



Federal Court of Australia
District Registry: New South Wales
Division: General

No: NSD1812/2017

GREGORY JOHN LENTHALL and others named in the schedule
Applicants

WESTPAC BANKING CORPORATION ABN 33 007 457 141 and another named in the
schedule
Respondents

ORDER

JUDGE: JUSTICE LEE

DATE OF ORDER: 01 August 2018

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. Pursuant to section 33ZA and/or section 37P(2) and/or section 54A of the *Federal Court of Australia Act 1974* (Cth) (**Act**), and Division 28.6 of the *Federal Court Rules 2011* (**FCR**):
 - a. The questions set out in Schedule 2 to this order (**Relevant Questions**) be referred to Mark Berry (**Referee**) for the purposes of the Referee conducting an inquiry into the Relevant Questions (**Reference**) and making a report in writing to the Court on the Relevant Questions stating, with reasons, the Referee's opinion on the Relevant Questions (**Report**).
 - b. The Reference will commence by 22 August 2018, or on such other date as ordered by the Court.
 - c. The Referee is to consider and implement such manner of conducting the Reference as will, without undue formality or delay, enable a just, efficient, timely and cost effective resolution of the Reference to allow completion of the Report including, if the Referee thinks fit, the making of inquiries in person or by telephone or in writing.



2. Further to Order 1 above, the Referee may make such enquiries as the Referee considers appropriate or necessary for the purpose of the Reference but without limiting this order, the Referee will obtain the assistance of Mr Edward Cowpe, the independent barrister nominated by the Court in the conduct of the Reference and the preparation and drafting of the report (**Counsel Assisting**).
3. The first, second, third and fourth applicants (**applicants**) and the first and second respondents (**respondents**) are to deliver to the Referee and Counsel Assisting forthwith, copies of the following documents:
 - a. this order;
 - b. FCR Division 28.6;
 - c. the current pleadings in the Proceeding;
 - d. the Statements of Advice (**SOAs**) of the representative applicants;
 - e. the applicants' application forms for BT Protection Plans;
 - f. the policy schedules of the applicants' insurance policies;
 - g. letters of renewal of the applicants' insurance policies in the relevant period;
 - h. a summary of the premiums paid on the Insurance Policies;
 - i. the Product Disclosure Statement documents for the policies in (f).
4. By 4.00pm on 29 August 2018, the applicants and the respondents provide the Referee and Counsel Assisting with a written proposal setting out the parties' position on how the Referee can best answer the Relevant Questions.
5. By 4.00pm on 29 August 2018, the applicants and the respondents provide the Referee with such facts and assumptions as are agreed between the parties.
6. If the Referee so directs, the applicants and the respondents must provide security for the payment of the remuneration of the Referee and Counsel Assisting by the payment into Court, or, if the applicants and respondents agree in writing, by payment into an interest bearing account in the names of the solicitors for the applicants and the respondents, and:



- a. the amount of security will be the amount proposed by the Referee and Counsel Assisting, and ordered by the Court; and
 - b. in the event that this direction not be complied with, the Reference will be stayed pending further order.
7. The security for the payment of the remuneration of the Referee and Counsel Assisting is to be provided in the first instance in equal shares by the applicants and the respondents.
8. The sum provided by way of security for the remuneration of the Referee and Counsel Assisting, including any interest, will not be disbursed other than by consent of both the applicants and the respondents, or pursuant to an order of the Court.
9. Without affecting the powers of the Court as to costs, the applicants and the respondents are to be jointly and severally liable for the fees payable to the Referee and Counsel Assisting including any disbursements incurred by the Referee and Counsel Assisting.
10. The Referee is to prepare a preliminary report on the Relevant Questions which is to be provided to the applicants and the respondents by 17 October 2018.
11. The applicants and respondents are to provide in writing to the Referee and Counsel Assisting (copied to the other party) any comments on the preliminary report by 4:00pm on 31 October 2018, for consideration by the Referee.
12. The Referee is to submit the Report to the Court in accordance with FCR 28.66, addressed to the New South Wales District Registrar, on or before 4:00pm on 21 November 2018.
13. The Referee:
 - a. is not bound to conduct the Reference in accordance with the rules of evidence; and
 - b. in the Report will, to the extent it was necessary for the Referee to make any findings of fact in order to express his opinion on the Relevant Questions:
 - i. make a statement of the facts found by the Referee from which the Court may draw such inferences as it thinks fit; and



- ii. submit any questions arising on the Reference for the decision of the Court, and provide alternative opinions on the Relevant Questions, depending on how the Court determines any question submitted to the Court.
14. Any amendments to these orders are subject to an order made by the Court.
15. If, for any reason, the Referee is unable to comply with the order for delivery of the Report to the Court by the date provided for in this order, the Referee is to provide to the District Registrar an interim Report setting out the reasons for such inability and an application to extend the time within which to deliver the Report to the Court to a date when the Referee will be able to provide the Report.
16. The Referee, the applicants and the respondents have liberty to seek directions with respect to any matter arising in the Reference and the Referee and Counsel Assisting has leave to communicate with the Associate to Justice Lee without notification to the parties to the proceedings.
17. Any application to adopt the Report or seek any other order under FCR 28.67 is to be filed and served by 4.00pm on 28 November 2018 and be returnable for directions at a date convenient to the Court and the parties in early December 2018.

Evidence

18. By 4:00pm on 14 September 2018, the applicants are to file and serve any lay and expert evidence (without annexures and exhibits) upon which they intend to rely excluding any expert evidence relating to an account of profits (to the extent the lay and expert evidence material refers to any documents, a cross-reference is to be included to the document in the tender bundle filed in accordance with Order 19 below).
19. By 4:00pm on 14 September 2018, the applicants are to file and serve a tender bundle in chief of all documents which the applicants intend to tender (except documents relating to expert evidence on account of profits) at the hearing of the applicants' claims, with such documents to be limited to those documents which the applicants propose to refer to in submissions.




20. By 7 December 2018, the respondents are to file and serve any lay and expert evidence (without annexures or exhibits) upon which they intend to rely excluding any expert evidence relating to an account of profits (to the extent the lay and expert evidence material refers to any document, a cross-reference is to be included to the document in the tender bundle filed in accordance with Order 21 below).
21. By 4:00pm on 7 December 2018, the respondents are to file and serve a tender bundle in chief of all documents which the respondents intend to tender (except documents relating to expert evidence on account of profits) at the hearing of the applicants' claim, with such documents to be limited to those documents to which the respondents propose to refer to in submissions.
22. By 4.00pm 25 January 2019, the applicants are to file and serve any lay and expert evidence in reply upon which they intend to rely (to the extent the lay and expert evidence material in reply refers to any documents, a cross reference is to be included to the document in the tender bundle in reply filed in accordance with order 23 below).
23. By 4:00pm on 25 January 2019, the applicants are to file and serve a tender bundle in reply of the additional documents upon which the applicants intend to rely at the hearing, with such documents to be limited to those documents which the applicants propose to refer to in submissions.

Pleading

24. By 4.00pm on 3 August 2018, the applicants are to file and serve a Second Further Amended Statement of Claim, limited to providing the further particulars of paragraph 23A that are set out in the letter from Shine to Allens dated 31 July 2018.

Date that entry is stamped: 3 August 2018


Registrar



Schedule

No: NSD1812/2017

Federal Court of Australia
District Registry: New South Wales
Division: General

Second Applicant SHARMILA LENTHALL

Third Applicant SHANE THOMAS LYE

Fourth Applicant KYLIE LEE LYE

Second Respondent WESTPAC LIFE INSURANCE SERVICES LIMITED ABN 31
003 149 157



Short Minutes of Order

No. NSD1812 of 2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Schedule 2

1. What are the criteria by which the relative merits of policies of insurance at issue in the proceedings should be compared (for example, the terms of cover, the speed and quality of underwriting and claims handling, the financial strength of the insurer, the insurer's record of paying claims)?
2. When were the policies particularised at paragraph 23A of the Second Further Amended Statement of Claim (**Pleaded Policies**) available? Were they available at the time the applicants received their Statements of Advice?
3. If the Pleaded Policies were available to the applicants at the time the applicants received their Statements of Advice:
 - a. whether it is possible to compare the Pleaded Policies with the policies actually obtained by the applicants having regard, for example, to:
 - i. whether the relevant insurers would be likely to have been willing to offer cover to the applicants;
 - ii. whether the relevant insurers would be likely to have imposed additional exclusions on the applicants' cover; and
 - iii. whether the policies were obtained within superannuation accounts or outside superannuation accounts (or partly within and partly outside),
 - b. whether they were substantially equivalent or better policies of insurance for the applicants at that time; and, if so,
 - c. what premiums would have been payable on those Pleaded Policies that were substantially equivalent or better policies of insurance.

The Referee should provide details of how different policies have been compared and how the premiums have been calculated. The Referee should not inquire into other aspects of the Statement of Advice such as whether the structure of the products was in the best interests of the applicants.