HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S67/2020
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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

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 OUTLINE OF ORAL ARGUMENT

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Part I: Certification

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

Part II: Outline of Propositions

2. **Introduction**. The issues raised by the appeal and the facts will be reviewed. Specifically, it is contended on the facts that the objective purpose of the Komlotex proceeding was to wrest control of the carriage of the controversy against AMP from the appellant.

3. **The essence of the "carriage motion" conducted below (AS [25]-[39]; AR [4])**. The primary judge, faced with "essentially duplicative" proceedings which offered "no real juridical advantage" over each other (PJ [347], [350]), conducted a "carriage motion", in which the court:

10 a. permitted competition between representatives/lawyers/funders over an extended period;

b. resolved that competition by a "multifactorial" analysis (PJ [33], [113], [126]-[356]) which sought to ascertain, and prefer, the proceeding with the representative/lawyers and funders which were most likely to produce the largest settlement or judgment sum against AMP and the highest net return for group members; and

c. having identified that proceeding, stayed all others on "case management" grounds (PJ [3], [104]).

4. **The US/Canadian antecedents (AS [55]-[61]; AR [4])**. The carriage motion is sourced from the United States and Canada (*Perera v GetSwift Ltd* (2018) 263 FCR 92 at [188]-[196] (***GetSwift FFC***)) where:

20 a. the class action proceeds under court certification rather than as of right;

b. an express step in certification is the court must be affirmatively satisfied that the *representative* will "adequately" protect the interests of the class;

c. a further express or necessary step in certification is that the court must be affirmatively satisfied that *lead counsel* are able "adequately" to represent the class; and in doing so may examine and provide for the proposed legal fees and costs of the action; and

d. the court resolves competition between actions by selecting the representative and counsel who are the best able to represent the class, and most likely to achieve the best result for it.

5. **No power in Part 10 of the CPA (AS [22], [40]-[45], [62]-[65], [68]-[69]; AR [5]-[9])**. Part 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**) contains a series of legislative choices which

30 depart from the US/Canadian precedents:

a. Parliament chose not to adopt a regime requiring "certification" before a representative proceeding would be allowed to proceed. Instead the representative may commence the

proceedings on behalf of the class as of right once stated conditions are met, subject to a regime for opt-out;

b. Parliament chose not to include any condition for the commencement of the action concerning the adequacy of the representative or the lawyers to represent the class; and

c. Instead, Parliament chose to allow a dissatisfied group member the opportunity to prove that the representative was not able adequately to represent the interests of the group and seek the court's substitution of a new representative (s 171); adequacy otherwise being addressed on application of a defendant or the Court's own motion (s 166(1)(d)).

6. Section 183, the only provision within Part 10 relied upon (faintly) by the Respondents to support the carriage motion, does not avail them. It is an "essentially supplementary" provision designed to "ensure that the proceeding is brought fairly and effectively to a just outcome": *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51 (***Brewster***) at [46]-[47], [124], [147]. Permanently staying the Wigmans proceeding was not the doing of justice in the Wigmans proceeding: cf *GetSwift FFC* at [127].

7. **No power under s 67 of the CPA (AS [66]-[67]; AR [10])**. The broadly expressed stay power in s 67 of the CPA is not without limits. It must be read in the context of Part 10 of the CPA and so as not to contradict its basic precepts. To recognise the carriage motion would:

a. contradict the express choices referred to at [5] above and in particular introduce incongruity with the provisions of s 171 CPA which convey a different onus and different standard for the question of adequacy;

b. encourage a multiplicity of proceedings, contrary to the purpose of Part 10;

c. risk the court preferring, or being seen to prefer, one side of the record; and

d. engage the court in a highly unusual and speculative task without any express criteria; cf *Brewster* at [59], [69], [125], [138]-[140]; *Wigmans v AMP Ltd* [2020] NSWCA 104 at [102].

8. The Court of Appeal erred in its analysis of the applicability of the common law authorities (**AS [46]-[54], [71]-[77]; AR [11]-[16]**) by wrongly:

a. dismissing the principle that it is *prima facie* vexatious and oppressive to commence an action if an action is already pending in respect of the same controversy and in which complete relief is available: *Carron Iron Co v Maclaren* (1855) 5 HLC 416 at 437-439; *CSR v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 393-394; CA [74]-[81];

b. regarding the approach in *McHenry v Lewis* (1883) 22 ChD 397 at 404 as "remarkably similar" to the carriage motion: CA [55], [84];

c. regarding *Lubbe v Cape plc* [2000] 1 WLR 1545 as a relevant analogy: CA [85], [86]; and

d. failing to hold that the common law's concern in resolving multiplicity of actions has always been limited to juridical advantages, being features of competing actions which are capable of being assessed under the judicial method and which bear upon which proceeding is more likely to lead to the just resolution of the issues in the broader controversy, rather than maximising the returns for the plaintiffs.

9. The Court of Appeal wrongly regarded ss 56-58 of the CPA as supplying an express statutory warrant for the Court to conduct an enquiry into which proceeding was most likely to maximise the returns to group members on a net basis: CA [88]-[94]. To read those generally worded provisions that far would be to contradict the basic premises of Part 10; to far exceed traditional common law principles; and to exceed the true role of these provisions which is to ensure that the real issues between the parties are fairly and efficiently joined, advanced through evidence and argument and ultimately brought to a just resolution.

10. This Court should disapprove the Federal Court's statement of the carriage motion power in *Getswift FFC*, and the Court of Appeal's competing statement of the power: CA [96]-[98].

11. **No inherent power (AS [68]; AR [18])**. The inherent power of the Court to stay proceedings cannot be a source of power to conduct a carriage motion when that procedure was not known to the common law and is inconsistent with the statute.

12. **Ground 2 (AS [78]-[94])**. If it was relevant to search for the vehicle likely to achieve the highest *net* returns, the primary judge erred by assuming that each action would achieve the same *gross* return: PJ [212]. The evidence before the primary judge directly contradicted such an assumption and otherwise left the question wholly speculative (PJ [208]-[211]). The exercise also involved assuming, contrary to *Brewster* and two recent intermediate appellate decisions, the amount of funding commission that might be approved on any settlement or judgment; commission that is unknowable at the commencement of an action.

13. **Relief (AS [95]-[96])**. If the appeal is successful on either Ground 1 or Ground 2, this Court should make the orders sought in prayers 1, 2(a)-(d), (f) and (g) and 3 of the Notice of Appeal.

Dated: 10 November 2020

Justin Gleeson SC
Counsel for the Appellant