



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 619 012 412**

Second Respondent

## FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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### Part I:

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

### Part II:

2. The words "appropriate or necessary" may take colour from each other. But "necessary" does not mean "indispensable": RS [16]. However "ensure" means "make certain". Whatever is appropriate or necessary to remove any material risk of injustice in the proceeding is authorised.
3. The submissions of BMW concerning "in the proceedings" rely on false dichotomies. That a CFO affects the rights and duties of the funder does not deny that it may be an order

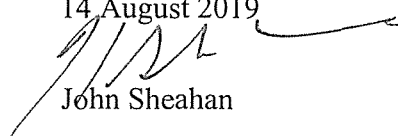
which is appropriate or necessary to ensure justice in the proceeding: cf AS [26]. Nor does the fact that a CFO will require consideration of a proper commercial return for the funder: cf AS[27]. Such matters are merely elements of seeing that the order is appropriate to ensure justice in the proceeding. They are means not ends. And BMW's submission that a CFO "creates an institutional bias in favour of plaintiffs" (AS[29]) ignores the main object of Part 10: to improve access to justice for claims that would otherwise be inefficient or impracticable to litigate.

4. The text and structure of Part 10 do not encourage a narrow construction of the powers it confers. It is plainly not a code. It takes its place in the scheme of the CPA and SCA, which are sources of powers of the broadest kind. It is not drafted in a strict style which seeks to avoid redundancy. Some provisions of the Part are unnecessary given s 183. They appear to have been enacted to give guidance, as opposed to power: s 171 (adequacy of representation); ss 165 and 166 (ordering that proceedings no longer continue under the Part); and ss 168, 169, 170 and 177(4) (giving directions for the resolution of group members' claims). Other provisions are best understood as enacted to avoid doubt: s 164, s 184, s 177(1)(a)-(d). Other provisions confer broad discretionary powers qualified by reference to considerations of justice or "fitness" or appropriateness: s 163(4), s 171(1) and (2), 173(2), s 178(4) and (5), s 180(4), s 184(3). These, along with s 183, emphasise the flexibility intended for the scheme, and the reliance on courts to deal with issues, perhaps unable to anticipated, as they arise. There are some - but not many - prescriptive and proscriptive provisions concerning the court's powers. Those are concerned with group members' right to opt out (s 162(1)), notices to group members (s 175(1), (6), s 176(1), (2), (5)), settlement (s 173(1)), some aspects of the mechanics of an order for damages (s 177(2), s 178(2), (3)), and costs (s 181).
5. Section 183 is an integral part of the novel scheme enacted by Part 10. It attracts uncontroversial principles of construction favouring a liberal construction.
6. The Appellant seeks to cut down s 183 by resort to the *Anthony Hordern* principle. However none of the sections relied on by BMW plainly creates a condition or limitation that would be avoided by a CFO. None addresses interlocutory orders. None addresses

expenses other than costs in the narrow sense. Section 177(2) is a machinery provision that should not be read as preventing any order that involves payment to a person on behalf of a group member, or as required by another order of the court. Section 184 addresses a foreseeable issue. It gives a measure of assurance that the plaintiff will not be left out of pocket if the claim is successful. The power would exist under s 183 in any case. But the express provision is useful to avoid doubt.

7. As for the principle of legality, a CFO reflects, in a new context, the equitable principle that underlies the court's power to order costs from a fund in favour of a plaintiff whose efforts have brought it about: *Boeing Co v Van Gemert* 444 US 472 (1980); *Westpac v Lenthall* at [103], CAB 105.48-106.30. Whether or not those principles create a free-standing right, they inform s 183 and make it impossible to conclude that fundamental rights are violated by a CFO.
8. As for judicial power, a CFO if made will be an interlocutory order. It is incidental to the exercise of judicial power in the controversy.
9. The CFO does not effect an acquisition of property. So far as it imposes obligations on group members in relation to the disposition the proceeds of any settlement or judgment it is provisional, contingent, and liable to defeasance at the election of the group members. It creates no contractual or proprietary right in the funder. It is enforceable only by proceedings for contempt. Further, to require reimbursement of the group members' contribution to the total costs of the proceeding would be irrelevant or inconsistent or incongruous with the objects of the order, and so the power. And it is outside s 51(xxxi) as an adjustment of competing rights. If just terms do not require reimbursement, then the Act affords just terms, as "appropriate or necessary to ensure justice".

14 August 2019

  
John Sheahan

  
Elisa Holmes

  
Rachel Mansted