IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S154 of 2019

BETWEEN: **WESTPAC BANKING CORPORATION**

First Appellant & Anor named in Annexure A to the Appellants' submissions

and

GREGORY JOHN LENTHALL

First Respondent & Ors named in Annexure A to the Appellants' submissions

10

APPELLANTS' OUTLINE OF ORAL ARGUMENT

Allens
Deutsche Bank Place, 126 Philip Street
Sydney NSW 2000

Telephone: 02 9230 4828
Fax: 9230 5333
Email: Malcolm.Stephens@allens.com.au
Ref: Malcolm Stephens 120721308-005

Part I: Certification as to suitability for publication

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

Part II: Propositions to be advanced in oral argument

2. ***Critical background*** **(AS[5]-[13], Reply [4])*:*** We commence by summarising: (i) the nature of the representative proceedings brought by the four Applicants and the funding agreements entered into by them (and only them) with the Funder (**JKL**), noting that the four Applicants had no capacity to bind, and did not bind, the group members; (ii) the effect, and legal character, of the Order made by the primary judge on 28 September 2018 (**Order**); and (iii) the fundamental differences between a common fund order (**CFO**) and a funding equalisation order (**FEO**).

3. ***Statutory construction*** **(AS [14]-[34], Reply [2]-[4])*:*** To the extent that Part IVA did interfere with pre-existing rights of individuals, on each occasion Parliament used very clear words. Sections 33V, 33Z, 33ZA and 33ZJ deal comprehensively with a *range* of inter-related distributions and actions, which are to take place *after* the time the moneys are received. The Act confers "one set of powers", which *must* be exercised after the total sum of money has been received, relating to the distribution of funds, deriving from a monetary award, settlement or payment into court: *MIMIA v Nystrom* (**4 JBA 39 p1643**) at [59].

4. It is telling that no provision requires notice to group members that a CFO is sought or has been made.

5. Viewing s.33ZF in the context of ss.22 and 23 of the FCA Act, the Order was not capable of being seen as appropriate or necessary to ensure that "justice" is done in "the proceeding". See *Jackson v Sterling* (**3 JBA 33 p1263**) at 616, 619-621, 626-627.

6. The Appellants' construction of s.33ZF is supported by (i) the Explanatory Memorandum to the *Federal Court of Australia Amendment Bill 1991* (**9 JBA 78 p3653**) at [3] and [33]; and (ii) ALRC Report No 46 (1988) (**9 JBA 76 p3615**) at [109], [116], [259], [261], [272], [274], [287]-[290], [315]-[318].

7. Statutory and common law development: There has been only a partial abolition of maintenance and champerty in Australia. The toleration of litigation funding, in only some Australian jurisdictions (cf *Campbells v Fostif* (**2 JBA 22 p707**) at [85]), provides no foundation for concluding that Parliament intended to empower the Court *affirmatively to facilitate* funding by third parties in return for a share in the proceeds.

8. The principle of legality: The principle of legality is engaged because the Order would, if valid, interfere with equitable / proprietary rights of the group members. The Full Court erred (**CAB 102** [94]) in holding that the principle did not apply because the group members' causes of action were "uneconomic to vindicate". Section 33ZF is to be construed in a way which avoids, or minimises so far as possible, interference with the group members' rights.

9. Absence of practical/guiding criteria to establish appropriate quantum: Making the Order involved the Court in fixing a return for a commercial funder operating in a fluid market, when there were no practical criteria specified in the statute to guide the Court in making such a determination. "Appropriate or necessary" provides no relevant guidance. The task is beset by what are in truth policy issues for the legislature.

10. ***The Order was not an exercise of judicial power*** **(AS [35]-[44], Reply [8]-[10])***:* Rights-creation and liability-creation generally stand outside the realm of judicial power.

11. A further indicium of non-judicial power is the absence of objective criteria providing practical guidance as to the exercise of the power (see above).

12. A common fund order has no historical analogue. It is fundamentally different from orders made in the Equity courts that costs be paid out of the resolution sum.

13. Section 33ZF is not a "double function provision".

14. The Order was not *incidental* to core judicial power as it did not "enable", "support" or "facilitate" the exercise by the Court of its judicial function, for similar reasons to those leading to the conclusion that the Order fell outside the scope of ss.22 and 23 (see above). The Order is not akin to orthodox interlocutory orders, as it is not directed at or in aid of the court's exercise of its substantive jurisdiction in adversarial proceedings: *Jackson* (**3 JBA 33 p1263**) at 626-627; *Palmer v Ayres* (**6 JBA 47 p2255**) at [36]. It imposes a funding regime to *sustain* a proceeding by altering proprietary interests in the substance of what is being litigated.

15. ***s 51(xxxi)*** **(AS [45]-[50], Reply [11]-[13])***:* Reallocation of part of the fruits of the cause of action from a group member to the funder involves the taking of property, for s.51(xxxi) purposes, and the conferral on the funder of a corresponding interest in property: *Smith v ANL* (**7 JBA 61 p2913**); *Telstra v Cth* (2008) 234 CLR 210 (***Telstra***); *JT v Cth* (**4 JBA 35 p1319**).

16. The affected interests of group members have an independent existence and proprietary character. Part IVA is merely one available procedure for pursuing the causes of action.

17. The acquisition occurs by compulsion, not consent: *Femcare Ltd v Bright* (**3 JBA 28 p1047**); see also *Paliflex v Cmr State Revenue* (**6 JBA 46 p2221**) at [41], contrasting "compulsion" with "agreement".

18. Section 33ZF is properly characterised as a law with respect to the acquisition of property, having regard to its practical and legal operation and effect: *Telstra*; *Cunningham v Cth* (**3 JBA 26 p921**); *Smith v ANL* (**7 JBA 61 p2913**).

19. That characterisation is not avoided because s.33ZF is a general power with many valid applications: *ICM Agriculture v Cth* (**3 JBA 31 p1137**); *Smith v ANL* (**7 JBA 61 p2913**).

20. Laws that confer powers on Ch III courts are not outside the reach of s.51(xxxi): *Rizeq v*
10 *WA* (**7 JBA 59 p2823**); *ICM* (**3 JBA 31 p1137**); *Wurridjal v Cth* (**8 JBA 68 p3347**).

21. Neither the head of power, nor the type of law involved, is such that it is incongruous or inconsistent for the constitutional guarantee to be engaged: *A-G(NT) v Emmerson* (**1 JBA 12 p345**).

22. There is no analogy with *Airservices Australia v Canadian Airlines* (**1 JBA 9 p85**) and the imposition of statutory liens arising from debts in respect of unpaid fees for services.

23. The Commonwealth's submission (as to acquisitions that are a necessary or characteristic feature of the means selected to achieve an object: CS[42]) is unsupported by authority: *Emmerson* (**1 JBA 12 p345**); *Cunningham v Cth* (**3 JBA 26 p921**); *Mutual Pools v Cth* (**5 JBA 42 p1999**).

20 24. Section 33ZF is not a law providing for resolving competing claims or for the genuine adjustment of competing rights, claims or obligations as considered in *Australian Tape Manufacturers v Cth* (**2 JBA 17 p525**), *Nintendo v Centronics* (**5 JBA 43 p2071**), *Mutual Pools* (**5 JBA 42 p1999**) and *Airservices* (**1 JBA 9 p85**).

25. Section 33ZF is not a law that provides for "just terms". Even with a "measure of latitude", the benefits of ongoing funding cannot be assumed to equate to the value of the rights taken from group members. The statute provides no such requirement.

26. Satisfaction about ensuring "justice in the proceeding" does not equate to "just terms".

Alec Leopold **Stephen Free** **Celia Winnett**

13 August 2019