



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD1812/2017

**GREGORY JOHN LENTHALL** and others named in the schedule  
Plaintiffs

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

**JUSTKAPITAL LITIGATION PTY LIMITED**  
Intervener

### **ORDER**

**JUDGE:** JUSTICE LEE

**DATE OF ORDER:** 21 October 2020

**WHERE MADE:** Sydney

#### **THE COURT ORDERS THAT:**

##### ***Referee***

1. Pursuant to s 54A(3) of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the referee's report prepared by Mr Mark Berry dated 17 September 2020 (**Report**) be adopted.
2. Pursuant to s 54A(1) and (3) of the FCAA, the supplementary questions contained in Schedule 1 to these orders be referred to Mr Berry for inquiry and report, with a supplementary report to be submitted to the Court, addressed to the New South Wales District Registrar, on or before 4pm on 20 November 2020 (**Supplementary Report**).
3. Any application to adopt the Supplementary Report or seek any other order under FCR 28.67 is to be filed, served and provided to the Associate to Justice Lee by 4pm on 20 November 2020 and be returnable for hearing at 9.30am on 17 December 2020.

##### ***Pleadings***



4. The applicants be granted leave to file and serve by 4 November 2020 a Fifth Further Amended Statement of Claim, with leave limited to providing further particulars of insurance policies referred to in paragraph 253 of the Report.
5. The Defence to the Fourth Further Amended Statement of Claim stand as a defence to the Fifth Further Amended Statement of Claim.
6. The Reply to the Defence to the Third Further Amended Statement of Claim stand as a reply to the Defence to the Fifth Further Amended Statement of Claim.

### ***Mediation***

7. The parties attend a mediation before a mediator to be appointed by the Court to commence no later than 26 March 2021.

### ***Expert evidence***

8. Pursuant to s 33ZF and/or 37P(2) of the FCAA:
  - a. by 4pm on 12 February 2021, the parties are to confer and seek to reach agreement as to the form of questions and directions to be provided for the Joint Expert Conference and to thereafter provide to the Associate to Justice Lee a draft order listing questions which are proposed to be dealt with by the Joint Expert Conference with any disputed questions to be the subject of a hearing on a date convenient to the Court after 12 February 2021.
  - b. Caspar Conde is appointed a facilitator of the Joint Expert Conference (**Facilitator**).
  - c. The experts relied upon by the parties are to:
    - i. subject to any hearing as contemplated by order 8(a), attend the Joint Expert Conference by no later than 26 February 2021 and continue the Joint Expert Conference as directed by the Facilitator, until the joint report is complete;
    - ii. address the list of questions as ordered by the Court;
    - iii. provide a joint report addressing the list of questions ordered by the Court and any other matters which in the experts' opinion needs to be addressed;



- iv. prepare the joint report, to the extent possible, in plain English and which explains the reasoning of the experts in as concise a manner as practicable and which does not incorporate, by reference, sections from prior reports of the experts in the joint report; and
  - v. provide the joint report to the Court by 5 March 2021, after which time it then will be provided to the parties by the Court.
9. The Joint Expert Conference is to be conducted as follows:
- a. in accordance with the directions of the Facilitator;
  - b. each expert must exercise their independent judgment in relation to the Joint Expert Conference, and is not to act upon any instruction or request to withhold or avoid agreement;
  - c. each expert must endeavour to reach agreement with the other expert(s) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify, with precision, the basis of disagreement on the issues which are in dispute.
10. The parties and their lawyers are not to attend the Joint Expert Conference and must not have any communication with the experts in relation to the Joint Expert Conference or the joint report (with the intention that all logistical arrangements as to notification of the details of the Joint Expert Conference are to be made by the Facilitator).

***Consolidated trial bundle***

11. Order 4 made on 10 July 2020 be varied to substitute the words "*an index of a tender bundle*" for the words "*a tender bundle*" (**Respondents' Index**).
12. Order 5 made on 10 July 2020 be varied to substitute the words "*an index of a tender bundle*" for the words "*a tender bundle*" (**Applicants' Reply Index**).
13. Following the service of the Applicants Reply Index, the parties shall confer and prepare a consolidated joint index of all documents in the index served by the applicants pursuant to Order 20 of 12 February 2020 (as extended), the Respondents'



Index and the Applicants' Reply Index (**Consolidated Index**), to be filed by 12 March 2021.

***Other pre-trial orders***

14. By 26 March 2021, counsel briefed to appear at the hearing confer and attempt to agree on and produce:

- a. a document entitled "Agreed Background Facts" which, in narrative form, identifies relevant facts in respect of which there is agreement or no contest between the parties;
- b. a document entitled "Factual and Legal Issues for Determination" (**Issues Document**) which document:
  - i. identifies each substantive contested factual issue in respect of which the parties consider it is necessary for the Court to make findings (**Principal Contested Facts in Issue**);
  - ii. identifies each contested legal issue in respect of which the parties consider it is necessary for the Court to determine at the hearing, cross referenced to the pleadings (**Contested Legal Issues**); and
  - iii. identifies which of the Principal Contested Facts in Issue and Contested Legal Issues are common questions in respect of which orders under s 33ZB of the FCAA will be sought following judgment, or questions of substantial commonality;
- c. a template for opening submissions (**Submission Template**), which document, when completed will:
  - i. provide an overview of each party's case in summary form (*Part A*);
  - ii. identify that party's summary contentions in relation to each of the Principal Contested Facts in Issue to the extent they relate to that party (*Part B*);
  - iii. identify that party's summary contentions in relation to each of the Contested Legal Issues to the extent they relate to that party (*Part C*).

15. By 2 April 2021, the parties provide to the Associate to Justice Lee:



- a. the agreed documents prepared in accordance with Order 14; or
  - b. in the event the parties are unable to reach agreement as to the contents of any of the documents to be prepared in accordance with Order 14, one version of the draft agreed document with the extent of the disagreement identified in mark-up together with brief submissions explaining the reasons for the disagreement.
16. There be a pre-trial case management hearing of the type referred to in Central Practice Note CPN-1 at 9.30am on a date convenient to the Court and the parties in April 2021 which will deal with the matters referred to in paragraph 13.3 of the Central Practice Note, resolve any disagreement notified in accordance with Order 15(b) and, at which, any final interlocutory applications will be heard.
  17. By 4pm on 9 April 2021, the applicants file and serve their opening submissions (and provide a Microsoft Word version of those submissions by email to the Associate to Justice Lee).
  18. By 4pm on 23 April 2021, the respondents file and serve their opening submissions (and provide a Microsoft Word version of those submissions by email to the Associate to Justice Lee).
  19. By 4pm on 3 May 2021, the applicants provide their reply to the opening submissions of the respondents, by way of including, in a revised opening submission, any material in reply and file and serve their revised opening submissions (and provide a Microsoft Word version of the revised opening submissions by email to the Associate to Justice Lee).
  20. The submissions filed by the parties in accordance with these Orders are to follow the Submissions Template, are to refer to any *authorised report* of any cases referred to or cited (or in the absence of an authorised report, any unauthorised report and the medium neutral citation), and are *not* to include footnotes.
  21. By 5 May 2021, the parties deliver to the Associate to Justice Lee a Court Book which:
    - c. as *Part A* contains the final version only of the pleadings or points of claim or responses to points of claim relied upon by the parties, any particulars not



included in the pleadings to be relied upon, and the final versions of the Agreed Background Facts and the Issues Document;

- d. as *Part B* contains the final versions of the opening submissions of each party (updated to contain cross references to Part C of the Court Book to the extent a document is the subject of reference);
- e. as *Part C* contains, in chronological order, one paginated copy only of the documents for tender notified by each party (being only documents to which a party proposes to refer to in submissions) and, in this regard, if only part of a document is to be relied upon, only that part of the document should be reproduced (additionally, in relation to any email, the email "chain" should not be reproduced but only one copy of each individual email communication should be extracted and then placed in the bundle chronologically by reference to when it was sent);
- f. as *Part D* contains any of the lay affidavit material proposed to be relied upon by any party (without any annexures or exhibits) and, to the extent the affidavit refers to any document, a cross reference to Part C of the Court Book;
- g. as *Part E* contains any of the expert affidavit and report material proposed to be relied upon by any party (without any annexures or exhibits) and, to the extent the affidavit and report material refers to any document which is to be referred to by a party in submissions, a cross reference to Part C of the Court Book; and
- h. as *Part F* contains any Joint Report(s) of an expert or any report of any referee adopted (or any report of any referee, which any party proposes be adopted by the Court at the trial).

22. The Court Book must contain double sided printing and, to the extent filed Court documents are reproduced, the Notice of Filing form is to be reproduced at the end of the relevant Court document.



23. By 3 May 2021, each party notify each other party of the objections which the notifying party has to material contained in Parts C, D and E of the Court Book and, in respect of each objection, the grounds of the objection.
24. By 5 May 2021, junior counsel briefed by each party confer and endeavour to resolve all objections.
25. By 12 noon on 7 May 2021, the applicants file, serve and provide to the Associate to Justice Lee a consolidated list of objections that contains a list of those objections that are pressed and, in respect of each such objection, the grounds of the objection and the response to those grounds provided by the counter-party.

Date that entry is stamped: 6 November 2020

*Sia Lagos*  
Registrar



## Schedule 1

### Referee's supplementary questions

*NOTE: To the extent that you refer to any documents in your answers to questions 1 to 3 below, and those documents have not otherwise been disclosed in the Report or the Reference Vault, please attach copies of those documents to the Supplementary Report.*

1. In relation to paragraph 296 of the Report and the calculations based on that paragraph, please answer the following questions:
  - a. At the relevant time (in relation to Mrs Lye), did AIA offer a policy equivalent to that offered by Westpac Life called Flexible Linking Plus?
  - b. Assuming that Mrs Lye only took out the pleaded term life and income protection policies from AIA (as a package of cover), what would have been the premium payable by her for those policies? Based on this assumption, please identify any changes that should be made to paragraphs 320 to 323 (inclusive) of the Report.
  - c. Assuming that Mrs Lye only took out the pleaded term life and income protection policies, what would have been the aggregate premium payable for such a “package of cover” offered by both AIA and Westpac Life?
2. In relation to paragraph 297 of the Report, assuming that Mr Lenthall did not take out any income protection cover with AIA at the relevant time, what changes should be made to the premiums payable by him for his AIA cover identified in paragraphs 312 and 313 of the Report?
3. On the assumption that Mr Lye and Mrs Lye would have participated in the Clearview Health Maintenance Program, please calculate the premiums that would have been payable by each of them for the Clearview policies referred to in paragraphs 316 to 323 (inclusive) of the Report.



**Schedule**

No: NSD1812/2017

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Plaintiff            SHARMILA LENTHALL

Third Plaintiff             SHANE THOMAS LYE

Fourth Plaintiff            KYLIE LEE LYE

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