HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S108/2024
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Important Information

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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

RESPONDENTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. Paragraphs 1 and 2 of the appellants' submissions (**AS**) identify the issues raised by the ground of appeal.

Part III: Section 78B notices

3. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. At the hearing of the separate question, the respondents (who are the representative plaintiffs) did not oppose an affirmative answer to the question as to whether the

Court has power to approve a notice to group members stating that, upon any settlement, the parties, alternatively, the defendants, will seek an order which, if made, has the effect that group members who have neither registered nor opted out will remain group members for all purposes of the proceeding, but shall not, without the Court's leave, be permitted to seek any benefit pursuant to any settlement that occurs before final judgment: J [6] (**CAB:** 16). However, the respondents expressly reserved their position on the question of discretion, that is whether the Court should exercise its discretion to issue a notice of the kind contemplated in the separate question if there was power to do so: J [6] (**CAB:** 16). The respondents continue to reserve their position on the question of discretion.

5. Given the position taken by the respondents on the question of power, they stated in their response to the special leave application that it was appropriate for the Court to make orders appointing a contradictor and that the respondents expected to make short supplementary submissions in support of the contention that the Supreme Court of New South Wales has the requisite power.

6. In those circumstances, the respondents do not repeat the submissions advanced by the appellants but wish to address briefly an issue which uniquely affects them (and their legal representatives), namely whether approval of the contemplated notice is beyond power because it gives rise to an "insoluble conflict of interest" for the respondents as the representative parties. They also wish to make one brief additional observation, from the perspective of the representative plaintiffs, concerning how the contention that the Court lacks power to *notify Group Members of the possibility of* a differential future outcome as between registered and unregistered group members sits most uneasily with the fact that the modern form of representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**) sanctions the existence of that very kind of differential outcome, which is indeed unavoidable.

Part V: Argument

Conflict of interest

7. It is accepted by the Court of Appeal (and is not in issue here) that the Court has power to make orders inviting group members to register their interest to participate

in a settlement and to provide claim information.[1] It is also accepted by the Court of Appeal (and is not in issue here) that the Court has power to make orders approving a settlement under which only those group members who have registered will receive part of the settlement, with the consequence that unregistered group members will not share in the settlement even though their claims are 'extinguished'.[2] (Technically, this 'extinguishment' occurs by merger of their claims in the Court's judgment approving the settlement and its distribution to others, with s 179 of the CPA statutorily binding them by that judgment). However, Bell CJ, with whom Gleeson, Leeming and Stern JJA agreed, held at [107] (**CAB:** 50) that the Court does not have power under s 175(5) of the CPA to approve a notice which foreshadows an application to limit the settlement to those group members which have registered because such a notice involves the Court giving "*apparent judicial blessing to a representative plaintiff engaging in what would inevitably be a conflict of interest*" between registered and unregistered group members.

8. To the extent that a conflict of interest between registered and unregistered group members exists, it does not arise because of the notification of the parties', or even the plaintiff's, intention to seek an order of the kind contemplated. Any such conflict may arise from the fact of some group members seeking to 'register' by making their interest in the proceeding known to the representative plaintiff's lawyers (whether they do so pursuant to Court orders seeking registration, or of their own volition absent any Court orders whatsoever). Alternatively, any such conflict may arise at the time when orders are sought approving a settlement in which only registered group members participate – which order might be sought either with the representative plaintiff's concurrence, or by the defendant's without that concurrence (as is foreshadowed as a possibility here). While neither of those situations necessarily involve any act by the representative plaintiff's which creates a situation of conflict, both of those situations may arise by reason of Court orders, which have been held by the Court of Appeal to be within power. The fact that a notice foreshadows a future application is not itself the source of any conflict that exists, or may come to exist, between registered and unregistered group members. It is not a sound basis upon which to deprive group members (or the Court for that matter) of

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[1] *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* (2020) 101 NSWLR 890; [2020] NSWCA 66 at [104]; *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 at [86].
[2] *Haselhurst* at [52]-[53], [87], [97], [105], [107]-[108].

information as to what the future position may involve having regard to the kinds of orders that the Court of Appeal has correctly held are within power.

9. Even if it were the case that, by seeking the notification orders the subject of the separate question, the respondents themselves manifested that a conflict of interest may arise because of their own intention to seek those orders in the future (which is not the case here, given the respondents have reserved their position), that conflict of interest would need to be considered in its proper context. As the Full Court recognised in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47 at [126], and Ward P recognized at [131] (**CAB**: 57), the risk of potential and actual conflict of interests is an inevitable feature of representative proceedings.

10. Part 10 of the CPA, like Part IVA of the *Federal Court of Australia Act 1976* (Cth), contemplates that conflicts of interest will be managed by the Court exercising a protective role in relation to group members' interests. The Court when performing that function in the context of a settlement approval application will be focused upon whether the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement and has been undertaken in the interests of group members and not just in the interests of the parties to the proceedings.[3]

11. The Court's ability to perform that supervisory and protective function would be enhanced, rather than hindered, by notification orders which transparently disclose, both to group members and to the Court, the intention of the parties (or one or other of them), and the consequences as early as possible. This enhances the Court's capacity to guard against the possibility that the settlement may reflect unknown or undisclosed conflicts of interest and that the interests of the parties before it and those of the group, or some part of the group, may not wholly coincide. The Court will, for example, be in a better position to consider whether it is necessary to appoint a contradictor on the settlement to represent the interests of absent group members (as frequently occurs in practice).

Differential outcomes and incongruity

12. It is inherent in the opt-out form of representative proceeding for which Part 10 of the CPA provides that different cohorts of group members may obtain different outcomes from the proceeding, and that some people who are included in an open

[3] *Parkin* at [130]-[133].

class will receive nothing. Because no formal step is required by group members for them to be included in a class, an open class will generally include persons who are either (a) indifferent to the proceeding and its implications for them and disinclined to either take the formal step of opting out or come forward to reap the benefits of findings on common questions, or to participate in any settlement; or (b) incapable of being otherwise identified or located so as to enable them to participate. It is impossible to guarantee that all group members in an open class action will come forward to participate or otherwise be able to be identified to facilitate their participation, and it is always the case that some proportion of the class will not do so.

13. The foregoing ought not be taken as acceptance that registration procedures will always be necessary in open class actions (cf AS [22]; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45 at [94]). In some cases, it will be possible to utilise a defendant's customer records to both identify and distribute compensation payments to group members even *without* them taking a positive step. For example, this may be both possible and appropriate in respect of consumer claims against banks, superannuation trustees or telecommunications providers, all of whom may be expected to have extensive customer records and the ability to credit money from a settlement directly to group members' bank accounts. Even in these cases, however, there will be persons who cannot be identified for a range of reasons (such as change of contact details). These are all matters which would need to be the subject of consideration, and evidence, at the time the Court is considering whether to approve a notice. They are one of the reasons why the respondents in the present case have reserved their position on the question of discretion.

14. A representative plaintiff who is preparing to negotiate for a settlement of an open class action must take account of the kinds of matters referred to in the foregoing paragraphs (as must legal practitioners acting on his or her behalf), and there are a range of ways of doing so. Where a lump sum settlement is sought and where some registration procedures have been followed, a common method involves making data-based assumptions as to the likely number of claimants who have not come forward or been identified already, but who will come forward or be identified if a settlement is announced, and allowing a buffer within the aggregate settlement sum which accommodates those persons. In *Parkin*, the Full Court had evidence before it of this kind of reasoning: at [15(c)]. Practitioners acting for representative

plaintiffs disclose their reasoning on such matters to the Court in confidential material filed on an application to approve the settlement. This is because the Court which is tasked with approving any settlement and making orders as to its distribution will have to take account of these matters.

15. The Court's power to approve settlements under s 173 is broad. It may be "just" within the meaning of s 173(2) for the Court to make orders distributing a settlement differentially to group members, including by sanctioning nil distribution to persons who have not manifested an interest in participating, nor been able to be otherwise identified so as to facilitate their participation, by a particular time. Indeed, it would be impossible for the Court to distribute a lump sum settlement without adopting some kind of discrimen of this kind, given that if a finite sum were held open to allow unknown claimants to prove on it indefinitely then distribution could never occur (which is not in the interests of any group members). And, as has been said above, the Court of Appeal correctly accepted that approval of a settlement and its distribution on this basis was within power.

16. Where a particular outcome – settlement with differential distribution as between registered and unregistered group members – is within power, it would be incongruent if the Court lacked power to notify the *possibility* of that particular outcome to group members through a notice given before settlement discussions occur (albeit retain power to do so after a settlement is achieved). The legislature did not intend any such incongruity.

Part VI: Notice of contention or cross-appeal

17. Not applicable.

Part VII: Estimate of time required

18. The respondents estimate they will require 15 minutes for oral argument.

Dated 19 September 2024

William A D Edwards KC
Owen Dixon Chambers West / Level 22 Chambers
(03) 9225 6059 / (02) 9151 2216
william.edwards@vicbar.com.au /
edwards@level22.com.au

Ryan May
Banco Chambers
(02) 8239 0204
ryan.may@banco.net.au

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ANNEXURE TO THE SUBMISSIONS OF THE RESPONDENTS

Pursuant to Practice Direction No 1 of 2019, the respondents set out below a list of statutory provisions referred to in these submissions.

No	Description	Version	Provisions
Statutory provisions			
1.	*Civil Procedure Act 2005* (NSW)	Current (Version 1 July 2024 – present)	Pt 10
2.	*Federal Court of Australia Act 1976* (Cth)	Current (Compilation No 57, 12 June 2024 – present)	Pt IVA