant offence was analogous: 202 CLR at [98]-[100]. McHugh J also seems to have approved the approach of Brennan J (at [344]), and resolved the matter on the basis that the fact that the acquisition of property was to secure payment of fees for services meant that the notion of just terms was irrelevant or incongruous: 202 CLR at [345]. Gummow J (with whom Hayne J agreed) held that the case was governed by the principle adopted by the majority in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510[23]:

> *[A] law may be supported by a head of power outside the operation of s 51(xxxi) if it imposes an obligation that involves "a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship". If that relationship "need[s] to be regulated in the common interest", the law is likely to fall outside s 51(xxxi) because it is unlikely that any "acquisition of property" which is an incident of the operation of that law will be capable of imparting to the law the character which attracts s 51(xxxi).*

41. Gummow J went on (at [498]-[500]) to note that care is required in the application of the principle. But here that care permits a conclusion that the principle applies. Part 10 of the CPA is plainly directed at achieving significant public interest goals in terms of access to justice. It is a legislative scheme for the efficient and fair conduct of claims in the Supreme Court which, but for its provisions, would likely be impracticable to

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[22] "*In my view, a law may contain a valid provision for the acquisition of property without just terms where such an acquisition is a necessary or characteristic feature of the means which the law selects to achieve its objective and the means selected are appropriate and adapted to achieving an objective within power, not being solely or chiefly the acquisition of property.*"

[23] He also referred to *Mutual Pools* (1994) 179 CLR 155 at 171, 177, 189-90; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160-1.

litigate. So understood, it is a not insignificant measure directed to advancing the rule of law. The (assumed) power to make a common fund order serves to adjust the respective interests and rights of those who act as representative plaintiffs, group members, and the funders whose commitment of resources and willingness to accept may be vital to the actual conduct of claims under the procedures provided by Part 10. The interests of the group member are not "displaced" by the order – rather, they are likely vindicated by it.

42. For these reasons and for those given by the Full Court of the Federal Court in *Lenthall* at [109]-[130] (WCAB 107-113), s 183 in its operation as authorising a common fund order is not to be characterised as a law with respect to the acquisition of property on just terms within the meaning of s 51(xxxi).

43. There is an additional, anterior question to that of characterisation: whether a common fund order effects an acquisition of property: *Airservices* at [326] per McHugh J. That question was answered in the negative by both the Court of Appeal (CA [109], CAB 71-2) and the Full Court of the Federal Court (*Lenthall* at [131] (WCAB 113)). The order sought does not involve an acquisition of property as the making of a common fund order does not involve the taking of property rights from the group members and the bestowal of those rights on the litigation funder: *Lenthall* at [131] (WCAB 113). Rather, the CFO only operates only if there are proceeds of the claim, and then only contingently. If the group member opts out of the class action, even after the making of a common fund order, they have lost nothing to the funder. As such, it does not rise to the level of a *"modification of a right to bring an action"*.[24] As the Court of Appeal correctly recognised, *"no group member needs ever be bound to pay any amount to Regency Funding"*: CA [109] (CAB 71). Or, put another way, the degree of impairment to the bundle of rights constituting the property in question is insufficient to attract the operation of s 51(xxxi): see *Smith v ANL Ltd* (2000) 204 CLR 493, 505 [23] (Gaudron and Gummow JJ)[25]. Here there is but a conditional – and fully reversible – impost on

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[24] *Smith v ANL Ltd* (2000) 204 CLR 493, 500 (Gaudron and Gummow JJ).

[25] Citing *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175, in which a restriction on the export of a painting left the applicant free to retain, enjoy, display or otherwise make use of the painting, subject to the requirement of an export permit *if* he desired to take it out of Australia.

the property right: if they opt out, group members remain free to deal with their chose in action as they see fit: they can pursue it outside the bounds of the class action (or transfer it; or abandon it), no part of its value having been transferred or taken.

44. Further, the opt out structure means that any acquisition permitted by a common fund order is not the result of the exercise of a compulsive power (cf *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 358 at [41]): CA [109] (CAB 71-72).

45. The Court of Appeal did not find it necessary to decide whether – if s 183 was a law with respect to the acquisition of property – a common fund order (or the CFO contemplated) would provide just terms. However the power to make orders that are appropriate or necessary to ensure justice is done in the proceedings necessarily entails that group members are not deprived of their rights except on just terms. Properly understood, just terms as assessed and ordered by the court are a condition of the power.

Part VI: NOT APPLICABLE

Part VII: ESTIMATE OF TIME REQUIRED

46. The first respondent estimates that he will require approximately 1 hour and 30 minutes for oral argument.

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