

BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45

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Facts

- In the Westpac matter, Lenthall commenced representative class action proceedings in the Federal Court.
- Lenthall alleged that Westpac's financial advisers breached their obligations in relation to advice given regarding life insurance policies.
- In the BMW proceedings, Brewster commenced representative proceedings in the NSW Supreme Court against BMW Australia Ltd ("**BMW**") due to the national recall of BMW vehicles fitted with defective airbags.
- Both the proceedings were funded by litigation funders.
- In each proceeding, the litigation funder had entered into a litigation funding agreement with a small number of group members.
- Common funds orders ("**CFO**") were made by the courts in both sets of proceedings. A CFO is an order that requires that all participating members contribute a percentage of any award of damages to the litigation funder regardless of whether the class member had signed a litigation funding agreement or been joined to the case.
- BMW and Westpac challenged the court's ability to make a CFO under each respective procedural legislation (the *Federal Court Act 1976* (Cth) ("**FCA**") and the *Civil Procedure Act 2005* (NSW) ("**CPA**").

Issues

- BMW and Westpac appealed to the High Court and argued that:
 - In the absence of clear words, the power to make a CFO could not be implied into s183 of the CPA or s33ZF of the FCA;
 - It was inconsistent with the exercise of judicial power under Chapter III of the Constitution; and
 - The power involved the acquisition of property without providing "*just terms*" contrary to s51(xxxi) of the Constitution.

Held

- The High Court by majority (Kiefel CJ, Bell, Keane, Nettle, Gordon JJ) allowed the appeals and held that, properly construed, neither s 33ZF of the FCA or s 183 of the CPA empowers a court to make a CFO.
- The Court determined that the Acts' statutory provisions conferred broad powers on the Court to make necessary orders to ensure that justice is done. However, a CFO is an order that defines the relationship between a party (the class members) and a third party (the litigation funder). A CFO cannot be described as necessary to ensure justice in a proceeding.
- The Court distinguished that the provisions allowed a court to make orders about how a class action should proceed. However, a CFO was an order about whether an action can proceed at all and was therefore beyond the statutory powers.
- Because the principal issue was resolved in favour of the appellants by a majority of the Court, it was not necessary to determine whether the relevant provisions of the FCA and the CPA infringe Ch III of the Constitution or are contrary to s 51(xxxi) of the Constitution.

Full Text

The full text is available here: <http://eresources.hcourt.gov.au/showCase/2019/HCA/45>

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