HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S67/2020
File Title:	Wigmans v. AMP Limited & Ors
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	03 Jul 2020

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MARION ANTOINETTE WIGMANS**
Appellant

and

10 **AMP LIMITED**
First Respondent

KOMLOTEX PTY LTD
Second Respondent

FERNBROOK (AUST) INVESTMENTS PTY LTD
Third Respondent

20 **FIRST RESPONDENT'S SUBMISSIONS**

PART I: CERTIFICATION

1. These submissions are in a form that is suitable for publication on the internet.

PART II: ISSUES ON APPEAL

2. This appeal raises the following issues:

   a. by Ground 1 of the Appellant's notice of appeal, where there are duplicative representative proceedings and all parties in this Court supported an order that all but one of the duplicative proceedings be permanently stayed, whether the Supreme Court of NSW has power to determine which of those proceedings should be permanently stayed by conducting a "multi-factorial" analysis; and

   b. by Ground 2 of the Appellant's notice of appeal, if the Supreme Court of NSW has such power, whether it is open to assume that each proceeding will achieve the same settlement or judgment sum.

PART III: SECTION 78B NOTICE

3. The First Respondent (**AMP**) does not consider it is necessary to issue a notice under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

4. AMP accepts the statement of material facts set out at [6]-[11] of the Appellant's submissions dated 5 June 2020 (**AS**).

PART V: ARGUMENT

A. Overview

5. This appeal is concerned with the power by and manner by which a multiplicity of duplicative representative proceedings is to be managed. The Appellant contends by Ground 1 of her Notice of Appeal that Part 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**) did not authorise the primary Judge to resolve the multiplicity of proceedings by conducting a "multi-factorial analysis, and staying all but one of the duplicative representative proceedings.

6. AMP neither consents to nor opposes the relief sought by Ms Wigmans in her notice of appeal. However, AMP submits that the Court had power to make the substantive

order impugned, namely an order permanently staying all bar one of the duplicative proceedings.

B. The power exercised by the primary Judge

7. The starting point for analysis is to identify the power, the exercise of which is challenged. In this case, the Appellant seeks to challenge the primary Judge's exercise of power under s 67 or s 183 of the CPA or the Court's inherent power to stay proceedings. It is significant that in addressing the primary Judge's exercise of power, the Appellant focuses almost exclusively on s 183 (the provision within Part 10) and deals only obliquely with s 67 and the Court's inherent power: see AS[66]-[67].

8. That one or more of these powers support the grant of a stay to rationalise duplicative proceedings ought be uncontroversial. Indeed, all parties before the primary Judge (and the Appellant now) supported a stay to resolve precisely that circumstance; as between the Appellant and the Second and Third Respondents the only question that the primary Judge was asked to address was which proceedings were to be stayed.

9. Section 67 of the CPA: Section 67 of the CPA presents in unvarnished terms a power for the Court to stay proceedings at any time, subject to the rules of court. Section 58 of the CPA specifies that in exercising a power of this kind, the Court must seek to act in accordance with the dictates of justice. The Court's power under s 67 is broad and covers a variety of circumstances in which the Court's inherent jurisdiction to prevent abuse of its own processes might be invoked: *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at [69] - [70] citing *State of New South Wales v Plaintiff A* [2012] NSWCA 248 at [15]. Section 58 specifies some of the matters to which the Court ought have regard in exercising the power under s 67.

10. Inherent power: The Court has an inherent power to stay a proceeding before it in an appropriate case: *Jago v District Court of NSW* (1989) 168 CLR 23 at 25 (***Jago***). A court of justice possesses an inherent power "to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people": *Batistatos v Roads & Traffic Authority New South Wales* (2006) 226 CLR 256 (***Batistatos***) at [6] citing *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536. That power extends to staying proceedings that are frivolous, vexatious or oppressive: *Batistatos* at [14]-[15]. This provides a further alternative power by which a stay may be ordered.

11. Section 183 of the CPA: The Appellant contends that s 183 of the CPA is incapable (apparently in any circumstance) of supporting a stay of proceedings: AS[65]. That position is far from clear, but strictly speaking it need not be resolved in this appeal having regard to the breadth of s 67 and the Court's inherent power. Section 183 provides that the Court may make any order that the Court thinks appropriate or necessary "to ensure that justice is done in the proceeding". To the extent that this Court considers it necessary to deal with the scope of s 183, two matters are to be noted.

12. *First*, the terms of s 183 would appear to support the grant of a stay, in an appropriate case, as necessary or appropriate to ensure justice between the parties.

13. Relevantly, s 183 is concerned with advancing "the just and effective resolution" of the issues in the proceeding: *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51 (***Brewster***) at [51]. The grant of a permanent stay is one means of resolving those issues. Moreover, the criterion that "justice is done" in s 183 requires consideration of the position of all parties: *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4 (***McMullin***) cited in *Brewster* at [46]. In an appropriate case, a stay of a proceeding may be justified so as to prevent a defendant from being unnecessarily vexed with a duplicative proceeding. That is consistent with the Court's inherent power to stay proceedings that are frivolous, vexatious or oppressive. In that case, such an order would advance the effective resolution of the issues between the parties to the proceeding and would thereby fall within the ambit of s 183. Viewed through another lens, if s 183 could not justify a stay in those circumstances, then a stay under any other power would need to be characterised as neither appropriate nor necessary to ensure justice in the proceeding. That is plainly not the case.

14. Further, unlike *Brewster*, this case does not concern a matter that is entirely outside the scope of the proceeding itself, or which involves the rights of outside third parties. Rather, it is concerned with the conduct of the proceeding between the parties and advancing it to a resolution: *Brewster* at [45], [47], [51] and [125]. Put differently, it is concerned with ensuring the operation of the procedure provided under Part 10 of the CPA.

15. *Secondly*, the Appellant cites *Perera v Getswift Ltd* (2018) 263 FCR 92 at [127] for the proposition that s 183 does not provide power to grant a stay. However, in that case, while doubting the equivalent power under the *Federal Court of Australia Act 1976* (Cth) (**FCA**) would support a stay, the Full Federal Court expressly refrained from determining the matter.

C. Whether there is an implied limitation on the powers in ss 67 and 183 of the CPA and the Court's inherent power

16. Once it is accepted that the primary Judge had power to stay duplicative proceedings, it becomes apparent that the Appellant's contention is not as to the existence of a power to make the orders now challenged, but rather the mode of exercise of that power. So much is made clear by the fact that the Appellant does not seek to challenge the grant of a stay order *per se* (which was the order in fact made), but rather seeks to attack the path the primary Judge took in determining to grant a stay, by recharacterising the primary Judge's exercise of power as the creation of an "elaborate, auction-type exercise": AS[44]. The following matters are relevant.

17. *First*, it may be accepted that where a statute specifies the mode of exercise of a power, the power must be exercised in accordance with the matters specified: *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at [7] and [64]. However, neither s 67 nor s 183 of the CPA expressly proscribe consideration of any of the matters that informed the primary Judge's determination. It follows, that in order for the Appellant to succeed, she must imply some limitation on s 67 and s 183 not found in their express terms.

18. A statutory provision which confers power on courts ought not be read down by making an implication which is not found in its express words or unless strictly required by its purpose: *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *Australian Building and Construction Commissioner v CFMEU* (2018) 262 CLR 157 at [103]; *Wong v Silkfield Pty Ltd* (1999) CLR 255 at [11], cited in *Brewster* at [146]. As is explained further below, neither the context nor purpose of the CPA require a limitation on ss 67 or 183 of the kind suggested by the Appellant.

19. *Secondly*, the Appellant seeks to imply a limitation on the operation of ss 67 and 183 by contending that Part 10 of the CPA evinces an intention that a group member in a representative proceeding should use (and only use) the provisions of that Part if dissatisfied with the manner in which the proceeding is being conducted: AS[41]-[43]. This, it is said, limits the scope for a court to resolve duplicative proceedings through an analysis of the features of those multiple proceedings: AS[65]-[67]. At the outset, it is to be observed that nothing in the introduction of Part 10 into the CPA indicated an intention to eviscerate the otherwise wide terms of the pre-existing

s 67.[1] The CPA, like any Act, must be read as a harmonious whole: *Johns v ASIC* (1993) 178 CLR 408 at 452.

20. Moreover, on analysis, nothing in Part 10 implies any limitation of the kind for which the Appellant contends. Indeed, to the contrary, a limitation of this kind would be contrary to the rights created under that Part.

21. The starting point for this analysis is that where seven or more persons have a claim against the same person, s 157 of the CPA confers a right on one or more of those persons to commence proceedings and to represent some or all of them: cf. AS[59]. The language of s 157 is telling. It confers a right on one, *or more*, of those persons, to commence *proceedings*. The width of these terms permits more than one such person to commence a proceeding, with the effect that there will be *proceedings* on foot. The interpretation advanced by the Appellant would limit the operation of s 157 to circumstances where a proceeding had not already been commenced. That would require impermissibly reading the terms "or more" and "proceedings" out of s 157 in a manner contrary to accepted canons of construction: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71].

22. Further, the matters on which the Appellant relies to fashion a limitation on the operation of ss 67 and 183 of the CPA do not provide any such limitation. The Appellant points to the ability of a group member to apply under s 171 of the CPA to replace a representative plaintiff as a means of resolving group member dissatisfaction with the conduct of the proceedings: AS[41]. However, s 171 is triggered only where the existing representative plaintiff is *unable* to adequately represent the interests of the group. It does not speak to a situation (such as the present) where a group member believes he or she is capable of *more adequately* representing the interests of group members. Thus, s 171 cannot be taken as evincing an intention to otherwise cut down rights that a group member may have under the CPA.

23. Further, the Appellant points to the ability of a group member to opt out of the proceeding pursuant to s 162 as evincing an intention that Part 10 should solely regulate circumstances where a group member is dissatisfied with the conduct of the proceeding: AS[41]-[43]. But the right to opt out under s 162 merely preserves a group member's ability to individually pursue proceedings outside the representative proceeding regime. Again, it does not speak to the right conferred on a group

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[1] Part 10 of the CPA was introduced by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW)

member by s 157 to commence his or her own representative proceeding on behalf of group members. This is again indicative of the fact that s 162 cannot be taken to otherwise cut down the rights that a group member may have under the CPA.

24. Once it is accepted that Part 10 of the CPA permits the possibility of multiple duplicative proceedings, it must follow that the CPA also permits the Court to manage those proceedings. Nothing in Part 10 limits the Court's ability to exercise its case management powers in regulating duplicative proceedings, having regard to the just determination of the proceedings (ss 57 and 58 of the CPA). It is noted that the plurality in *Brewster* observed at [45], without criticism, that s 183 of the CPA has been used to regulate multiple class actions.

25. It follows that there is nothing in the context of the CPA that would cut down the otherwise broad terms of the powers conferred by ss 67 and 183 of the CPA.

26. *Thirdly*, there is nothing in the purpose underlying Part 10 of the CPA that would (as a matter of necessity or otherwise) limit the Court's broad powers to stay proceedings in the manner for which the Appellant contends.

27. Part 10 of the CPA was modelled substantially on Part IVA of the FCA.[2] Part IVA of the FCA was in turn introduced following Report 46 of the Australian Law Reform Commission titled "Grouped Proceedings in the Federal Court" (**ALRC Report**). It may be accepted that the introduction of the representative proceeding regime was motivated by a desire to avoid a multiplicity of proceedings.[3] However, that desire was framed in the context of providing a mechanism to group multiple *individual* claims, rather than addressing the different question of how multiple duplicative *representative proceedings* might be resolved.

28. Moreover, insofar as the purpose of Part IVA was directed to avoiding a multiplicity of proceedings, the exercise of power by the primary Judge was entirely consistent with that purpose; far from encouraging duplicative proceedings (cf. AS[22]), the orders made by the primary Judge remedied precisely that situation by staying all but one of the proceedings.

29. In circumstances where it is common ground that Part 10 of the CPA does not expressly prohibit the commencement of duplicative representative proceedings (see AS[42]), it is inappropriate to artificially constrain the scope of the general powers in the CPA that might be used to address that problem. Permitting s 183 to address that

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[2] Second Reading Speech for the *Courts and Crimes Legislation Further Amendment Bill 2010*, Hansard, 24 November 2010, Mr Hatzistergos

[3] See, for example, ALRC Report at [14], [19], [62] and [64]; *Brewster* at [82] and [127].

problem (and even more so s 67) is consistent with its role in addressing "unforeseen difficulties": *McMullin* at 4; *Brewster* at [46] and [98]. Moreover, the absence of provisions in Part 10 expressly regulating duplicative representative proceedings makes it imperative to preserve the width of the court's general case management powers to address what is fundamentally a case management issue.

30. *Fourthly*, it is to be accepted that the Court's inherent power may be limited by statute: *Jago* at 74. However the legislature will not be taken to overturn a fundamental principle of the administration of justice without expressing itself with clarity, such that there is a strong presumption that the legislature does not intend to abrogate the inherent jurisdiction of a superior court to control abuse of its process: *R v WRC* (2003) 59 NSWLR 273 at [49] citing *Potter v Minahan* (1908) 7 CLR 277 at 304 and *Bropho v Western Australia* (1991) 171 CLR 1 at 17-18. For the reasons explained above, nothing in Part 10 of the CPA affected the Court's power in this case, let alone to the extent of rebutting the strong presumption against such limitations.

D. Ground 2

31. Ground 2 of the Appellant's notice of appeal concerns one of a number of the matters the primary Judge took into account in determining that the Appellant's proceeding be stayed, namely, the projected net return to group members from that proceeding. AMP maintained before the primary Judge and the Court of Appeal, and maintains now, that it should not be vexed with more than one proceeding. However AMP does not take a position on Ground 2.

PART VI: TIME REQUIRED FOR ORAL ARGUMENT

32. AMP estimates that it will require 30 minutes for the presentation of its oral argument.

Dated: 3 July 2020

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ANNEXURE A

List of constitutional provisions, statutes and statutory instruments referred to in the submissions

1. *Civil Procedure Act 2005* (NSW) No 28 (historical version 30 June 2018 to 22 March 2020)
2. *Courts and Crimes Legislation Further Amendment Act 2010* (NSW)
3. *Federal Court of Australia Act 1976* (Cth) Compilation no 54 (start date 25 August 2018)