

BETWEEN:



Westpac Banking Corporation & Anor
Appellants

and

Gregory John Lenthall & Ors
First to Fourth Respondents

JustKapital Litigation Pty Limited
Fifth Respondent

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FIFTH RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

- 20 1. This outline of oral argument is in a form suitable for publication on the Internet.

Part II:

A funder is not a stranger to the litigation (JKL WS [31]):

2. A funder performs a critical role in many Part IV representative proceedings – a role that is necessary if the rights of the class are to be vindicated. The funder is a “real party interested in the outcome of the suit”. The funder assumes the substantial risk of the litigation with a view to making a commercial return. If it cannot profit, it will not take the risk.
- 30 3. The practical reality of modern class actions is that the funder coordinates the aggregation of claims and marshalls and deploys the substantial capital that is necessary to vindicate them – and, importantly from a practical perspective, to do so with an equality of arms that might match the resources of the typical corporate class

action defendant. The involvement of the funder enables the just quelling of the dispute between the parties and promotes the orderly and efficient conduct of litigation.

Part IVA empowers the Court to make common fund orders (JKL WS [12]-[26])

4. The power to make CFOs on a final basis is found, in the case of a settlement approval, in s 33V; in the case of a judgment, in s 33Z(1)(g) but also s 33Z(2); and in any event in s 33ZF(1).
5. Section 33ZF is not merely a gap-filling power. It is a primary source of power. More specific powers, such as a 33Z(2) and s 33ZJ dealing with “damages” claims, are *exemplifying* provisions, not limiting provisions beyond their precise affirmative terms. “Damages” means damages and not simply “money”: s 51A.
6. When made on a final basis, the effect of CFOs, like funding equalization orders, is that the Court orders that a portion of the resolution sum is to be paid to a funder, being a portion that the Court considers fair and reasonable and commensurate with the beneficiaries of the award bearing a proportionate amount of the costs of achieving it, including the funder’s fees for the risks and other services it provides as part of funding the proceedings. CFOs and funding equalization orders are not relevantly different so far as power to make the orders under Part IVA is concerned.
7. If there is power to make the orders on a final basis, s 33ZF, properly construed, also authorises the Court to make a common fund order on an interlocutory basis where the Court considers the making of the interlocutory order is necessary or appropriate to ensure justice is done in the proceeding.

Many powers exercised by courts affect choses in action and are inherently incompatible with a requirement to give “just terms”: (JKL WS [46]-[49])

8. Where jurisdiction and power are conferred on a court in respect of a matter, the Court has powers to manage the procedural course of the litigation in order to do justice in the matter. Those powers will necessarily be capable of affecting the rights of a litigant in respect of the chose in action and in that sense may be apt to work an acquisition of property within the broad sense that concept is used in the Constitution. That kind of power — a supervisory, managerial judicial power to control the

proceedings — is inherently incompatible with the provision of just terms and so is the legislative power to confer such managerial powers on courts.

9. The power to stay proceedings, to strike-out an action for want of prosecution, to dismiss proceedings in whole or in part for a party's failure to comply with a direction — are examples of the many powers held by courts which impact on causes of action and have the effect of limiting, modifying or extinguishing a person's rights. Like s 33ZF of the *Federal Court of Australia Act 1976*, statutory provisions giving those powers are not properly characterized as being with respect to the acquisition of property for the purposes of s 51(xxxi). They are powers conferred to enable the Court to advance the cause of justice, which is the court's role once seized of a matter. Once in that territory, the notion that such powers can only be exercised where just terms or fair compensation is provided is incongruous.

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Any acquisition is on just terms (JKL WS [50]-[55])

10. The highest and best use of many choses in action will be use within a class action. The market value of such a chose in action, so used, will bring to account any reasonable funding commission determined by the court that is empowered to realise the value of the chose. Accordingly there is no relevant acquisition of property; or if there is, it is an acquisition that *gives* the chose in action its value and therefore is not otherwise than on just terms.

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Noel Hutley
Fifth Floor St James' Hall
T: 02 8257 2500
F: 02 9221 8389



Brendan Lim
Eleven Wentworth
T: 02 8228 7112
F: 02 9232 7626



Sonia Tame
New Chambers
T: 02 9151 2003
F: 02 9233 1850

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