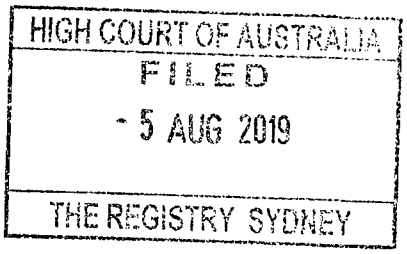
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S152 of 2019

BETWEEN: **BMW AUSTRALIA LTD ACN 004 675 129**

Appellant



and

OWEN BREWSTER

First Respondent

10 **REGENCY FUNDING PTY LTD ACN 619 012 421**

Second Respondent

APPELLANT'S REPLY

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PART I: CERTIFICATION

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

PART II: REPLY

Construction

2. That litigation funding was contemplated by Parliament when Pt 10 was enacted (see s 166(2)) weakens the respondent's arguments, just as does the ALRC's original consideration of the issue: cf RS[8]. If Parliament had intended to allow orders compelling group members to give a share of litigation proceeds to funders, it would have said so expressly. "[W]here a question arises as to the creation of new rights and liabilities which will engage Ch III ..., it is to be expected that the Parliament will clearly state its will".[1]

3. As for the character of a CFO, the submission at RS [12] and [24] that the funder's interest in the chose is contingent is wrong. The funder's interest is *defeasible* if a group member elects to opt-out. The possibility of future defeasance does not detract from the fact that the funder obtains an immediate interest akin to a charge or partial assignment. Further, opt-out notices are generally required to be sent prior to the start of a trial (s 162(4)), and as Lenthall states (at [6]), notice is ordinarily given in a generalised way that "will not necessarily come to the personal attention of all group members".

4. Many submissions seek to downplay CFOs as merely being interlocutory and provisional. The orders have direct and immediate effect unless later varied. Orders transferring a substantial proportion of the fruits of litigation are of a different character to the various procedural powers sought to be analogised. Orders made under those powers are part of the process of adjudicating the claims in dispute in the proceeding: see AS [50]. Any rights created by the orders are rights in the litigation itself, not substantive rights which exist outside it: cf Cth [27]. As for provisionality, JustKapital gives the real aim of early CFOs away by referring to "the need for litigation funders to have some comfort that funding open class actions ... will not be a commercial futility" (at [16]; note AS [43]).

5. As for the text of s 183, the meaning of the word "appropriate" in a power conferred on a court is not at large: its meaning is informed both by the express words of limitation in s 183 ("to ensure justice in the proceeding") and the context and purpose:[2] cf RS [14]. The phrase "appropriate or necessary" must be read together and in context, otherwise "appropriate" renders "necessary" superfluous: cf RS [16]. The respondent's two reasons (RS [17]) why making a CFO is "to ensure that justice is done in the proceeding" are answered at AS [28]–[29]. CFOs do not merely share existing costs equally; they impose an additional amount the funder would not otherwise receive.

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1 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 458 (McHugh and Gummow JJ), quoted approvingly in *Shergold v Tanner* (2002) 209 CLR 126, [27] (per curiam).

2 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 622 (Deane J; Mason CJ, Wilson, Dawson and Brennan JJ agreeing); *ABCC v CFMEU* (2018) 262 CLR 157, [22]–[23] (Kiefel CJ), [103]–[110] (Keane, Nettle and Gordon JJ).

6. As to the suggestion that s 183 authorises a court to impose a "fee for services" (RS [39]; Lenthall [28]), there are no words to justify that construction. Contrary to Lenthall [28], even on the broadest academic view of the exceptional category of "necessitous intervention", it does not extend to requiring the recipient of an unrequested service to pay a reward to a person who, in the absence of any imminent peril, has intervened for their own self-interest.[3] Likewise, the equitable jurisdiction to award a trustee remuneration is both highly exceptional,[4] and has no relation to a litigation funder: trustees must perform duties for the benefit of the beneficiaries.[5] Contrary to RS [25], authorities in this Court deny any general equitable principle that those who benefit from the efforts of another must contribute to the expenses incurred in those efforts,[6] let alone provide a reward. If the Parliament had intended to create such a right to reward for funders it would have stated it expressly; compare the limited right created by CPA, s 184.

7. As to the purpose of Pt IVA/10, it was not merely to increase litigation per se, nor to address every barrier to litigation (cf Cth Westpac subs (**Cth**) [18]). As noted at AS [13] (see also Lenthall [10]), alternative methods to fund class actions have existed for some time, and continue to exist. The empirical data in the ALRC's recent report shows that third-party litigation funding leads to lower returns for group members.[7] Thus it cannot be concluded simplistically that CFOs generally further the purpose of Pt IVA/10.

8. As to *Anthony Hordern*, RS [19]–[20] seeks to avoid the point by level of characterisation – because no other power expressly authorises CFOs, no *Anthony Hordern* point is said to arise. That misses the point that powers over costs and directing of damages are addressed, in restricted terms, by the Act. Conversely, Lenthall [10]-[12] argues that because existing provisions address those issues, it "is not a great leap" to read ss 183/33ZF as authorising CFOs, admitting that some leap is required. Relatedly, BMW makes no concession CFOs are authorised at settlement. The argument at RS [21] that s 177(2) may be construed as "the Court must make provision for the payment or distribution of the money to or as directed by the group members entitled" does not assist the respondent. Unfunded group members do not direct that their money be paid to the funder; the court compels it.

9. As to the principle of legality, RS [22] merely repeats the Court of Appeal's reasons without engaging with AS [37]–[39]. There is no basis for the suggestion at RS [23] that the principle does not apply because the power is conditioned on a requirement to ensure

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3 See, eg, *Goff & Jones* (9th ed, 2016), [18-71]–[18-79]; *Mason & Carter* (3rd ed, 2016), [814]. The actual cases recognising a right to restitution are limited e.g. fees for provision of emergency medical services; supply of necessaries to the mentally ill/minors; fee for burial of the dead. Lenthall [28] cites Mason & Carter at [811], but it is there stated that "Ultimately the right to reimbursement or recompense is correlative to something equivalent to a duty (albeit often moral) to intervene".

4 The office of trustee is ordinarily gratuitous: see *Jacobs' Law of Trusts in Australia* (8th ed, 2016), [17-39].

5 See also *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307, [48] in the context of liquidators.

6 *Mahoney v McManus* (1981) 180 CLR 370, 376–477; *Bourke v LFOT* (2002) 209 CLR 282, [44]; *Friend v Brooker* (2008) 239 CLR 129, [45]–[49], [63]–[66], [68], [70]–[83].

7 ALRC Report 134 (2018), [3.49], [3.55]–[3.60].

justice. Courts must always ensure justice. That does not mean the principle has no work in construing the powers and jurisdiction of courts: cf Cth [12].[8] Reference to the Court's "supervisory role" does not address whether s 183 extends to making CFOs: cf Cth [13]. CFOs have a significant effect on rights by transferring a substantial portion of valuable rights: cf JustKapital [23].

Judicial power

10. The Commonwealth implicitly seeks to characterise the BMW's arguments as a generic attack on ss 183/33ZF: at [21]-[24]. They are not. BMW's challenge is to the exercise of that power to make CFOs, giving rise to the two concerns identified at AS [46]-[53]. That exercise of the power would be judicial in other contexts does not answer the argument that in *this* context ordering a CFO would involve the creation of rights without direction from any statutory criteria going to rate-setting: cf Cth [30]; Lenthall [43].

11. BMW accepts that not every discretionary power appearing to have the effect of creating rights lies outside judicial power: see AS [48]; cf Cth [27]. Parliament may enact "double function" laws both creating rights and conferring jurisdiction, but in each case the nature and extent of the rights must be delineated by "legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature":[9] cf Cth [30], [33].

12. Equally, the suggestion that *Cominos* is determinative (Cth [23]–[24]) is baseless; it could similarly be said that the Court's decision in *Queen Victoria Memorial Hospital* is determinative in BMW's favour. In truth, the cases show that the context, not the verbal formula, is critical. In *Cominos*, s 87(1) of the *Matrimonial Causes Act* was, by its terms, engaged only where the Court was exercising other powers under Pt VIII to grant final relief in respect of maintenance, custody or the settlement of property consequent upon dissolution of marriage. In that context, it was understandable for the powers in s 87(1), including the power in s 87(1)(l), to be regarded as part of, or incidental to, the traditional function of courts exercising jurisdiction in respect of matrimonial causes. CFOs are not analogous to any traditional power of courts nor are they an aspect of the final relief. They seek to pre-assign a future judgment or settlement sum to a third party.

13. Contrary to submissions made by various parties, the criterion of ensuring justice in the proceeding does not assist in quantifying the commission to be paid. The court is acting at the market setter, not merely an observer of market rates: cf Cth [33]. Should the return on investment for litigation funders be more, or less, or the same as other moneylenders? Should the return be proportionate to the risk? If so, how is that to be determined? The answers to these, and other similar, questions are based solely on policy considerations.

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8 The Commonwealth's contrary submission is denied by numerous cases: eg, *R v Snow* (1915) 20 CLR 315, 322; *Wall v R; Ex parte King Won (No 1)* (1927) 39 CLR 245, 250; *Davern v Messel* (1984) 155 CLR 21, 30–31, 48, 63, 66; *Hogan v Hinch* (2011) 243 CLR 506, [5], [27]; *Green v R* (2011) 244 CLR 462, [28].

9 *Precision Data* (1991) 173 CLR 167, 191 (per curiam).

14. Further, even assuming answers to those questions, the process involved is non-judicial. To assess risk the court must assess and provide an advisory opinion on the prospects of success and likely quantum of the claim. It must also assess the value of the funding provided by the funder without knowing the amount and length of time of funding. The task is not analogous to an ordinary valuation; if it is analogous to anything, it is valuing a piece of property which does not yet exist and whose features are unknown: cf Cth [33].

15. As to alleged historical analogies, there is no analogy between a solicitor's lien and a CFO: cf Cth [28]–[29]. The former is an existing legal right springing from the solicitor-client retainer, the latter is a discretionary remedy created by a court without any pre-existing relationship between funder and unfunded group members.

Acquisition of property

16. The Commonwealth's argument at [50] that the funder acquires no property by virtue of the order focuses on the future proceeds and is inconsistent with *Georgiadis, Mewett* and *Smith v ANL* where the Court held that s 51(xxxi) applies to the extinguishment or modification of choses in action. By a CFO, the funder acquires an immediate, albeit potentially defeasible, interest in respect of each group member's chose in action: see [3] above and AS [21]. The reason the funder could not complain about any acquisition of its property if the court subsequently varied the rate is because its property was inherently susceptible of that variation from its inception: cf Cth [50].

17. As to characterisation, McHugh J's statement in *Airservices* that s 51(xxxi) is an exception to the ordinary principle of multiple characterisation is incorrect and contradicted by the reasons of Deane and Gaudron JJ in *Mutual Pools*[10] which McHugh J relied upon: cf RS [35]. The Commonwealth's submissions concerning characterisation at Cth [39] (which notably are contrary to the Commonwealth's submissions in *Spence*)[11] are inconsistent with *Bourke*, where the Court unanimously held that s 52 of the TPA was, *in its operation to State banks in the conduct of their intra-State business*, a law both with respect to banking and State banking. The submissions would allow s 51(xxxi) to be defeated by circuitous device: see AS [57]. Contrary to Cth [40], it is not a necessary or characteristic feature of doing justice that property be acquired without just terms.

18. The submission (Cth [46]) that s 51(xxxi) does not apply to powers conferred on courts is without foundation. The legislative power to confer *powers* (as opposed to jurisdiction) on courts comes from s 51(xxxix). The Commonwealth cannot, say, authorise the compulsory acquisition of power stations or banks without compensation simply by vesting the divestment power in a court. There is nothing incongruous about the guarantee applying to powers vested in the courts. The quote from *Plaintiff M61/2010E* supports the proposition that powers in s 51 are subject to the prohibitions in Ch III. It does not

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10 (1994) 179 CLR 155, 188.

11 Commonwealth AG's Written Submissions, *Spence v Queensland*, 6 February 2019, [24]–[25].

support the radically different proposition that the legislative powers in Ch III (if any), or connected to it, are not subject to the prohibitions found elsewhere in the Constitution.

19. The suggestion that "the exercise of judicial power commonly involves the transfer of property rights without compensation" (Cth [46]) is unsupported and incorrect. Judicial power quintessentially involves *determination* of existing rights: that involves no acquisition of property. None of the examples given at JustKapital [46] involve an acquisition of property. They involve a court determining existing rights (eg summary judgment; judgment on admissions), a temporary effect on existing rights pending determination (eg stays; security for costs) or no relevant effect on rights at all, including because dismissal not on the merits does not extinguish the right to bring action.

20. *Airservices* does not establish that "fees for services" lie outside s 51(xxxi): cf RS [39]; Cth [49]. A fee for a service involves a *quid pro quo*, and accordingly (unlike a tax) is not incongruent with the concept of just terms. Important elements of the statutory scheme there included (a) that the acquisition of property was made to secure payment of existing obligations and (b) those obligations arose out of a statutory scheme where the provision of services could by law come only a particular price.[12] Neither feature is present here.

21. As to just terms, Cth [52] and JustKapital [53] are contrary to the Court's previous decisions[13] that just terms require the person to receive the full value of the property acquired. The Court should not depart from those decisions.[14] The Convention Debates do not show that s 51(xxxi) was intended to differ substantively from the US Constitution: the reference to "just terms" is a shorthand for "just terms of compensation".[15]

Judiciary Act, s 79

22. Qld [16]–[24] (cf Vic [10], WA [32], Cth BMW subs) are inconsistent with *Rizeq*[16] and *Masson v Parsons*.[17] Queensland does not provide a reason to depart from those cases.

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12 *Airservices Australia* (1999) 202 CLR 133, [98], [101] (Gleeson CJ and Kirby J), [494] (Gummow J; Hayne J agreeing).

13 *Australian Apple & Pear Marketing Board v Tonking* (1942) 66 CLR 77, 85 (Williams J), affirmed 102 (Latham CJ), 107 (Rich J); *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, 323 (Latham CJ), 324 (Rich J), 327–328 (Starke J), 333 (Williams J).

14 In addition to the cases cited at AS [58], see also *Smith v ANL Ltd* (2000) 204 CLR 493, [8] (Gleeson CJ); *JT International SA v Commonwealth* (2012) 250 CLR 1, [235]–[236], [239] (Heydon J).

15 Convention Debates, Melbourne, 4 March 1898, p 1874; see also 25 January 1898, p 152. Cf Dixon J's dictum in *Nelungaloo*, which his Honour did not in fact apply. He followed the approach of the other members of the Court in *Tonking's Case*: see *Nelungaloo v Commonwealth* (1948) 75 CLR 495, 569–571.

16 *Rizeq v Western Australia* (2017) 262 CLR 1, [16], [21], [24], [28] (Kiefel CJ), [84], [87], [89], [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

17 (2019) 93 ALJR 848, [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).