HERBERT SMITH FREEHILLS

THE END OF COMMON FUND ORDERS?

BRIEFING PAPER

DECEMBER 2019

Common fund orders after the High Court's decision in *BMW* and *Westpac*

Overview

On 4 December 2019, the High Court of Australia in *BMW Australia Ltd v Brewster & Anor* and *Westpac Banking Corporation & Anor v Lenthall & Ors*[1] held by a 5:2 majority that courts do not have power under s 33ZF of the *Federal Court of Australia Act* (or its NSW equivalent s 183 of the *Civil Procedure Act*) to make 'common fund' orders.

The effect of the High Court decision is that Australian courts cannot rely on s 33ZF to make common fund orders. Consequently, and absent any statutory intervention, common fund orders of the kind sought in *BMW* and *Westpac* will no longer feature in the Australian class action landscape.

Following the Full Federal Court's 2016 decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*,[2] common fund orders have been made in numerous class actions, the effect of which is to require group members to contribute to the litigation funder a percentage of their entitlement under any settlement or judgment, whether or not the group member had entered into a funding agreement with the funder.

The High Court decision means further evolution of the market for third party litigation funding in Australia, possibly leading to increased competition amongst funders for fewer investment opportunities, and making it more imperative for funders to 'book build' (or sign up group members to funding agreements) before commencing a claim, as well as over the life of a class action proceeding.

Background

The BMW and Westpac appeals arose out of consumer products class actions commenced in the Federal Court of Australia and the Supreme Court of New South Wales (in the case of the BMW matter, relating to airbags; in the case of the Westpac matter, relating to life insurance policies). In both instances only a small number of group members had entered funding agreements with the litigation funder.

The initial appeals were heard together in an historic joint sitting of the Full Federal Court and the New South Wales Court of Appeal. In separate judgments, each Court upheld the validity of common fund orders. It was from those decisions that BMW and Westpac were granted special leave to appeal to the High Court, and successfully appealed.

The appeals concerned the interpretation of the statutory provisions in the Commonwealth (s 33ZF) and NSW (s 183)[3] class action legislative regimes, which confer power to make "*any order this Court thinks appropriate or necessary to ensure that justice is done in the proceedin*g."

Findings

The limits of s 33ZF

The plurality judgment (Kiefel CJ, Bell and Keane JJ – with whom Nettle J and Gordon J agreed in the result but gave separate reasons) distinguished s 33ZF as being concerned with *how* an action proceeds, rather than the different question as to whether a proceeding *can* proceed at all. The plurality considered that ensuring that a proceeding is funded is not 'appropriate or necessary' to ensure that justice is done in a proceeding:

> "It is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court."[4]

The plurality also considered that there are provisions of Pt IVA which expressly deal with the making of orders distributing proceeds of a representative proceeding at the conclusion of the proceeding, and that to use s 33ZF to support the alternative process of a common fund order would be to 're-write' the legislation.[5]

[1] [2019] HCA 45.

[2] (2016) 245 FCR 191.

[3] For simplicity, we refer below only to s 33ZF.

[4] At [47] per Kiefel CJ, Bell and Keane JJ.

[5] At [68]-[70] per Kiefel CJ, Bell and Keane JJ.

Risks faced by funders

The plurality held that there was no justification for judicial involvement, through common fund orders, to assist to manage the litigation risk faced by litigation funders.

> "To the extent that a [common fund order] may allow a litigation funder to avoid the burden of the process of book building by enlisting the court's aid, there is no warrant to supplement the legislative scheme by judicial involvement to ease the commercial anxieties of litigation funders or to relieve them of the need to make their decisions as to whether a class action should be supported based on their own analysis of risk and reward."[6]
>
> …
>
> "Why and how should a court assess the economics of a class action? Asking and answering these and similar questions is not appropriate or necessary in ensuring that justice is done in a proceeding."[7]

The plurality also expressed a view that, absent some statutory criteria, courts were not well-placed to speculate on the risks of bringing litigation, as courts were necessarily required to do in making the assessments required to decide the terms of common fund orders.[8]

Access to justice concerns

The plurality held that although common fund orders may improve access to justice, there is no basis in the legislation or extrinsic material for concluding that an objective of the legislation is that all claims should be brought to the courts, no matter how dubious their merits or low the likely recovery. The dissenting judges on the other hand construed the power under s 33ZF as extending to enhancing access to justice.[9]

Funding equalisation orders

A number of the judges considered the role that funding equalisation orders may play in addressing issues relating to the equitable sharing of costs between group members and the problem of 'free riding' which might otherwise occur where only funded group members bear the cost of the litigation.

A funding equalisation order, made at the conclusion of a proceeding when the actual costs of the litigation are known, provides for deductions from amounts payable to unfunded group members equivalent to the funding commission contributions paid by funded group members. This ensures that funded and unfunded group members receive proportionately equal shares of the settlement amount or judgment.[10]

Although not in issue in the High Court appeals, four of the judges accepted the validity of funding equalisation orders.[11]

Conclusions

The High Court decision is likely to increase the scrutiny applied by litigation funders to assessing the viability of potential class actions before they are commenced, and to make more imperative the need for 'book-building' prior to a claim being filed. There may also be an increase in closed class actions and competing class actions for 'viable' claims.

Book-building has continued to be commonplace notwithstanding the availability of common fund orders since 2016. This is because a claim supported by a 'book build' may have better prospects in contests between competing class actions. The High Court decision will substantially reinforce this dynamic. Funding equalisation orders will also remain as a mechanism for addressing the issue of costs borne differently by funded and unfunded group members.

It is open to State and federal legislatures to introduce statutory reform to enable common fund orders. There now may be increased pressure to do so. Proponents of statutory reform will point to the Australian Law Reform Commission's recommendation in early 2019 that Part IVA of the federal legislation be amended to give the Federal Court express statutory power to make common fund orders.[12]

---

[6] At [94] per Kiefel CJ, Bell and Keane JJ.

[7] At [158] per Gordon J.

[8] At [66]-[69] per Kiefel CJ, Bell and Keane JJ.

[9] At [110] per Gageler J (see also at [205] per Edelman J).

[10] At [88] per Kiefel CJ, Bell and Keane JJ.

[11] At [89]-[90] per Kiefel CJ, Bell and Keane JJ; at [169] per Gordon J.

[12] ALRC, *Report 134: Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019), Recommendation 3.

Our team

Jason Betts
Partner
T +61 2 9225 5323
Jason.Betts@hsf.com

Helen Mould
Executive Counsel
T +61 3 9288 1718
Helen.Mould@hsf.com

Peter Butler
Partner
T +61 2 9225 5686
Peter.Butler@hsf.com

Ruth Overington
Partner
T +61 3 9288 1946
Ruth.Overington@hsf.com

Ante Golem
Partner
T +61 8 9211 7542
Ante.Golem@hsf.com

James Page
Senior Associate
T +61 3 9288 1160
James.Page@hsf.com

Damian Grave
Partner
T +61 3 9288 1725
Damian.Grave@hsf.com

Gregg Rowan
Partner
T +61 3 9288 1568
Gregg.Rowan@hsf.com

Cameron Hanson
Partner
T +61 2 9225 5224
Cameron.Hanson@hsf.com

Christine Tran
Senior Associate
T +61 2 9225 5786
Christine.Tran@hsf.com

Peter Holloway
Partner
T +61 3 9288 1693
Peter.Holloway@hsf.com

Leah Watterson
Senior Associate
T +61 3 9288 1849
Leah.Watterson@hsf.com

Claire Jago
Solicitor
T +61 3 9288 1768
Claire.Jago@hsf.com

Jacqueline Wootton
Partner
T +61 7 3258 6569
Jacqueline.Wootton@hsf.com

Alan Mitchell
Partner
T +61 3 9288 1401
Alan.Mitchell@hsf.com

HERBERTSMITHFREEHILLS.COM

BANGKOK
Herbert Smith Freehills (Thailand) Ltd

BEIJING
Herbert Smith Freehills LLP
Beijing Representative Office (UK)

BELFAST
Herbert Smith Freehills LLP

BERLIN
Herbert Smith Freehills Germany LLP

BRISBANE
Herbert Smith Freehills

BRUSSELS
Herbert Smith Freehills LLP

DUBAI
Herbert Smith Freehills LLP

DÜSSELDORF
Herbert Smith Freehills Germany LLP

FRANKFURT
Herbert Smith Freehills Germany LLP

HONG KONG
Herbert Smith Freehills

JAKARTA
Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm

JOHANNESBURG
Herbert Smith Freehills South Africa LLP

KUALA LUMPUR
Herbert Smith Freehills LLP
LLP0010119-FGN

LONDON
Herbert Smith Freehills LLP

MADRID
Herbert Smith Freehills Spain LLP

MELBOURNE
Herbert Smith Freehills

MILAN
Herbert Smith Freehills Studio Legale

MOSCOW
Herbert Smith Freehills CIS LLP

NEW YORK
Herbert Smith Freehills New York LLP

PARIS
Herbert Smith Freehills Paris LLP

PERTH
Herbert Smith Freehills

RIYADH
The Law Office of Mohammed Altammami
Herbert Smith Freehills LLP associated firm

SEOUL
Herbert Smith Freehills
Foreign Legal Consultant Office

SHANGHAI
Herbert Smith Freehills LLP
Shanghai Representative Office (UK)

SINGAPORE
Herbert Smith Freehills LLP

SYDNEY
Herbert Smith Freehills

TOKYO
Herbert Smith Freehills