HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 05 Nov 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S108/2024
File Title:	Lendlease Corporation Limited ACN 000 226 228 & Anor v. D
Registry:	Sydney
Document filed:	Contradictor's outline of oral submissions
Filing party:	Respondents
Date filed:	05 Nov 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

CONTRADICTOR'S
OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of oral submissions

First issue: Power to issue the proposed notice pursuant to s 175

2. The proposed notice (CAB 67) gives notice of the commencement of the proceeding and the right of group members to opt out (the fixing of an opt out date being a compulsory aspect of the scheme of Part 10 of the CPA (s 162, s 175(1)).
3. The proposed notice gives group members three options: (i) "Register to Participate"; (ii) "Opt Out"; or (iii) "Do Nothing". The proposed notice states that the lawyers for the parties intend to conduct a mediation (CAB 68). It says that the representative plaintiffs seek relief for group members, including compensation (CAB 71). The notice confirms that if a settlement is achieved, Lendlease (and perhaps the representative plaintiffs) will apply for an order which would have the effect that unregistered group members would be bound to the outcome of the proceeding but shall not obtain compensation received through settlement (CAB 76[5]): CS [7(a)]-[(d)].
4. What is left out of the notice? The role of the representative plaintiffs at the mediation, and who they will be advocating for is not described. The conflict for the representative plaintiffs in obtaining compensation for themselves and registered group members in consideration of settlement of all group members' claims is not disclosed: CS [7(e)], [67]-[69]. The commercial benefit to Lendlease in paying compensation only to registered group members but receiving the benefit of finality as against all group members is ignored. The forensic advantage to Lendlease, in being able to say at a subsequent hearing that unregistered group members were 'forewarned' that their claims would be extinguished without compensation is not explained: J[105] (CAB 49).
5. The purpose of the notice is described in Mr Betts' affidavit at [29]-[30] (AS [8], ABFM 30-31) as providing a more reliable registration data set than can otherwise be obtained because group members are forewarned of Lendlease's intentions. A rational group member who sees and understands the notice and who does not want to opt out will (in the language of the notice) "register to participate" – and therefore 'opt in' (CS [12]) to ensure their claim is preserved. The effect of the notice is to require action by a group member to ensure they protect their right to obtain any benefit from the proceeding – it divides the class into registrants and non-registrants so that a settlement can be obtained which will necessarily extinguish non-registrant claims for no value: CS [25].

6. Whether section 175(5) empowers a Court to issue the proposed notice is to be determined by consideration of the text of the provision in the context of Part 10 and having regard to the mischief that Part 10 was intended to remedy: *Brewster* at [43].
7. The purpose of Part 10 (identified by the plurality in *Brewster* [82], [93]-[94]), informs the proper construction of s 175. The purpose is undermined by a notice in the proposed terms. See also: *Brewster* [108]-[109] (per Gageler J); [125] (per Nettle J); and [137] (per Gordon J). The approach taken in *Brewster* to the interpretation of s 183 applies equally to s 175 (see in particular *Brewster* at [43], [48], [70], [125]): CS [10].
8. Consideration of the provisions of Part 10 confirms the centrality of the representative plaintiff in choosing to commence proceedings and then acting as the representative of group members; it provides for notice to group members in certain circumstances: CS [27]-[31]. Part 10 provides that the time at which a group member who has not opted out must take steps to participate in the proceeds of a class action is at the time of settlement and judgment. All group members who have not opted out will then be bound by the judgment: s 179. Section 175(5), as the general power to issue a notice, cannot be the source of power to issue a notice that requires group members to participate prior to settlement or judgment: CS [12]-[13]; [57]; [67]. Lendlease has never contended that there was any other source of power (such as s 183); it expressly disavowed any challenge to the Court of Appeal's decision in *Haselhurst*: J [58] (CAB 33); CS [9].
9. Further, the proposed notice does not satisfy the constraints of s 175: to give notice of any "matter" as required by s 175(5); nor has there been the happening of a relevant "event" as required by s 175(6): CS [14]-[34].
10. Finally, the Court is not empowered to issue a notice which will place a representative plaintiff in a position of real, immediate and direct conflict: CS [39]-[42].

Second issue: intermediate appellate courts

11. When dealing with a matter that is to be determined by the application of New South Wales law, such as interpreting New South Wales legislation, the Court of Appeal, even though not legally bound by its earlier decision, will not depart from an earlier decision unless convinced the decision is plainly wrong or there is a compelling reason to do so.
12. This standard (and its clarity) imposes a significant restraint on a Court departing from its earlier decisions which fosters stability and predictability in the law and the administration of justice: CS [75]; [79].

13. The same standard is applicable to a trial judge or an intermediate appellate court in relation to another intermediate appellate court on the interpretation of Commonwealth legislation, uniform national legislation or the common law: CS [76].
14. There is no principled reason why a different test or approach should apply to an intermediate appellate court when considering Commonwealth legislation, uniform national legislation or the common law (or statutes, such as Part 10 CPA and Part IVA FCA, which are not uniform national legislation, but are largely identical statutory schemes). That is, an intermediate appellate court should not depart from its earlier decision unless convinced that decision is plainly wrong or there is a compelling reason to do so: CS [80]-[81]. A compelling reason may be that a coordinate appellate court subsequently reached a different view with the benefit of more extensive argument or by addressing matters not raised for consideration in the earlier decisions.
15. This approach is consistent with the role of the High Court to resolve differences of opinion between different courts: s 35A(a)(ii) of the *Judiciary Act* 1903 (Cth).
16. When intermediate appellate courts differ it is not a matter of isolating "inter-jurisdictional" and "intra-jurisdictional" imperatives which may then "neutralise" each other (*contra* AS [68]) permitting the later in time Court to reach its own view: CS [77].
17. Such an approach is inconsistent with an intermediate appellate court's place in the integrated Australian judicial system.
18. The correct approach, which will foster stability and predictability in the law and the administration of justice, is to ensure the same standard is applied by an intermediate appellate court whether considering the interpretation of a statute of its own parliament or considering Commonwealth legislation, uniform national legislation or the common law.
19. This will apply to the current matter – whether Part 10 is approached as a New South Wales statute or a statute that operates in the nature of uniform national legislation.

Dated: 5 November 2024

Kate Morgan

Zoë Hillman