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' REPLY

Part I: Internet publication

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

Part II: Reply submissions

1. ***The tension underpinning the Contradictor's submissions:*** On the one hand, the Contradictor argues: (a) that the proposed notation in the registration/opt-out notice, foreshadowing the seeking of a Settlement Order (AS[6]), does nothing. It is a "contingent, hypothetical … prediction" (CS[19]) that simply "lays down a marker as to Lendlease's current thinking" (CS[24]). On the other, the Contradictor contends: (b) that the notation and thus the notice lies outside the Court's power to approve as it brings about nefarious consequences. It "shift[s] [the] risk" away from the representative plaintiff (CS[31], [59]), "facilitate[s]" the "bargain[ing] away [of] the claims of unregistered group members for no reward" (CS[53]), and "engender[s]" a "conflict" and empowers the Court to "manage" such a conflict (CS[43]). Both (a) and (b) cannot simultaneously be true.
2. ***The notice serves an important purpose:*** As to (a), this characterisation is unfair. *First*, the notation is not a mere thought bubble; it describes the appellants' considered position, albeit one subject to the overriding supervision of the Court. The notice encourages group members to provide information, and plays an important function in doing so, as the members of the class "cannot be readily identified" (CS[53]) and "[t]he quantum of the totality of the claims and each group member's claim is unknown" (CS[59]). It facilitates the negotiating parties' understanding of the claims. The proposed notation is an effective way of ensuring that the maximum number of group members who will come forward, do come forward, before any settlement terms are agreed (by warning that this may be the last opportunity). Where a settlement is negotiated on the basis of an aggregate sum, this enables the representative plaintiff to better discharge its duties to the class – by having a closer (albeit not perfect) approximation of the value of the common claims, and thus minimising the risk that an agreed amount representing a just outcome for the estimated claims is later diluted to a value that is no longer just on a pro rata basis. Importantly, the starting point for negotiation is not a complete list of group members, some of whom will be ignored or excluded at the mediation. The starting point is an *incomplete* list, and the purpose of the registration process is, in part, to supplement that list (eg by identifying group members who stand behind large nominee companies and institutional shareholders).
3. *Second*, in any event, ss 175-176 do not provide that the only things which may be notified to group members are past occurrences set in stone for history to observe (AS[61]-[65]; see

also CPA ss 176(6), (7)).

4. *Third*, s 175 is a means of giving procedural fairness to group members, and should be broadly construed in that context. The Contradictor's arguments about "set[ting] the stage" for a future settlement approval (CS[12]) and facilitating "ultimate submission[s]" by the parties (CS[25]) boil down to this proposition: it is illegitimate first to afford procedural fairness (via a notice procedure) of a legitimate step proposed to be taken at settlement, and then to contend that the notice recipients have accordingly been afforded procedural fairness. It is not evident why there is anything wrong with that "ultimate submission".

5. *Fourth*, the proposed notice is not misleading: cf CS[63]-[72]. It states the possible consequences for group members' rights and the action they must take to avoid the risk of those consequences. As explained at [7]-[9],[12] below, the notice neither "convert[s]" the regime into an opt-in regime prematurely, nor necessitates a conflict of interest: cf CS[33], [43], [67]. In any event, subject to the question of power raised in this appeal, whether to approve any particular notice is a matter for the Court's discretion: CPA s 176(1).

6. ***The nefarious consequences do not arise:*** <u>As to (b),</u> these loose propositions collapse on closer analysis. *First*, the concept of "risk-shifting" is extraneous to Pt 10, and provides no relevant yardstick against which this Court can assess the power to give the notice. The origin of the "risk" identified by the Contradictor appears to be *Farey v National Australia Bank Ltd* [2016] FCA 340 at [38], but as Leeming JA pointed out below, the risk referred to there was the risk that, upon a settlement approval, "there may be nothing, there may be something, surprisingly there may be a lot": T49.1-2. That risk is inherent in the Court's power to approve settlement on terms extinguishing unregistered group members' rights (CS[44]); it is not created, or "shifted" onto unregistered group members, by the notice.

7. *Second*, the Contradictor nowhere explains how the fixed intention to seek the Settlement Order can be sheeted home to the *representative plaintiffs*, nor how the proposed notice binds the *representative plaintiffs* to anything in the nature of "bargain[ing] away the claims of unregistered group members for no reward" (CS[53]), "pursuing an outcome" that arbitrarily extinguishes group members' claims (CS[32], cf [44]);"seek[ing] to negotiate a settlement of their claim for no value" (CS[45]); or "abandon[ing] unregistered group members' claims": CS[60]. The Contradictor's submissions on this point reveal confusion between the position of the appellants (who owe no fiduciary duties to their opponents in litigation) and that of the representative plaintiffs: see CS[31], cf [55], [69].

8. Here, unlike the position in *Wigmans CA*, the representative plaintiffs have expressly reserved their position on the question of the Court's discretion to issue the notice (RS[4],

[13]), and as to "how they will approach the mediation": T41.28-30. Assuming that the Court has power to and does approve the notice, that is no reason for the representative plaintiffs to abandon all obligations to unregistered members. The notice raises the prospect that, due to the position that will be taken by the appellants at any settlement approval, and *might* be taken by the representative plaintiffs, unregistered group members may receive nothing. But the notice does not absolve or prevent the representative plaintiffs from "properly exert[ing] themselves to obtain a proper outcome" for those members: cf CS[44].

9. *Third*, the Contradictor does not satisfactorily explain how the notice either creates or operates on any extant conflict of interest (cf AS[53]). Because the representative plaintiffs have not committed to contending, *and may never contend*, at any settlement approval that unregistered group members should get nothing, no conflict of interest arises at the stage of the notice. But if and to the extent a conflict does arise at some point, it is incorrect to say that Pt 10 *does not countenance* such conflicts: cf CS[33], [39]-[48]. Contrary to CS[39], the statutory regime recognises the existence of both "[c]ommonality" and "divergence" of interest between representative plaintiffs and group members' claims in CPA s 157's "very wide"[1] gateway for the commencement of representative proceedings, as "the legal interests of a group member and the lead plaintiff only align to the extent that each has an interest in the resolution of the common question or questions": *Timbercorp* at [141]. For this reason, procedural safeguards such as "opt-in or opt-out procedures and approval of settlements" exist, in addition to fiduciary duties, to "guard against collateral risks of representation": *Tomlinson* at [40]; see [16] below. A registration process is not an "arbitrary" way to close an open class, but one that must ordinarily occur, and can occur fairly under the supervision of the Court (cf CS[32]-[33], [44]-[45], [57], [60]).

10. ***Erroneous factual assumptions:*** The Contradictor's submissions proceed from various incorrect factual premises. *First*, the Contradictor mischaracterises the evidence of Mr Betts at [41]-[42] (ABFM 33-34) to paint "finality" for the appellants as the only end to be achieved by the notice and one that can be satisfied by alternative techniques for structuring a settlement of an open class proceeding: CS[6]. This ignores the evidence of Mr Betts at [43] (ABFM 34) that these alternative techniques for structuring settlements of open classes "all involve considerable uncertainty", and that the proposed notice is promoted "to avoid or reduce such uncertainty", to make it "more likely" that group members will register and to "enable the parties to negotiate with as complete a set of information as possible".

[1] *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 at 156 (endorsed by the High Court in *Wong* at [29]).

11. *Second*, the Contradictor wrongly assumes that, after the notice is issued, the parties will mediate on the footing that unregistered group members' claims *are* excluded, rather than that they *might be* excluded subject to the Court's discretion and the ultimate success of the appellants' foreshadowed application: cf CS[12], [40], [45]. As submitted below, "it would be naïve in the extreme" for either party to proceed on this basis and treat the claims of unregistered group members as pre-emptively extinguished: T36.22, 48, T12.41-44.

12. *Third*, the Contradictor's arguments concerning the time at which unregistered group members' claims are affected fails to engage with the distinction between the present notice and the order sought in *Haselhurst*. There, the applicants asked the Court to exercise its powers, prior to mediation, "to effect a contingent extinguishment of group members' rights of action against the respondents": at [59]. Here, the application of the reasoning in *Brewster* was the basis on which the appellants "did not challenge the correctness of *Haselhurst*" (T28.24-35; see CS[9]; J[58], [79], [95] (CAB 33, 40, 45-46)). But the appellants *did* challenge the Court of Appeal's reliance, in both *Haselhurst* and *Wigmans CA*, on the passage at [40] of *Mobil Oil:* T30.9-31.22. The present notice does not offend the architecture of Pt 10 as it does not involve the making of an order distributing any proceeds (in the sense of determining that certain group members will not share in the proceeds), or exercising powers as to judgment or settlement proceeds prior to a proceeding's conclusion: *Haselhurst* at [104]; *Brewster* at [68], [125]; cf CS[10]. There is nothing in the proposed notice which purports to fetter the Court's ability to extinguish unregistered members' claims, nor to "commence the process of filtering claims" (cf CS[59]). The discretion whether to filter claims in the proposed manner remains with the Court, to be exercised at the time contemplated in CPA s 173.

13. *Fourth*, the Contradictor seeks to draw a binary distinction between "a pre-mediation registration process" and a "post-settlement approval registration process" (CS[60]). But there is no such bright line. While the Court has no power to extinguish group members' claims prior to a settlement approval or judgment (*Haselhurst* at [53]), the same cannot be said of the time at which a *registration process* may occur. A notice "exhorting registration" is "within power": *Haselhurst* at [104], *Wigmans CA* at [86].

14. ***Access to justice:*** In asserting that the proposed notice "impede[s] rather than enhance[s] access to justice" (CS[52]-[53], [60]), the Contradictor selectively quotes from *Brewster* at [82]-[84], and does not grapple with the fact that it is neither impermissible nor unreasonable for a defendant to seek finality. *Brewster* (at [82]) described the objectives of the statutory scheme as two-fold: enhancing access to justice, and increasing the efficiency

of the administration of justice by allowing a *common binding decision* to be made in one proceeding rather than multiple suits: see also Second Reading Speech at 28066. CPA s 56 is also part of the architecture of the Act, and mandates that justice be "quick and cheap". Multiple rounds of "copycat" litigation would not promote those objectives.

15. Further, there are real difficulties with the contention that the inability readily to identify group members (a problem said to lie at the feet of the representative plaintiff for "draw[ing] a class which they agree to represent so broadly": CS[53]) is to be solved by redefining the class: CS[55]; J[117] (CAB 53). The ability to draw an open class is the mechanism by which Pt 10's opt-out regime seeks to achieve access to justice. A proceeding that draws a wide class and then takes proactive steps to encourage as many group members as possible to come forward before a settlement sum is agreed is in aid of, not "anathema to", access to justice: cf CS[53]. To draw the class narrowly, or to amend the class definition, does not advance the claims of those who have barriers to entry: CS[52]. Their claims may exist but will remain unresolved by the class action regime.

16. Nevertheless, if the Court is not satisfied that a sufficient number of group members have received, read or understood the notice (CS[70]), there is nothing that prevents the Court from encouraging a further round of registration, or a further opportunity for unregistered group members to opt-out, as the Court did in *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439 at [126], [140] (see J[135] (CAB 58)), or from allowing group members who later identify themselves to participate in the settlement, as the Court did in *Wetdal* at [50], [104]. The first and third of these possibilities are expressly flagged in the notice, albeit not "confirm[ed]" (cf CS[63]) so as not to undermine the exhortative power of the notice and to preserve the flexibility of the Court's discretion. To hold that the Court has no power to issue the proposed notice fetters the procedural flexibility of the regime.

17. ***Conflict between intermediate appellate court authorities***: The Contradictor does not explain why, when intermediate appellate Court A within our integrated national judicial system says X and intermediate appellate Court B says Y, the mere fact that *Court A* said X should erect a starting point that X is to be preferred by Court A in a future case: see CS[78].

Dated: 24 October 2024

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First Appellant

Lendlease Responsible Entity Ltd ABN 72 122 883 185
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and

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

Martin John Fletcher
Second Respondent

ANNEXURE TO THE APPELLANTS' SUBMISSIONS IN REPLY

Pursuant to paragraph 3 of the Practice Direction No. 1 of 2019, the Appellants set out below a list of statutes referred to in the Appellants' submissions in reply. Note: this annexure only sets out provisions not already cited in the annexure to the Appellants' submissions in chief.

No.	Description	Version	Provision
1.	*Civil Procedure Act 2005* (NSW)	Current version for 1 July 2024 to date (accessed on 24 October 2024)	S 56 S 157