FEDERAL COURT OF AUSTRALIA

Westpac Banking Corporation v Lenthall [2019] FCAFC 34

|  |  |
| --- | --- |
| Appeal from: | *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422  |
|  |  |
| File number: |  |
|  |  |
| Judges: | **ALLSOP CJ, MIDDLETON AND ROBERTSON JJ** |
|  |  |
| Date of judgment: | 1 March 2019 |
|  |  |
| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) – where primary judge determined making of common fund order appropriate to do justice in the proceedings – whether s 33ZF authorises the Court to make common fund order –– relevant considerations – width and purpose of s 33ZF – nature and purpose of common fund order – principle of legality – construction of Part IVA**CONSTITUTIONAL LAW – JUDICIAL POWER** – whether power to make common fund order part of or incidental to exercise of judicial power by the Court – conferral of power by Parliament – capacity of the Court to balance competing interests and rights – incidental resolution of legal rights **CONSTITUTIONAL LAW – ACQUISITION ON JUST TERMS** – whether common fund order amounts to acquisition of property other than on just terms – nature of power – order directed toward appropriate reward for funder upon bearing of costs and risk – whether nature of benefit to group members proprietary **PRACTICE AND PROCEDURE** – whether primary judge erred in exercise of discretion  |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15A*Australian Constitution* s 51(xxxi), 71, 76, 77*Federal Court of Australia Act 1976* (Cth) ss 5, 21, 22, 23, 33E, 33V, 33X, 33Z, 33ZA, 33ZB, 33ZF, 33ZJ *Re-establishment and Employment Act 1945-1952* (Cth) ss 27, 28 |
|  |  |
| Cases cited: | *Airservices Australia v Canadian International Airlines Ltd* [1999] HCA 62; 202 CLR 133*Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; 47 CLR 1*Attorney-General (Cth) v Schmidt* [1961] HCA 21; 105 CLR 361*Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; 233 CLR 542*Attorney-General (NT) v Emmerson* [2014] HCA 13; 253 CLR 393*Australian Tape Manufacturers* *v Commonwealth* [1993] HCA 10; 176 CLR 480*Bank of New South Wales v Commonwealth* [1948] HCA 7; 76 CLR 1*Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334*Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330; 343 ALR 476*Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527*Campbells Cash and Carry v Fostif Pty Ltd* [2006] FCA 41; 229 CLR 386*CMA CGM SA v The Ship ‘Chou Shan’* [2014] FCAFC 90; 224 FCR 384*Coco v The Queen* [1994] HCA 15; 179 CLR 427*Cominos v Cominos* [1972] HCA 54; 127 CLR 588*Courtney v Medtel Pty Limited* [2002] FCA 957; 122 FCR 168*Davis v Insolvency and Trustee Service Australia* [2010] FCAFC 141*Falcke v Gray* (1850) 4 Drew 651; 62 ER 250*Femcare Ltd v Bright* [2000] FCA 512; 100 FCR 331*Fisher v Fisher* [1986] HCA 61; 161 CLR 438*Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; 63 NSWLR 203*Georgiadis v Australia and Overseas Telecommunications Corporation* [1994] HCA 6;179 CLR 297*Harris v Caladine* [1991] HCA 9; 172 CLR 84*Health Insurance Commission v Peverill* [1994] HCA 8; 179 CLR 226*Hodges v Sandhurst Trustees Limited* [2018] FCA 1346*ICM* *Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; 240 CLR 140*Impiombato v BHP Billiton Limited* [2018] FCA 1272*Jackson v Sterling Industries Ltd* [1987] HCA 23; 162 CLR 612*Johnstone v HIH Limited* [2004] FCA 190*JT International SA v Commonwealth* [2012] HCA 43; 250 CLR 1*Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2010] HCA 2; 240 CLR 409*McMullin v ICI Australia Operations Pty Ltd (No 6)* [1998] FCA 658; 84 FCR 1*Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; 228 CLR 566*Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1*Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1*Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; 245 FCR 191*Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9; 179 CLR 155*Nicholas v The Queen* [1998] HCA 9; 193 CLR 173*Nintendo Co Ltd v Centronics Systems Pty Ltd* [1994] HCA 27; 181 CLR 134*Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199*Peacock v Newtown Marrickville and General Co-operative Building Society No.* *4 Limited* [1943] HCA 13; 67 CLR 25*Pearson v State of Queensland* [2017] FCA 1096*Perera v GetSwift Limited* [2018] FCAFC 202*Perera v GetSwift Limited* [2018] FCA 732; 127 ACSR 1*Potter v Minahan* [1908] HCA 63; 7 CLR 277*Precision Data Holdings Ltd v Wills* [1991] HCA 58; 173 CLR 167*Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; 152 CLR 328*Queen Victoria Memorial Hospital v Thornton* [1953] HCA 11; 87 CLR 144*R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12; 237 CLR 603*R v Davison* [1954] HCA 46; 90 CLR 353*R v Spicer; Ex parte Australian Builders’ Labourers’ Federation* [1957] HCA 81; 100 CLR 277*R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; 123 CLR 361*Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342*Re Tracey; Ex parte Ryan* [1989] HCA 12; 166 CLR 518*Smith v ANL Ltd* [2000] HCA 58; 204 CLR 493*Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; 328 ALR 375*The National Bolivian Navigation Company and Others v William Millar Wilson and Others* (1880) 5 App Cas 176*The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Inc.* [1994] HCA 54; 181 CLR 404*Thomas v Mowbray* [2007] HCA 33; 233 CLR 307*United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2007] FCAFC 115; 163 FCR 183*Wong v Silkfield Pty Ltd* [1999] HCA 48; 199 CLR 255 |
|  |  |
| Date of hearing: | 4-5 February 2019 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 139 |
|  |  |
| Counsel for the Applicants: | A Leopold SC with S Free SC and A Lyons |
|  |  |
| Solicitor for the Applicants: | Allens |
|  |  |
| Counsel for the Respondents: | J Gleeson SC with W Edwards and Z Heger |
|  |  |
| Solicitor for the Respondents: | Shine Lawyers |
|  |  |
| Counsel for the Intervener: | N Hutley SC with B Lim and S Tame |
|  |  |
| Solicitor for the Intervener: | Roberts & Partners Lawyers |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1880 of 2018 |
|   |
| BETWEEN: | WESTPAC BANKING CORPORATION First ApplicantWESTPAC LIFE INSURANCE SERVICES LIMITED Second Applicant |
| AND: | GREGORY JOHN LENTHALLFirst RespondentSHARMILA LENTHALLSecond RespondentSHANE THOMAS LYE Third Respondent**KYLIE LEE LYE**Fourth Respondent |
|  | JUSTKAPITAL LITIGATION PTY LIMITED Intervener |

|  |  |
| --- | --- |
| JUDGES: | ALLSOP CJ, MIDDLETON AND ROBERTSON JJ |
| DATE OF ORDER: | 1 march 2019 |

THE COURT ORDERS THAT:

1. Leave be granted *nunc pro tunc* for JustKapital Litigation Pty Limited to intervene in the application for leave to appeal and appeal.
2. Leave be granted to appeal on the grounds set out in the notice of appeal contained in the Combined Appeal Book at pp 90–93, dispensing with the need for the filing of any further document.
3. The appeal be dismissed.
4. The appellants pay the respondents’ costs of the application for leave to appeal and of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This is an application for leave to appeal and the appeal should leave be granted from orders made by a judge of the Court providing for what is referred to as a common fund order: *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422. For the reasons that follow leave to appeal should be granted and the appeal dismissed with costs.
2. Pursuant to agreement between the Chief Justice and the Chief Justice of New South Wales and the President of the Court of Appeal of New South Wales it was agreed to hear this matter and a matter before the Court of Appeal (*BMW Australia Ltd v Owen Brewster* 2018/00332812) at the same time in the same courtroom. The issues in the two matters overlapped considerably; and, given the importance of the questions, in particular of the Constitutional questions, it was thought convenient for the administration of justice that both Courts have the advantage of written and oral argument of counsel on the same occasion. Each Court would, of course, decide the matter before it according to the views of the judges constituting the Court. One party, BMW, raised concerns about the procedure and, in particular, objected to any discussion among or between judges from the two Courts about the issues. In light of this, a protocol was announced at the commencement of the hearing of the two matters that dealt with such matters as judges from either Court asking any counsel questions in argument. Each Court had the written submissions relied on in both matters. To the extent that evidence was relevant it was read by affidavit in each proceeding. The Courts informed the parties that, without the consent of the parties, the members of the Courts would not discuss the substance of the arguments or their views thereon with the judges from the other Court, or exchange drafts. No argument was heard on this question and whether this was a necessary or proper precaution. It is appropriate to say, however, that (subject to being persuaded to the contrary) we would not have considered that the kinds of considerations discussed in *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342 (see especially the judgment of Mason J at 350–352) would have made such communications in any way inappropriate. As Mason J said at 351, a judge may consult another judge of his or her court who has no interest in the matter or other court personnel whose function is to aid him or her in carrying out his or her judicial responsibilities. In an integrated federal judicature, with two benches hearing two matters with overlapping issues in federal jurisdiction, it would be passing strange if a principle underpinning the fair, impartial and due administration of justice prevented discussions between the members of the Courts involved in deciding the cases, having just heard all the arguments in the same courtroom, as if the members of the bench of the other Court were strangers or third parties having private communications with the Court. It would go without saying that if any issue raised in such discussions had not been adequately ventilated, natural justice might require that some step be taken (just as it would if judges of the same court were to consider such a new issue to be relevant).
3. By proceedings under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**the Act**) commenced in October 2017, Gregory John Lenthall and three others as representative applicants sue, on behalf of group members, Westpac Banking Corporation and Westpac Life Insurance Services Ltd (**Westpac**). The nature of the proceedings was sufficiently described by the primary judge at [7] of his reasons as follows:

The action seeks to vindicate the individual claims of Mr and Mrs Lenthall and also Mr and Mrs Lye. These applicants also represent persons (**group members**) who, on or after 12 October 2011, were (a) given advice by Westpac Banking Corporation, through its financial advisers in Westpac Financial Planning (including BT Advice, St George Financial Planning, Bank of Melbourne Financial Planning or Bank SA Financial Planning), on insurance and the premiums payable; and (b) obtained, from Westpac Life, policies of insurance by reason of that advice. Amongst other things, it is alleged that in providing advice, the relevant financial advisors breached their fiduciary duties to group members along with the statutory best interests and no conflict obligations. Put simply, the applicants say that those obligations, among other things, required Westpac Banking Corporation and the Westpac Financial Planning financial advisors to advise group members about policies of insurance offered by third party insurers where those policies were equivalent or better and were available at a lower premium price. All allegations of breach are denied and the proceeding is being defended.

1. The applicants had entered a funding agreement with JustKapital Litigation Pty Limited (**JKL**). At the first case management hearing an application for a common fund order was foreshadowed. By March 2018, the applicants were preparing what was to be the contested application. A notice was sent out to all group members in the form set out in [9] of the primary judge’s reasons.
2. The application was heard in May 2018, by which time no reasoned objection had been received in respect of the making of the order. The content of the order will be examined in due course, but it suffices to say that its essential element was that it made all members of the group liable for a proportionate share not only of legal costs of the proceedings but also of the funder’s return by way of commission. Up to the point of making the order only a relatively small number of group members had entered the funding agreement with JKL.
3. The primary judge considered the evidence and made relevant findings at [14]–[24] of his reasons. JKL was selected as the funder (one other funder having been approached) after negotiation of the funding commission (30%). There are no other funders apparently interested in the proceedings. Likely total legal costs disclosed in the retainer agreement are between $6.5 million to $9 million. The funder has spent $1.2 million to date on legal costs. Whilst it is difficult to be precise, there are in excess of 80,000 group members. Each claim might be worth up to $15,000.
4. In [17]–[24], the primary judge helpfully and insightfully discussed the market for litigation funding and its relevance (in a way that attracted no critical submission on appeal), as follows:

17 There was no evidence filed on behalf of the applicants or by JKL which sought to justify, by way of any detailed economic analysis, the reasonableness of the return that would be received by JKL in the event that the common fund order was made and the applicants were successful. Rather, the approach of the applicants was to point to “market” rates for litigation funding, as revealed in a number of cases where settlement approvals have been made, or where the Court has made common fund orders.

18 This sort of empirical data, although useful, has obvious limitations. Any interested observer of the market for litigation funding in Australia, would be aware that the market is in a state of flux and is dynamic. This dynamism has two facets. The *first* is the increasing number of funders coming into the litigation funding market. The *second*, which no doubt is related to the first, is the apparent downward pressure on funding rates.

19 As noted below, some of these aspects of the changing litigation funding market were addressed in the evidence and they were also the subject of extended discussion during the course of submissions. The evolving nature of the market means that the rates historically charged for litigation funding must be approached with some degree of caution, to the extent that they are relied upon as reflecting contemporary market conditions. The further caveat is that funding rates are influenced by risk. Like an insurance policy, the amount to be charged for the provision of services (including adverse costs protection) is, or at least rationally should be, affected by risk of the payment of adverse costs. Again, although there is some use that can be made of funding fees charged in other class actions, there is a risk of decontextualisation. The amount to be charged in an individual case is not only a function of macro market forces and prevailing funding rates, but also the subjective assessment of risk of a bespoke funding proposal.

20 The significant changes in the funding market were illustrated by evidence filed on behalf of Westpac. A solicitor for Westpac, Mr Guy Stuckey-Clarke, swore an affidavit which, among other things, noted that in the five competing AMP class actions (now being dealt with by the Supreme Court of New South Wales: see *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143), the Maurice Blackburn class action secured funding from International Litigation Funding Partners Pte Ltd at a funding commission rate of 12.5% of what I infer is the gross resolution sum. The Quinn Emanuel class action secured funding from Burford Capital at a funding commission rate of 10% of what I again infer is the gross resolution sum (further, Quinn Emanuel has agreed to undertake this work on a speculative basis). The Slater & Gordon class action secured funding from Therium at a funding rate of 10% of *net* recoveries with Slater & Gordon working on a speculative basis). The other two AMP class actions (by Shine Lawyers, run by Ms Antzoulatos, and IMF) have apparently undertaken to charge a funding commission rate no higher than that approved by the Court.

21 Additionally, evidence was also adduced that in none of the AMP class actions (or indeed in competing proposals dealt with in *GetSwift*) was there a provision for an extra 5% commission for each appeal, as there is in the present proposal (see the proposed Funding Terms, cl 6(c)).

22 From this evidence and the history of settlement approvals over the last decade, it is possible to argue that abnormally high returns have likely been enjoyed by funders in securities class actions in recent times. What is plain is that the “business model” has proven to be a profitable one; particularly given that no liability to pay adverse costs has ever been triggered in a common form securities class action, and that no such cases have proceeded to a final determination. Such a conclusion would be consistent with the observations of Professor Michael Legg in “A Critical Assessment of the Shareholder Class Action Settlements - The Allco Class Action” (2018) 46 *Australian Business Law Review* 54. Professor Legg notes (at 64) that the state of the current litigation funding market is unclear and “the continued entry of new funders may suggest that above normal returns are being earned” and that, consequently, “the current approach to determining a litigation funder’s fee [by reference to past headline rates] may create concern”: see also *GetSwift* at 63 [242] and *Australian Executor Trustee Ltd v Provident Capital Ltd* [2018] FCA 439 at [25]-[26] (Rares J).

23 What is particularly notable about recent developments (but hardly surprising) is that when there is real competition for funding, the rates charged have reduced considerably from those which prevailed in similar cases at a more embryonic stage of the development of the market for funding securities class actions.

24 Drawing these threads together, it seems to me that I should proceed to determine this application on the basis that the competition in the funding market for securities class actions is now far more intense than previous times and that the funding rates previously enjoyed by funders no longer reflect the contemporary market. For other types of commercial class actions, the picture is not quite so clear. For reasons that I will come to, however, these conclusions do not assume decisive importance in determining whether or not the present application should be granted.

1. At [25]–[29], the primary judge discussed the cases that had held that the Court had power based on s 33ZF of the Act to grant a common fund order: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; 245 FCR 191; *Pearson v State of Queensland* [2017] FCA 1096; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527; *Impiombato v BHP Billiton Limited* [2018] FCA 1272; and *Hodges v Sandhurst Trustees Limited* [2018] FCA 1346. (To these there may be added *Perera v GetSwift Limited* [2018] FCAFC 202.)
2. The primary judge referred to the findings of the Full Court in *Money Max* relevant to his decision that included the following: the funder having sufficient resources to meet its obligations; any funding rate being reasonable; no conflict issue arising; the legal costs in complex class actions being considerable; and litigation funders being generally unprepared (without a common fund order) to fund closed class actions. He also referred to the considerations in *Pearson* of relevance, including group members being informed of the order and being given an opportunity to opt out; and the order eliminating different interests between group members.
3. At [29], the primary judge adopted what he had said in *Perera v GetSwift Limited* [2018] FCA 732; 127 ACSR 1 at [244]–[246]:

Unlike in *Caason* and *Hodges v Sandhurst Trustees Limited*, in *Money Max,* *Pearson* and *Impiombato*, common fund orders were made at a relatively early stage of the proceedings (although unlike in *Money Max*; in *Pearson* and *Impiombato*, a rate was set). A similar approach to *Pearson* was taken in *GetSwift* where the following was noted at 64 [244]-[246]:

Despite some earlier hesitancy in the Court making common fund orders at the commencement of a proceeding (rather than at the settlement stage), there is nothing which prevents an order being made sooner rather than later. Indeed in [*McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd* [2017] FCA 947] at [22], Beach J noted that whether such an order should be granted and its terms needed, in the circumstances of that case, to be dealt with at “*an early point*”. It was for this reason, among others, that it was necessary to resolve the appropriate constitution of the competing class actions before dealing with common fund questions. Moreover, if the possibility of a ‘windfall’ can be removed, the basis for the hesitancy in setting fund rates at the commencement of a proceeding disappears.

To my mind, provided the potential ‘windfall’ problem is minimised, there are significant advantages of making a common fund order and putting in place a funding regime sooner rather than later. *First*, it has the advantage of there being some certainty (subject to later variation) prior to the time being fixed for opt out. At the time of opt out, group members can make an informed decision, including as to whether they consider that the proposed funding regime is appropriate in all the circumstances. *Secondly*, it is already inherent in setting funding rates for different actions that there needs to be an assessment of risk by the funder. In this case the differing common fund proposals presumably reflect that assessment of risk. An assessment as to whether it is likely that the funder will have to pay adverse costs orders (an eventuality, it will be recalled, that has not, as yet, occurred) which would include a subjective assessment of the prospects of success of the case and the likelihood of settlement, should be an *ex ante* rather than an *ex post* analysis. The risk of hindsight bias is real when one is dealing with a common fund application at the conclusion of a case.

It is notable that Murphy J in *Pearson* made orders early on during the course of proceedings in circumstances where group members would be informed of the requirement to pay the commission *before* they decided whether to opt out and which would allow members to opt out if they were unhappy with the order. Making the order at this time also avoided wasted costs associated with book building which would ultimately have been deducted from the possible recoveries, and the waste of time and effort that would have been needed to explain the details of funding arrangements against a backdrop of uncertainty as to what the Court would eventually do.

1. At [30]–[57], the primary judge dealt in detail with Westpac’s opposition to the order. It is unnecessary at this point to explain the primary judge’s approach. The primary attack on appeal was as to the power of the Court to make the order (about which only a formal submission was made to the primary judge), a question which the primary judge (correctly) concluded as having been resolved in *Money Max*. There are a number of aspects (assuming the Court has power) of the exercise of the power by the primary judge said to reveal error. We will deal with these in due course.
2. Before dealing with the arguments on appeal it is appropriate to make some preliminary remarks about representative proceedings under Pt IVA of the Act and litigation funding.

## Part IVA of the Act and litigation funding

1. It is unnecessary to trace in any great detail the origins of Pt IVA of the Act. It was the statutory response to the recommendations of the Australian Law Reform Commission Report on Grouped Proceedings in the Federal Court (Report No 46). Representative proceedings originated in Chancery and, prior to the introduction of Pt IVA, found their place in the rules of most Australian jurisdictions: see div 9.2 of the *Federal Court Rules 2011* (Cth) for the successor to Order 6 rule 13 of the earlier Federal Court Rules at the time of the ALRC Report. The origins of representative proceedings in Chancery practice was discussed by the High Court in *Wong v Silkfield Pty Ltd* [1999] HCA 48; 199 CLR 255 at 261–263 [13]–[17]; and in *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1 at 29–30 [33]–[34].
2. Thus, Pt IVA can be seen to have equitable roots, making the approach of a court of equity to questions of the administration of representative proceedings relevant to consider in working through the meaning and operation of Pt IVA.
3. The Court, as a court of law and equity (s 5(2) of the Act), was clothed with power, from its establishment in that character and the provisions of the Act, in particular ss 21, 22 and 23, to make any appropriate order in a matter within its jurisdiction that a court of equity could make in similar or like circumstances. As a court of equity, the Court, in appropriate circumstances, will take cognizance of, and apply, fundamental equitable doctrines and principles in the proper and just execution of its jurisdiction.
4. One of the underlying maxims of equity that informs the shape and direction of equitable principle and the manner in which a court of equity will exercise power in appropriate circumstances is that equity is equality, or equality is equity. One can see the maxim informing principles such as contribution, marshalling, hotchpot, the liability to contribution of co-trustees, and rateable distribution of assets between different types of debt: see generally Heydon, Leeming and Turner, *Meagher, Gummow and Lehane’s Equity: Doctrine and Remedies* (LexisNexis, 5th ed, 2014) at 84–87 [3-130]ff. As the authors say at p 87, equity has an aversion to capricious results; see also Young, Croft and Smith, *On Equity* (Lawbook Co, 2009) at 172–175; and Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (Little, Brown and Company, 6th ed, 1853) at 59–60 [64(f)]. The maxim is an expression of the general object of law and equity to distribute property and losses in proportion to the claims and liabilities of the parties.
5. At the time of the introduction of Pt IVA into the Act (1991) the funding of legal proceedings by third parties was known. It had been the subject of discussion in the ALRC Report: at 128–130 [315]–[319]. By 2006, following the decision of the High Court in *Campbells Cash and Carry v Fostif Pty Ltd* [2006] FCA 41; 229 CLR 386 that litigation funding was not necessarily contrary to public policy, the funding of litigation could legitimately be seen as part of a facilitation of access to justice: see the comments of Mason P in *Fostif* in the Court of Appeal: [2005] NSWCA 83; 63 NSWLR 203 at 227 [105], referred to by Gummow, Hayne and Crennan JJ in the High Court: 229 CLR 386 at 425 [65].
6. To the extent that the presence of a funder for litigation can be seen to facilitate the bringing forward of legitimate claims, in particular where the claimants are numerous and the claims small or modest, such can be seen to conform with, and not be antithetical to, the evident statutory policy of Pt IVA of increasing access to justice. Thus, in the circumstances of the clear refusal of the High Court to view litigation funding as necessarily against public policy, and the power (and obligation) of the Court to ensure that its processes are not abused, litigation funding, in an appropriate context, can be viewed as an expense appropriate to be incurred for the vindication and realisation of the rights of the applicants and group members in proceedings under Pt IVA.
7. Turning briefly to the claims here, one can easily conclude from the nature of the claims set out at [3] above, their number, and their modest individual worth that, first, the individual prosecution of the claims would be uneconomic; and, secondly, to persuade enough members to enter a funding agreement with JKL in order that it is economic for JKL to fund the proceedings would be both costly and problematic. The primary judge recognised this when he drew the following conclusion at [63] of his reasons:

… Without an appropriate common fund order being made, a particular injustice would result, being the likely inability, absent funding, of the group members to have their claims advanced in this class action.

## The common fund order here

1. The orders made by the primary judge involved funding terms set out in an annexure to the orders. The orders and the funding terms have certain characteristics. First, the terms provide, in section C cl 4, for the pooling of any settlement or judgment obtained by the applicants or group members. This is the pooling of the realisation or fructifying of the rights of action of the applicants and group members who have not opted out.
2. Secondly, paragraph 1 of the orders, section C cl 5 and section D cl 6 create an order of priority out of the common pool:

Order 1:

Pursuant to ss 23 and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) and rule 1.32 of the *Federal Court Rules 2011* (Cth) (**FCR**), the Applicants and group members shall pay from any Resolution Sum (as defined in the Funding Terms being Annexure “A” to these orders) the amounts referred to in subclauses 6(a) to (c) of the Funding Terms, prior to any distribution to group members, in accordance with the Funding Terms.

Sections C and D, clauses 5 and 6:

5. Subject to any Court order, the Lawyers will:

(a) first, pay to the Funder out of the account referred to in paragraph 3 above all payments referred to in paragraph 6 below;

(b) second, pay to themselves any unpaid portion of the Legal Costs and Disbursements (including any uplift fee payable on “Lawyers Professional Fees” pursuant to the Legal Costs Agreement) and any amounts in relation to GST but not exceeding such amounts as the Court determines to be fair and reasonable in all the circumstances;

(c) third, pay all Administration Expenses approved by the Court; and

(d) fourth, distribute the balance to the Group Members on a pro rata basis by reference to the claims of the Applicants and all Group Members in accordance with any distribution scheme approved by the Court.

6. Upon Resolution, the Funder or its nominees shall be paid the following amounts from any Resolution Sum, prior to any distributions to the Lawyers, Applicants and Group Members:

(a) an amount equal to the total moneys paid by the Funder pursuant to paragraph 2(a), (c) and (e) above, whether paid before or after the date of these orders; and

(b) an amount, as consideration for the funding of the Proceeding being the lesser of (i) three times the amount referred to in paragraph 6(a) above; or (ii) 25% of the net Resolution Sum (being the Resolution Sum minus the amount referred to in paragraph 6 (a) above), as approved by the Court; and

(c) if the Funder funds an appeal or the defence of an appeal, or any further appeal or the defence of any further appeal, a further amount expressed as the lesser of a multiple of legal costs or a percentage of the net Resolution Sum at a rate approved by the Court, in respect of each appeal so funded,

but not exceeding any such amounts as the Court determines to be fair and reasonable in all the circumstances.

1. The phrases “Resolution Sum” and “Settlement” were defined in the funding terms as follows:

“**Resolution Sum**” means the amount or amounts of money for which (a) the Claims and the claims of Group Members are Settled, or (b) judgment is given in favour of the Applicants and/or the Group Members in the Proceeding, or in any subsequent proceeding brought by any Group Member against the Respondents in reliance on the findings made in any judgment in the Proceeding, including (but not limited to) any interest and costs recovered pursuant to a Costs Order or by agreement.

“**Settlement**” means any settlement, compromise, discontinuance or waiver, except where approval of the Court is required, in which case it means any settlement, compromise, discontinuance or waiver with the approval of the Court and "Settle," “Settles” or “Settled” shall be construed accordingly.

1. This order of priority makes clear that the funder’s expenses, including legal costs, and commission, are one of the burdens to be borne by the common pool. The commission is set out in section D cl 6, especially cl 6(b) as the lesser of three times the legal costs and reasonable fees of the costs referee and 25% of the **net** Resolution Sum being the Resolution Sum less the legal costs and the reasonable fees of the costs referee. Importantly, however, that commission whilst set, is subject to variation given the overriding control seen in the last clause of section D cl 6:

… but not exceeding any such amounts as the Court determines to be fair and reasonable in all the circumstances.

1. To the force of these words can be added the supervisory authority of the Court under Pt IVA, to which we will return.
2. Thirdly, the funding terms can be seen as treating the funder as a service provider to the group, its costs and commission being seen as a common responsibility of the applicants and the group from the realisation of the claims of the applicants and group members.
3. Fourthly, by Order 2, JKL, the solicitors and the applicants each undertake to be bound by the funding terms:

Order 1 is subject to the undertaking by JustKapital Litigation Pty Limited (ACN 168 872 606), the Applicants, and Shine Lawyers to each other and to the Court that they will comply with their obligations under the Funding Terms, such undertaking being in the terms of Annexure C.

1. That undertaking by JKL removed the right of JKL under the previous funding agreement (in which commission was set at 30% of gross settlement on judgment sum) to withdraw from the funding arrangement, giving 14 days’ notice. This can be seen to give the proceedings a stable base of funding. By section B cl 2 of the funding terms, JKL agreed as follows:

2. The Funder must fund the Project Costs of the Applicants and Group Members, by:

(a) paying to the Lawyers the Legal Costs and Disbursements charged by the Lawyers for all Legal Work in accordance with the Funding Agreements and the Legal Costs Agreement;

(b) paying the costs of any ATE insurance and / or any deed of indemnity obtained by the Funder covering any Adverse Costs Order;

(c) paying any Costs Order which the Court makes in the Proceeding against the Applicants or any Group Member in favour of the Respondents, in so far as those costs were incurred either before or during the Funding Period;

(d) providing any security for costs in the Proceeding, in the form that the Court orders, or in the absence of any order, in such other form as the Funder determines and the Respondents accept; and

(e) paying the reasonable fees of the Costs Referee.

1. In the resolution of the appeal, it is important to recognise that aspects of the arguments turn on how one characterises the nature and operation of the common fund order. Westpac emphasises the existing rights of action or claims of group members as property of those persons which is being interfered with, or lessened in value, or burdened or acquired by the non-consensual order that gives a third party, JKL, valuable rights in or to that property. The applicants (to the proceedings) and JKL emphasise that the order, looked at in its entirety, is a regime concerning the realisation or fructifying of rights of action that are otherwise uneconomic to litigate and so virtually valueless. From this perspective, what is occurring is not to be seen as the imposition on, or interference with, or acquisition of, valuable rights, but the provision of a stable funding arrangement, at a proper fee as supervised by the Court, that will facilitate the vindication and realisation of the claims of applicants and group members with a sharing of the burden of legal and funding costs reasonably and appropriately expended for that vindication and realisation.

## Westpac’s submissions

1. Westpac submitted as follows:
2. first, that on their proper construction neither s 23 nor s 33ZF authorised the Court to make a common fund order, either at all, or prior to settlement of, or judgment in, the proceeding (the construction argument);
3. secondly, the making of a common fund order was not an exercise of judicial power, or an appropriate incidental power to judicial power (the judicial power argument);
4. thirdly, to the extent that the making of a common fund order is an exercise of judicial power authorised by s 23 or s 33ZF, such provisions are to that extent a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the *Constitution*, which does not provide “just terms” (the acquisition argument); and
5. fourthly, if there was power to make the order, the exercise of the power by the primary judge miscarried for any one or more of three reasons (the discretion argument).
6. Westpac adopted the submissions of the applicant in the Court of Appeal (BMW) that were heard in the same courtroom at the same time as these proceedings in the Court. We propose to express Westpac’s submissions in a way that will include any relevant development or nuance from the way BMW put it, without always separately identifying the source of the terms of the submission.

### The construction argument

1. Westpac’s submissions involve the consideration of Pt IVA as a whole, and in particular aspects of ss 33E, 33V, 33X, 33Z, 33ZA, 33ZB, 33ZF and 33ZJ. Those provisions are in the following terms:

**33E Is consent required to be a group member?**

(1) The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person.

(2) None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so:

(a) the Commonwealth, a State or a Territory;

(b) a Minister or a Minister of a State or Territory;

(c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or

(d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.

**33V Settlement and discontinuance--representative proceeding**

(1) A representative proceeding may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

**33X Notice to be given of certain matters**

(1) Notice must be given to group members of the following matters in relation to a representative proceeding:

(a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);

(b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;

(c) an application by a representative party seeking leave to withdraw under section 33W as representative party.

(2) The Court may dispense with compliance with any or all of the requirements of subsection (1) where the relief sought in a proceeding does not include any claim for damages.

(3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.

(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 33V must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates.

**33Z Judgment – powers of the Court**

(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:

(a) determine an issue of law;

(b) determine an issue of fact;

(c) make a declaration of liability;

(d) grant any equitable relief;

(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;

(g) make such other order as the Court thinks just.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

(4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to:

(a) the manner in which a group member is to establish his or her entitlement to share in the damages; and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

**33ZA Constitution etc. of fund**

(1) Without limiting the operation of subsection 33Z(2), in making provision for the distribution of money to group members, the Court may provide for:

(a) the constitution and administration of a fund consisting of the money to be distributed; and

(b) either:

(i) the payment by the respondent of a fixed sum of money into the fund; or

(ii) the payment by the respondent into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and

(c) entitlements to interest earned on the money in the fund.

(2) The costs of administering a fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs.

(3) Where the Court orders the constitution of a fund mentioned in subsection (1), the order must:

(a) require notice to be given to group members in such manner as is specified in the order; and

(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish his or her entitlement to the payment; and

(c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and

(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

(4) The Court may allow a group member to make a claim after the day fixed under paragraph (3)(c) if:

(a) the fund has not already been fully distributed; and

(b) it is just to do so.

(5) On application by the respondent in the representative proceeding after the day fixed under paragraph (3)(d), the Court may make such orders as are just for the payment from the fund to the respondent of the money remaining in the fund.

**33ZB Effect of judgment**

A judgment given in a representative proceeding:

(a) must describe or otherwise identify the group members who will be affected by it; and

(b) binds all such persons other than any person who has opted out of the proceeding under section 33J.

**33ZF General power of Court to make orders**

(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.

**33ZJ Reimbursement of representative party's costs**

(1) Where the Court has made an award of damages in a representative proceeding, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

(3) On an application under this section, the Court may also make any other order it thinks just.

1. Central to the debate is the width of operation of s 33ZF. It stands beside another provision, s 23, which has been part of the Act since its first promulgation. Section 23 is in the following terms:

**23 Making of orders and issue of writs**

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

1. Westpac, at the outset of its submissions, stressed the extraordinary form of the order as one depriving people of part of the fruits of their choses in action in order to make a payment to a third party, without reference to any existing obligation or entitlement between them. Further, it was an order involving a role of price setting. Three features of the orders were of significance for the construction (and validity) of s 33ZF: first, the deprivation of group members’ rights; secondly, the involvement of the Court in fixing a fair return for funding; and thirdly, the creation of new rights, rather than enforcement of existing rights.
2. The deprivation of property rights engaged, it was submitted, the principle of legality: clear words were required to reveal an intention to interfere with (by altering, modifying and curtailing) common law rights, and rights of property. Further, a construction which authorises the least interference with private property rights would be favoured: see generally, *Potter v Minahan* [1908] HCA 63; 7 CLR 277 at 304; *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; 152 CLR 328 at 341; *Coco v The Queen* [1994] HCA 15; 179 CLR 427 at 436–438; *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12; 237 CLR 603 at 608 [5] and 619 [42]–[43]; *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2010] HCA 2; 240 CLR 409 at 420–21 [32]; and *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; 328 ALR 375 at 389 [68].
3. An example of the necessary words for interference with existing property rights was said to be s 33E, which indicated that no consent was required from group members to be within representative proceedings.
4. Were such an “unusual judicial task” (using the words of the primary judge) as providing for a commercial return to a funder intended to be given to the Court, it would be expected that the relevant provision be accompanied by specific practical criteria by reference to which the task could be undertaken. The lack of these express objective criteria indicates that the task was not intended to interfere with common law rights or property rights.
5. Westpac submitted that the phrase “appropriate or necessary to ensure that justice is done in the proceedings” involves a hendiadys; that “appropriate” encompasses “necessary”; and that “ensuring justice” must be within the precise metes and bounds of the proceeding – requiring the identification of the particular issue or problem in the proceeding that needs to be addressed. The work of s 33ZF, it was submitted, was far more limited than the promotion or facilitation of proceedings or the provision of certainty to the funder and a stable funding arrangement. Such latter considerations are divorced from the judicial power to resolve controversies.
6. It was submitted, at least inferentially, that it would be unethical to commence proceedings that may not be continued without a common fund order.
7. Section 33ZF should be seen in the context of the whole of Pt IVA. A consideration of the balance of the Part, it was submitted, would see s 33ZF as not empowering this kind of order. Other provisions of the Part in dealing with the Court’s powers on settlement or at judgment deal with powers that interfere with rights of group members. Section 33ZF as a general power should not be construed as extending to the same matters as dealt with in more specific provisions: *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; 47 CLR 1 at 7; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; 228 CLR 566 at 589 [59].
8. Particular reliance was placed on the well-known passage from the reasons of Gavan Duffy CJ and Dixon J in *Anthony Hordern* at 7:

When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

1. The cases applying *Anthony Hordern* were discussed by Gummow J and Hayne J in *Nystrom*. Westpac relied on their Honours’ summary of the principle at 589 [59]:

*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the “same power”, or are with respect to the same subject-matter, or whether the general power encroaches upon the subject-matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.

(Footnotes omitted)

1. In particular, it was submitted that s 33V empowers the Court to make such orders as are just with respect to distribution of any money paid under a settlement or paid into court. The exercise of this power is confined to approval of a settlement, which approval must be notified to group members: s 33X(4). Westpac submitted that if the order can be made under s 33ZF, it can be made (even if it was not here) without notification to group members, yet it has the capacity (unless varied) to affect settlement and sums due in a substantial way. In that way it runs counter to s 33X(4).
2. Similarly, it was submitted, there is specification of powers for the payment and distribution of moneys to group members upon a judgment: s 33Z(2). The phrase “award of damages” in s 33Z encapsulated, it was submitted, any payment of money. Further, s 33ZA also provides in detail for constitution of a fund and for distribution of money to group members, and for what must be borne by the fund prior to such distribution.
3. Section 33ZJ contains another express interference with the rights of group members in that the Court is empowered to order costs, reasonably incurred by the representative party not recovered from a respondent, to come out of the common fund of damages.
4. Thus it was submitted that s 33ZF, if it supported a common fund order, would cut across these specific provisions dealing with distribution of money, and it would cut across Pt IVA generally in that, as an opt out model, it interferes with rights of group members that involve mandatory procedures for notification and the right to opt out: s 33X and with the careful specification in s 33ZB as to what rights are affected. It would be, it was submitted, inconsistent with a carefully drawn statutory scheme intended to cover the universe of the distribution of money to construe s 33ZF as authorising a court without practical criteria or mandatory notification to make an order that pre-emptively reallocates part of the proceeds to a third party.
5. The position of s 33ZF under the heading “Miscellaneous” also indicated, it was submitted, that the provision was not intended to encompass such a major aspect of the distribution of moneys. Section 33ZF was to be seen as a “gap filler” and there was no gap to fill here.
6. Westpac submitted that the express powers in Pt IVA deal with the universe of possibilities in distributing the funds available from settlement, judgment and payment into court, as can only be dealt with when the fund comes into existence and not pre-emptively. If s 33ZF can support a common fund order it would go to the heart of the subject matter of distribution and deductions. It was a matter of some emphasis in the submissions that when the final consideration of the matter is given and the order confirmed or varied it would be made under s 33V or s 33ZA, being the true home of the source of power for these kinds of orders.
7. Submissions in the alternative were made about *Money Max*. Westpac submitted first that *Money Max* should be recognised as limited in its authority. A common fund order was made but with two critical qualifications. First, the Court did not stipulate a percentage rate, but ordered that the funder be paid an amount “as consideration for the funding of the proceedings, expressed as a percentage of the (defined) resolution sum as approved by the Court.” It was submitted that this deferred the setting of the fee to a time when fuller information was available. Secondly, there was a so-called “floor condition” to the effect that no amount payable by the applicant and group members to the funder would exceed an amount that would otherwise be payable by them in the event that the order had not been made. It was submitted that these two features were inter-related, and that the counterfactual in the second qualification was explained by an assumption that some kind of order as to equality of treatment between group members would be made.
8. In the light of these qualifications and their evident importance in the Court making the order it did, *Money Max* is not to be taken as authority for the general proposition that the Court has power under s 33ZF to make a common fund order that lacks these two features. If *Money* *Max* is to be taken as authority for that general proposition, as it was in *Perera v GetSwift* [2018] FCAFC 202 at [159] and [295], it is (plainly) wrong (as is *Perera*) for reasons based on the proper construction of s 33ZF, the principle of legality and *Anthony Hordern* outlined above.
9. In relation to s 23 of the Act, Westpac pointed out that the primary judge had not referred to it in his reasons, but had included it in the order as one of its foundations. The submissions of Westpac did not deal with s 23 in any detail. Reference was made, however, to *Jackson v Sterling Industries Ltd* [1987] HCA 23; 162 CLR 612 at 619 in particular and the comments of Wilson J and Dawson J that s 23 cannot be employed to create and enforce new rights.

### The judicial power argument

1. The central proposition put by Westpac was that the power to make a common fund order was not one that can be conferred on a court constituted under Ch III of the *Constitution*, it not being an exercise of judicial power nor auxiliary or incidental thereto.
2. The argument, at one level, can be seen as constructional: none of ss 33V, 33Z and 33ZF is wide enough to encompass the power, their proper construction and reach being informed by the proper limit of judicial power: cf s 15A of the *Acts Interpretation Act 1901* (Cth).
3. The argument was pitched at a level of principle whereby it was submitted in argument that neither a section of an Act nor an order of the Court could be promulgated or made in terms such as the following:

Section: The Court may, at any stage in the proceedings, make orders concerning the distribution of funds otherwise payable to group members requiring all group members to bear equally or equitably from the funds the burden of the costs and expenses reasonably and appropriately expended to advance and vindicate the claims of group members including, but not limited to, legal costs, funding commission, and administrative costs.

Order: Order that all reasonable and appropriate costs and expenses, including but not limited to reasonable and appropriate legal costs, expenses, administrative costs and funding commission, referable to the proper vindication of the common rights of applicants and group members, be paid and borne by all applicants and group members from the fund of settlement or judgment moneys equally or equitably.

1. In essence, the submission of Westpac was that s 33ZF did not have the width to incorporate such an explicated power, and that, even expressed in these explicated terms, the section and the order would be beyond judicial power.
2. Westpac recognised in its submissions that “no single combination of necessary or sufficient factors identifies what is judicial power”: *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; 233 CLR 542 at 577 [93].
3. Westpac submitted first that central to the characterising of this power as **necessarily** non-judicial was that it was not concerned with the determination of pre-existing rights (as a core characteristic of judicial power) but with the forward-looking creation of rights (for the benefit of a non-party, the funder). Reliance was placed on the characterisation of the powers in *Precision Data Holdings Ltd v Wills* [1991] HCA 58; 173 CLR 167 at 188–191, and *Alinta* 233 CLR at 550 [2]–[3], 553–554 [14], 561 [42], 576 [88]–[90], 577 [94], 578–579 [96], 599 [176].
4. Secondly, it was submitted that the imposition of new obligations on group members, at least when occurring prior to settlement or judgment, does not accord with judicial process that is the essential characteristic of judicial power: *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334 at 359 [56] and the cases referred to at footnote 110, in particular *Harris v Caladine* [1991] HCA 9; 172 CLR 84 at 150 and *Nicholas v The Queen* [1998] HCA 9; 193 CLR 173 at 208–209. It was submitted that nothing in the Act required them to be notified. They were not represented. The determination takes place in the abstract prior to the relevant factors of settlement or judgment being known.
5. Thirdly, it was submitted that no criteria were provided in the Act for fixing the funding commission at an appropriate rate. The words “appropriate or necessary” give no objective guidance as to how the power should be exercised. Thus the Court is driven to value judgments about market rates or fair return to funders and group members. This is not, it was submitted, judicial power because it is not exercised according to legal principle or by reference to an objective standard or test prescribed by legislation: *Precision Data* 173 CLR at 191 and *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation* [1957] HCA 81; 100 CLR 277 at 291; resembling an exercise by reference to policy or by personal opinion of fairness: *Precision Data* at 191, *Re Tracey; Ex parte Ryan* [1989] HCA 12; 166 CLR 518 at 580; and see *Fostif* 229 CLR at 434–435 [92]. Whether there is an objective standard is a matter of substance, not verbal formula: *Queen Victoria Memorial Hospital v Thornton* [1953] HCA 11; 87 CLR 144.
6. Fourthly, there is no relevant analogy with an admittedly judicial function, through history or tradition: *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] HCA 8; 123 CLR 361 at 374; *Cominos v Cominos* [1972] HCA 54; 127 CLR 588 at 607. Westpac submitted that the Court in *Money Max* 245 FCR at 225 [171] was wrong to use the supervisory duty of the Court to draw an analogy with other protective jurisdictions.
7. Fifthly, it was submitted that the fact that the order related to extant proceedings, to ensure justice in the proceeding, did not make it incidental to the determination of existing rights, contrary to that proposition in *Money Max* at 225–226 [173]. To use the words of French CJ in *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at 66 [91], the order, it was submitted, did not “enable” or “support” or “facilitate” the exercise by the Court of its judicial function.
8. To a degree, involved in a number of these submissions were propositions that can be put separately: that the order is premature and hypothetical, and as such lacked characteristics of judicial power. It was submitted that what fell from the plurality in *Bass* at 198 CLR at 356–357 [48]–[49] and 359 [56] (though concerned with declarations), concerning the need for orders to be made on found facts and the advisory nature of a declaration to be based on facts that are not left open, was of particular force here. The hypotheticality and prematurity discussed in *Bass* are here intertwined: it is premature to make the order without all facts found, and it is hypothetical, and may mislead people as to what will in fact happen when all relevant facts are known.

### The acquisition argument

1. This contention was not put before the primary judge; however it was said to turn solely on the proper characterisation of the Act.
2. Westpac’s submission was that the common fund order took away part of the future proceeds (if any) of each group member’s cause or causes of action. It therefore violated that future property or expectancy, which was a form of property for the purposes of s 51(xxxi) of the *Constitution*. If s 33ZF authorised a common fund order, the law was effecting an acquisition because the funder received an identifiable (albeit contingent) “benefit or advantage” corresponding to the relevant future property acquired from group members. Section 33ZF was therefore properly characterised as a law with respect to the acquisition of property.
3. Westpac submitted the section did not make provision for the acquisition to occur on just terms. Although the advantage or benefit gained did not need to correspond precisely to what was taken away, the party whose property was acquired must be given “the pecuniary equivalent of the property acquired”: *Bank of New South Wales v Commonwealth* [1948] HCA 7; 76 CLR 1 (*Bank Nationalisation Case*) at 300. The section did not secure just terms for group members, in the sense of ensuring that they received full compensation or the pecuniary equivalent in return for any amount contingently taken from them by means of a common fund order. No criteria were provided to ensure that any order made by the Court secured for each group member a compensatory benefit which equated to the value of the property which was contingently taken from each group member. Section 33ZF could not operate to secure “just terms” in circumstances where a common fund order was made prior to the resolution of proceedings.
4. It was submitted that the reasoning of Beach J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330; 343 ALR 476 (*Allco No 3*) should not be followed and s 33ZF should be read down.
5. In oral submissions, Westpac put that it was clear that there was a corresponding identifiable and measurable benefit or advantage relating to the use or ownership of property which was conferred on the funder by virtue of the order.
6. Westpac put that there was no sensible analogy in the present case with the regulation of class actions procedure, where in the course of that regulation there was a power conferred on the court *ex hypothesi* to make an order that part of the fruits of group members’ claims be paid to someone else.
7. Westpac submitted that the notion that there was a quid pro quo in the form of a service for the property which was acquired did not take the acquisition outside s 51(xxxi) as a matter of characterisation: it remained an acquisition of property.
8. Westpac submitted that the notion of laws which sit outside s 51(xxxi) because they provide for a genuine adjustment of competing rights, claims or obligations arose only in a very particular context, which was that there were existing competing claims over particular property or amounts of money. That was the context in *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9; 179 CLR 155, *Nintendo Co Ltd v Centronics Systems Pty Ltd* [1994] HCA 27; 181 CLR 134 and *Health Insurance Commission v Peverill* [1994] HCA 8; 179 CLR 226. In the present case, Westpac submitted, there was no competing claim before the common fund order was made over who was entitled to the fruits of the group members’ choses in action. Westpac also adopted BMW’s submission that the context of the reasoning in *Nintendo* was the adjustment of competing rights created under a statutory scheme enacted by the Commonwealth Parliament.
9. Westpac submitted that the fact that an order was made under s 33ZF only if the Court had concluded that it was appropriate or necessary to ensure justice in the proceeding, so that the criterion is justice in the proceeding, could not be equated with just terms. There may be a degree of overlap in the sense that a group member as a participant in the proceeding had an interest in the achievement of justice in the proceeding, but that was not equivalent to provision of compensation which demonstrated an equivalence between what the person lost, that portion of the fruits of their chose in action, and what they were given in return. At the point when the order was made, the value of what was taken as a proportion of a group member’s claim was not known, because it was not known what the Resolution Sum would be.
10. Westpac submitted that it was not possible to characterise the acquisition of a group member’s rights as occurring by consent merely because of the opt out regime in Pt IVA of the Act. That procedure involves attempts at notice, rather than requiring actual consent.
11. The respondents submitted that the common fund order did not result in the funder “acquiring” any property of group members: *JT International SA v Commonwealth* [2012] HCA 43; 250 CLR 1 at 33–34 [42], 53 [118], 67–68 [169], 73 [189]; *ICM* *Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; 240 CLR 140 at 202 [151]. It could not be said that the funder had obtained an “identifiable benefit or advantage relating to the ownership or use of property”. First, the effect of cl 7 of the Funding Terms was that the amounts “will not become due or owing…unless and until Resolution”. Secondly, there was presently no (and may never be any) Resolution Sum. Thirdly, the amounts were subject to approval under cl 6 of the Funding Terms, as well as ss 33V or 33Z. The order had “no final binding effect at this stage”.
12. The respondents submitted that, in any event, s 33ZF was not properly characterised as a law with respect to the acquisition of property. Section 33ZF was part of a broader scheme establishing this Court and defining its jurisdiction. Section 33ZF, in permitting common fund orders, supported the exercise of that jurisdiction.
13. It was submitted that s 33ZF was properly characterised as a law providing for the “adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity”: *Allco No 3* 343 ALR at 506–507 [114]–[116]. Parallels were found in the law of salvage, where a person who helps recover another person’s ship or cargo in peril at sea is entitled to a reward commensurate with the value of the property salved: see, eg, *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2007] FCAFC 115; 163 FCR 183.
14. The respondents submitted s 33ZF provided for “just terms”. That the Act provides for “just terms” was confirmed by the fact that, when it came time for the settlement to be approved or judgment delivered, the Court could make “just” orders regarding the distribution of the settlement sum (s 33V(2)) and could make “just” orders in determining the proceedings (s 33Z(1)(g)).
15. The respondents relied on *Airservices Australia v Canadian International Airlines Ltd* [1999] HCA 62; 202 CLR 133. In that case the lien was enforceable against anyone who had an interest in the aircraft, such as an owner or a lessee, even though those persons had not contractually incurred the relevant debts. That was held not to be an acquisition of property.
16. JKL referred in its submissions to *Attorney-General (Cth) v Schmidt* [1961] HCA 21; 105 CLR 361 where, at 372, Dixon CJ said that the principle by which s 51(xxxi) reduced the content of other heads of power cannot be applied in a “too sweeping and undiscriminating way” because it “cannot have much to do with some of the subject matters of power upon the very terms in which they are conferred”. “[Q]uestions of degree and judgment” are involved in “[m]arking the boundary of ‘just terms’, by reference to the application of a requirement that an exaction is ‘inconsistent’ or ‘incongruous’ with them”: *Attorney-General (NT) v Emmerson* [2014] HCA 13; 253 CLR 393 at 436 [77].

### The discretion argument

1. If, contrary to the above submissions, s 33ZF empowered the Court to make a common fund order, Westpac submitted that the primary judge erred by failing to consider, as it was submitted he was obliged to do, how delivering a benefit to a third party at the cost of group members was appropriate or necessary to ensure justice in this proceeding having regard to the interests of group members. Westpac submitted that for the Court properly to execute the task of considering whether the order was appropriate or necessary to ensure justice was done in the proceedings, it was necessary that the Court consider what would have happened if no order was made and whether JKL would have continued to fund the proceedings if the order that it sought was not made. His Honour did not find that funding would be withdrawn and proceedings would come to an end. Westpac submitted that at [16] the primary judge thought this a distraction, in saying as follows:

Additionally, further evidence was filed, apparently in response to the possibility I raised (on 29 May 2018) that if the Court made a common fund order other than as proposed by the applicants, it would then be a matter for JKL to decide if it wants to continue to fund the proceeding and, if it does not, the matter would be stayed to allow the applicants the opportunity to find another funder. In response to this, Ms Antzoulatos deposed that if the Court set its own funding terms, then JKL may elect not to fund the proceeding and Shine may terminate their retainers with the applicants. In these circumstances, if a new litigation funder was not found by the applicants, there was a potential for a permanent stay of the proceeding. There is no real reason to doubt this evidence, although I consider it to be of marginal relevance. If I am not satisfied it is appropriate to make the proposed common fund order, then the appropriate exercise of discretion would be to refuse the amended application or suggest the basis upon which I would be prepared to approve such an order. In the circumstances of this case, I intend to place little weight on this evidence because the Court’s task is to form a view on whether the proposal currently put forward is one which is in the interests of group members, without the distraction of any minatory suggestion that the funding would be, or may be, withdrawn if the Court declines to make the precise order JKL seeks.

1. Westpac submitted that the primary judge failed to address the question of whether the funding terms involved the minimum possible amount of benefit to the funder for the proceedings to continue such that the Court could be satisfied that group members were subjected to the minimum necessary charge. Instead, the primary judge (at [47], [49], [52] and [60] of his reasons) assessed whether the return to JKL was “competitive”, “reasonable”, and a “‘market’ return … commensurate to the risk undertaken.” It was submitted that these were irrelevant considerations to the decision under the section. The submission drew a fine, but important, distinction between, on the one hand, approaching the matter (as at [52] and [63] of the reasons) by assessing the interests of group members through the prism of whether the order resulted in a “fair and reasonable” outcome and finding that without an appropriate common fund order a particular injustice would result (being the likely inability, absent funding, of the group members to have their claims advanced in the class action); and on the other, approaching it by concluding that if the order was not made in the terms that it was, funding would in fact be withdrawn and the proceedings would come to an end. The former was submitted to be an impermissible approach, the latter to be permissible.
2. In oral address, this submission was developed by reference to what was said to be an inconsistency between the approach in [16] and in [62] and [63] of the reasons. We have set out [16] above. This is to be contrasted, it was submitted, with aspects of [62] and [63] as follows:

62 *… sixthly*, that the legal costs are likely to be very considerable and without litigation funding it is likely that the proceeding would not advance to resolution at a mediation or on the merits; …

63 In the circumstances, in accordance with s 33ZF of the Act, the making of a common fund order in the terms I have proposed is appropriate to ensure that justice is done in this proceeding. Without an appropriate common fund order being made, a particular injustice would result, being the likely inability, absent funding, of the group members to have their claims advanced in this class action.

1. It was not clear whether the submission was focused on an apparent inconsistency, or was focused on the distinction drawn above: that the considerations in [62] and [63] were not sufficiently precise – what was required was a finding that this funding would be withdrawn, and these proceedings would come to an end as alluded to, but not decided at [16]. We take it, overall, that the latter was the submission.
2. It was also submitted that it was a legal error not to impose a floor condition of the kind imposed in *Money Max*. This was a necessary element of understanding and limiting the practical effect on group members. It was a safeguard without consideration of which the Court could not be satisfied as to the practical effect of the order.

## The disposition of the arguments

### The construction argument

1. Three matters, in particular, stand as the framework for the rejection of Westpac’s arguments as to construction: first, the width of s 33ZF; secondly, the judicial character of the making of the order; and, thirdly, the proper characterisation of the nature and purpose of the order.
2. We deal with the second matter in the next section of these reasons.
3. As to the first matter, Pt IVA was a novel procedure (with its historical roots in equity). The expression of Wilcox J of the width and purpose of s 33ZF in *McMullin v ICI Australia Operations Pty Ltd (No 6)* [1998] FCA 658; 84 FCR 1 at 4 bears repeating:

Section 33ZF appears in Div 6 of Pt IVA which is headed “Miscellaneous”. It bears the marginal note “General power of Court to make orders”. These two features support the conclusion, that would in any event arise from its wording, that s 33ZF(1) was intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding. It is understandable Parliament should have thought it appropriate to make such a provision. In enacting Pt IVA of the *Federal Court of Australia Act*, Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties, the only limitation being that the Court must think the order appropriate or necessary to ensure “that justice is done in the proceeding”.

1. This reflects the expression of the matter in wide terms by the Explanatory Memorandum for the Federal Court of Australia Amendment Bill 1991 and in the Minister’s Second Reading Speech. It is the widest possible power that extends to all procedures appropriate or necessary to deal with the matter on a just basis, see *Courtney v Medtel Pty Limited* [2002] FCA 957; 122 FCR 168 at 182 [48]; and *Johnstone v HIH Limited* [2004] FCA 190 at [104]–[105]. Having that wide character from its words, context and purpose, the injunction against reading down statutory powers given to courts, absent clear indication in terms or context (*The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Inc.* [1994] HCA 54; 181 CLR 404 at 421), is of particular force.
2. The language of the section itself, far from hinting at restriction, denotes width, amplitude and flexibility. The power may be exercised on the Court’s own motion. “Any” order of the relevant kind is empowered. The view of the Court is for any order that is appropriate or necessary. The word “necessary” was discussed by the Full Court in *Money Max* 245 FCR at 223–224 [161]–[165]. We do not repeat that discussion. We agree with it and with the conclusion at 224 [165]: that the expression “necessary to ensure that justice is done” requires that the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.
3. The language of s 33ZF reflects an intention of Parliament 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 Pt IVA was to work. A wide and unstructured form to the section would permit the practical working out, over time, of available and appropriate procedures for individual Pt IVA cases. This reflects the common law process in its relationship with statute: the experience of the Court accumulated from individual cases applying the law to new facts as they arise: Gageler, “Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process” (2011) 37(2) *Monash University Law Review* 1 at 1. The application of s 33ZF will be affected and informed by practical experience, changing practices and the immanent, and to a degree evolving, values of the law as perceived by the Court to be relevant to the operation of s 33ZF’s fundamental normative standard: “appropriate or necessary to ensure that justice is done in the proceeding”. This does not involve personal intuitive assertion. It is an evaluation to be reasoned and articulated by reference to the values and norms recognised by the statute, equitable principle and the essential features of judicial power: cf *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199 at 274–275 [296]–[302].
4. This was the clear intention of Parliament. It would be frustrated by a confined approach urged by Westpac. The purpose of s 33ZF was a wide power in which, using the techniques of judicial power, the Court would shape the procedures and principles applicable to representative actions against an assessment of all connected circumstances.
5. The construction propounded by Westpac was too narrow, in part from giving greater stringency to the word “necessary” than the discussion in *Money Max* suggests is appropriate, and by characterising the phrase “appropriate or necessary” as hendiadys. Whilst each word assists (as part of the same phrase in the section) in the understanding of the meaning of the other, we do not consider it right to say that there is a hendiadys and that the word “appropriate” has within it the word “necessary”. The conjunction is “or”, not “and”. A view as to appropriateness to ensure that justice is done may found an order. Westpac’s submission was also too narrow in restricting the order to the “metes and bounds” of the proceedings, which we took to mean the pleaded issues for resolution. It is not an order restricted to a particular issue requiring resolution. It is “justice” that is to be ensured in the proceeding. That is procedural or substantive justice; and the Court is to be satisfied that there is something in the proceeding that should be addressed in order to ensure that justice in the proceeding is done. There is no reason to limit that to the pleaded issues. There is every reason to view as wide enough to deal, in a fair way, with circumstances that will remove a risk to the prosecution and vindication of the group’s rights.
6. At this point, before examining the balance of Part IVA, to demonstrate why there is not the textual or contextual limitation on s 33ZF asserted by Westpac, it is helpful to say something of the nature and purpose of the order itself. Westpac stressed the “taking” from the group members’ rights of action. That, however, is too narrow a focus, at least in the circumstances here where the claims are small to modest and the claimants numerous. If funding of an open class is seen as a legitimate, appropriate and in a broad sense, necessary, part of the framework for the vindication of the rights of group members, there is every reason in fairness and equity to have the cost of such funding shared equally. The benefit inures to all, and should be paid for by all. An early order making that clear (or refusing it, if circumstances persuade the Court of that approach) can place the group action on a known and stable foundation, and reduce or eliminate the risk of the action not proceeding. Other orders may do the same. What is most appropriate will guide the Court in the exercise of the power.
7. We reject the submission that the absence of express statutory criteria somehow limits the reach of the general words. We deal with this more fully below, but part of the exercise and character of judicial power is the development, on a case by case basis, on evidence led before the Court, of criteria of sufficient clarity, and of an appropriate nature upon which to exercise the power judicially and not idiosyncratically or personally. Depending upon the nature of the power and the task there may be varying degrees of specificity and precision in such considerations. But judicial power is not limited to decision by application to facts of definitions and rules. The words of this section make that pellucid: **any** order the Court thinks **appropriate** to ensure **justice** in the proceeding. One would have thought that it may have been unwise of Parliament to lay down precise criteria for a provision so widely worded and with a purpose to adapt to the future in a novel legislative and litigious framework.
8. Westpac sought to derive from the balance of the Part a limitation upon s 33ZF that placed a common fund order outside its boundary.
9. First, the principle of legality does not require that common fund orders be viewed as outside s 33ZF. The nature of the order is rooted in a view that it is appropriate to ensure the ends of justice in a way that equitably and fairly distributes the burden of a proper and legitimate funding cost to vindicate and **realise** common rights. Such conforms, entirely, within the principle of legality. It reflects equity’s basal maxim of equity being equality. It not so much takes away from, as supports and fructifies, rights of persons that would otherwise be uneconomic to vindicate. This is especially so when put in place at a time when those persons can opt out and pursue their own course of action if desired.
10. Secondly, the principle of *Anthony Hordern* and the proper construction of the balance of Pt IVA do not lead to the conclusion that s 33ZF cannot support a common fund order. As Gummow J and Hayne J said in *Nystrom* 228 CLR at 589 [59], the proper approach is one of statutory construction and one must find that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of other apparently applicable powers by reference to restrictions in the former power.
11. In our view, the other provisions of Pt IVA, taken individually and collectively, do not lead to this conclusion. That the common fund order deals with aspects of distribution and payment (in an interlocutory revisable form in order to achieve the practical purposes to which we have referred) and ss 33V and 33Z deal with the same broad subject areas, does not lead one to the conclusion that, if the order can be made, it can only be made at the later points in time at which ss 33V and 33Z are engaged. There are no restrictions or conditions or qualifications that tell one that s 33ZF cannot be used in an unconstrained way to deal with the same subject (at a later time) as ss 33V and 33Z deal on a constrained basis. Sections 33V and 33Z also can deal with costs. It would be absurd to conclude from that that s 33ZF did not authorise an interlocutory order directed to how costs would be controlled or borne. The overlap of subject matter at a broad level of abstraction between sections is not the point. One must find from the provisions of Pt IVA a statutory intention that, within the provisions which might empower the Court at the end of the case to make a common fund order, there is no power to deal with the same subject at an earlier point of time, provisionally, in the sense of being open to review, in order that the appropriate ends of justice be met. There is no basis for that conclusion. There is no restriction or condition that is being circumvented. Sections 33V and 33Z are not “cut across”. There is no power being undermined or made redundant or compromised in any way. Indeed, the statutory aims and purposes of the Part are being advanced. In this respect, we refer to *Money Max* 245 FCR at 226–231 [176]–[205]. The order must, however, be founded upon a legitimately available view that it is appropriate or necessary to ensure that justice is done in the proceeding.

### The judicial power argument

1. There is a general acceptance that there is no exhaustive and complete definition of judicial power. That this is so derives from the nature of power itself. Judicial power is of a special and protective kind, deriving its essential character from how it is exercised: *Nicholas* 193 CLR at 208–209; and *Bass* 198 CLR at 359 [56], rather than the presence or absence of some one or more features.
2. The creation of rights or obligations by the exercise of power may, in some circumstances, lead to a conclusion that the power is executive or legislative in character: *Precision Data* and *Alinta* (see [56] above). But the creation of rights or obligations is not foreign or inimical to judicial power, especially in the form of interlocutory orders: *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at 327–329 [15]–[16]; *Precision Data* 173 CLR at 191; *Fisher v Fisher* [1986] HCA 61; 161 CLR 438 at 453–454; *Cominos* 127 CLR at 600; *Peacock v Newtown Marrickville and General Co-operative Building Society No.* *4 Limited* [1943] HCA 13; 67 CLR 25 at 35, 46 and 54–55; *R v Davison* [1954] HCA 46; 90 CLR 353 at 368–369.
3. One of the important features of these last mentioned cases is the importance of the choice made by Parliament to confer the power on a court. That choice will bring about the proper exercise of the judicial function in making the order with its essential fair character discussed in *Nicholas* and *Bass*. But the reliance upon and expectation that the Court would exercise the power in a judicial way, may not be sufficient if the task is one that cannot be given to the Court. The setting of a national minimum wage by reference not only to evidence, but policy, and the conducting of a prices justification tribunal, may well be seen to be of a character that the whole power is necessarily non-judicial, irrespective of the fairness to be accorded in procedure and the acting on substantial evidence. The conclusion is not definitional, but one of characterisation. An example is *Queen Victoria Memorial Hospital* 87 CLR 144. The *Re-establishment and Employment Act 1945-1952* (Cth) provided for certain preferences in employment. Section 28 gave to a person whom an employer had refused to engage the right to apply to a court of summary jurisdiction for an order under the section if the person considered that having regard to the provisions of s 27 the employer should have engaged him or her. Section 27(4) provided that in determining between two or more persons entitled to preference (as defined by reference to war service) the employer should consider comparative qualifications and certain matters in s 27(3), including (a) length, locality and nature of service; (b) the qualifications of the job applicant; (c) the qualifications required; (d) the procedures if any provided by law for engagement; and (e) any other relevant matters. The Court did not find it necessary to discuss the limits of judicial power. Rather it characterised the nature of the jurisdiction in a way that led to the conclusion that the task was not, and could not be, judicial. The Court said the following at 150 and 151:

What s. 28(1) appears to attempt is to invest a State court of summary jurisdiction with a power which may be briefly described as that of making an appointment in substitution for the appointment made by an employer.

…

In relation to s. 27(4) a court of summary jurisdiction constituted by a magistrate has a discretion which is complete except that he is to be under a duty to consider the matters referred to in sub-s. (3) (*a*) to (*e*). So long as the court takes them into account it may do as it thinks fit in making the appointment. No antecedent rights exist in any of the persons concerned which the court of summary jurisdiction is called upon to ascertain, examine or enforce. There is no issue of fact submitted to it for decision. Its function appears to be entirely administrative and to differ in no respect from the function of the employer himself in considering applications for employment which are affected by s. 27(4). Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers. Here there is nothing but an authority which clearly is administrative.

1. The power (in s 33ZF) and the common fund order made here can be seen to be part of, or incidental to, the undertaking of the judicial task of the Court. The explication of the section and order at [53] above illustrates, with respect, the barrenness of the proposition that such is inherently non-judicial. Much of what we have said above on the question of construction illuminates why an open-textured and wide section without textual over-precision was chosen by Parliament for the exercise of judicial power by the Court. The Court’s role, through the technique of judicial interpretation and case management is to give practical content to the section from the application to various circumstances, on a case by case basis. Rules, principles and guiding approaches thereby emerge: *Thomas v Mowbray* 233 CLR at 351 [91]. We agree with the way JKL put the matter in submissions that it is difficult to conceive of a function or standard more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding.
2. The submission that s 33ZF would, if it authorised a common fund order, permit the Court to act contrary to judicial process by affecting third parties’ (group members’) rights without notice should be rejected. The reasons of the Full Court in *Femcare Ltd v Bright* [2000] FCA 512; 100 FCR 331 at 338–351 [28]–[84], despatch the premises of this argument. The proceedings are undertaken under a unique regime. The place and interests of group members are a primary consideration of the Court. Here, notice of the application was given to group members. One of the reasons for dealing with the order at an early stage in the proceeding is to give group members ample notice of it so as to allow them to express a view or take their own course.
3. That there may be, at the interlocutory stage of making the common fund order, or at the final stage when ss 33V and 33Z are engaged, a necessity to balance and assess the proper monetary compensation for risk and reward of funders, bearing in mind the rights of the parties and any benefits funding may have brought group members, does not make this somehow non-judicial. The Court is able to develop approaches and principles upon which, with the assistance of evidence, lay and expert, to balance the competing interests and rights of the parties. An illustration was given in argument of salvage. There, now by reference to international convention, a *reward* is given by reference to factors developed in the law maritime that include the nature and extent of the risk undertaken, the danger faced, and the nature and extent of the benefit conferred. It can be accepted that this assessment is done after the event; but the point is that courts assess imprecise, and to a degree indeterminate, considerations such as risk, reward, danger and related benefits conferred in the proper exercise of judicial power. It could never be suggested that this task was non-judicial because of the indeterminacy of the commercial, physical and legal considerations. Salvage in maritime law is not some backwater exception to *Falcke v Gray* (1850) 4 Drew 651; 62 ER 250. It is a fundamental principle of the law maritime, a body of contemporaneous law (with deep equitable roots) separate from the common law: *CMA CGM SA v The Ship ‘Chou Shan’* [2014] FCAFC 90; 224 FCR 384 at 405–407. That there is no objective guidance in the statute means that the Court will look for legal and factual criteria that will inform an exercise of power that involves assessing risk, reward and fair commercial return in the light of all relevant circumstances, including the benefit conferred on group members. This is not to act as a prices justification tribunal, it is to supervise the vindication and realisation of rights by a process that ensures as far as possible a just and efficient process and result, by, if necessary, balancing the rights of the group to a fair outcome and the entitlement of a funder to a return commensurate with the risk it undertakes in all the circumstances, based on evidence led by the parties.
4. To the extent that analogy is required, it is sufficient to refer to the control of the necessary or appropriate costs and expenses (not just legal costs) in representative actions in equity. *The National Bolivian Navigation Company and Others v William Millar Wilson and Others* (1880) 5 App Cas 176 concerned, amongst other things, the proper order for costs in a representative proceedings brought in Chancery. The proceedings involved a suit by one Wilson on behalf of himself and as a representative for other bondholders who had lost money to an ill-fated commercial venture to build canals and railways in Bolivia and Brazil. Ultimately, after an appeal to the Court of Appeal and then the House of Lords, the trustees of the remainder of the bondholders’ loan funds were ordered to repay the remaining funds in hand proportionally to all bondholders. The final order in respect of the costs of Mr Wilson (the party representing the bondholders) provided for all his costs, charges and expenses (not just his costs of the appeal) to be taxed on a solicitor-client basis and to be paid out of the fund held by trustees on behalf of all bondholders. Mr Wilson was also required to pay back into the fund any amount he received from the parties to the suit who had been ordered to pay his costs. There was no discussion of the doctrinal basis of the order, but it is plain that it was just and fair and a reflection of equity being equality: all bondholders who had benefited from the suit by Mr Wilson were responsible for a proportionate share of all proper costs, charges and expenses that he paid or for which he was liable in pursuit of an action that had realised a benefit for them. See *Daniell’s Chancery Practice* (Stevens and Sons, 6th ed, 1884) at 1239.
5. After *Fostif*, funding costs and commission can be seen, in apprpriate circumstances, as legitimate expenses (properly controlled) of the venture under Pt IVA; the proper perspective is that which would see all who may benefit from it pay for it equally, as they may well have to for proper legal costs and other expenses.
6. Here, the order should not be characterised only as assessing and delivering a funding commission, but as the Court acting incidentally to the resolution of legal rights of the parties and the group to ensure, as far as it can be, that those rights can be vindicated, at a reasonable cost, in an efficient manner, giving proper reasonable recompense in legal costs to professional lawyers, and commercial reward for funding appropriately commensurable with the risk undertaken and benefit conferred on group members.
7. A common fund order reached by a judicial process directed to these kinds of considerations is an exercise of judicial power.

### The acquisition argument

1. Section 51(xxxi) of the *Constitution* provides:

**51 Legislative powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

…

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

1. The issue is one of characterisation of the law.
2. It is plain that s 33ZF itself does not have the character of a law with respect to the acquisition of property. In its terms it is an express power given to the Court, in any representative proceeding, to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
3. The argument for Westpac is that the common fund order effects an acquisition of property other than on just terms and that s 33ZF should be read down by reference to s 51(xxxi) so as to preserve its validity. The consequence of the argument is that the common fund order was invalid.
4. In our opinion the dominant considerations which lead to the conclusion that neither the section nor the order effect an acquisition of property other than on just terms are: first, the legislative power involved; secondly, that the exercise and nature of the power concerns interlocutory orders made by the Court in representative proceedings; thirdly, that each group member stands to benefit from the carrying forward of the action; and, fourthly, that JKL did not by the order acquire a group member’s *property*. We also consider that Westpac has not established that any acquisition has been other than on just terms. We consider those elements in turn.
5. We accept for present purposes that part of the future proceeds (if any) of each group member’s cause or causes of action may be property within s 51(xxxi).
6. First, as to the legislative power, we have already explained at [97]–[106] above that the power in question is judicial and stems from Ch III of the *Constitution*. In particular, Parliament has exercised its legislative power under ss 71, 76(ii) and 77(i), which support the conferral of such incidental powers as are necessary or convenient to the exercise of the judicial power of the Commonwealth vested in this Court by s 71, as a federal court created by the Parliament. The property in issue is a chose in action dependent for its realisation on the exercise of the judicial power and on the Court’s processes, including interlocutory orders.
7. Section 33ZF of the Act forms part of those processes and is incidental to the exercise of Commonwealth judicial power – it is concerned with the terms on which contested legal rights and liabilities in a matter are to be determined and enforced (see also our reasoning at [100] above) – and for that reason is not a law with respect to the acquisition of property. To the extent that it permits orders acquiring property, that is “subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by the law so that the provision respecting property [has] no recognizable independent character”: *Mutual Pools* 179 CLR at 171, see also 189–191; as to the proper characterisation of the common fund order, see [91] and [105] above. This is a matter going to the characterisation of s 33ZF in particular; it does not imply a broader proposition that what would otherwise be an acquisition of property is immunised because the power to acquire is conferred on a court.
8. Secondly, as to the nature of the power concerning interlocutory orders made by the Court in representative proceedings, we accept the submission that the Court is exercising a power that is directed to the realisation of disputed choses in action in circumstances where those choses in action are in issue between Westpac and the group members and each of them. The impugned order is made pursuant to a power to manage the procedural course of the litigation in order, in the exercise of judicial power, to do justice in the matter. Necessarily the power is capable of affecting, on an interlocutory basis, the rights of a group member in respect of their chose in action.
9. We see a parallel in, and adopt, the reasoning of the Full Court in *Davis v Insolvency and Trustee Service Australia* [2010] FCAFC 141 at [20]:

The *fourth* matter said to be triable was whether the actions of the Registrar in taking Mr Davis’ interest in the Gold Coast land caused his wife economic harm and whether it also conferred upon the Commonwealth a benefit. These two propositions had as their terminus the notion that the child support legislation thereby operated as a law with respect to the acquisition of property which was not accompanied by just terms and was, therefore, invalid by reason of s 51(xxxi) of the *Constitution*. The learned primary judge rejected this as an issue worth trying on the basis that enforcement provisions designed to allow admitted debts to be recovered could not possibly be an acquisition of property to which s 51(xxxi) of the *Constitution* was directed. We agree. The proposition that the enforcement and execution provisions of statutes governing the civil process of courts involves an acquisition of property to which the language of s 51(xxxi) is directed is without merit. Execution by civil process is properly to be seen as being in the same category, for s 51(xxxi) purposes, as the making of a sequestration order: *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 170–171 per Mason CJ, 187–188 per Deane and Gaudron JJ. The acquisition of an asset as part of the process of the curial enforcement of debts is an acquisition of a kind which “is inconsistent or incongruous with the notion of just terms” (*Mutual Pools* 179 CLR at 187). Such execution provisions are to be seen as a means of “resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship, e.g., the relationship between a bankrupt and the creditors in the bankruptcy” (*Mutual Pools* 179 CLR at 171).

1. Thirdly, as to each group member standing to benefit from the carrying forward of the action, the starting point is that each group member was a person interested in the litigation in which the order was made. It may be taken that each group member, unless they opt out, has an interest in the proceeding being carried forward so as to realise their claim. It may also be taken that carrying the litigation forward and realising that claim involves substantial cost and also risk borne by the funder.
2. We accept the submission that s 33ZF authorised the common fund order and that order was directed to an appropriate reward to JKL, being the person providing what was necessary for the maintenance of the proceedings; as to the proper characterisation of the order, see also at [91] and [105]. We also accept that JKL was not relevantly a stranger to the proceedings.
3. The relevant principle from *Australian Tape Manufacturers* *v Commonwealth* [1993] HCA 10; 176 CLR 480 is that a law is unlikely to involve any question of an “acquisition of property” within s 51(xxxi) if it imposes an obligation that involves “a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship”. Mason CJ, Brennan, Deane and Gaudron JJ said, at 509–510:

The answer to the question whether a legislative imposition of an obligation to pay money involves an "acquisition of property" for the purposes of s. 51(xxxi) of the Constitution must depend upon the context in which the obligation is imposed. … Section 51(xxxi)'s guarantee of just terms is not to be avoided by "a circuitous device to acquire indirectly the substance of a proprietary interest" (*Bank of New South Wales v. The Commonwealth* [[1948] HCA 7;] (1948) 76 CLR 1 at p. 349, per Dixon J). In a case where an obligation to make a payment is imposed as genuine taxation, as a penalty for proscribed conduct, as compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an "acquisition of property" within s. 51(xxxi) of the Constitution (See, generally, *Attorney-General (Cth) v. Schmidt* [[1961] HCA 21;] (1961) 105 CLR 361, at pp 372-373.). On the other hand, the mere fact that what is imposed is an obligation to make a payment or to hand over property will not suffice to avoid s. 51(xxxi)'s guarantee of "just terms" if the direct expropriation of the money or other property itself would have been within the terms of the sub-section. Were it otherwise, the guarantee of the section would be reduced to a hollow facade.

1. If that relationship “need[s] to be regulated in the common interest”, as a matter of characterisation the law is likely to fall outside s 51(xxxi): *Georgiadis v Australia and Overseas Telecommunications Corporation* [1994] HCA 6;179 CLR 297at 306–307 per Mason CJ, Deane and Gaudron JJ.
2. In *Nintendo* 181 CLR at 161, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said:

The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s. 51 of the Constitution. The [*Circuits Layouts Act 1989* (Cth)] is a law of that nature. It cannot properly, either in whole or in part, be characterized as a law with respect to the acquisition of property for the purposes of that section. Its relevant character is that of a law for the adjustment and regulation of the competing claims, rights and liabilities of the designers or first makers of original circuit layouts and those who take advantage of, or benefit from, their work. Consequently, it is beyond the reach of s. 51(xxxi)’s guarantee of just terms.

(Footnote omitted.)

1. *Airservices* 202 CLR 133, so far as presently relevant, concerned whether provisions imposing statutory liens on aircraft, for which charges for services provided by the Civil Aviation Authority were unpaid, were a law with respect to the acquisition of property within s 51(xxxi)*.* Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ, held that they were not. Gaudron and Callinan JJ dissented.
2. Gleeson CJ and Kirby J said, at 180–181 [98]–[101]:

98 The principles which determine whether a law providing for a statutory lien, with the incidents specified in the [*Civil Aviation Act 1988* (Cth)], in support of a scheme of charging for services and facilities, is within the reach of the requirement of just terms stipulated by s 51(xxxi) have been considered in many recent cases. In *Mutual Pools & Staff Pty Ltd v The Commonwealth*, Brennan J, referring to earlier authority, pointed out that a grant of legislative power comprehends a power to enact provisions appropriate and adapted to the fulfilment of any objective falling within the power, and that s 51(xxxi) does not abstract the power to prescribe the means appropriate and adapted to the achievement of an objective falling within another head of power where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed. (In that context, “necessary” does not mean “indispensable”.) That was the explanation of decisions that laws providing for the imposition of a tax, the compulsory payment of provisional tax, the seizure of the property of enemy aliens, the sequestration of bankrupts' property, the forfeiture of prohibited imports or the exaction of fines and penalties are not affected by s 51(xxxi). His Honour said:

“In my view, a law may contain a valid provision for the acquisition of property without just terms where such an acquisition is a necessary or characteristic feature of the means which the law selects to achieve its objective and the means selected are appropriate and adapted to achieving an objective within power, not being solely or chiefly the acquisition of property. But where the sole or dominant character of a provision is that of a law for the acquisition of property, it must be supported by s 51(xxxi) and its validity is then dependent on the provision of just terms.”

99 In *Re Director of Public Prosecutions; Ex parte Lawler* [[1994] HCA 10; 179 CLR 270] a law providing for the forfeiture of a fishing vessel operating illegally in Australian waters was held not to contravene s 51(xxxi), even though the owner of the vessel was not complicit in the offence. The considerations relevant to whether the forfeiture of property of an innocent third party, where such property has been used in the commission of an offence, is “appropriate and adapted to the enforcement of the offence-creating provision”, are not identical to those relevant to whether the creating of a statutory lien over an aircraft is appropriate and adapted to the provision, on a commercial basis, of services and facilities such as those provided by the CAA. However, the test is the same.

100 Having regard to the relationship between the services provided by the CAA and the safety of the aircraft concerned, the reasonableness of a system which provides that those who operate aircraft must pay charges which, in totality, will defray the cost of providing the services, the possibility that operators will have few assets in the jurisdiction apart from aircraft, the mobility of aircraft, and the desirability of providing adequate security for liabilities incurred, it is at least as easy to draw a conclusion supportive of the legislation as it was in *Ex parte Lawler*.

101 Concepts of “innocence”, lack of “complicity” or “culpability” are difficult to relate to the present issue. However, the position of the respondents was not isolated from the conduct of Compass. They had leased or sub-leased aircraft to Compass. By inference, they did so knowing that such aircraft would be flown on routes to, from and within Australia, attracting charges for services and facilities provided to all airline operators. They could be taken to know that such charges were not insubstantial. Unpaid, they would accumulate to very large sums. They could readily have ascertained that provision for statutory liens existed under Australian law as under the laws of other jurisdictions involved in civil aviation of a comparable kind. By inference, it would have been open to them to protect themselves (by contract, insurance, or facilities for auditing and reporting) against the kind of result that ensued. Without the provision of their aircraft to Compass, that company would not have been in a position to accumulate the very substantial charges which it did. We accept that s 51(xxxi) of the Constitution must not, in accordance with the authority of this Court, be given a pedantic or narrow construction. We also accept that the taking of property under a federal law is not removed from “acquisition” simply because it is described as “forfeiture”. It is not the name, but the character of the taking, that controls the outcome of constitutional characterisation. But, in this case, the statutory liens are valid. In our opinion they bear no similarity to outmoded notions of deodand. They were provided to secure the effectiveness of charges relating to aircraft which, of their very nature, could otherwise leave Australia with substantial debts unpaid and with no effective means for their recovery.

(Footnotes omitted.)

1. McHugh J gave extensive reasons, at [320]–[357], to the effect that the imposition of a statutory lien in the circumstances was irrelevant to, or incongruous with, the notion of fair compensation, given that services were provided. His Honour also found that the liens provisions were supportable under either or both of the trade and commerce power in s 51(i) and the external affairs power in s 51(xxix) of the *Constitution*.
2. At 298–299 [497] and 300 [501] Gummow J said:

497 It was said in their joint judgment in *Australian Tape Manufacturers* by Mason CJ, Brennan, Deane and Gaudron JJ, that a law may be supported by a head of power outside the operation of s 51(xxxi) if it imposes an obligation that involves “a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship”. If that relationship “need[s] to be regulated in the common interest”, the law is likely to fall outside s 51(xxxi) because it is unlikely that any “acquisition of property” which is an incident of the operation of that law will be capable of imparting to the law the character which attracts s 51(xxxi).

…

501 However, the line drawn in *Australian Tape Manufacturers* is to be drawn in the present case. The statutory lien provisions are part of the regulatory scheme for civil aviation safety created by the Act. The lien provisions adjust the respective interests of those who own, lease or operate the aircraft and of the provider of services necessary for commercial operations of the aircraft in Australia. The interests of security holders are, to the extent discussed above, not displaced. The services were provided by the Authority to the aircraft, in the sense that it was particular operations using the aircraft which provided the incident for the attraction of the charges.

(Footnotes omitted.)

1. At 304–305 [517]–[519] Hayne J agreed with the reasons given by Gummow J, while adding some further short reasons, citing *Nintendo* 181 CLR at 161.
2. *Airservices* shows that it does not necessarily follow that there is a law with respect to the acquisition of property where charges for the provision of necessary services support a lien enforceable against persons who may not have contractually consented to those services or to pay for them, but who nevertheless benefited from those services.
3. In the present case, the order makes an interlocutory, and thus provisional, but genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, even where each group member does not have a contractual relationship with JKL or with other group members. We have determined the process by which that adjustment is undertaken at [102] above. The particular relationship or area of activity is provided by the representative action itself, brought in the interest of each group member in the potential realisation of their chose in action through necessary expenditure on legal services to pursue the claim (see also our observations and reasoning at [26] and [105] above). We accept that the relationship needed to be regulated in the common interest.
4. We do not accept Westpac’s submission that the concept of the adjustment of competing rights is limited to rights created under a statutory scheme enacted by Parliament. In our opinion, there is no basis in principle for such a limitation.
5. Further, we do not accept Westpac’s submission that, for this purpose, a genuine adjustment of competing rights, claims or obligations arises only where there are existing competing claims over particular property or amounts of money. Again, we see no basis in principle for such a limitation.
6. Fourthly, as to whether the order effected an acquisition of *property*, we do not accept that JKL obtained an “identifiable benefit or advantage relating to the ownership or use of property”: *Mutual Pools* 179 CLR at 185; *ICM* 240 CLRat 179–180 [82]–[84]. In our opinion the benefit to JKL was not proprietary in nature. We accept that nothing in the nature of property has passed from the group members to the funder as a result of the order: cf our explanation of the order’s operation at [20]–[28] above. Further, unlike *Georgiadis* and *Smith v ANL Ltd* [2000] HCA 58; 204 CLR 493,no benefit is conferred on the obligee of the identified chose in action. While, therefore, there may have been deprivation of rights in relation to property, of itself that does not constitute an acquisition of property: *Mutual Pools* at 185.
7. Finally, and in any event, we do not accept Westpac’s submission that any acquisition of property was not on just terms. Although we have accepted that part of the future proceeds (if any) of each group member’s cause or causes of action may constitute property for this purpose, we note that its value, if any, has not yet been established. Thus Westpac has not shown that a group member will not receive “the pecuniary equivalent of the property acquired”: *Bank Nationalisation Case* 76 CLR at 300.
8. We conclude that s 33ZF supports the common fund order and that the order does not have the effect that the section is a law with respect to the acquisition of property other than on just terms, within the meaning of s 51(xxxi).

### The discretion argument

1. We reject all aspects of the discretion argument. The primary judge considered the interests of group members, and what would or may happen if the order was not made. His Honour was not required to look at the minimum possible benefit to the funder in some rigidly structured way. It was not irrelevant, but central, to examine the return to JKL in the way he did. The question was not the precise point at which funding would be withdrawn; especially is this so when this submission was not put to him as essential. Thus, his Honour did not have to deal with the matters he left in [16]. The risk to funding continuing, and so the action continuing, was a legitimate and relevant perspective. Thus, his Honour was entitled to draw the conclusions about the risk of the litigation not proceeding that he did at [62] and [63]. There was no inconsistency with [16].
2. Nor was it a legal error not to place a precise floor condition of the kind imposed in *Money* *Max*. That condition arose from the particular circumstances of the case in *Money Max*. There was a real and ample safeguard in the primary judge’s order in the ultimate control given in the concluding words of section D cl 6:

“but not exceeding any such amounts as the Court determines to be fair and reasonable in all the circumstances.”

1. The primary judge addressed the considerations put to him and in a widely phrased provision such as s 33ZF it is difficult to conclude some error of principle has occurred by the failure to deal with considerations not put to him.
2. In our view the primary judge committed no error.

## Orders

1. It is necessary to make an order for the intervention of JKL. Its written and oral submissions were of assistance. It was content for the order to be so limited. The intervention did not substantially increase costs; such increase as there may have been was more than balanced by the assistance given.
2. The questions involved were important. Leave to appeal should be granted. The appeal should be dismissed. Westpac should pay the costs of the respondents.

|  |
| --- |
| I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, and Justices Middleton and Robertson. |

Associate:

Dated: 1 March 2019