HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Jul 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S67/2020
File Title:	Wigmans v. AMP Limited & Ors
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	24 Jul 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S67 of 2020

BETWEEN:

MARION ANTOINETTE WIGMANS

Appellant

and

AMP LIMITED

ABN 49 079 354 519

First Respondent

KOMLOTEX PTY LTD

Second Respondent

FERNBROOK (AUST) INVESTMENTS PTY LTD

ACN 068 190 296

Third Respondent

APPELLANT'S REPLY

Quinn Emanuel Urquhart & Sullivan
Level 15, 111 Elizabeth Street
Sydney NSW 2000

Contact: Damian Scattini
Telephone: 02 9146 3500
Email: damianscattini@quinnemanuel.com

Part I S67/2020

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

Part II

2. *Summary:* The respondents do not engage squarely with the central question on this appeal: what was the source of the primary judge's authority to conduct the elaborate 'carriage motion' process with a view to selecting the vehicle she considered most in the interests of group members? The primary judge did not, as the respondents' submissions suggest, merely conduct a garden-variety case management exercise grounded in Part 6 of the *Civil Procedure Act 2005* (NSW) (**CPA**).[1] Rather, as submitted in chief, her Honour engaged in a foreign process imported judicially from North American jurisdictions where it has an express statutory basis. There is nothing in the CPA which expressly authorises the process. The Court's inherent jurisdiction has never been held to authorise it.

3. The central question on appeal is whether it is permissible for the Court to exercise its power to stay proceedings through such a process, in the absence of any express statutory authority to support it. The answer is not found in a broad power to stay proceedings (contra KS [23], AMPS [9], [19]-[29]). Power to stay does not imply power to conduct a carriage motion.

4. *Proper characterisation of the exercise undertaken by the primary judge:* The primary judge proceeded on the basis that the law required her to identify which of the multiple competing representative proceedings before the Court would best advance the interests of group members, and then to stay all others (PJ [125], [347]-[349]). A central, and as it turned out decisive, consideration in that exercise was to ascertain which proceeding was most likely to deliver the highest returns to group members (PJ [121]-[126], [127]-[216], [354]). The origins of that exercise were sourced not to the CPA, as Komlotex would have it, but rather to the four authorities from Ontario, Canada, referred to at PJ [121]-[125][2] and cited in the *GetSwift* decisions at first instance and on appeal.[3] Under Ontario law, unlike Australian law, the relevant statutory scheme applicable to class actions both: (i) requires that any class action be "certified" by the Court and (ii) contains an express provision that "[t]he court, on its own initiative or on

[1] See the submissions of the second and third respondents (collectively, **Komlotex**) at [11]-[14] (**KS**) and the submissions of the first respondent (**AMP**) at [8], [16] (**AMPS**).
[2] Citing *Sharma v Timminco Ltd* (2009) 99 OR (3d) 260 at [17]; *Vitapharm Canada Ltd v F Hoffmann-LaRoche Ltd* [2000] OJ No 4594 at [49]*; Locking v Armtec Infrastructure Inc* 2013 ONSC 331 at [7], [8]; *Mancinelli v Barrick Gold Corporation* (2015) 126 OR (3d) 296 at [18], upheld on appeal in *Mancinelli v Barrick Gold Corporation* 2016 ONCA 571.
[3] *Perera v GetSwift Ltd* (2018) 263 FCR 1; [2018] FCA 732 at [97]-[99] and *Perera v GetSwift Ltd* (2018) 263 FCR 92; [2018] FCAFC 202 at [195].

the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate".[4]

5. *Source of power – Part 10:* The respondents appear to concede that Part 10 of the CPA does not *expressly* empower the Court to conduct such a carriage motion procedure (KS [25]; AMP [11]); their contention instead is that the *absence* of any such express power in Part 10 is a reflection that the legislature contemplated that such power *already existed* in Part 6, in particular s 67 (KS [34]-[35]; AMPS [22], [24]). There are four problems with that response.

6. First, the respondents' reasoning is openly at odds with the reasoning in *Brewster*[5] (see appellant's submissions in chief (**AS**) at [44]).

7. Secondly, the submission proceeds on the erroneous premise that Part 10 countenances the commencement of multiple duplicative representative proceedings. The respondents' flawed logic is that Part 10 must permit the commencement of multiple duplicative representative proceedings because it does not expressly prohibit it (KS [31]-[32]; AMPS [20]-[24], [29]). Statutory construction does not proceed on the basis that all that is not expressly forbidden is permitted (eg, Part 10 does not expressly prohibit common fund orders, but that does not mean that s 183 authorises the Court to make such orders (see *Brewster*)). Part 10 was enacted, amongst other reasons, to *reduce*, not encourage, multiplicity of actions, consistent with the common law's aversion to multiplicity. It is not to the point that Part 10 contemplates a group member may bring their own individual claim, before or after opt out (KS [31]).[6] Nor is to the point that there may be multiple non-overlapping classes (KS [32]). In neither case does a *duplicative* representative proceeding arise. The submission at AMPS [21] reflects a clear misreading of s 157. The word "proceedings" in s 157 is used in its familiar form to mean a single set of proceedings. The reference to "one or more" group members simply means that one may have co-plaintiffs in a single action.

8. Thirdly, as acknowledged at KS [34] and AMPS [22], Part 10 provides an express mechanism for a group member to take over carriage of a representative proceedings where the lead plaintiff is an *inadequate* representative of the class. But it does not provide a mechanism, or otherwise contemplate, a contest among group members claiming to be the *most adequate* representative of the class. This further reinforces the conclusion that Part 10 does not contemplate or countenance a group member in a representative proceeding commencing a duplicative

[4] *Class Action Proceedings Act 1992*, c 6, ss 8, 13. As to the US approach, see Federal Judicial Center, *Manual for Complex Litigation* (4th ed. 2004), at [10.224], [21.25]-[21.27].
[5] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 94 ALJR 51; [2019] HCA 45 (***Brewster***).
[6] The group member would need to opt out to avoid the individual proceeding becoming an abuse of process: *Oliver v Commonwealth Bank of Australia (No 2)* (2012) 205 FCR 540; [2012] FCA 755.

representative proceeding for the purpose of seizing carriage of the action, on the basis that they are the superior representative.

9. Fourthly, Part 10 operates against the background of the common law. Nothing in Part 10 displaces or cuts down the common law's well-established aversion to multiplicity.

10. *Source of power – Part 6*: Merely identifying a broad stay power in Part 6 of the CPA (KS [23]-[24]; AMPS [9]-[10], [16]-[30]) falls well short of demonstrating that the primary judge was authorised to conduct a contest for carriage of the claims of the class, in search of the proceeding most likely to deliver the highest returns (gross or net) to group members. In the present case, as in most cases concerning multiple duplicative representative proceedings, the considerations in ss 56 to 58 point in favour of allowing only one action to proceed. But those provisions are otherwise silent on the principles that apply in determining *which* action is to proceed. It does not follow that each court in Australia that is faced with multiple duplicative representative proceedings and asked to stay all but one is free to fashion its own idiosyncratic selection procedure, under the guise of a generally worded stay power. The Court of Appeal (departing from the position taken from the Full Court in *GetSwift*: see AS [37]-[39]) identified, but only in part, the permissible bounds of the exercise, holding that an assessment of which legal team was the most experienced and capable was off-limits (CA [96]-[98]); and *semble* preferring a search for the highest net rather than gross returns (CA [93]-[94]). The Court of Appeal failed to recognise that the statute does not authorise the whole of the elaborate and invidious exercise in the first place.

11. *Common law principles*: Contrary to KS [41], the principle that it is prima facie vexatious and oppressive to commence a duplicative proceeding where complete relief may be had in an earlier proceeding is not confined to cases where a defendant is being sued by the same party in multiple fora (see AS [46]). The source of the vexation lies not in a strict identity of parties[7] but in the one controversy being litigated in multiple actions. Contrary to KS [42], the fact that *Carron Iron*[8] and *CSR*[9] concern the equitable jurisdiction to grant anti-suit relief does not detract from their importance as authority as to when a subsequent proceeding will "*in general*" (*Carron Iron* at ER 970; *CSR* at 393) be considered vexatious and oppressive. The authorities concerning the equitable jurisdiction and those concerning the Court's power to protect its own processes speak with one voice on this point.

[7] See *Moore v Inglis* (1976) 9 ALR 509.
[8] *Carron Iron v Maclaren* (1855) 5 HLC 416; 10 ER 961.
[9] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

12. Contrary to KS [43], one need look no further than the present case to understand how vexation arises from a group member's decision to commence their own duplicative proceeding. In the present case, with clear knowledge of the existence of the Wigmans proceeding,[10] and whilst still a group member in that proceeding, Komlotex commenced its own essentially duplicative representative proceeding, resulting in a nearly six-month delay in the progress of group members' claims while the multiplicity of proceedings was resolved.

13. Contrary to KS [45], the appellant has consistently maintained that it is prima facie vexatious and oppressive for a group member to commence a second action against the same defendant, on behalf of the same class and in respect of the same controversy as an earlier filed action in which complete relief is available to the group member (eg AS [21]). There is no "*shifting sand*".

14. Contrary to KS [46]-[48], the concept of "juridical advantage" is not fluid or indistinct. As amply illustrated in traditional stay jurisprudence since *Voth*[11], the concept focuses upon the features present in one proceeding (but not another) that facilitate or promote the just resolution of the plaintiff's claims. The manner in which a proceeding is funded has not traditionally been considered such a feature.[12]

15. There is no reason why, in the context of duplicative representative proceedings, the consideration of legitimate juridical advantage should be broadened so as to encompass the Court's search for the funding arrangement it considers most favourable for group members. Such exercise involves the Court in promoting the interests of one side of the record (as where the Court seeks to discern the incentive structure that will produce the largest settlement or judgment sum for the plaintiff and the class); shifts between gross and net returns; involves the Court in inappropriate speculation (as evident from the matters raised in ground 2 of this appeal); and requires to Court to conduct the search without any statutory guidance as to how the assessment of the relative merits of competing funding arrangements is to be made.

16. *Public policy:* Contrary to KS [49]-[53], the appellant's approach is not, and never has been, "first past the post". The appellant does not contend that the time of filing is necessarily and always determinative (cf KS [41]). If an action commenced hastily includes meritless claims to enlarge the claim period (KS [52]), a later action that is not guilty of the same will be able to point to a legitimate juridical advantage (eg superior pleading). In the present case, Komlotex commenced without any pleading, and expanded its claim period to match the appellant's.

---

[10] AFM 1:109.
[11] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564-565 (***Voth***).
[12] Komlotex's attempt to place funding in the same bucket as security for costs (KS [48]) has no basis in logic or authority and should be rejected.

17. The approach of the primary judge and that in *GetSwift* invites multiplicity (cf KS [53]; AMPS [28]) as demonstrated by a recent judgment of Lee J in the Federal Court suggesting that law firms merely *considering* a class action overlapping one on foot should appear (without a client) at the first directions hearing of the action, apparently to bring on a carriage motion.[13] S67/2020

18. *Ground 2:* Komlotex's submissions on Ground 2 proceed from the erroneous assertion that "*there [was] nothing before the Court to suggest that one proceeding [was] likely to produce a different outcome from another proceeding*" (KS [58]). To the contrary, the evidence before the primary judge led her Honour to conclude that the different funding models created differing incentives and disincentives, but it was not possible to say how those differing incentives would play out (PJ [208]-[212]). The primary judge then assumed the one thing she could not safely find on that evidence: that each competing proceeding had an equal probability of achieving the same gross outcome (PJ [212] and AFM 2:493-496). The finding at PJ [212] quoted in KS [55] and [59] was premised on that erroneous assumption. The need for the assumption to be made illustrates that the entire exercise is inconsistent with judicial method and incapable of workable and consistent application. Her Honour, in effect, assumed the answer to the question she posed for herself. In the absence of any sound basis to predict outcomes, the primary judge ought to have stayed the Komlotex proceeding on the basis of the evidence before her because it offered no advantage over the earlier filed Wigmans proceeding and was not as far advanced.

19. *Scope of appeal:* The appeal grounds cover the scope of the appellant's argument on appeal (contra KS [3], [18(b)], [24], [28]; AMPS [17]). The appellant made clear in oral submissions on the special leave application that Ground 1 was intended to encompass her arguments on traditional common law principles as well as the Court's lack of authority under Part 10 and ss 67/58 of the CPA to conduct a US/Canadian style carriage motion.[14] No objection was taken by Komlotex once leave was granted to the form of Ground 1.

20. *Relief:* If the appeal is successful on either Ground 1 or Ground 2, there being no submission by either Respondent as to the need for a remitter, this Court should make the orders sought in prayers 1, 2(a)-(d), (f) and (g) and 3 of the Notice of Appeal.

Dated: 24 July 2020

Justin Gleeson SC
Banco Chambers
(02) 8239 0200
justin.gleeson@banco.net.au

Adam Hochroth
Banco Chambers
(02) 8239 0200
adam.hochroth@banco.net.au

Patrick Meagher
Sixth Floor Selborne
(02) 8915 2643
pmeagher@sixthfloor.com.au

[13] *CJMCG Pty Ltd as Trustee for the CJMCG Superannuation Fund v Boral Limited* [2020] FCA 914 at [7]-[10].
[14] See [2020] HCATrans 052 at p 17 line 41-50.