

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY



No. S152/2019

BETWEEN:

BMW AUSTRALIA LTD ACN 004 675 129
Appellant

and

OWEN BREWSTER
First Respondent

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REGENCY FUNDING PTY LTD 619 012 421
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154/2019

BETWEEN:

WESTPAC BANKING CORPORATION
Appellant

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WESTPAC LIFE INSURANCE SERVICES LIMITED
Second Appellant

and

GREGORY JOHN LENTHALL
First Respondent

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SHARMILA LENTHALL
Second Respondent

SHANE THOMAS LYE
Third Respondent

KYLIE LEE LYE
Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED
Fifth Respondent

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ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)
OUTLINE OF ORAL SUBMISSIONS

Filed on behalf of the Attorney-General for
the State of Queensland (intervening)
Form 27F; Rule 44.08.2
Dated: 14 August 2019
Per: Margot Clarkson
Ref: PL8/ATT110/3931/CMA
Document No: 9430324

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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: OUTLINE OF PROPOSITIONS TO BE ADVANCED

2. The BMW proceeding potentially gives rise to a question which was neither argued nor necessary for decision in either *Rizeq* or *Masson*. That is: in what circumstances will a law conferring a power on a court be characterised as ‘commanding the manner of exercise’ of jurisdiction?
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3. That question arises if:
 - 3.1 As a matter of construction, s 183 of the *Civil Procedure Act 2005* (NSW) authorises the making of a common fund order.
 - 3.2 The Court accepts that there remains an aspect of s 79(1) of the *Judiciary Act 1903* which is unresolved following the decisions in *Rizeq* and *Masson*, concerning the extent of the ‘gap’ created by State legislative incapacity to regulate federal jurisdiction.
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 - 3.3 The making of a common fund order is not merely ‘procedural’, but is ‘substantive’ in the sense described by Edelman J at [59] of *Masson*.
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 - *Masson v Parsons* (2019) 93 ALJR 848, 865[59] (**JBA vol 4, tab 38, 1638**).
 - 3.4 The court finds that the making of a common fund order is an acquisition of property on other than just terms.
4. If each of those requirements is met, a question arises as to whether substantive powers of the kind referred to by Edelman J in *Masson* at [58] fall within the ‘gap’ and are therefore picked up and applied by s 79(1) of the *Judiciary Act*.
5. It is necessary to say something further about the second and third conditions.
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 - Second condition* ([3.2] above)
6. Whether laws that confer powers upon a court to make substantive orders in relation to the rights, powers, duties, and liabilities of persons are laws that regulate or govern the

federal authority to decide was not the subject of argument, and was not necessary to decide, in either *Rizeq* or *Masson*.

- *Masson* (2019) 93 ALJR 848, 865 [60] (**JBA vol 4, tab 38, 1638**).
- *Rizeq v Western Australia* (2017) 262 CLR 1, 42 [109], 43 [111], 72 [198] (**JBA vol 7, tab 59, 2864-5, 2894**).

10 *Third condition* ([3.3] above)

7. As a matter of statutory construction s 183 is properly characterised as a ‘procedural power’ in the sense described by Edelman J in *Masson* at [59], because it does ‘*command a court as to the manner of exercise of federal jurisdiction*’.

8. If that is right then, on the approach of all members of the Court in *Rizeq*, s 79(1) operates to ‘pick up’ s 183. Queensland therefore accepts that [24] of its written
20 submissions overreaches in submitting that s 183 is not picked up in any circumstance.

9. Further, Queensland accepts and adopts the position that the making of a common fund order regulates the exercise of federal jurisdiction. It is not a substantive order which is determinative of rights or creates rights. It is incidental to the exercise of judicial power.

- First respondent (BMW proceeding) [28]; Vic [20]-[21] (in BMW proceeding); Cth [31] (in Westpac proceeding).

30 10. However, BMW submits that the making of a common fund order is of a ‘different character’ from ‘procedural powers ... which go to the conduct of the litigation as distinct from its determination’. Westpac submits that common fund orders ‘create and enforce new rights’. Both appellants submit that the common fund order ‘interferes with or modifies the rights of group members to the proceeds of their cause of action’, and gives rise to an acquisition of property.

- Transcript, p 11, lines 394-6 (Mr Kirk); p 59, line 2575 (Mr Leopold); p 62, lines 2713-9 (Mr Free).

40 11. If the Court accepted that submission, then it would be necessary to determine whether s 79(1) is needed to, and does, pick up a power to make a substantive order of that kind. If that point is reached, Queensland submits that the power to make a common fund

order applies of its own force in federal jurisdiction, because laws which confer power to make substantive orders do not ‘command the manner of exercise of jurisdiction’.

- *Masson* (2019) 93 ALJR 848, 864 [58] (**JBA vol 4, tab 38, 1637**).

11.1 Section 79(1) assumes that the Courts to which it is directed have, and are capable of exercising, jurisdiction. In other words, it assumes that the Court is ‘already vested’ with the substantive powers necessary to exercise jurisdiction.

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- *Masson* (2019) 93 ALJR 848, 865 [61] (**JBA vol 4, tab 38, 1638**).

11.2 The exclusive vesting of jurisdiction in federal courts, and the vesting of federal jurisdiction in State courts (by ss 38 and 39 of the *Judiciary Act*) meant that States could not regulate the federal authority to decide, but did not otherwise take away State legislative power.

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- QS 6-10 [17]-[23].

- *Rizeq* (2017) 262 CLR 1, 52 [141] (**JBA vol 7, tab 59, 2874**).

11.3 The contrary conclusion that it is necessary for s 79(1) to pick up and apply State laws conferring substantive powers gives rise to a range of difficulties, including with respect to the identification of the applicable law in federal jurisdiction (‘choice of law’) and double-function provisions.

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- QS 8-9 [20].

- *Rizeq* (2017) 262 CLR 1, 44-5 [118] (**JBA vol 7, tab 59, 2866-7**).

- *Masson* (2019) 93 ALJR 848, 865-7 [61]-[68] (**JBA vol 4, tab 38, 1638-40**).

Dated: 14 August 2019.

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