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 SUBMISSIONS

20

30

Ashurst
Level 11, 5 Martin Place
Sydney NSW 2000

Telephone: 02 9258 6000
Fax: 02 9258 6999
Email: john.pavlakis@ashurst.com
Ref: JPAV / EPE / 1000 040 771

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. The appeal raises three principal issues. *First*, does s 183 within Pt 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**) on its proper construction authorise a "common fund order" (**CFO**) – an order which obliges all group members in a representative proceeding to pay a proportion of any future judgment or settlement to a litigation funder?

3. *Secondly*, does such an order involve the exercise of a power which is not judicial, or incidental thereto, with the result that such a power is not picked up and cannot be exercised by a State Court exercising federal jurisdiction?

4. *Thirdly*, does such an order involve an acquisition of property other than on just terms, with the same result?

PART III: SECTION 78B NOTICES

5. Appropriate notices have been given in compliance with s 78B of the *Judiciary Act*.

PART IV: REASONS FOR JUDGMENT BELOW

6. The reasons of the Court of Appeal are *Brewster v BMW Australia Ltd* [2019] NSWCA 35 (**CA**). The reasons of Sackar J for removing the matter to the Court of Appeal are *Brewster v BMW Australia Ltd* [2018] NSWSC 1602.

PART V: FACTS

7. The appellant (**BMW**) is the defendant in one of seven class actions pending in the Supreme Court pursuant to Pt 10 of the CPA against various car manufacturers (together, the **Takata Proceedings**).[1] The Takata Proceedings relate to allegedly defective airbags manufactured or supplied by Takata Corporation or related entities, and involve alleged breaches of the *Trade Practices Act 1974* (Cth) and the *Australian Consumer Law* (Cth).

8. The first respondent (the **Plaintiff**) is the representative plaintiff in the proceeding against BMW. The second respondent (**Regency**) is funding the class actions. The total number of group members in the BMW proceeding is about 200,000. Together the proceedings are the largest collective legal action in Australia to date: CA [2]. The total number of group members in the Takata Proceedings is likely to exceed 2 million.[2] The proceedings

---

1 The other manufacturers are Toyota, Nissan, Honda, Subaru, Mazda and Volkswagen.

2 See Affidavit of Damian Scattini affirmed 27 September 2018, [8] (AFM 49).

are being managed together and are currently listed for hearing in March 2020.

9. On 14 August 2018 the Plaintiff filed a Notice of Motion[3] seeking, well in advance of any judgment or settlement, what has come to be called a "common fund order", obliging all group members to pay a proportion of any future judgment or settlement to Regency.

10. By October 2018, only 33 group members in the BMW proceeding had entered a contract with Regency to fund the litigation (0.0165% of the group), and only 116 had shown interest in doing so. That "is a tiny proportion of the whole": CA [3].

11. On 22 October 2018, on the application of BMW, Sackar J stated a separate question of law: *Does the Court have power to make Order 1 sought in the Notice of Motion filed by the Plaintiff on 14 August 2018?* His Honour ordered that the proceeding be removed to the Court of Appeal for determination of the separate question. The separate question was heard on 4–5 February 2019 at the same time and in the same court room as an appeal to the Full Federal Court in *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 (***Westpac***). The Court of Appeal answered the separate question "Yes". BMW appeals.

PART VI: ARGUMENT

Funding of class actions

12. In ALRC report number 46, which led to the enactment of Pt IVA of the *Federal Court of Australia Act 1976* (**FCA Act**) – the progenitor of Pt 10 of the CPA – it was recognized that issues arose as to how the new type of group proceedings would be funded.[4] In the words of the Full Federal Court in *Money Max*, the ALRC "specifically recommended against funding being provided in consideration for a share of the proceeds of the action: ALRC Report at [318]".[5] At that time, maintenance and champerty were prohibited (save in Victoria[6]), although the ALRC had itself earlier recommended that the prohibition on maintenance be lifted, which recommendation it re-affirmed in report number 46.[7] Thus "litigation funding was not lawful when Part IVA was enacted, although it was lawful when Part 10 was enacted": CA [81]. Part 10 should be construed harmoniously with Part IVA, which it copied.

---

3 See CAB 6. Similar orders are sought against the other manufacturers, except Volkswagen, as the proceeding against it were commenced after Sackar J stated the separate question.

4 ALRC Report No 46, *Grouped Proceedings in the Federal Court* (1988), Ch 8, "Costs and Funding".

5 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (***Money Max***) (2016) 245 FCR 191, [76] (the Court).

6 *Abolition of Obsolete Offences Act 1969* (Vic), ss 2 and 4; note ALRC Report No 46 at [274].

7 ALRC Report No 46 at [317]; note also CA [70].

13. Part IVA, which commenced on 4 March 1992, operated effectively without CFOs being made for over two decades. Class actions have been funded in a range of ways, including by group members directly,[8] by law firms appearing for claimants acting on a "no win no fee" basis,[9] or by third party funders in closed class actions (ie where group members must have a contract with the funder in order to be a group member).[10] Of class actions filed in the Federal Court from March 1992 to March 2018, 28% had third party funding.[11]

14. The situation where some group members fund the litigation and others do not has been addressed by various means, including funding equalisation orders, whereby funded group members may recoup their expenses (both legal costs and sometimes agreed funding commission) from the actual settlement amount, before the balance is distributed between all group members.[12] All group members in like circumstances receive an equal *net* award. Any third party funder receives only what it is contractually entitled to receive from funded group members. In contrast, under a CFO, the funder receives additional funding commissions from unfunded group members which but for the order it would have no entitlement to.

15. Prior to *Money Max* in 2016, CFO-type orders were made in two Federal Court cases in 2012 and 2014, but in very different circumstances where the proceedings had been commenced as closed proceedings, and were briefly opened then closed again.[13] The Full Federal Court in *Money Max* accepted at [136] that these cases were not analogous. In *Modtech*, in the context of a settlement approval in 2013, the Federal Court declined to make a CFO, indicating that whilst it could depend upon the circumstances, "it is difficult to conceive of a circumstance in which it would be appropriate".[14] The first case in which a pre-settlement CFO was sought was *Blairgowrie Trading Pty Ltd v Allco Finance Group Ltd* (***Allco No.1***). Wigney J rejected the application, as, in summary:[15]

> it would be premature and inconsistent with the statutory scheme in Pt IVA of the

---

8 See, eg *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379, [23], [57].

9 See recently *Wigmans v AMP Ltd* [2019] NSWSC 603, with Maurice Blackburn winning a "beauty parade" between competing class actions on this basis.

10 Upheld in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 (FC).

11 ALRC Report No 134, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2018), p 75 Table 3.2.

12 See eg *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [26]-[28]; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [58].

13 *Pathway Investments Pty Ltd v NAB Ltd (No 3)* [2012] VSC 625; *Farey v NAB Ltd* [2014] FCA 1242.

14 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [60] (Gordon J).

15 (2015) 325 ALR 539, [7].

> FCA Act to make the proposed order at this stage of the proceeding when the reasonableness of the amounts involved cannot be assessed. It also cannot be concluded at this stage that the proposed order would be beneficial to or in the best interests of the group members as a whole. Indeed, at this stage it would appear that the only clear beneficiaries of the proposed order would be the applicants and [the funder].

16. Subsequently, in *Money Max*, the Full Federal Court concluded that s 33ZF did authorise the making of a CFO,[16] obliging group members as a whole to pay from any judgment or settlement sum an amount to the litigation funder, including such commission as the court *may* – and implicitly may not – *later* determine. The Court did not set the commission rate, but deferred determination of the rate to a possible future time "when more probative and more complete information will be available to the Court".[17] The Court imposed a proviso that the amount was not to exceed the amount that would otherwise have been payable by group members to the funder in the event that the order had not been made, so that "no class member can be worse off".[18] The proviso – which was critical to the Court's reasoning[19] – had the effect that if a commission rate was ultimately determined, the group members could be no worse off than if a funding equalisation order had been made.[20] The Court suggested that CFOs would "reduce the prospect of overlapping or competing class actions".[21] That has proved inaccurate.[22]

17. Since *Money Max*, CFOs have been made in a number of cases in the Federal Court. In practice, as *Westpac* illustrates, the proviso in *Money Max* has been discarded.[23] Federal Court judges have set a funding rate prior to settlement, contrary to *Money Max* (and to *Allco No 1*).[24] CFOs are commonly made without any contradictor. Applicants/plaintiffs are usually the ones seeking a CFO; they do not oppose them. They are typically conflicted by their own contractual relationship with the funder.

---

16 *Money Max* (2016) 245 FCR 191, [7]–[12], [78].

17 *Money Max* (2016) 245 FCR 191, [11].

18 *Money Max* (2016) 245 FCR 191, [12]; note also [100]–[104].

19 See *Money Max* (2016) 245 FCR 191, [101]–[102], [104], [113], [167].

20 *Money Max* (2016) 245 FCR 191, [12].

21 *Money Max* (2016) 245 FCR 191, [14]; see also [205].

22 See, eg, *Wileypark Pty Ltd v AMP Ltd* (2018) 359 ALR 43; *Perera v GetSwift Ltd* (2018) 363 ALR 394.

23 See *Lenthall v Westpac Life Insurance Services Ltd* (2018) 130 ACSR 456, [29], [24]; also *Blairgowrie Trading Pty Ltd v Allco Finance Group Ltd (Allco No.3)* (2017) 343 ALR 476, [105]; *Pearson v Queensland* [2017] FCA 1096, [30].

24 *Webb v GetSwift Ltd (No 3)* [2018] FCA 1133 (Lee J); *Impiombato v BHP Billiton Ltd* [2018] FCA 1272 (Moshinsky J); *Lenthall v Westpac Life Insurance Services Ltd* (2018) 130 ACSR 456 (Lee J). In *Pearson v Queensland* [2017] FCA 1096, Murphy J made an order setting a *maximum* funding rate prior to settlement.

The effect of Order 1 as sought here

18. Order 1 of the Plaintiff's Motion would bind all group members to the "Funding Terms". It would require group members to pay from any judgment or settlement the following: Legal Costs (which includes any adverse costs order made against the Plaintiff) and Administration Expenses (as defined in the Funding Terms); then 25% of the balance to Regency "or such other percentage as the Court considers reasonable at the time of approval of a settlement under section 173 or judgment under section 177" of the CPA (together with any GST payable). Thus if Order 1 is made, group members will receive less than 75% of any settlement/judgment sum attributable to them.

19. To use an example raised by the Plaintiff in the course of an earlier interlocutory issue, if each class member "suffered only $1,000 in loss", Order 1 could result in a funding commission in the order of $50 million,[25] in addition to reimbursement of costs. An equivalent amount in each of the Takata Proceedings would take the total return to in the order of $500 million.[26]

20. If made, Order 1 will be immediately binding on all group members, as an order of a superior court of record. Those terms will also bind Regency, as funder, as a result of the undertaking given by it at the time of seeking the order. As an interlocutory order, Order 1 is subject to variation by a later order if there is a material change in circumstances.[27]

21. The immediate pecuniary consequence of Order 1 is to transfer a substantial part of each group member's chose in action to Regency. Before the order, group members have a right to take action to recover 100% of any loss suffered by them; after the order, group members have a right to take action to recover less than 75% of any loss suffered by them. The order results in substance in an immediate assignment to Regency of part of the chose in action of each group member.[28] As regards the ultimate *proceeds* of the group members' choses in action, the order will have effect if and when there is a "resolution sum" available, whether by way of a future judgment or settlement. This will have been done without consent of any group member other than the 0.0165% funded members.

---

25 200,000 potential group members x $1,000 x 25%.

26 2 million group members (say) x $1000 x 25%; note AFM 49, [8].

27 See, eg, *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 (NSWSC), 46 (McLelland J).

28 The funder's rights are also analogous to a charge over the chose such as created by a partial assignment of a chose in action: see *Re Lawson Constructions Pty Ltd* [1942] SASR 201, 204; *Bailey v Medical Defence Union* (1995) 184 CLR 399, 446.

22. More broadly, the effects of the order sought, if made, include the following:

    (a) The return and profit of the funder will substantially be increased beyond what it would have been able to obtain if it had proceeded by seeking to enter contractual arrangements with group members.

    (b) It will save or postpone costs of the funder, in terms of having to undertake the task of actually identifying group members – even though this task would be inevitable if any settlement or money judgment is obtained.

    (c) The orders remove the need to persuade group members to agree that the fee sought is reasonable. Instead, that judgment will be left to the Court, which (as developed below) is far from well-equipped to make such an assessment.

    (d) The orders sought seek to pre-empt orders that might be made with respect to any settlement or judgment, as is developed below.

Construction of s 183

23. These effects of Order 1 are not consistent with the text or context of s 183 (or s 33ZF of the FCA Act); involve pre-emptive judgments about a range of matters; doing so without any statutory guidance as to rate-setting; were not intended when Part IVA was enacted; and if they had been intended this would, and should, clearly have been stated.

Text

24. Section 183 provides:

> In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

25. Section 183 only empowers the making of orders that are "appropriate or necessary to ensure that justice is done *in the proceedings*". Those words of limitation are significant. What justice requires "in the proceedings" is defined by the claims made and the issues in dispute in the proceedings. This follows as a matter of ordinary language, and is supported by ss 56(1) and (2) of the CPA, focusing attention on the "just, quick and cheap resolution of the real issues in the proceedings". The "requirement ... that the order be 'appropriate or necessary' would ordinarily require, as a first step, the identification of a

particular issue or problem in the proceeding that needs to be addressed".[29] So much is reinforced, too, by the words "ensure that justice is done".

26. That understanding is consistent with the purpose of the provision. As Wilcox J stated, it was "impossible to foresee all the issues that might arise" from the new "entirely novel procedure" of class actions.[30] Complexities can arise where the Court is determining claims (or questions relating to claims) or of represented group members not before the Court. Sections 33ZF/183 give the Courts a broad power to control the proceeding, including to address the various unforeseen or miscellaneous issues that may arise from time to time in class actions. But it is not directed to the rights or interests of third parties, such as a funder, nor to achieving some notion of fairness or access to justice beyond what is required to resolve the real issues in dispute in the proceeding. As noted above, the issue of third party funding was foreseen, and not sought to be addressed. Access to justice is promoted by Parts IVA/10 themselves; that does not mean taking ever more steps to promote/facilitate litigation. "[N]o legislation pursues its purposes at all costs".[31]

27. The Court of Appeal did not address why making a CFO is "to ensure that justice is done *in the proceedings*". Based on the arguments below and the reasons in *Westpac*, there appear to be three arguments. *First*, such an order is said to ensure justice in the proceedings because it provides an "appropriate" or "commercial" reward to the funder for services rendered to group members: see *Westpac*, [105], [118]. That argument replaces "justice in the proceedings" with a generalised notion of "fairness to the funder". Further the notion of "fairness" asserted is one which the law has long rejected. At general law the mere unsolicited conferral of services or benefits on another generates no obligation in fairness or justice to reward the provider[32] or contribute to the costs.[33] In some cases where the services are necessary to preserve life, health or property – notably, salvage – the unrequested services must be paid for, but this is the exception.[34] The

---

29 *Allco No.1* (2015) 325 ALR 539, [112] (Wigney J).

30 See *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4.

31 *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, [41] (the Court).

32 See, eg, *Taylor v Laird* (1856) 25 LJ Ex 329, 332 (Pollock CB); *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch D 234 (CA), 248 (Bowen LJ); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, [80] (Gummow, Hayne, Crennan and Kiefel JJ).

33 *Ruabon Steamship Company v London Assurance* [1900] AC 6, 12 (Earl of Halsbury LC), 15 (Lord Macnaghten); *Mahoney v McManus* (1981) 180 CLR 370, 376–377 (Gibbs CJ; Murphy and Aickin JJ agreeing).

34 See *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, [80] (Gummow, Hayne, Crennan and Kiefel JJ). See generally K Mason et al, *Mason and Carter's Restitution Law in Australia* (3rd ed, 2016), Ch 8; I Jackman, *The Varieties of Restitution* (2nd ed, 2017), pp 138–143.

argument thus involves not only an impermissible rewriting of s 183, but imputes to Parliament an intention to override basic common law principles without clear language.

28. *Secondly*, it is said that a CFO ensures "justice in the proceedings" by equalising the costs borne by group members: *Westpac*, [91]. But a CFO does much more than this. It obliges group members who have not entered into a funding agreement to pay the funder *additional* commission to which, but for the order, it would not be entitled.[35]

29. The *third* argument is that without a CFO the funder will not be prepared to continue funding the proceedings and they will cease. The underlying premise is that there is evidence to establish (a) that the funder will cease funding if the order is not made, and (b) there is no alternative funding mechanism available. Even assuming those matters were established in the particular case, the argument fails. Section 183 presupposes a proceeding. Encouraging the commencement or continuance of proceedings has no role in its application. If an inability, whether actual or likely, of group members to have their claims advanced justifies an order under s 183, "justice in the proceedings" has been replaced with "the interests of group members in the proceedings". That is not what s 183 says. Moreover, that construction would create an institutional bias in favour of plaintiffs.

30. At CA [56]–[58] the Court of Appeal said that s 183 attracts the familiar principle of construction identified in *Owners of Ship "Shin Kobe Maru" v Empire Shipping Co Inc.*[36] That principle, whilst important generally, is of little assistance in the present case. As with any other statutory provision conferring power on a court, s 183 can only "be construed as liberally as its terms and context permit".[37] As Sackville J said of s 33ZF, whilst it "should be given a broad construction, that does not mean it can or should become a vehicle for rewriting the legislation".[38] Further, the *Shin Kobe* principle does not "trump" other principles of statutory construction, such as the principle of legality, nor does it obviate the need to construe the statutory text in light of its context and purpose.[39] And the principle in *Shin Kobe* is of limited assistance where the critical issue is the meaning to be given to the *express limitation* on the scope of s 183 – "to ensure that

---

35 See *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [57] (Gordon J).

36 (1994) 181 CLR 404, 421 (the Court).

37 *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, 313 (Brennan CJ, Gaudron and McHugh JJ).

38 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [52].

39 See *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, 313 (Brennan CJ, Gaudron and McHugh JJ); *Australian Building and Construction Commissioner v CMFEU* (2018) 262 CLR 157, [22] (Kiefel CJ), [103]–[110] (Keane, Nettle and Gordon JJ).

justice is done in the proceedings".

Context and Anthony Hordern

31. The Court of Appeal also erred in rejecting BMW's submission that the context created by ss 173, 177, 178 and 184 of the CPA indicates that s 183 does not authorise a CFO (CA [64]–[67]). The Court's reasoning does not deal with the reasoning underlying the *Anthony Hordern* principle.[40] If Parliament has enacted safeguards, restrictions or conditions on a power, it intends them to have effect. Consequently, if there is a specific power granted to achieve a particular result but subject to safeguards, a general provision will not be construed to authorise the same result absent the safeguards.[41] Otherwise, the safeguards and Parliament's purpose would be defeated.

32. Part 10 regulates in detail the Court's powers in respect of awards of damages in representative proceedings. Section 177(1)(e) authorises "an award of damages for group members, sub-group members or individual group members". In context, "damages" means any pecuniary claim and is not limited to damages at common law, but includes liquidated claims, claims for statutory compensation and equitable compensation.[42] If it is not construed in this way, s 177 would not authorise the award of statutory compensation or liquidated claims in representative proceedings – an unlikely result.

33. Section 177(1)(f) authorises an award of aggregate damages. In making an award of damages, s 177(2) obliges the Court to "make provision for the payment or distribution of the money *to the group members entitled*". Section 177(3) refers to the "total amount to which group members will be *entitled*" under an award of aggregate damages. Section 177(4) empowers the Court to give directions as to the manner in which group members' "*entitlement* to share in the damages" is to be established and determined. With three stated exceptions, these provisions indicate that group members are the *only* persons entitled to money paid under an order for an award of damages.

34. Those exceptions are as follows. *First*, in making an award of damages the Court directs the establishment of a fund, the costs of administering the fund are to be borne by the fund, by the defendant or both, as the Court directs: s 178(2). *Secondly*, if the Court

---

40 *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon J).

41 The same principle explains the guarantee created by s 51(xxxi): see *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371–372 (Dixon CJ; Fullagar, Kitto, Taylor and Windeyer JJ agreeing).

42 See, eg, *Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213 (NSWSC), 215–216 (Brownie J). Note also, in this regard, CA [47].

orders the establishment of a fund, the Court may order the payment of surplus monies to the defendant: s 178(5). *Thirdly*, where the Court has made an award for damages, it may make an order for the reimbursement of a representative party's legal costs out of the damages, but only if "satisfied that the costs reasonably incurred in relation to the representative proceedings by the [representative party] are likely to exceed the costs recoverable" from the defendant: s 184.

35. Thus there is a power (to award damages) subject to a safeguard (except in the three specified cases, the damages must go to group members). Applying the reasoning underlying *Anthony Hordern*, s 183 cannot confer a power to deal with the proceeds of future damages awards (eg by making a CFO), otherwise s 183 could be used to defeat the safeguard. The Court of Appeal's reasoning at CA [67] that s 183 "does not qualify, let alone prevent, the exercise of power in ss 177 and 178" is not to the point. On that reasoning, s 183 allows the Court to circumvent ss 177 and 188. A similar argument applies in respect of settlement, where there is a specific power in s 173(2) to make orders "as are just with respect to the distribution" of settlement monies, but only after a settlement has been approved by the Court.

Principle of legality

36. Decisions of this Court for more than a century establish that legislation will not be construed to interfere with vested property rights or other valuable rights (as is the case here) absent clear words.[43] General words will rarely be sufficient.[44]

37. The Court of Appeal did not deny that a CFO interferes with vested property rights or other valuable rights (the group members' choses in action). Nor did the Court suggest that there were clear words authorising this. Rather, it reasoned that because in *other* provisions of Pt 10 there was a "clear adjustment of represented parties' right to litigate a cause of action", the principle of legality had no further work to do: CA [58], [61]. The Court appears to have had in mind the fact that Parts IVA/10 authorise a representative party to litigate on behalf of others. But there is a substantial difference between litigating an action for the benefit of group members in which they stand to receive 100% of any damages to which they are entitled, and transferring some 25% of the right to receive

---

43 See, eg, *Clissold v Perry* (1904) 1 CLR 363, 373 (Griffith CJ; Barton and O'Connor JJ agreeing); *Cluniess-Ross v The Commonwealth* (1984) 155 CLR 193, 199–200 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376, [68] (the Court).

44 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

damages to a third party. Requiring clear words for such a taking of property is hardly acting to "narrow the protections" in other provisions in Pt 10 (cf CA [61]).

38. The Court of Appeal said its view was supported by the reasons of Gageler and Keane JJ in *Lee v NSW Crime Commission*,[45] quoted at CA [61]. Those reasons were directed to a case where a statutory provision clearly interferes with a fundamental common law right or principle but there is a question about the extent of the interference. They were not concerned with a generally expressed provision. Nor were they concerned with the present case where in one provision (CPA, s 159) there is a clear, but distinct and limited, interference with property rights – authorising a group member's claim to be litigated (as opposed to partially acquired) without their consent – and the issue is whether a separate, generally expressed, provision (s 183) authorises a separate, substantial taking. Parliament has squarely considered the issue of the interference with group members' property rights, and in clear words (see s 159) authorised only a limited interference.

39. Further, in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*, French CJ, Kiefel and Bell JJ stated that the "principle of legality favours a construction, if one be available, which avoids *or minimises* the statute's encroachment upon fundamental principles, rights and freedoms at common law".[46] Their Honours went on to explain that the principle is properly applied to choose the construction (if it is reasonably open), "which involves *the least interference*".[47] That approach applies here. The Court of Appeal seemed to have had more general doubts about the principle of legality (CA [63]), but those doubts are contrary to a long line of cases in this Court.

Pre-emption and uncertainty

40. The arguments set out above apply to the making of a CFO at any time under s 183. There are further reasons why no such order properly can be made at a stage prior to approval of any settlement or orders pursuant to ss 177–178.

41. The presumption of the application is that there will be some common fund created, yet by no means is that necessarily so.[48] Further, a CFO sought at the early stages of the

---

45 (2013) 251 CLR 196, [314].

46 (2015) 256 CLR 569, [11] (emphasis added); cf [81] (Gageler J, dissenting).

47 (2015) 256 CLR 569, [11] (emphasis added). See also *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 252 (Deane, Dawson, Toohey and Gaudron JJ): "will be construed as effecting *no more than is strictly required* by clear words or as a matter of necessary implication" (emphasis added).

48 See *Allco No. 1* (2015) 325 ALR 539, [144]–[154].

proceedings (as in this case) involves making an order where many of the critical criteria said to guide the setting of the funder's commercial return (see CA [113]) are matters of speculation. Moreover, the pleadings may yet change, perhaps adding/subtracting causes of action. It is unknown: whether the matter will settle (and at what stage) or go to trial; what amounts will be agreed/awarded (if any), and whether in favour of all or just some group members; whether subgroups will be established (cf s 168); whether individual questions will be needed (cf s 169); whether the representative party and/or the lawyers involved remain the same throughout (cf s 171); or what costs orders – including perhaps against the lead applicant/s – have been made along the way and why (cf ss 181, 184(2)). The length of the proceedings and the time the funder's money is at risk are unknown. Further, an assessment of the "litigation risks of providing funding in the proceeding" (see CA [113]) must necessarily involve the court forming a definite view about the plaintiff's prospects of success. The court neither can nor should form such a view at an early stage.

42. An early CFO thus has an inherently infirm factual foundation. Order 1 recognises that the Court may choose not to fix a funding commission rate but that the rate will be fixed in the *future* at the time of judgment or settlement pursuant to a different statutory power, ie, ss 173 or 178. In other words, the Plaintiff's application has as an implicit premise that the Court will reconsider the CFO at a later point, and that the power finally relied upon will be different. What a CFO seeks to do, at best, is to pre-empt a later exercise of power under a different provision to the one relied upon for first making the CFO.

43. Given the substantial uncertainty that arises prior to any settlement/judgment, it is not possible to determine what is necessary or appropriate to ensure justice is done in the proceeding. This is not answered by the fact that a CFO is an interlocutory order capable of variation: cf CA [67]. That misses the very point of CFOs which is, as the Federal Court has acknowledged, to give a degree of certainty to funders.[49] A CFO can be varied later. But unless later varied, it will have effect. In any subsequent argument the very point of having such an order is so that the funder can *start* from what has been previously ordered, and invoke its obvious detrimental reliance on it. If the identified rate is of no weight, why set it?[50]

---

49 *Perera v Getswift Ltd* (2018) 357 ALR 586, [245]–[246]; *Allco No.1* (2015) 325 ALR 539, [135], [160].

50 See similarly *Allco No.1* (2015) 325 ALR 539, [192].

44. Moreover, whether or not a rate is specified, emphasis on the possibility of variation in light of later facts points to a problem with hypotheticality, as addressed below.

45. These characteristics of CFOs militate strongly against any finding that they are within the power conferred by s 183. So, too, does the unguided and subjective nature of the decision as to rate-setting, a point also developed in the following section.

Judicial power

46. Contrary to what is suggested at CA [88]-[89], BMW does not submit that the separation of powers in Ch III of the Constitution applies directly to a State. Rather, since the current proceeding is in federal jurisdiction (CA [2]), and since s 183 of the CPA purports to "determine ... the powers that a court has in the exercise of federal jurisdiction",[51] it follows that s 183 can only apply in the proceeding if, and to the extent that, it is "picked up" by s 79 of the *Judiciary Act*. Section 79 only "picks up" State laws which, if enacted as federal laws, are not inconsistent with the Constitution.[52] It is long-established that federal laws can only confer on a State court exercising federal jurisdiction powers within the judicial power of the Commonwealth or incidental thereto.[53] Thus if the making of a CFO is not an exercise of judicial power, or incidental thereto, s 79 does not pick up s 183 of the CPA insofar as it authorises such an order. There are two matters which indicate that the making of a CFO in terms of Order 1 exceeds these limits.

47. *First*, for the reasons articulated above at [41], CFOs such as Order 1 have an infirm factual foundation. The Court of Appeal emphasised that such orders could be altered; Order 1 itself recognises that the Court may not fix a funding commission rate but that the rate will be fixed in the *future* at the time of judgment or settlement pursuant to different statutory powers (ss 173 or 178). The Plaintiff's application has as an implicit premise that the Court will reconsider the CFO at a later point. The description at CA [67] of the order as operating "contingently" illustrates that a CFO involves the provision of an impermissible advisory or predictive judgment as to what amount might ultimately be awarded to the funder in the future (under different powers), contrary to the principles

---

51 *Rizeq v Western Australia* (2017) 262 CLR 1, [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

52 See, eg, *Solomons v District Court (NSW)* (2002) 211 CLR 119, [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

53 See *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151–152 (the Court); *R v Murphy* (1985) 158 CLR 596, 614–615 (the Court).

established by this Court.[54] That the group members are immediately bound by the Funding Terms does not change this characteristic (cf CA [100]).

48. *Secondly*, prima facie "if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power".[55] A discretionary power appearing to have the effect of bringing new rights into existence will nevertheless constitute judicial power if it is "possible to conclude that the determination by the court gives effect to rights and obligations *for which the statute provides*".[56] This is a consequence of the fact that Parliament may enact so-called "double function" laws, both creating substantive rights and conferring authority on a court to provide a remedy (including a discretionary remedy) in respect of them.[57] However, the nature and extent of the rights must be delineated by some objective criteria set out in the statute.

49. The object of a CFO is not to resolve a dispute about existing rights and obligations. Prima face it lies outside judicial power. Nor is it a case where it is possible to conclude that a CFO gives effect to the rights *created by the statute*. There is no mention of litigation funders' rights in Pt 10, let alone s 183. And there are no objective criteria specified that delineate the nature and extent of the litigation funders' rights, a point accepted in *Westpac*, [102].

50. The Court of Appeal's reasons do not address this argument. The examples given at CA [97]-[98] – interlocutory injunctions, orders for security for costs against third parties, and courts requiring third parties to give an undertaking as to damages – are not to the point. These orders are made for the purpose of the Court resolving a dispute about existing rights. An interlocutory injunction preserves the status quo pending the Court's determination of existing rights. Orders for security, and orders requiring undertakings as to damages, ensure that the Court's determination of existing rights does not unfairly prejudice the defendant. In contrast, the purpose of a CFO is not to resolve a dispute

---

54 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 612; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, [49]-[56].

55 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (the Court).

56 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 191 (the Court) (emphasis added).

57 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165–166 (Dixon J); *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312, 317 (Dixon CJ, Williams, Kitto and Taylor JJ).

about existing rights but to create new rights in the third party funder.

51. CA [99] asserts an analogy between a CFO and a court assessing a "reasonable rate of return" for the purposes of approving a liquidator's funding arrangement under s 477(2B) of the *Corporations Act 2001* (Cth) or an award of salvage. There is no analogy. The Court of Appeal's reasoning assumes that s 183 specifies that a CFO is to give the funder a "reasonable rate of return". Nothing in the legislation suggests that. The absence of criteria emphasises the non-judicial character of the power.

52. On approving a liquidator's funding arrangement under s 477(2B) the Court is not concerned with questions of commercial judgment, merely whether the arrangement is ill-advised or improper.[58] That may be contrasted with a CFO, where the Court apparently has the function of *setting* what is the "appropriate" or "reasonable" commercial return for an investor. That is a non-judicial task.[59] Analogously, to "ask whether the bargain struck between a funder and intended litigant is 'fair' assumes that there is some ascertainable objective standard against which fairness is to be measured", an assumption which is not well founded.[60] Courts are not equipped to act as remuneration tribunals.[61] Where courts do fix remuneration – eg of a liquidator – that is based on established market rates. However, in fixing the rate under a CFO, the court is acting as the market setter – there are no common fund commission rates other than those set by courts. Privately arranged funder rates are distinct as they do not apply to a whole open class of group members, only those who sign funding agreements.

53. There is no analogy between a CFO and an award of salvage. An award of salvage is made to reflect a pre-existing *right* to salvage.[62] In making an award the Court is merely determining the quantum of an existing right, having regard to a range of specified factors.[63] Further, an award of salvage is made *after* the salvage services have been provided. In contrast, the CFO sought is made at a point in the proceeding when, as explained above, the critical matters said to guide the determination of the commission

---

58 See, eg, *Re McGrath; HIH Insurance Ltd* (2010) 78 ACSR 405 (NSWSC), 409–410 (Barrett J).

59 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 297–298.

60 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [92] (Gummow, Hayne and Crennan JJ).

61 Acknowledged in *Lenthall v Westpac Life Insurance Service Ltd* (2018) 130 ACSR 456, [60] (Lee J).

62 See Art 12 of the *International Convention on Salvage 1989:* "Salvage operations which have had a useful result *give right to a reward*". The Convention is given effect in Australian law by reg 17 of the *Navigation Regulation 2013* (Cth).

63 See Art 13 of the *International Convention on Salvage 1989* which lists 10 specific factors to be taken into account in determining the quantum of the award.

rate are unknown and unknowable.

Acquisition of property

54. For the reasons set out at [46] above, s 79 of the *Judiciary Act* will not pick up a State law to the extent that, if enacted as federal law, it would infringe the guarantee created by s 51(xxxi) of the Constitution. No issue of "reading down" s 183 arises: cf CA [107]. Rather it is a question of how much is picked up by s 79. The Court of Appeal gave two reasons relevantly for rejecting BMW's argument that it was not picked up: that s 183 is not a law "with respect to" the acquisition of property (CA [108]), and that any acquisition was consensual (CA [109]). Both propositions involve error.

10 55. As to the latter, for an acquisition of property to be consensual (and so not an "acquisition" within the meaning of s 51(xxxi)) there must be actual agreement.[64] Part 10 does not proceed on the basis of consent; it proceeds on the basis of potential opting-out. A person who does not know of the proceeding and their right to opt-out cannot be said to have agreed to a CFO (group members are not necessarily notified of early CFOs being sought or made).[65] Clearly, the right to opt-out may not come to the attention of all group members.[66] Silence or inaction is not necessarily consent, as recognised both at general law,[67] and in the context of class action proceedings.[68] And group members are not presented with a choice between the status quo – receiving the full value of their chose in action in any judgment/settlement – and the position if a CFO is made.

20 56. As for the conclusion on characterisation at CA [108], the Court of Appeal did not say that such an order does not effect an acquisition of group members' property. "Property" for the purposes of s 51(xxxi) is construed broadly and includes choses in action.[69] A number of decisions of this Court establish that a law effecting or authorising the non-consensual extinguishment or modification of a chose in action in favour of another party, such as the partial assignment here (see [21] above) is an acquisition of property.[70]

---

64 See *Trade Practices Commission v Tooth & Co Limited* (1979) 142 CLR 397, 416–417 (Stephen J), approved in *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 325, 349 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

65 See eg *Perera v GetSwift Limited* (2018) 357 ALR 586, [245] (Lee J).

66 See eg *Allco No 1* (2015) 325 ALR 539, [180] (Wigney J).

67 *Felthouse v Bindley* (1862) 11 CB (NS) 869; 142 ER 1037.

68 See *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [23] (Finkelstein J); *Allco No.1* (2015) 325 ALR 539, [180] (Wigney J); *Money Max* (2016) 245 FCR 191, [50] (the Court).

69 *JT International SA v Commonwealth* (2012) 250 CLR 1, [263] (Crennan J), and the cases cited.

70 *Georgiadis v AOTC* (1994) 179 CLR 297; *Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493.

Nevertheless, the Court of Appeal appears to have reasoned that because s 183 authorises many other orders which do not involve an acquisition of property, it cannot be characterised as a law with respect to such: see CA [107]. It appears that the Court sought to identify the sole or dominant character of the law.

57. It is axiomatic in Australian constitutional law that a statute may have more than one character. "To describe a law as 'really', 'truly' or 'properly' characterised as a law with respect to one subject matter, rather than another, bespeaks fundamental constitutional error."[71] In characterising a law for the purposes of s 51(xxxi) one has regard to the various legal and practical operations of the law.[72] In determining whether a law has a character so as to infringe upon a limitation on Commonwealth legislative power, it will be enough that the law in some of its operations has the prohibited character.[73] If it were otherwise, the guarantee could be defeated by the circuitous device of enacting a generally expressed provision which acquired property in only some of its operations. Section 51(xxxi) is concerned with matters of substance, not form.[74] It cannot make a difference to the operation of s 51(xxxi) whether the power to make a common fund is conferred by a general provision such as s 183 or a separate section (say, s 183A) that only empowered the making of common fund order. In authorising a CFO, the direct effect of s 183 is to acquire property.

58. The Court of Appeal did not state that the making of a CFO involves providing just terms. Acquisition on just terms requires that the person whose property is acquired receive the full value of the property acquired.[75] For the reasons explained at [41] above, it is not possible in this case to conclude that the value of the property acquired is equal to the value of the "benefits" obtained by group members by the funder bearing the risk of funding the proceeding. Further, the legislation must affirmatively provide just terms,

---

71 *New South Wales v Commonwealth* (2006) 229 CLR 1, [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285 (the Court); *Georgiadis v AOTC* (1994) 179 CLR 297, 307 (Mason CJ, Deane and Gaudron JJ).

72 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [138] (Hayne, Kiefel and Bell JJ).

73 See, eg, *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 (s 52 of the *Trade Practices Act 1974* (Cth) a law with respect to State banking to the extent that it applied to State banks in the conduct of their banking business not extending beyond the limits of the State).

74 See *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, [43] (the Court) and the cases cited.

75 *Australian Apple & Pear Marketing Board v Tonking* (1942) 66 CLR 77, 85 (Williams J), 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); *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293, 306–307 (Rich J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 300 (Starke J); *Georgiadis v AOTC* (1994) 179 CLR 297, 311 (Brennan J).

otherwise the legislation will not fall within the s 51(xxxi) head of power.[76] There is no such provision here; the criterion in s 183 is not directed to that issue.

59. Something should be said as to the reasoning in *Westpac* (at [128]) that a CFO effects a "genuine adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity" which "needed to be regulated in the common interest", and is therefore not capable of being characterised as with respect to the acquisition of property. That approach is unsupported by the cases and is wrong in principle.

60. The origin of the principle said to be applied by the Full Court is the dictum of four members of this Court in *Australian Tape Manufacturers v Commonwealth*[77] quoted at *Westpac*, [119]. That dictum was of limited scope. The case relevantly concerned a levy imposed on the vendors of blank audio tapes payable to a collecting agency on behalf of copyright holders, as a solution to the "complex problem of public importance"[78] of copyright infringement. Their Honours stated that but for their conclusion that the levy was a tax, they would have held it to be an unconstitutional acquisition of property.[79] Thus, notwithstanding that the levy could be seen as a genuine adjustment of the copyright holders' rights or claims in a particular area of activity, the case did not fall within the dictum. The citation of *Attorney-General (Cth) v Schmidt*[80] shows that what their Honours had in mind was an adjustment of existing competing rights to property analogous to the adjustment that occurs in a winding up of an insolvent or bankrupt estate, which as Dixon CJ said "no one would doubt" lies outside the guarantee.

61. The broader dictum stated by three members of this Court in *Georgiadis v Australian and Overseas Telecommunications Corporation*, suggesting that generally it will be enough to escape s 51(xxxi) if there is "some general regulation ... in relationships or areas which *need* to be regulated in the *common interest*"[81] did not represent a majority of the Court, is not well based on principle,[82] and has not been adopted by the Court. It would render the guarantee worthless – many things (eg compulsory land acquisition for public

---

76 See *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 402 (Latham CJ). See also *Australian Apple & Pear Marketing Board v Tonking* (1942) 66 CLR 77, 100–103 (Latham CJ), 107–108 (Rich J).

77 (1993) 176 CLR 480, 509–510 (Mason CJ, Brennan, Deane and Gaudron JJ).

78 See (1993) 176 CLR 480, 495–496, 504–505 (Mason CJ, Brennan, Deane and Gaudron JJ).

79 (1993) 176 CLR 480, 495.

80 (1961) 105 CLR 361, 372–373 (discussing the kind of laws concerning bankruptcy that would be outside s 51(xxxi)).

81 (1994) 179 CLR 297, 307 (Mason CJ, Deane and Gaudron JJ) (emphasis added).

82 See *Smith v ANL Ltd* (2000) 204 CLR 493, [9] (Gleeson CJ), [180]–[181] (Callinan J); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, [498]–[500] (Gummow J).

purposes) can be justified by a need to regulate in the common interest.

62. Subsequently, in *Nintendo Co Ltd v Centronics Systems Pty Ltd*[83] the broader formulation was rejected in favour of the earlier, narrower, statement in *Tape Manufacturers*. Again, the decision in *Nintendo* demonstrates the limited scope of the statement. In the context of the High Court's primary reason for decision – that the creation of new intellectual property rights will inevitably involve an acquisition of property and therefore must lie outside s 51(xxxi) – it is apparent that the Court was referring to the adjustment of the competing rights of persons created by a Commonwealth statutory scheme. Such statutory rights are in a different category because they may be inherently capable of variation.

63. In *Airservices Australia* – the final case relied upon by the Full Court on this issue – only Gummow J[84] (with Hayne J agreeing) relied on the statement from *Tape Manufacturers*, but his Honour was careful to note its limitations (at [498]–[500]).

64. Properly understood, the principle from *Tape Manufacturers* is confined to cases involving the adjustment of competing existing rights (a) in bankruptcy, insolvency or other circumstances where the concept of "just terms" in an incongruous notion, or (b) created under a statutory scheme inherently susceptible of variation. This provides a doctrinal justification for the principle and accords with the Court's more recent jurisprudence. Where "just terms" is an incongruous notion, the principle of interpretation by which s 51(xxxi) is construed to confer a guarantee is not applicable;[85] where the statutory rights are inherently susceptible of variation there is no acquisition.[86]

65. Even if the *Tape Manufacturers* principle were thought to be more general, it can only apply in relation to the adjustment of persons who have *existing* rights and claims in a *pre-existing relationship*. It cannot justify the creation of wholly new rights in previously unrelated parties. If the principle extended that far, it would substantially undermine the

---

83 (1994) 181 CLR 134, 160–161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

84 (1999) 202 CLR 133, [501]. The other members of the majority drew an analogy between the law creating the statutory liens and laws concerning forfeiture where "just terms" is an incongruous concept: [99]–[100] (Gleeson CJ and Kirby J), [348]–[351] (McHugh J). See *Theophanous v Commonwealth* (2006) 225 CLR 101, [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

85 See *Theophanous v Commonwealth* (2006) 225 CLR 101, [56]–[60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

86 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, [30] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

guarantee created by s 51(xxxi). Property of its nature consists of rights or powers.[87] All laws affecting property may be thought to reflect the Parliament's judgment of where the public or common interest lies. Those features are not distinguishing; "[m]any laws may be so described".[88]

66. If (contrary to the submissions above), *Nintendo* is thought to be contrary to the propositions above it should be departed from. Apart from *Nintendo*, all of the statements in the other cases are dicta. *Nintendo* itself does not need to be overruled, since the primary reason for decision turned on the nature of intellectual property rights. There is no principle that has been worked out in a significant succession of cases, the suggested doctrine leads to significant inconvenience and has no principled justification.[89]

PART VII: ORDERS SOUGHT

67. BMW seeks the following orders:

(a) Appeal allowed.

(b) Set aside the orders made by the Court of Appeal, Supreme Court of New South Wales, on 1 and 22 March 2019, and in their place:

(i) answer the question stated for separate determination "No"; and

(ii) order the Plaintiff to pay the Defendant's costs of the application for, and the hearing of, the separate question.

(c) The first respondent is to pay the appellant's costs of the appeal in this Court.

PART VIII: ESTIMATE OF TIME REQUIRED

68. BMW will require some 2 hours for argument in chief, and some 30 minutes in reply.

19 June 2019

J K Kirk
Eleven Wentworth
T: (02) 9223 9477
kirk@elevenwentworth.com

T O Prince
New Chambers
T: (02) 9151 2051
prince@newchambers.com.au

---

87 *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, [44] (the Court).

88 *Smith v ANL Ltd* (2000) 204 CLR 493, [51] (Gaudron and Gummow JJ), note also [181] (Callinan J); see further *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, [500] (Gummow J).

89 See *John v FCT* (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).