



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: S67/2020
File Title: Wigmans v. AMP Limited & Ors
Registry: Sydney
Document filed: Form 27F - Outline of oral argument-First Respondent's Outli
Filing party: Respondents
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Important Information

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BETWEEN:

MARION ANTOINETTE WIGMANS

Appellant

and

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AMP LIMITED

First Respondent

KOMLOTEX PTY LTD

Second Respondent

FERNBROOK (AUST) INVESTMENTS PTY LTD

Third Respondent

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FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Outline

2. AMP neither consents to nor opposes the relief now sought by the Appellant, that is, the lifting of the permanent stay of her proceedings and the imposition of a permanent stay of the Komlotex proceedings.
3. AMP contends that the primary judge had broad powers to order a permanent stay of not identical but “essentially duplicative” representative proceedings, including pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) (CPA) and the Court’s inherent power. All parties before the primary Judge contended for a permanent stay of all but one of the extant proceedings, and the primary Judge was correct to grant such a stay.

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4. Ground 1 of the Notice of Appeal is whether the Court of Appeal erred in failing to find that Part 10 of the CPA did not authorise the approach taken by the primary judge to the determination of the cross-stay applications between the Appellant and the Second Respondent.
5. The “approach taken by the primary judge” is characterised by the Appellant as an attempt to ascertain and prefer the proceeding likely to produce the largest settlement or judgment and the highest net return for group members (AS[13]) and an “elaborate, auction-type exercise” (AS[44]).
6. This is not a fair characterisation of the primary judge’s approach. The primary judge identified the task confronting her as the determination of “*which of the competing proceedings should be permitted to continue (in the interests both of justice and of group members, and consistent with the overriding purpose of achieving the just, quick and cheap resolution of the real issues in the proceedings) or ... looking to the best and most efficient result for group members and the fairness to the defendant*”: PJ[349].
7. Further, the apparent premise of Ground 1, namely, that power for the approach taken by the primary judge *must be* sourced in Part 10 of the CPA, is incorrect.
8. Part 6 of the CPA confers powers on the Court in relation to any proceedings, including representative proceedings. Section 67 confers a broad power on the Court to stay any proceedings before it, subject to rules of court. In exercising the power in s 67 the Court must seek to act in accordance with the dictates of justice: s 58(1), as elucidated by s 58(2).
9. The power conferred by s 67 ought not be read down by making an implication which is not found in its express words or unless strictly required by its purpose: 1RS[18].
10. Specifically, the provisions of Part 10 do not impliedly limit the power in s 67 to stay duplicative representative proceedings. Part 10 does not confer an express power on the Court intended or capable of being used to resolve a multiplicity of representative proceedings. This may be characterised as a dispute as to which is the “most adequate” representative as opposed to whether a representative is an “inadequate” representative (ARS[8]), which is the concern of s 171 of the CPA. The powers conferred by s 165 (to stay proceedings if distribution costs are likely

to be excessive) and s 166 (de-classing) are not able to resolve the problem of duplicative representative proceedings.

11. Further, Part 10 does not prohibit the *commencement* of a second (or - as occurred in the present case - a third, fourth and fifth) representative proceeding arising out of the same sub-stratum of facts, provided the requirements in s 157 are met. It in fact contemplates multiplicity, providing specifically for a right of a group member to opt out of representative proceedings: s 162.
12. A construction of s 67 not limited by Part 10, and in accordance with its broad terms, promotes, rather than detracts from, a harmonious construction of the CPA as a whole.
13. Considerations of purpose demonstrate that the insertion into the CPA in 2010 of a “more detailed regime”, a regime which was “substantially modelled on Part IVA of the *Federal Court of Australia Act 1976*”: 1RS[27], was not intended to effect a removal or dilution of the Court’s existing powers. Those existing powers included the power conferred by s 67, and for that matter, the Court’s inherent power.
14. Further, considerations of purpose do not support an implied limitation on the power conferred by s 67, or, for that matter, the Court’s inherent power. The objectives of Part IVA (and Part 10) include increasing the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits. However multiple duplicative *representative* suits are not one of the mischiefs identified in the extrinsic material: 1RS[27].
15. The decision of this Court in *Brewster* does not provide any support for implying a limitation on the power conferred by s 67 to deal with duplicative representative proceedings, it being concerned with the ambit of the power in the gap filling or supplementary power conferred by s 183 in a different context, namely, the making of a common fund order.
16. AMP does not seek to be heard on Ground 2 of the Notice of Appeal.

Dated: 10 November 2020



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Elizabeth Collins SC
Senior Counsel for the First Respondent

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