

COMMON FUND ORDERS UPHeld FOLLOWING HISTORIC JOINT SITTING

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Legal Briefings - By **Helen Mould, James Page and Anna Whalan**

Less than a month after an historic joint sitting of the Full Federal Court of Australia and NSW Court of Appeal, decisions have been handed down by both Courts, confirming the validity of 'common fund orders' in class action proceedings.¹

BACKGROUND

In February 2019, a two-day hearing was conducted before three judges of the Full Federal Court and three judges of the NSW Court of Appeal relating to two class actions:

- a. a proceeding in the NSW Supreme Court against BMW Australia relating to allegations concerning faulty airbags (**Brewster**); and
- b. a proceeding in the Federal Court against Westpac relating to allegations of overcharging under life insurance policies (**Lenthall**).

Although involving unrelated claims, both proceedings had given rise at around the same time to a question regarding the power of those Courts to make common fund orders. On account of the 'considerable overlap' in the issues to be addressed in the two proceedings, the Chief Justice of the Federal Court, the Chief Justice of the NSW Supreme Court and the President of the NSW Court of Appeal agreed to conduct an historic joint sitting to hear the matters.

THE DECISIONS

Both BMW and Westpac challenged the power of the Court to make common fund orders, running similar arguments relating to the interpretation of the statutory provisions under which common fund orders have been made previously, as well as constitutional arguments.

A 'common fund order' essentially requires those participating in a class action to contribute a percentage of any settlement or judgment amount that may result from the litigation to a third party litigation funder, regardless of whether the class member has entered into a funding agreement with the funder.

Both challenges were unsuccessful, and the decisions confirm the power of the Federal Court and the NSW Supreme Court to make common fund orders in class action proceedings.

WILL WE SEE MORE JOINT SITTINGS?

The two-day hearing was conducted in a courtroom of the NSW Registry of the Federal Court on 4-5 February 2019, and the separate unanimous judgments were delivered on 1 March 2019, less than a month later.

The unusual joint sitting demonstrates a proactive and cooperative approach by the Courts to managing issues arising in circumstances where different jurisdictions with class action regimes are considering similar questions at around the same time.

A similar cooperative approach is evident in the November 2018 decision of the Chief Justices of the Federal Court and NSW Supreme Court to enter a protocol for working together to address the issues raised when competing class actions are filed in both jurisdictions at around the same time.² In its January 2019 report, the Australian Law Reform Commission has recommended that the Supreme Courts of States and Territories with class action procedures consider joining that protocol.³

CONSEQUENCES FOR CLASS ACTIONS

The decisions in *Brewster* and *Lenthall* are significant for a couple of reasons.

First, the decisions strongly confirm the validity of common fund orders, preserving what has been an important feature of the Australian class action landscape since the first common fund order was made by the Full Federal Court in *Money Max*⁴ in late 2016. It remains to be seen whether BMW and/or Westpac seek to appeal these decisions to the High Court.

Second, the joint sitting mechanism adopted in these decisions has operated smoothly and may become a model for further cooperation between courts overseeing the functioning of the Australian class action regimes, assisting the development of a more uniform, more efficient approach across the jurisdictions.

[The Globalisation of Class Actions Hub](#)

ENDNOTES

1. *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; *Brewster v BMW Australia Ltd* [2019] NSWCA 35.
2. Bathurst CJ and Allsop CJ, *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings* (November 2018).
3. ALRC, *Final Report: Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (January 2019).
4. *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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