HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

ON APPEAL FROM
THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

Lendlease Corporation Limited ACN 000 226 228
First Appellant

Lendlease Responsible Entity Ltd ABN 72 122 883 185
as responsible entity for Lendlease Trust ABN 39 944 184 773 ARSN 128 052 595
Second Appellant

and

David William Pallas and Julie Ann Pallas
as trustees for the Pallas Family Superannuation Fund
First Respondent

Martin John Fletcher
Second Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

ISSUE 1: Does CPA Pt 10 (particularly ss 175, 176) empower the Court to approve an opt-out and registration notice which includes the additional notation that: *if there is a settlement, the defendant and/or the parties will seek an order at settlement approval precluding group members* (**GMs**) *who have neither registered nor opted out from benefiting from the settlement without leave of the Court* (**Settlement Order**)?

1. ***Common ground:*** First, the Court has power to approve a notice which "exhorts" GMs to register to participate in a class action prior to any mediation or settlement: see *Wigmans CA* at [86] (**4/JBA/23 p993**). Second, the Court has power, in approving a settlement under s 173, to make a Settlement Order: CPA ss 173(2), 179; *Haselhurst* at [52]-[53], [97], [105]-[108] (**4/JBA/16 pp739, 741-3**).

2. ***Prior authorities****:* The NSWCA in *Wigmans CA* construed the notice power narrowly, working backwards from *a priori* assumptions regarding the "basic precepts" of the statutory scheme. The FCAFC in *Parkin* (**4/JBA/18 p833**) held that *Wigmans CA* was plainly wrong. Below, the NSWCA upheld its own previous decision.

3. ***Facts:*** Shareholder class action for alleged breach of continuous disclosure laws and MDC. The class is defined as those who (a) acquired an interest in the appellants' securities during the relevant period; and (b) suffered loss by reason of the pleaded conduct: **ABFM 14-15**.

4. The share register does not identify beneficial owners, nor does it identify individual trading data, such that the *number and identity* of GMs and the *quantum* of claims cannot be readily identified: see similarly *Wigmans CA* at [44]-[45] (**4/JBA/23 pp985-6**).

5. Terms of the proposed notice: **CAB 67-79**.

6. On the evidence, the appellants seek the proposed notation because it will (a) encourage GMs to register; (b) facilitate settlement discussions by improving the parties' understanding of the number and size of claims; (c) assist in providing finality (by providing more reliable data on group member numbers): **ABFM 30-34 [29], [43]**.

7. ***Statutory scheme:*** First, the introduction of Pt 10 did not remove or dilute any of the Court's existing powers; CPA must be read as a whole (including eg ss 56-58): *Wigmans HCA* at [77] (**3/JBA/12 pp574-5**) (AS[18]).

8. Second, Parliament adopted an opt-out model but recognised the problem of 'free-riding'

by facilitating opt-out before the outcome of the action is known: ss 159, 162; *Brewster* at [73] (**3/JBA/7 p264**) (AS[16]).

9. Third, Pt 10 recognises GMs may have a diversity of claims with a common question of law or fact, *not an identity* of claims: ss 157, 168-170; ALRC Report 46 at [5] (**5/JBA/25 p1046**); *Timbercorp* at [49]-[50] (**3/JBA/10 pp477-8**) (ASR[9]).

10. Fourth, the Court is given broad, flexible, *discretionary* powers which have a protective function: ss 164-166, 171, 173, 183 (AS[14]-[15], [17]). Notice provisions (ss 175-176) are part of this suite (AS[30]-[31]).

11. Fifth, the Court's powers to award damages and distribute proceeds recognises the need to identify group members, sometimes before an assessment can be made: ss 177, 179.

12. ***The notification is within power****:* First, a narrow construction of the notice provisions is not supported by their text or purpose (AS[61]-[66]). Textually, ss 175 and 176 are not limited to 'events which have happened' (cf **CAB 53-4 [119]**): ss 175(1)(a), 176(6), (7). Section 175(6) ensures notice is prompt when the subject of the notice is a past event. It does not confine the scope of "matters". Purposively, the notice provisions are aimed at affording procedural fairness to GMs: *Wigmans HCA* at [122] (**3/JBA/12 pp591-2**); *Brewster* at [118], [142] (**3/JBA/7 pp279, 287**); ALRC Report 46 at [188] (**5/JBA/25 pp1071-2**). This is a warrant to construe them broadly. It would be a counterintuitive result for the Court not to have power to notify GMs in advance of a matter in respect of which it has power and which is material to GMs (AS[48]).

13. Second, there is no "basic precept" underlying Pt 10 that GMs must be and are entitled to remain absolutely passive (**CAB 64 [156]**) (AS[20]-[27]).

    (a) The opt-out regime recognises that GMs must take action in some circumstances (ss 162, 171, 174(3)) and "at some stage" if they are to participate: *Brewster* at [94] (**3/JBA/7 p271**); ALRC Report 46 at [109] (**5/JBA/25 p1054**). There is no statutory basis for restricting that stage to *after* judgment or settlement approval: see e.g. ss 177(1)(f), (3) and 176(6), (7).

    (b) As another example, it may in certain circumstances be appropriate to order discovery against GMs, just as that may be ordered against a defendant: *P Dawson Nominees v Brookfield Multiplex (No 2)* [2010] FCA 176 at [14]-[23], [35].

    (c) *Mobil Oil* at [40] (**3/JBA/9 p371**) was not purporting to articulate the "evident legislative intent" of representative proceedings (cf *Haselhurst* at [53], **4/JBA/16 p730**).

14. Third, the Court's power to approve a notice is not subject to eliminating all actual or potential conflicts. No conflict arises at this stage between the representative plaintiff and unregistered GMs, however, to the extent one does at a later stage, the Court's supervisory powers under the statutory scheme (including the *discretion* to make an order) are designed to manage such conflicts: see *Wigmans HCA* at [117], [120] (**3/JBA/12 pp589, 590-1**) (AS[52]-[57]; ASR[7]-[9]).

15. Fourth, the availability of alternative procedures does not inform the question of power. The Court's power is not subject to any "least restrictive means" qualification. In any event, the supposed alternatives are not as effective at addressing the objectives of greater certainty and finality (**ABFM 34 [43]**; cf **CAB 53 [117]**; CS [5]-[6]) (ASR[10]).

16. ***Key errors in the CA's reasoning:***

    (a) Incorrect identification of purpose of notice: [12] (cf [13], 1st sentence), [105] (Bell CJ).

    (b) Top-down reasoning via "fundamental precept": [66], [67], [96], [97], [98], [99] (suggesting different power analysis where class is closed cf for open class), [104], [112] (Bell CJ); [150], [156], [157], [[158] (Leeming JA).

    (c) Conflict of interest: [106], [107], [110], [115] (Bell CJ).

    (d) Narrow and atextual construction of s 175(5): [119] (Bell CJ).

    (e) Alternative mechanisms: [117] (Bell CJ).

ISSUE 2: Conflict between intermediate appellate court authority

17. The "plainly wrong" doctrine recognises that *consistency* should trump *correctness* in certain circumstances for rule of law-related reasons. But we have an integrated national judicial system presided over by the High Court, in which there is a single common law. Where conflict arises between two decisions of intermediate appellate courts (A and B), any benefits from Court A's pursuit of consistency (by following its prior decision) are neutralised because that comes at the expense of consistency with Court B's decision.

18. Applying the "plainly wrong" doctrine in this setting can also lead to: (a) uncertainty on what the law is, culminating in fragmentation across different jurisdictions; (b) pressure on the HCA to hear appeals; (c) intermediate appellate court decisions that do not give the HCA the benefit of reasoning on the merits (see **CAB 58-9 [137]**).

19. In the above circumstances, Court A should decide for itself on the correct legal conclusion.

Elizabeth Collins SC **5 November 2024**