IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S154 of 2019

BETWEEN: **WESTPAC BANKING CORPORATION**

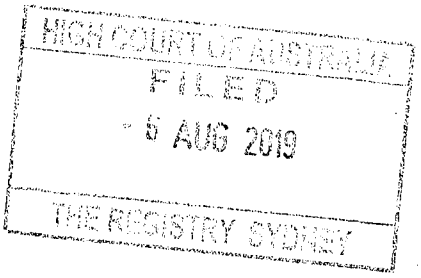
First Appellant & Anor named in Annexure A to the Appellants' submissions

and

GREGORY JOHN LENTHALL

First Respondent & Ors named in Annexure A to the Appellants' submissions

10



APPELLANTS' REPLY

Allens
Deutsche Bank Place, 126 Philip Street
Sydney NSW 2000

Telephone: 02 9230 4828
Fax: 9230 5333
Email: Malcolm.Stephens@allens.com.au
Ref: Malcolm Stephens 120721308-005

Part I: Certification as to suitability for publication

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

Part II: Reply

2. ***Expanding Pt IVA through judicial policymaking:*** CFOs cannot be supported by reference to the scope and purpose of Pt IVA: cf L[9]-[13], [21]; JKL[16]; WA[23]. Part IVA introduced "procedures" to permit the "vindication of rights held in common with others" (*Femcare Ltd v Bright* (2000) 100 FCR 331 (***Femcare***) at [65], [75]). But it is indeed a "great leap" (L[12]) to say that Pt IVA envisages redistributing part of the *substance* of the underlying right being vindicated in those actions (L[23]; cf A[32]). Further, Pt IVA does not "promote" (L[20]) open class actions to the extent of contemplating the *maintenance* of proceedings. There is no suggestion that it was a purpose of the scheme to encourage or sustain litigation. And ALRC Report No 46 (1988) (**ALRC 1988**) could hardly have set its face more strongly against litigation funding which involved (as with a CFO) the funder receiving a share of the proceeds of the resolution of the proceeding: see, eg, [317]-[318].

3. The central logic of the appeal to Pt IVA is: (i) Pt IVA permits open class actions; (ii) open class actions generate litigation risk; (iii) litigation risk needs funding; (iv) neither private funding nor Pt IVA's express powers to redistribute expenses between group members adequately address that need; (v) therefore, the Court may cure the problem by using s33ZF to impose CFOs. The respondents point to nothing in the pre-2016 history, during which open class actions were brought and resolved without recourse to CFOs, evidencing any deficiency in the scheme's operation. The assertion that "book building" is an exercise in "wasted costs" (FCAFC[10]; L[18]; JKL[10]) overlooks the fact that group members "will have to take action, at some stage, to obtain monetary relief" (ALRC 1988 [109],[116]) and that such action is likely to require considerably more interaction with group members than signing a funding agreement. But, most importantly: *if* there is a hole of such magnitude in the scheme, it is Parliament's role to choose from the many different policy options available for fixing it. These include an *express* power to make CFOs (subject to constitutional considerations and such conditions as Parliament may impose, including eg caps on commissions/ floor conditions, and licensing/ prudential requirements for litigation funders) as well as other avenues: see ALRC Report No 134 (Dec 2018) (**ALRC 2018**) [1.67],[4.35],[6.65],[7.3]. Section 33ZF is too slender a reed on which to hang a complex new litigation funding framework for open class actions.

4. ***Eliding FEOs with CFOs:*** Various parties (see L[16],[27],[35]; Cth [6],[19],[28]-[29]; WA[20],[22],[27]; JKL[35]) obscure the core reasons why CFOs differ from funding

equalisation orders (**FEOs**). CFOs involve the court in a novel rights-creation exercise and impair group members' proprietary rights. Unlike FEOs (and equivalent orders historically made in equity), CFOs do not spread the burden of an *existing* expense across all persons in a common interest. Instead, by judicial order they impose a new burden on all group members and create a correlative new right in a non-party (the funder) to *more* than its contractual entitlements. They do so by effectively imposing a lien (Cth [29]) on the fruits of each group member's chose in action. The claim that the funding commission was already an existing expense in this case (L[16],[27]) ignores the fact that funded applicants have no power to contract away a share of other group members' interests in any resolution sum: *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (2015) 325 ALR 539 (***Blairgowrie***) at [59]. These differences also explain why no provision of Pt IVA authorises the making of a CFO at any stage of proceedings. Westpac has not made, and does not make, any concession or submission to the contrary (cf L[2],[32]; JKL[13]; Cth [19]). An FEO, adjusting the final amount payable to each group member to reflect an equal sharing of contracted legal costs amongst all group members but "ensuring that the funder does not receive more than the total commission it would have received from the funded group members",[1] is simply an aspect of the Court's "distribution" (ss33V(2), 33Z(2)) or damages award (s33Z(1)(e)) to group members. A CFO, granting new rights to a funder over and above those costs (and without being tied to *contractual* arrangements, of the kind emphasised by the ALRC: ALRC 1988 [252],[259],[261],[272],[286]-[287]), is not (cf Cth [19]).

5. ***What the funder receives:*** Key to various parties' defence of CFOs is the claim that these orders provide a "stable base of funding" for a proceeding, and do so by incentivising the funder to commit to the litigation without having signed up further members to funding agreements: L[18]; Cth [7]; JKL[16],[51]. Against that backdrop, their characterisation of the interest the funder receives – "provisional" and "revisable" (L[47]; JKL[32],[36]; Vic(BMW)[30]); lacking "permanence and stability" (Cth [50]); and giving rise to no "right[s]" at all until certain contingencies are satisfied (Cth [8]) – is divorced from "practical economic reality" (JKL[25]). The "stability" of the funding is only possible because a CFO immediately bestows upon a profit-making entity a valuable commercial benefit, of a proprietary kind, as a "quid pro quo" for the obligation to fund (Vic(BMW)[37]; WA[49]). The CFO "turn[s] to account" group members' choses in action by effectively assigning to the funder part of the damages or

---

[1] *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289 at [59] per Lee J.

settlement sum which "might later be recovered" in the class action (*Smith v ANL* (2000) 204 CLR 493 (***Smith***) at [20]), creating for the funder a correlative and valuable interest.[2] That this interest is susceptible to later judicial variation does not alter the position (cf Cth [50]) for the purposes of s51(xxxi). JKL's newly created interest need not precisely correspond with what was taken from group members (*Georgiadis v AOTC* (1994) 179 CLR 297 at 305), and it is enough that JKL enjoys valuable benefits of a proprietary kind while the CFO persists.

6. ***"Uneconomic" rights:*** The proposition that group members' choses in action in this case were *uneconomic* to litigate *in the absence of the CFO* (see JKL[6],[37],[52],[55]; L[18],[22]; Cth[52]) is wrong and irrelevant to the construction and validity of s33ZF. It is erroneous to approach the issues of construction and validity as if Part IVA merely facilitates the fructification of causes that would otherwise wither. No party submits that Part IVA should be read down as applying only to claims that would otherwise be uneconomic to litigate. In any event, it overreads PJ[63] (advancement of claims "in this class action" likely not possible "absent funding" – but with no finding as to whether funding would have been available, eg following a book build). It ignores the potential availability of other funding models for the representative proceedings such as FEOs (which secure *higher* returns to group members: see *Money Max* at [53]-[60]; *Blairgowrie* at [164]; cf JKL[10]) or "no win, no fee" arrangements, which were not considered below. And it overlooks the fact that the group members in the present matter have effective, low-cost alternative avenues available to them.[3]

7. Thus, there is no basis to the contention that group members' claims were "practically valueless" (L[22]; Cth [52]) before the CFO was made. Nor is it correct to say that the CFO's "substantive effect" was to enable the "value" of those choses in action to be "realised" (L[5](b)). That ignores the fact that what is "realised" for the property owner upon resolution of the CFO-funded proceedings is *not* the "value" of the property but a significantly diminished version (potentially only 75%) of his or her entitlement. This is no *de minimis* impairment of the owner's rights: cf *Smith* at [23]. In truth, the argument reduces to the assertion that the 25% sacrifice is a fair price for achieving any resolution sum. But that is not a conceptually coherent foundation for denying that the principle of legality is engaged (JKL[19]ff) or contending that the law effects no acquisition of any property (L[47]). The extent of the disadvantage caused to

---

[2] See ALRC 2018 at [6.120]; and see also *ICM Agriculture v Cth* (2009) 240 CLR 140 (***ICM***) at [147] (the ability to trade/ use entitlements as security evidences "property" within s51(xxxi)).

[3] For example, at the time the Order was made (28/9/18), the Financial Ombudsman Service was available to resolve any claim by any affected person. See ss 912A(1)(g), (2) of the *Corporations Act 2001* (Cth) and *ASIC Regulatory Guide 139*. The FOS was replaced from 1/11/18 by the Australian Financial Complaints Authority.

group members may be relevant to just terms, but not to whether there is "property" that has been "acquired": see *Smith* at [8],[21]-[22],[35].

8. ***Judicial power***: None of the supposed analogies proffered by the parties provides a true analogy to CFOs: cf L[28],[44]-[45]; JKL[32]-[33],[46]; Cth [24],[27]. Neither freezing orders nor any other interlocutory case management powers alter a litigant's proprietary interests (let alone create interests in a third party) in the very substance of what is being litigated before the court. The means by which a CFO seeks to sustain pending litigation goes too far to justify its description as a step "in service of the ultimate quelling of the controversy" (cf JKL[32]; see also Cth [18]). Unlike CFOs, rewards under the law of salvage involve conventional judicial enforcement of pre-existing entitlements under admiralty law. Restitutionary principles are inapt: a funder seeking to secure a commercial investment falls far outside the sphere of what is contemplated by "necessitous intervention". The circumstances are also unlike the payment of expenses or remuneration to liquidators or trustees, which helps effectuate the statutory duties of the former (see *Stewart v Atco Controls Pty Ltd* (2014) 252 CLR 307 at [48]) and the fiduciary duties of the latter (see L[44]). The courts should not develop, by discretion, a "new categor[y]" conferring proprietary rights on funders according to notions of fairness: see *Muschinski v Dodds* (1985) 160 CLR 583 at 615-616, cf L[28].

9. It is too simplistic to rely on textual similarities between s33ZF and s87(1)(l) of the *Matrimonial Causes Act*, upheld in *Cominos v Cominos* (1972) 127 CLR 588 (cf Cth [23]; see also L[37]; Q[12]; Vic(BMW)[14]). The provisions to which s87(1)(l) was *expressly* made ancillary empowered the court to make orders respecting maintenance and property settlement in the exercise of its jurisdiction to determine matrimonial causes. Those provisions, and the grant of jurisdiction itself, necessarily confined the scope of s87(1)(l) to the adjustment of rights and obligations as between parties to a marriage and their dependants and provided context to guide the court's exercise of discretion: see at 591, 593, 594-5, 603, 606. Further, s87(1)(l)'s validity was considered only in the abstract. But no provision of Pt IVA confers jurisdiction to resolve competing claims of group members and litigation funders, or establishes any framework that could inform the court's resolution of such claims.

10. It is wrong to take the traditional indicia of judicial power, confront the absence of each one with the answer that none is essential, and suggest instead that conferral of a power *on a court* is effectively determinative of the power's character (cf Cth [25]-[32]). That ignores the fact that the cumulative effect of several considerations – in this case, the power to create new rights, in novel circumstances, absent any legislative "criteria which permits assessment; some

ascertainable tests" – can result in characterisation of the power as non-judicial: see *Yanner v MATSI* (2001) 108 FCR 543 at [2], [96], [114]. Further, if a power is alien to the judicial function, a statutory formulation requiring a court to be satisfied that the power's exercise is "appropriate or necessary to ensure that justice is done" does not transform it into one exercisable by a federal court (cf Cth [34]; Q[12]; Vic(BMW)[25]). The trappings of judicial process are not enough to render the power to make CFOs a judicial power (cf JKL[28]-[29]).

11. ***S 51(xxxi) and conferral of powers on courts:*** The claim that s51(xxxi) does not abstract from the legislative power to confer powers on courts (Cth [46]; JKL[42]) runs contrary to the s51(xxxi) jurisprudence (see *Wurridjal v Cth* (2009) 237 CLR 309 at [75],[185],[187], [457]; *ICM* at [43]-[46],[174]). It risks permitting Parliament to deploy the judicial process as a means of acquiring property without paying compensation, and overlooks that Ch III's systemic safeguards have different objectives from those of s51(xxxi)'s constitutional guarantee. To say that affording just terms in this context would be inherently incongruous reduces to the same overbroad proposition. The parties' claims that just terms have been afforded also undermines any suggestion of incongruity (L[54]; Cth [52]; WA[50]). The Commonwealth's attempt to extrapolate from the "incongruity" cases a "more general" test for laws engaging s51(xxxi) (Cth[42]) elides characterisation with proportionality in a manner that detracts from the nature of the guarantee: see *JT International v Cth* (2012) 250 CLR 1 at [229]-[232],[339]-[341].

12. ***Compulsion:*** The right to opt out does not mean that any group member made subject to a CFO has voluntarily acceded to the acquisition: cf L[53]; Cth [49]; Vic(BMW)[32]; WA[47]-[48]. The decision to opt-out may be made before a CFO is made or where there is no notice given of it (as none is required), and will certainly be made before any adjustment of a CFO at the time of final resolution. If notice is given, it cannot be assumed that notification of the opt-out procedure is effective, and opting out may give rise to limitation difficulties: see *Femcare* at [75] and *Blairgowrie* at [180], [182].

13. ***Just terms:*** In determining "just terms", a group member's interests are not balanced against those of "the community at large", as s51(xxxi) ensures that a property owner is not required to sacrifice property for "less than its worth": see *Smith* at [8]; cf L[54]. Section 33ZF does not positively afford just terms for the acquisition effected by a CFO (A[49]-[50]), and the terms provided by an individual order are irrelevant to the constitutional question (cf Cth [52]).

Alec Leopold
T: 02 9221 1942
aleopold@selbornechambers.com.au

Stephen Free
T: 02 9233 7880
sfree@elevenwentworth.com

Celia Winnett
T: 02 8915 2673
cwinnett@sixthfloor.com.au

6 August 2019