

Summary of Key Submissions in Westpac Banking Corporation & Anor v Lenthall & Ors (S154/2019)¹

For those with a keen interest in the future of the so called 'common fund order' in the Australian class action landscape (lawyers, funders and corporates alike), the recent filing of reply submissions sees the strategies set and battle lines drawn for next week's much anticipated hearing of the appeals to the High Court of Australia in *Lenthall* and *Brewster*. Before we get to the hearing (on 13 August 2019), familiarise yourself with the key aspects of the parties' respective positions, as summarised below.

Introduction

The primary issue for determination by the High Court of Australia is whether s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), on its proper construction, empowers the Federal Court to make a common fund order (**CFO**) in representative proceedings, requiring that part of the fruits of any success otherwise payable to each group member instead be paid to a funder.

Section 33ZF of the FCA Act relevantly provides:

- (1) *In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.*
- (2) *Subsection (1) does not limit the operation of section 22.*

The following ancillary issues arise in connection:

1. In determining the primary issue, is the principle of legality engaged because of the effect of a CFO on proprietary rights?
2. If the answer to 1 is 'yes', does s 33ZF infringe on the separation of powers by conferring on the Federal

Court power that is neither judicial nor incidental to the exercise of judicial power?

3. If the answer to 1 is 'yes', is s 33ZF properly characterised for the purposes of s 51(xxxi) of the *Constitution* as a law with respect to the acquisition of property?
4. If the answer to 3 is 'yes', is s 33ZF invalid because it provides for the acquisition of property otherwise than on just terms?

Overview

The Appellants' Primary Argument:

The essence of the Appellants' argument is that the Full Court below erred by failing to identify the distinction between CFOs and Funding Equalisation Orders (FEOs). The Appellants submit that in handing down a CFO, the court is assuming a position akin to a remuneration tribunal fixing a fair commercial reward for the provision of financial services.

They argue that a CFO:

- a. Deprives group members of (or devalues) their proprietary rights;
- b. Confers an interest in the group members' proprietary rights on a third party funder far in advance of a resolution to the proceedings;
- c. Involves a Court fixing a fair return

for a third party where there are no specified practical criteria for making such a determination; and

- d. The Court is making new rights rather than enforcing existing ones.

The First to Fourth Respondents' Primary Argument

- a. Part IVA of the FCA Act, in enabling the bringing together of multiple causes of action which would otherwise be uneconomic to litigate, necessarily assumes that someone will bear the risk of that action. Justice requires that such person be reimbursed for costs incurred, and rewarded for the risk they have taken;
- b. The effect of the CFO is to share the benefits and burdens of the litigation across group members, including the funder's, solicitors' and any administrator's fees. It also requires the funder to commit to the funding of the proceedings. By providing a stable base of funding, the CFO's substantive effect is not to diminish the value of group members' choses in action but to enable their value to be realised;
- c. The principle of legality is not engaged in accordance with b

¹The *Lenthall* appeal to the Full Court of the Federal Court was heard concurrently with the NSW Court of Appeal's hearing of a referred matter which raised equivalent issues about the construction and validity of the corresponding provision in the Civil Procedure Act 2005 (NSW) (**CPA**): *Brewster v BMW Australia Ltd* [2019] NSWCA 35 (*Brewster*). As *Brewster* raises similar issues regarding the corresponding CPA provision, we focus our summary on the key submissions filed in *Lenthall*.

above;

- d. The making of a CFO is an exercise in judicial power; and
- e. Because the effect of the CFO is to enable the value of group members' claims to be realised, it effects no "acquisition of property" for s 51(xxxi) purposes. Alternatively, s 33ZF is not properly characterised as a law with respect to the acquisition of property; the requisite element of "compulsion" is lacking; or s 33ZF provides for "just terms".

The Fifth Respondent's Primary Argument

The Fifth Respondent's primary argument is centred around three points:

1. That as an interlocutory order, a CFO is inherently capable of being revisited.
2. The primary judge found that an injustice would occur if a CFO was not made as group members' claims would not be able to be realised.
3. The proper construction of s 33ZF enables the making of a CFO.

Detail

On the issue of legality

The Appellants submit that the effect of a CFO is to diminish proprietary rights and more broadly effects a partial loss of group members' choses in action by rendering that property less valuable. Pursuant to the principle of legality,² and the absence of clear and unequivocal words in s 33ZF allowing the Court to make orders to 'alter', 'modify' or 'curtail' rights, the section should not be so construed as to allow for the making of CFOs.

The Appellants submit that the Full Court below erred in that it used flawed analysis in coming to the conclusion that making a CFO under s 33ZF complies with the principle of legality because a CFO 'not so much rakes away from, as supports and fructifies, rights of persons that would

otherwise be uneconomic to vindicate'. The Appellants say:

- a. This poses a false dichotomy;
- b. It is not correct to suggest that the principle of legality is not engaged if the diminution in property rights can be seen to be bound up with some perceived countervailing benefit – here, the vindication and realisation of common rights.

The Appellants submit that the Full Court erred in approaching the issue of construction on the basis that s 33ZF is engaged where the rights of represented persons 'would otherwise be uneconomic to vindicate.' The Appellants submit that an order "granting a funder a share of any fruits of the litigation", in advance of determining the proceedings, is not capable of being seen as "appropriate or necessary to ensure that justice is done in the proceeding".

The First to Fourth Respondents argue here that the *actual* effect of a CFO is to realise, not diminish property rights. They make the point that the Appellant's have focused on the issue in terms of before the CFO a group member would be entitled to \$X and *after* the CFO they would be entitled to \$X-\$Y, but neglect to grapple with the fact that the *before* sum (\$X) has little-to-no practical value.

The First to Fourth Respondents also argue here that Part IVA already effects significant alteration to the rights of group members but enabling their choses in action to be litigated without their consent or even their knowledge. In this sense, the legislature has, contrary to the Appellants' submissions, turned its attention to the question of the abrogation or curtailment of group members' property rights and concluded that those rights should be limited, by curtailing the requirement for consent or knowledge in order to run such claims.

The First to Fourth Respondents argue that Parliament must have intended that the Court would, 'over time, in individual cases, develop new procedures in form and contour as it responded to the practical and economic circumstances in which the legislation was to work.' They say that Parliament must have intended for s 33ZF to resolve unforeseen

difficulties.

The Fifth Respondent agreed with the other Respondents' arguments as to the principle of legality and added that it was only upon the idealised conception of the group members' property that the Appellants seek to put forward, divorced from its practical value, is it possible for the Appellants to argue that the CFO diminished group members' proprietary rights. The Appellants' conception of the principle of legality in this instance seeks to subvert the principle's traditional application by treating as *destructive* of those rights, legislation that is in truth, *in aid* of them.

The Fifth Respondent adds that where the practical economic value of a property right is reduced by the costs of realising that value, legislation that seeks to lower or otherwise regulates those costs is not legislation that relevantly interferes with or infringes the right so as to attract the principle of legality.

The central idea in reply for the Appellants is that a CFO cannot be supported with relation to the scope and purpose of Part IVA. They argue that it is a 'great leap' to say that Part IVA envisages redistributing group member entitlements in order to maintain a proceeding. The Appellants also argue here that the Respondents have not made any attempt to highlight the deficiencies of the pre-2016 scheme for open class actions during which CFOs were not made. They suggest that Parliament has the ultimate role to play here in fixing a purported 'hole' in the system of carrying on class-action litigation.

Further, in an overall reply to the Respondent side's comments regarding the differences between FEOs and CFOs the Appellants argue chiefly that the Respondents and interveners have obscured the core reasons that differentiate FEOs and CFOs. They say that CFOs do not spread the burden of an existing expense on all group members as they effectively impose a lien on the fruits of each group members' entitlements. On the other hand they say that, an FEO, in adjusting the final amount payable to each group member to reflect an equal sharing of contracted

²That is, if Parliament intends to interfere with fundamental rights, or to depart from the general system of law, then it must express that intention by clear and unambiguous language.

The Appellants additionally argue in reply that for the Respondents to say that a group members' rights are uneconomic to pursue without a CFO is wrong, and irrelevant to the construction of s 33ZF. They say that it is erroneous to approach the issues of construction and validity as if Part IVA merely facilitates fructification of causes that would otherwise wither. They argue that there is no basis for the Respondents to argue that the group members' claims were practically valueless before the CFO was made nor that it is correct to say that the substantive effect of the CFO was to enable the realisation of choses in action. The Appellants in reply say that the apparently fair price that group members sacrifice is not a conceptually coherent foundation for denying that the principle of legality is engaged or that s 33ZF effects on acquisition of property.

On the issue of judicial conferral of interests on third parties in advance of resolving proceedings

The Appellants submit that the characteristics of a CFO mean that it is not capable of being seen as 'appropriate or necessary to ensure that justice is done in the proceeding.' The "proceeding" in which the Court's jurisdiction is invoked is that in which damages are claimed from a respondent. The parameters of the Court's task in that proceeding are charted by s 22 of the FCA Act, requiring it to grant all remedies to which a party is entitled "in respect of a legal or equitable claim" brought by him or her in the proceedings so as to determine "all matters in controversy between the parties", and by s 23, empowering it to make all orders it thinks appropriate "in relation to matters in which it has jurisdiction". On the back of this point, the Appellants argue that granting a funder a share of any fruits of the litigation, and doing so far in advance of determining the matter is not a step that aids in the determination of the parties' legal interests or in the resolution of matters in controversy between them.

The First to Fourth Respondents say that the doing of 'justice' is not limited to deciding the issues in dispute between the parties. It encompasses both procedural and substantive justice. It was therefore

open to the Court to consider that it does 'justice' to make a CFO designed, in part, to remove a risk to the prosecution and vindication of group members' rights. The First to Fourth Respondents also argue that a CFO promotes 'justice in the proceeding' in other ways too, including: a CFO achieves justice between group members in that its function is to share the benefits and burdens of the litigation across group members, a CFO ensures court supervision of the amount of legal costs and the commission payable to the funder, and benefit of making a CFO before the point of settlement or judgment, is that group members can make a more informed decision on whether to opt out of the proceedings as they will have a better understanding of the likely financial consequences of choosing to remain in it.

On the issue of the absence of practical guidelines

The Appellants submit that the words of s 33ZF give no meaningful content to the discretionary exercise of fixing a rate of return to a funder.

The First to Fourth Respondents argue that the purpose of s 33ZF is to empower the Court to make orders necessary to resolve unforeseen difficulties in proceedings, and thus, it should not be read down notwithstanding the absence of practical guidelines. The First to Fourth Respondents also submit that the Appellants implicitly accept that, despite the general terms of s 33V (a section which empowers a Court to make orders 'as are just with respect to the distribution of any money paid under a settlement or paid into the Court'), that it would empower the Court to make a CFO at the point of settlement.

On the issue of the Separation of Powers and the Incidental Power

The Appellants submit that for a Court, in handing down a CFO, to determine what legal rights and obligations should be created, stands outside the realm of judicial power. Whilst they concede that historically there have been instances where a power exercised by a Court involves no determination of pre-existing rights, they say that there is no history or tradition of courts making anything akin to CFOs.

The First to Fourth Respondents argue that the making of a CFO is at *least* incidental to the exercise of judicial power. As to the absence of 'tradition', they say that there is no authority for this argument. The Fifth Respondent argues that on this point, the Appellant holds the burden to show that the power is incapable of being exercised through the application of a judicial process or otherwise that the power is directed to an end that is 'divorced from' the quelling of a controversy. They say that neither burden has been discharged.

On the issue of the acquisition of property otherwise than on just terms

The Appellants argue, that if s 33ZF authorised the making of a CFO, it is properly characterised as a law with respect to the acquisition of property. Therefore, whilst it may be accepted that the Court exercises judicial powers in such a way as to realise the benefits of a chose in action, it does not follow that Parliament may empower the Court to take property rights from one party and confer them on a non-party if thought appropriate or necessary, without complying with s 51 (xxxi) of the *Constitution*. Finally, the Appellants argue that if s 33ZF does not make provision for the acquisition of property on just terms, it is invalid.

The First to Fourth Respondents argue that s 33ZF effects no acquisition of property; the effect of a CFO is not properly characterised as taking away a portion of the fruits of the litigation but puts into place a regime to realise those fruits. The First to Fourth Respondents say that the unstated premise of the Appellants' case is that, for s 33ZF to validly authorise the making of a CFO, it must not only provide for recompense to the funder for the services provided, but must also require the funder to pay back to group members the whole of the amount received by it, or else their property is being acquired otherwise than on just terms.

The First to Fourth Respondents also state that:

1. Section 33ZF is not properly characterised as a law with respect to the acquisition of property;

2. That s 51(xxxi) of the *Constitution* contemplates acquisition by compulsion and that the required element of compulsion is lacking here in circumstances where group members were notified of the CFO application under the relevant procedures, retain the ability to opt out of the proceedings, including if the CFO is not to their liking, and will have the opportunity to object to the final amounts to be paid to the funder as part of any settlement approval under s 33V;
3. Even if s 33ZF is properly characterised as a law with respect to the acquisition of property, the requirement for ‘just terms’ was satisfied.

In reply, here the Appellants argue that s 51(xxxi)’s purpose is to ensure that property is not required to be sacrificed for less than its worth. They say that s 33ZF does not afford just terms for the acquisition effected by a CFO, and that the terms provided by an individual order are irrelevant to the constitutional question. The Appellants also argue in reply that the right to opt out does not mean that any group member made subject to a CFO volunteers to the partial acquisition of their chose in action.

Intervening Parties: Attorney Generals (AG) of the Commonwealth, Victoria, Queensland and Western Australia

The Commonwealth AG makes submissions in support of the Respondents whilst the others primarily concern themselves with matters arising under s 79 of *The Judiciary Act 1903* (Cth).

The Commonwealth AG’s Argument

The Commonwealth AG makes substantially the same argument as the First to Fifth Respondents. However, for the sake of this summary, the Commonwealth AG makes the following submissions:

On the Effect of the Order

The Commonwealth AG argues,

in line with the Fifth Respondent, that CFOs are interlocutory and subject to variation. Similarly to all Respondents, the Commonwealth AG reinforces the argument that CFOs are a vehicle for *realising* of group members’ rights, and that the funder is bound to the terms of a CFO which can only be terminated by a subsequent order of the Court. Conversely, if the funder had separate agreements with each group member, they could withdraw funding on their own volition.

On the power of the Court to make a CFO and the Principle of Legality

The Commonwealth AG argues that the Appellants’ approach to statutory interpretation is not grounded in authority and should not be accepted. The Commonwealth AG submits that in taking an interpretative route, the Appellants are seeking to place a limitation on the exercise of s 33ZF even where the trial judge thinks that such an order is necessary or appropriate to ensure justice in the proceedings.

The Commonwealth AG submits that the principle of legality is unlikely to assist when interpreting powers given to a Court as it will be in tension with principles that “[powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle [which] tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body”. They say that to the extent that the principle of legality is relevant, it should not displace established authority on statutory interpretation. Finally, they submit that even if the principle of legality is engaged, that it does not contradict the scheme in Part IVA as it in evinces a clear intention to adjust the parties’ rights.

On the issue of whether CFOs are ‘appropriate or necessary’:

The Commonwealth AG submits that the Appellants ‘miss the point’ in arguing that CFOs made do not directly assist in the resolution of matters in controversy between the parties. The Commonwealth AG argues that the only express limitation on the terms of s 33ZF is that the Court must think the order appropriate or necessary to ensure that justice is done.

On the matter of judicial power to make CFOs:

The Commonwealth AG submits that CFOs are of the same general character as other interlocutory orders, being orders calculated to facilitate the maintenance of proceedings by placing the proceedings on a stable footing. They argue that:

1. A power does not cease to be judicial merely because it authorises the creation of rights;
2. A power does not cease to be judicial merely because it has no precise historical analogue;
3. The power conferred by s 33ZF is not non-judicial because it is expressed in imprecise terms or involves considerations of policy;
4. It is not a necessary characteristic of judicial power that exercise of the power always conclusively and finally determined rights;
5. An order does not cease to be judicial because it involves a degree of prediction;
6. It is not correct to say that the making of a CFO is not judicial because, in making the order, the Court may determine an amount which is appropriate for the funder to receive as consideration for funding the proceedings.

The Commonwealth AG submits that the Appellants’ submissions on the issue of the incidental power are misconceived as they fail to grapple with the power conferred by s 33ZF, and that s 33ZF ‘must be at least incidental to the exercise of judicial power, given its express terms, which align the power with the contours of what is necessary and appropriate to ensure justice in the proceeding.’

On the issue of s 51(xxxi) of the Constitution

The Commonwealth AG submits that s 33ZF is not a law with respect to the acquisition of property for three reasons:

1. Section 33ZF is a generally expressed power authorising all kinds of orders, the vast majority

of which have nothing to do with property. It is directed at achieving justice in a proceeding.

2. Section 33ZF is a law “directed to resolving competing claims or providing for ‘the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest’”.
3. Section 51(xxxi) does not abstract from all of the Commonwealth’s legislative powers, and the better view is that it has no operation in respect of legislative powers to confer power on a court.

In response to the Appellants’ contention that even to the extent that s 33ZF authorises the court to make CFOs, it is not a law with respect to the acquisition of property otherwise than on just terms

The Commonwealth AG makes four points on this issue:

1. Section 51(xxxi) does not apply to non-compulsory takings of property;
2. Section 51(xxxi) is not engaged on the making of a CFO because any right that is acquired by the funder is not in the nature of property. It lacks permanence and stability, is personal to the funder and does not attach to any particular liquidated sum;
3. This adjustment of rights is effected because it is thought to be necessary and appropriate for doing justice in the proceeding. It is not involving an acquisition of property;
4. The orders of the Full Court are appropriate to ensure that justice is done in the proceedings. This evidences a fair dealing.



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