HIGH COURT OF AUSTRALIA

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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

(ACN 004 390 023)

Second Respondent

FERNBROOK (AUST) INVESTMENTS PTY LTD

(ACN 068 190 296)

Third Respondent

SECOND AND THIRD RESPONDENTS' SUBMISSIONS

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Part I: Certification

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

Part II: Issues on appeal

2. This is an appeal from the decision of the New South Wales Court of Appeal in *Wigmans v AMP Ltd* (2019) 373 ALR 343; [2019] NSWCA 243 (**CA**),[1] affirming the decision of Ward CJ in Eq in *Wigmans v AMP Ltd* [2019] NSWSC 603 (**PJ**).[2]

3. Ground 1 of the notice of appeal (**NOA**)[3] is confined to a failure by the Court of Appeal to find that Part 10 of the CPA "*did not authorise*" the approach taken by the primary judge. This ground presents the following issue: Is the Supreme Court of New South Wales's power to order a stay of proceedings under sections 67 or 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**), or in its inherent power (together, the **stay power**), constrained by an implicit restriction in Part 10 of the CPA on the commencement of representative proceedings against the same defendant with respect to the same subject matter? There is no express appeal ground in the NOA to the effect that the primary judge or Court of Appeal erred by failing to find the later-in-time proceedings were vexatious and oppressive, or an abuse of process, although it appears that the appellant seeks to raise that issue as somehow falling within ground 1.

4. Ground 2 of the NOA seeks to present an issue of principle as to whether the primary judge erred by assuming that each competing proceeding would produce the same settlement or judgment outcome. This issue must be addressed in the context of the evidence that was before the primary judge, and the findings that her Honour made on that evidence (which findings are not the subject of appeal).

Part III: Section 78B notice

5. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Relevant facts

6. At AS [6], the appellant says she commenced her proceedings (the **Wigmans proceedings**) on behalf of all persons who purchased shares in the first respondent (**AMP**) between 10 May 2012 and 15 April 2018. The class as defined was expressly

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[1] Core Appeal Book (**CAB**), p. 149.
[2] CAB, p. 6.
[3] CAB, p. 199.

confined to person who acquired those shares "*on the financial market operated by the [ASX]*". This potentially excluded person who made off-market purchases of AMP shares: PJ, [339] (CAB: 130). The appellant also sought to amend the class definition on 25 September 2018, as addressed below.

7. At AS [7]-[8], the appellant refers to the commencement of the further representative actions against AMP. The second action (the Wileypark proceeding) was filed on the same day as the appellant's proceeding (PJ [9], [19]). The four other proceedings (including the second respondent's proceedings (the **Komlotex proceedings**)) were filed within a month of the Wigmans proceeding (and within two months of the AMP evidence referred to at AS [6]).[4] The quote at the end of AS [7] is also incomplete. The primary judge found that "*there is no real juridical advantage in the pleading put forward by any of the parties over that of the others"* (emphasis added) (PJ [350]).

8. At AS [11], the appellant refers to certain features of the Komlotex proceedings. The Komlotex proceedings were to be funded on a "no win no fee" basis with a 25% uplift on professional fees only if the resolution sum exceeded $80 million.[5] The Wigmans proceedings, on the other hand, were funded by a commercial litigation funder on terms pursuant to which the funder stood to recover up to 20% of any recovery from funded group members and that a common fund order be made (PJ [55]-[56]).

9. The appellant does not refer to changes in the Wigmans proceedings after it and the other competing proceedings were commenced. On 25 September 2018, the appellant served an Amended Summons and Amended Commercial List Statement on AMP that sought to include a new claim of unconscionable conduct and expand the class to include all persons who acquired an interest in shares on or before 17 April 2018.[6] This amended class definition included persons who acquired their shares at a time when they may have been partially aware of AMP's conduct, as well as persons in relation to whom AMP may have a limitations defence (PJ [249], [253]). It was the features of this proposed amended case (not the original case referred to at AS, [6]) that the appellant relied upon on the competing stay motions (PJ [248]-[252]).

Primary judgment

10. The summary at AS [12]-[15] ignores that the primary judge recognised that the stay orders were sought on two distinct jurisprudential bases (albeit with some degree of

[4] Komlotex proceeding originating application: Applicant's Further Materials, Volume 2, p. 349.
[5] Affidavit of Andrew Watson dated 7 November 2018, [30] (AFM2: 374-375).
[6] Affidavit of Damian Scattini dated 7 November 2018, [37]-[40] (AFM1: 114-115).

overlap): PJ [34], [47]. *First*, the appellant primarily sought to stay the other proceedings on the basis that they, being later in time, constituted an abuse of process. At PJ [65]-[98], her Honour considered the appellant's argument and held that the competing proceedings were not an abuse of process (PJ [97]-[98]).

11. *Second*, each representative party (including by the appellant in the alternative), sought a stay on what the primary judge referred to as "*case management principles*", including that it was "*in the interests of the just, quick and cheap resolution of the real issues in dispute*" that all but one proceeding be stayed (PJ [5], [27], [30]-[31]). This was a reference to the Supreme Court's express power to stay proceedings in its inherent power to control its processes and pursuant to (and in accordance with) Part 6 of the CPA (under section 67) (PJ [334]). It was in this context that the primary judge considered a number of factors. That is, having already found that the later-in-time proceedings were not an abuse of process, her Honour proceeded to determine the competing stay motions (including the appellant's motion) on the basis of a consideration of the relevant evidence led by each of the parties as to the respective merits of their proceedings.

12. The primary judge ultimately concluded at (PJ [332]-[356]) that the Komlotex proceedings should be permitted to continue and that the other proceedings (including the appellant's proceedings) be stayed in the interests of both justice and the group members, and consistent with the overriding purpose in section 56 of the CPA. It is not correct that the primary judge "*[b]y the multifactorial analysis, sought to ascertain, and prefer, the proceeding which was likely to produce the largest settlement or judgment sum against AMP and the highest net return for group members*" (AS [13]). Her Honour did not seek to ascertain or prefer anything. Her Honour merely responded to, and dealt with, the particular factors advanced by the appellant, the second and third respondents and the other representative parties as relevant in support of their respective applications.

13. Her Honour undertook a detailed analysis of each party's evidence and submissions on a range of factors (at PJ [113]-[331]). A number of factors were considered to be neutral or of no weight, including the relative experience and skill of the legal representatives. The primary judge said that the fact that the Wigmans proceeding was further advanced was a factor that might have preferred Ms Wigmans' proceedings if the other factors were neutral: PJ [324]. The superior security provided by the Wigmans and Komlotex proceedings was held to be a basis for preferring those

proceedings over the Georgiou and Wileypark proceedings: PJ [233]. The primary judge also found (at PJ [214]-[215]) that the fact that the Wigmans, Georgiou and Wileypark proceedings sought a common fund order, and the Komolotex proceedings did not, conferred a marginal advantage on the Komlotex proceedings (given that the High Court had granted special leave in relation to what became *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51). As between the Wigmans and Komlotex proceedings, the fact that the Wigmans proceedings was likely to take a greater share of group member recoveries (leaving less to group members) was held to be a reason for preferring the Komlotex proceedings over the Wigmans proceedings (but not over the Georgiou or Wileypark proceedings): PJ [212]-[213].

14. No factor relied upon by the primary judge involved preferring the interests of any plaintiff and group members over those of the defendant. For example, the analysis of the net recoveries of group members merely concerns the sharing of a particular recovery between group members on the one hand and the lawyers and funders on the other.

Court of Appeal

15. As to AS [18], the appellant appealed the primary judge's decision to the Court of Appeal on a number of grounds, including that the trial judge erred in not finding that the Komlotex proceedings were an abuse of process (CAB 142-143). The Court of Appeal unanimously affirmed the primary judge's decision.

Part V: Second and third respondents' argument

A. Overview

16. As outlined in Part II, the present appeal concerns the power of the Supreme Court of New South Wales to resolve competition between overlapping representative proceedings against the same defendant by means of permanently staying one of those proceedings under sections 67 or 183 of the CPA, or pursuant to its inherent power.

17. The existence of the Supreme Court's power to grant a stay in these circumstances has never been in dispute: PJ [334]. The appellant's Ground 1 is that the primary judge erred by adopting an "*approach*" to the resolution of the competing stay motions which Part 10 of the CPA "*did not authorise*".

18. The appellant's argument appears to proceed as follows:

(a) *First*, the appellant appears to accept that the Supreme Court had the power to stay one or more of the competing proceedings, at least under section 67 of the CPA or in its inherent power (the **power exercised**) (AS [66]).

(b) *Second*, the appellant says that in exercising that power, the Supreme Court was constrained in some unexpressed way by the statutory scheme of Part 10 of the CPA which (it is said) displays an aversion to multiplicity of actions. In this context, the provisions of Part 6 (in which section 67 is found) are said to play a subservient role to Part 10 (the **statutory scheme argument**) (AS [41]-[45]).

(c) *Third*, the appellant says that "*traditional common law principles*" concerning multiplicity are applicable to representative proceedings and not displaced by Part 10. Those principles are said to encompass a presumption that a second-in-time proceeding (even by a non-party) with respect to the same subject matter is vexatious and oppressive and ought to be stayed unless the plaintiff in the later proceeding can discharge an onus to prove that its proceeding offers some "*juridical advantage*" to the first proceeding (the **traditional common law principles argument**) (AS [46]-[53]).

(d) *Fourth*, the appellant says that adopting any approach other than a "first past the post" rule encourages multiplicity, whereas (it is said) entrenching the first mover is consistent with the law and policy concerns of Part 10 and the common law (the **policy argument**) (AS [23], [26]-[39]).

19. Each of the second, third and fourth contentions are wrong for the reasons explained further below. The true position is that the approach adopted by the primary judge is consistent with (a) the scope of the power her Honour was exercising; (b) the scheme of Part 10 and the CPA more generally; and (c) the traditional approach to the resolution of competition between representative proceedings. Far from representing a "*wrong turning*" (AS [24]), the approach her Honour adopted – which involved a considered exercise of discretion to determine which proceedings should be stayed in the interests of justice and the group members, based on an assessment of the evidence – was entirely orthodox. By contrast, adoption of the "*first past the post*" rule promoted by the appellant would represent a significant departure from both the traditional and modern approach to the issues that can arise in the management of competing representative proceedings. It would also encourage a race to the courthouse and the unsavory consequences that would inevitably follow.

20. The appellant's second ground is, upon proper analysis, an attempt to cavil with factual conclusions. The primary judge did not make any unwarranted "assumption", but merely proceeded on the basis of the evidence before her which did not suggest any reason for distinguishing between the proceedings on the basis of likely recoveries from the defendant.

B. Appeal Ground 1

B.1 Power exercised

21. At various points in the appellant's submission the order challenged is pejoratively referred to as an order "*to sanction the filing of multiple duplicative class actions only so that the court can later preside over an auction process designed to eliminate such multiplicity*" (e.g. AS [67]). This characterisation is inaccurate. The primary judge did not invite the representative plaintiffs to file their respective claims or to file their respective notices of motion. Nor did her Honour solicit any proposals for the conduct of any proceeding. It was the plaintiff in each proceeding (including the appellant) who moved the court to grant a stay. The jurisdiction thereby being regularly invoked, the primary judge was bound to determine those applications in accordance with law as applied to the evidence before the court.

22. The proper starting point is therefore to identify the source of the power exercised by the primary judge and the legal principles that apply to the exercise of that power. Her Honour expressly sourced the order to stay the appellant's proceedings to: (a) the statutory power under section 67 of the CPA; (b) the statutory power under section 183 of the CPA; and (c) the inherent power of the court.[7] Each of these powers has a distinct jurisprudential underpinning which informs the factors that are and are not relevant to the exercise of the power and the weight that must be given to those factors.[8] We address each in turn.

23. *First*, the power in section 67 of the CPA is to "*at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day*". The section is expressed in broad terms and does not contain any particular criteria relevant to the exercise of the power.[9] It encompasses (and overlaps with) the Supreme Court's inherent power to prevent abuse of its processes (addressed below).[10]

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[7] Orders of the primary judge: CAB, p. 139, order 6.
[8] *Macedonian Orthodox Church St Petka Inc v Petar* (2008) 237 CLR 66; [2008] HCA 42, [138].
[9] *State of New South Wales v Plaintiff A* [2012] NSWCA 248, [15] (Basten JA).
[10] *State of New South Wales v Plaintiff A* [2012] NSWCA 248, [15] (Basten JA).

However, as is clear from the express reference to the stay power in section 58 of the CPA, the power in section 67 has a broader operation and may be exercised as a means by which the Court can regulate its processes and manage cases before it in accordance with the principles set out in Part 6 of the CPA. Section 58 provides that "*[i]n deciding whether to make any order… for the management of proceedings, including… any order granting… [a] stay of proceedings, and the terms in which any such order… is to be made, the court must seek to act in accordance with the dictates of justice*", and also provides that for the purpose of determining what is in accordance with the dictates of justice in the particular case, the Court must have regard to sections 56 and 57 and may have regard to "*such other matters as the court considers relevant in the circumstances of the case*." As Bell P observed below (CA [88]-[90]), pursuant to sections 57 and 58 the Supreme Court must also have regard to: the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of judicial resources and the timely disposal of the proceedings at a cost affordable by the respective parties. This, in one sense, is a complete answer to this appeal. The Court would not read down the ample scope of the statutory stay power, or displace the statutorily mandated considerations applying to its exercise, by reference to extra-statutory factors.

24. *Secondly*, the inherent power of the court to grant a stay is a power to prevent an abuse of its processes,[11] including where proceedings are found to be vexatious and oppressive[12] (in the "*strict sense*").[13] The relevant principles are addressed in further detail below in addressing the appellant's traditional common law principles argument. The existence of this power is, however, of lesser relevance in the present context than it was in *Perera v GetSwift Ltd* (2018) 263 FCR 92; [2018] FCAFC 202 (***GetSwift***) in circumstances where the Court has an express statutory power (section 67) and the appellant's abuse of process ground is no longer the subject of appeal. It is sufficient to note at this juncture that the Court has warned on multiple occasions that the expressions "*abuse of process*" and "*vexatious and oppressive*" are not susceptible to "*hard and fast*" definitions. Notions of justice and injustice and considerations that bear upon the public confidence in the administration of justice must reflect

[11] *Rozenbilt v Viner* [2018] HCA 23; 262 CLR 478, [65].
[12] *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [2006] HCA 27, [5] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[13] *Henry v Henry* (1996) 185 CLR 571, 591 (Dawson, Gaudron, McHugh and Gummow JJ).

contemporary values *and take into account the circumstances of the case*.[14] This observation tells strongly against the appellant's submission that the Court should lay down a "*first in time*" rule based on a *presumption* that a second proceeding is vexatious and oppressive in *all* circumstances.

25. *Thirdly*, the power in section 183 is a supplementary power that is available to the court specifically in Part 10 proceedings to ensure justice in the proceeding.[15] In circumstances where the Supreme Court has an acknowledged power to grant a stay of proceedings (under section 67 or the inherent power) it is not necessary for the purpose of the disposal of this appeal to determine whether section 183 (or its equivalents in other jurisdictions) independently supports the grant of a stay in the present circumstances. In the present context, it supports the exercise of the Supreme Court's express stay powers where the interests of justice so require.

B.2 The statutory scheme argument

26. The scope of the express stay power in section 67 (as supplemented by section 183 and the inherent power), and whether it mandates particular weight be given to time of filing, is to be determined by consideration of the text of the provision in its context.[16]

27. As the appellant candidly accepts (AS [42]) there is no provision in the CPA that expressly prohibits a group member from commencing a second representative proceeding against a defendant in relation to the same controversy. Indeed, the appellant now does not even appear to contend that there is any implied limitation. Rather, the appellant says that the absence of an express limitation "hardly bespeaks a policy in favour of multiplicity" (AS [42]), which is not the same as an implied limitation, and that the absence of any criteria dealing with the resolution "is itself some contextual indication that the power to conduct such an exercise cannot be sourced to Part 10" (AS [44]), which is not to suggest an implied limitation on a power sourced elsewhere. Finally, the appellant asserts that "nothing in Part 10 operates to eviscerate or cut down traditional common law principles applicable to multiplicity of actions" (AS [45]).

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[14] *Ridgeway v The Queen* (1995) 184 CLR 19, 74-75 (Gaudron J); cited with approval in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; [2006] HCA 27, [14] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[15] *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51, [60] (Kiefel CJ, Bell and Keane JJ).
[16] *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51, [43] (Kiefel CJ, Bell and Keane JJ).

28. The appellant's approach appears to remove any content from Ground 1 of the Notice of Appeal, such that "did not authorise" merely means "is not itself a head of power". Given that an alternative source of power was identified by both the primary judge and the Court of Appeal, Ground 1 (which reproduces the first of the questions on which the appellants was granted special leave) would not appear to lead anywhere. There is also no Ground of Appeal expressly asserting that the Court of Appeal erred in its approach to the common law principles.

29. Even if the appellant was to alter her argument to contend that Part 10 contained some implied limitation, and (somehow) disclosed a legislative intent that the court must give predominant weight to the order in which proceedings are filed when exercising its power to grant a stay, the Court would reject this argument for four primary reasons.

30. *First*, while it may be accepted that the relevant context for the purposes of statutory interpretation of the stay power includes Part 10 of the CPA (insofar as the proceedings before the court are representative proceedings) the context also incudes – far more directly – Part 6. That section is entitled "case management and interlocutory matters", and includes the "guiding principles" in sections 56 to 60.[17] As Bell P recognised (CA [88]-[91]), those sections provide an entirely independent ground upon which proceedings may by stayed where the Court forms the view that a stay is justified in accordance with the dictates of justice or to advance the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute. There is no reason why those mandatory factors must play a subservient role to Part 10 (*cf* AS [67]). Nor is there any warrant for the submission that "*Section 58 cannot be used to fill the gap in power under Part 10*" (AS [67]). There is no relevant "gap". Section 67 expressly provides the stay power, and (as noted above) that power is expressly conditioned by section 58 (which in turn incorporates sections 56 and 57).

31. *Secondly*, Part 10 does not in any event evince an intention that there will be only one proceeding against a defendant. In the ordinary course, different plaintiffs could commence separate actions against a defendant arising out of the one set of circumstances. Part 10 does not alter that. For example, it contains no provision to prevent any plaintiff from bringing his, her or its own personal action against a defendant. One of the fundamental premises of the Part 10 opt-out model is that group members may not even be aware of the representative proceedings brought on their

[17] Those Part and Division headings form part of the Act: *Interpretation Act 1987* (NSW), section 35(1).

behalf until they receive an opt-out notice and are given opportunity to opt out (see section 175(1)(a)). Until that time, it cannot be the legislative intention that their rights (including their right to commence proceedings) should be curtailed by the unrequested commencement of proceedings on their behalf by someone else.[18] It would be an odd result if, despite the express reservation of the right to commence separate proceedings by means of the opt out procedure, any proceeding by a group member commenced prior to opt out (and potentially without notice) was liable to be stayed as an abuse of process. In that regard, it is also relevant that group members are not parties.[19]

10 32. Part 10 (s 162) also expressly allows group members to opt out and bring their own proceedings in tandem with the representative proceeding. It expressly allows a plaintiff to commence proceedings on behalf of part of a class of affected persons (for example, those persons who have signed a litigation funding agreement), thereby leaving room for a further proceeding in relation to the same issues: s 166(2).

33. *Thirdly*, although arising out of a common event or set of circumstances, separate actions by different plaintiffs may involve different pleadings, potentially with different causes of action, different ways of formulating the claim, and potentially different time periods. That was the position in the present case. Although the appellant relies (AS [7]) on the phrase "essentially duplicative" (at PJ [347]), the invocation of
20 that phrase tends to obscure the more nuanced assessment by her Honour which was not that there were no differences, but that the differences were not such as to prefer one proceedings over another for the purposes of her Honour's overall assessment: PJ [242]-[246], [258]. Those matters are properly to be addressed in the exercise of the Court's power to stay proceedings, and in accordance with "the dictates of justice" and by reference to "such… matters as the court considers relevant in the circumstances of the case" (CPA, s 58). Importantly, the notion of "essentially duplicative" does not involve any fixed criteria, and Part 10 certainly does not purport to specify such criteria. To the extent to which the appellant suggests that Part 10 contains an implied prohibition against "essentially duplicative" proceedings by a representative plaintiff
30 who is a group member in another proceedings, the content of the prohibition is indeterminate, which tends against any such implication.

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[18] *Oliver v Commonwealth Bank of Australia (No 2)* [2012] FCA 755; 205 FCR 540, [2]-[3]
[19] *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [36]-[27]; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [36]; *Oliver v Commonwealth Bank of Australia (No 2)* (2012) 205 FCR 540, [2].

34. *Fourthly*, the specific provisions of the CPA identified by the appellant (sections 171 and 169 (see AS, [42])) do not point to a different conclusion. Section 171 is confined to replacement of a representative party where it appears to the court that that party is *"not able adequately to represent the interests of the group members*". That fastens upon "ability", not on whether another action is better. This test will generally only be satisfied where the representative plaintiff ceases to have a sufficient interest in the dispute to bring the claim[20] or is otherwise incapable or refuses to perform the role of representative plaintiff.[21] It is not a mechanism for a representative plaintiff to be replaced on application of a group member who disagrees with the way the case is being run: *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [5] (Gleeson CJ). Section 169, being the right to opt out, hardly evidences an intention to preclude subsequent proceedings – as identified above.

35. In summary, and as the appellant essentially acknowledges at AS [45], the most that can be said is that Part 10 does not address the issues that may arise (but will not necessarily arise) where there are competing representative proceedings. This is not a proper basis to limit the Supreme Court's express stay power. To the contrary, the inference that should be drawn from the lack of express reference to competing actions in Part 10 is that the legislature contemplated that any such issues could be managed by the court by means of its general case management powers (Part 6 of the CPA, including section 67) and specific case management powers (section 183). Indeed, as will be explained below, this is the "*traditional*" approach to overlapping representative proceedings even before the introduction of modern class action procedures. The only remaining question, therefore, is whether the Court's express powers (which, it bears repeating, were the powers the primary judge actually exercised) are constrained by extra-statutory concepts which can be sourced in "*traditional common law principles*".

36. Before addressing these common law principles, however, it is important to note one further aspect of the Part 10 regime that is not emphasised by the appellant. That is that the Court assumes an important supervisory and protective role vis-à-vis group members. It has been said that, in certain circumstances (particularly settlement approval), the court assumes a role akin to that of a guardian and acts to protect those group members who are not represented by the representative plaintiff (or his/her

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[20] *Revian v Dasford Holdings Pty Ltd* [2002] FCA 1119, [8], [14], [23].
[21] *Tongue v Council of the City of Tamworth* (2004) 141 FCR 233, [11],

solicitors) and whose interests may be prejudiced in their absence.[22] Observations of this nature have not been restricted to modern representative proceedings,[23] but the role of the court in this respect is readily ascertainable from the text and context of Part 10 (e.g. the requirement for court approval of settlements in section 173). It is strongly supportive of an approach that allows the court, when exercising its powers under the CPA, to be mindful of the best interests of group members, particularly where there is a real risk – as there is in the present context – that those interests may diverge from the interests of the representative party.[24]

B.3 The traditional common law principles argument

37. The appellant relies on two so-called "*traditional common law principles*": *first*, that at common law, there is a *prima facie* presumption that proceedings are vexatious and oppressive if an action is already pending in respect of the same controversy and in which action complete relief is available (the **rebuttable presumption proposition**) (AS [21]); and *second*, that the onus is on the party commencing the second action to show that it is not vexatious and oppressive, and that this onus can only be discharged by some "*legitimate juridical advantage*" (the **onus proposition**): AS [46]-[47].

38. In relation to the suggestion that the time for assessing relevant matters is the date of commencement of the action, the statutory criteria provided for in the CPA include matters that can only be assessed by reference to the parties' conduct since the proceedings were commenced.[25]

39. As the Court of Appeal observed, there are a number of difficulties in applying principles developed in "*traditional stay jurisprudence*" (usually in the context of transnational litigation) to the unique circumstances of overlapping representative proceedings. These difficulties confirm that the asserted principles form an unsafe basis to seek to constrain the court's stay power in the present circumstances. There are three main difficulties.

40. ***First***, the appellant's summary of the relevant principles is imperfect. It cherry-picks concepts that have developed in different areas of law with distinct jurisprudential underpinnings and that do not have ready application to the present circumstances. This can be demonstrated by reference to the main cases relied upon by the appellant.

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[22] *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8].
[23] *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398; [1995] HCA 9, 408 (Brennan J).
[24] See, eg, *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323; 335 ALR 439, [63] (Murphy J).
[25] See s 58(2)(b)(ii), (iii), (iv), (v) and (vi) of the CPA.

41. *Henry v Henry* (1996) 185 CLR 571 (***Henry***) and *Moore v Inglis* (1976) 9 ALR 509 (***Moore***) concern the circumstances where a second or subsequent action may be considered vexatious and oppressive in the "*strict sense*",[26] that is, as an abuse of process.[27] As Bell P observed below, this generally only applies on a presumptive basis where a defendant is being sued by the *same party* in more than one proceeding and typically in more than one forum.[28] The moving party is also almost always the person who is suffering from the presumed vexation – namely, the defendant (CA [75]). And even in that context the cases demonstrate that the weight given to the first filed proceedings will always depend upon the circumstances of the case, including where (as here) the difference in time of filing is material or not (CA [59]-[61]). Further, even in those cases where the *prima facie* rule has been propounded (as in *Henry*), the reasons of the court disclose that the time of filing is not considered to be determinative and is merely considered as one amongst a range of factors (including factors personal to the parties) (CA [68], [86]).

42. *Carron Iron Co v Maclaren* (1855) 5 HLC 416 (***Carron***) and the cited passages from *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 (***CSR***) are in a different category. They do not concern the grant of a stay pursuant to the inherent power at all, but rather the equitable jurisdiction to grant an anti-suit injunction. The equitable jurisdiction does not operate upon *prima facie* assumptions but rather a wholistic assessment of all of the circumstances of the case to determine whether the *plaintiff's conduct* is unconscionable or involves an unconscientious exercise of a legal right.[29] The appellant does not seek to invoke this jurisdiction on the present application or allege that the second or third respondent's conduct was relevantly unconscionable or unconscientious. The Court would accordingly be careful not to transpose those principles out of their context and apply them to constrain the Supreme Court's express statutory and inherent power.

43. ***Second***, the appellant does not explain how the concepts of vexation and oppression discussed in the cases can apply to the conduct of a group member in representative proceedings. As has been observed by the Full Court of the Federal Court in *Getswift*,

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[26] *Henry v Henry* (1996) 185 CLR 571, 591 (Dawson, Gaudron, McHugh and Gummow JJ).
[27] See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390-391, citing *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 and (at footnote 102) *Henry v Henry* (1996) 185 CLR 571.
[28] CA, [66]; see the authorities quoted by Mason J in *Moore v Inglis* (1976) 9 ALR 509 at 513-514.
[29] *CSR* at 392 and 394. See also *Carron* at 438-439 (Lord Cranworth) and Spry, *The Principles of Equitable Remedies: Specific performance, rectification and equitable damages* (9th Edition), pp. 347-348.

[150] (see also [155]-[157]) and by Perram J in *Oliver v Commonwealth Bank of Australia (No 2)* (2012) 205 FCR 540; [2012] FCA 755, [2]-[3], it is difficult to see how the later commencement of proceedings by a group member (in circumstances where their individual rights are preserved by the right to opt out and they may not even know of the existence of the earlier proceedings) could ever be considered to be vexatious, oppressive or an abuse of process in the relevant senses described above. This understanding accords not only with the scheme of Part 10 (as explained above), but with the historical approach to competing representative proceedings in the old equity practice as typified by *McHenry v Lewis* (1882) 22 Ch D 397 (***McHenry***).

10 44. *McHenry* concerned three representative proceedings against the trustees of a railway scheme, two by Mr McHenry (one in England and one in the United States) and one by a Mr Conybeare (in England). Insofar as the two English proceedings were concerned, Jessel MR did not seek to apply any of the principles derived from "*traditional stay jurisprudence*".[30] Rather, it was observed that the two overlapping representative actions could be resolved by consolidation or, failing that, by the court bringing each of the actions before it and determining which action to stay (on the defendant's motion). The factors that Jessel MR considered relevant on such a stay application included the relief sought, the way the action was framed (i.e. the pleadings), the parties, *and the financial means of the plaintiff*.[31] As Bell P observed,[32]
20 this approach has a striking similarity to the multi-factorial approach applied by the primary judge.

45. The appellant's attempts to distinguish *McHenry* are unpersuasive and should be rejected. She says that the two proceedings in *McHenry* were not "*duplicative in the strict sense*" as described in *Carron* and *CSR* because Mr McHenry sought some further relief (AS [72]). But this submission only serves to reveal the shifting sands of the argument. Whereas "*duplicative proceedings*" are initially defined (at AS [20]) as proceedings against the *same* defendant, in respect of the *same* controversy and on behalf of the *same* class of persons (criteria which would all be met by the two English actions in *McHenry*), the definition is ultimately reduced to later proceedings that seek
30 the same relief as the first proceeding in an attempt to distinguish this authority (and the others cited by Bell P) (AS [72]-[73]). There is no authority that supports the

[30] *McHenry*, 399-403.
[31] *McHenry*, 404.
[32] CA, [55], [84] (CAB: 171, 180).

proposition that this is enough to make a proceeding vexatious or oppressive in the relevant sense, and certainly not the equity cases of *Carron* and *CSR* (as discussed above). The true chameleon nature of the central concept of "*duplicative proceedings*" is revealed in this context, including the nuanced, evaluative judgments that it entails (which judgments are entirely disconnected from the statutory text).

46. ***Third***, the onus proposition and the related concept of "*juridical advantage*" do not advance the appellant's argument. The only authority cited on onus is a line from Mason J's judgment in *Moore* quoting from Lord Esher MR's dissenting judgment in *The Christiansborg* (1885) 10 PD 141 at 148. But, as has been observed above, these comments were made in the context of proceedings commenced *by the same person* where it was alleged that the second proceeding was an abuse of process. There is a more generally applicable line of authority to the effect that the burden of proof is on the defendant seeking the stay, including to show that the granting of the stay would not visit an injustice on the plaintiff.[33] There is no reason to think that the burden should be shifted to the party whose proceeding is being stayed where it is the plaintiff in a competing proceeding (and not the defendant) seeking the relief.

47. The related concept of "*juridical advantage*" that arises in this aspect of the appellant's submissions is also difficult to pin down. It is initially sourced (at AS, [47]) from *Voth v Manildra Flour Mills Proprietary Ltd* (1990) 171 CLR 538 (***Voth***) at 564-565, where the plurality said that, in considering a clearly inappropriate forum application, the "*connective factors*" and "*legitimate and personal or juridical advantage*" referred to by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (***Spiliada***) at 477-478 and 482-484 provided valuable assistance. Putting the appellant's excision of "*personal…advantage*" to one side, it is plain that the "*juridical advantage*" referred to in this context is the relative advantage (or disadvantage) arising from the different processes and available remedies in courts in different fora (*Spiliada* at 482-3) – a concern that has no relevance here. More fundamentally, however, Lord Goff in *Spiliada* (at 483) made it clear that he was not exhaustively defining the categories of relevant considerations and observed that "*the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice*". This is entirely at odds with the appellant's attempt to distinguish between legitimate juridical and illegitimate non-juridical considerations, with the matters considered by Jessel MR

[33] *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382, 398 (Scott LJ); see also *Marine Insurance Co Ltd v Geelong Harbour Trust Commissioners* (1908) 6 CLR 194.

in *McHenry* (which included the financial standing of the plaintiff) apparently falling within the former category (AS, [74]), and the advantages to group members potentially flowing from adoption of a particular funding model in the latter (AS [52]),

48. The problems with this proposed distinction can be seen from the concession made by the appellant on multiple occasions that if the second-in-time action offered security for costs and the first-in-time did not, then this could properly lead to the second-in-time action being preferred[34] - indeed, it was said on the special leave application that it "*probably would be decisive*".[35] This concession reveals the fluidity of the concept of "*traditional juridical advantage*" as used by the appellant. It is apparently capable of including matters that would be of benefit to the ultimate financial position of the defendant, but not matters that would be of benefit to the ultimate financial position of the group members (such as the funding arrangements adopted). No proper basis for the distinction is identified. It also tells against any suggestion that Part 10 contains an implied prohibition against a subsequent matter.

B.4 The public policy argument

49. The final strand of the appellant's argument is that by not adopting a "*first in time*" rule the courts have encouraged multiplicity and taken on the role of presiding over a marketplace of bidders (AS, [35]). It is not said that this involves the court exercising a non-judicial function that is outside Chapter III. It is simply said to be a "*wrong turning*" and asserted that it copies a United States certification procedure that is at odds with the traditional role of Australian courts (AS, [55]-[61]).

50. This submission, which is somewhat divorced from the thrust of the appellant's other arguments, only serves to obscure the true policy issue on this appeal. That issue is that if the Court does adopt a "*first in time*" presumption on the grounds proposed by the appellant, it will be encouraging two undesirable behaviours. The first, and most obvious, is a race to the courthouse. This danger has been well summarized by Allsop CJ in *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1; [2018] FCAFC 143 at [18].

51. The second undesirable behaviour is the framing of claims (which may be hastily prepared for the reasons identified above) as broadly as possible. If the appellant's contention is accepted, a representative plaintiff can best entrench themselves not only

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[34] Court of Appeal transcript T9.1-.11 (copy attached).
[35] *Wigmans v AMP Limited* [2020] HCA Trans 52 (17 April 2020), p. 5, line 115-116.

by filing first but by filing with the longest claim period possible and the broadest claim for relief possible to gain the so-called "*juridical advantages*".

52. Not only do the commercial pressures described above (to act quickly and explore larger and more speculative claims) have obvious ethical problems attached to them for legal practitioners, but they are not in the interests of group members or defendants. As the primary judge observed (PJ [339]-[341]), group members are not served by the inclusion of potentially unnecessary (and therefore wasteful) causes of action or claims on behalf of persons who may have a conflict of interest with other group members. Nor is the encouragement of claims brought on this basis at all consistent with the just, quick and cheap resolution of the real issues; cf. CPA, s 56.

53. By contrast, to the extent the multi-factorial approach encourages greater competition at the initial stage of proceedings, this multiplicity is (self-evidently) short-lived. It is also undeniable that the advent of competition for the conduct of representative proceedings has lowered the overall cost of those proceedings for group members. This is an outcome that is in the best interests of group members (and potentially also defendants, because it reduces the costs that have to be factored into any settlement) and that is entirely consistent with one of the central purposes of modern class action procedure (namely, to "*reduce the costs of proceedings*")[36] and the mandatory case management objectives enshrined in the CPA.[37] It is also incongruous for the court to ignore net returns at this stage, but to consider that as a relevant factor upon approval of any settlement: see *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [52] (Jacobson, Middleton and Gordon JJ) and AS [92].

C. Appeal Ground 2

54. The appellant's second ground of appeal proceeds on the assumption that she has been unsuccessful on her first ground, and the Court has found that the primary judge properly engaged in an assessment that included consideration of the likely net returns to group members. The appellant's complaint is one that is framed as an allegation that the primary judge improperly assumed that each proceeding had an equal possibility of achieving the same settlement or judgment outcome. However, the appellant's argument mischaracterises the way in which this issue arose before the

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[36] See Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174-3175 (the Honourable Michael Duffy), with respect to the introduction of Part IVA in the *Federal Court of Australia Act 1976* (Cth).
[37] CPA, s 57(1)(d).

primary judge and was dealt with by her Honour. It is an attempt to extract an issue of principle out of what was merely a factual evaluation based on the particular evidence in the present case.

55. The appellant's proceeding stood out from the other proceedings because it had a significant level of funding commission payable by group members. On any given level of settlement or judgment, it produced a materially poorer return for funded group members (and thus likely group members). As the primary judge found at PJ[212], "[t]he most significant feature of the comparative tables in this regard, in my opinion, is that there is a broad comparability of outcome across all funding models with the notable exception of the Wigmans model" [emphasis added]. The primary judge also found that there was no basis for distinguishing the competence or experience of the legal teams (PJ [311]), consistent with the submission of the appellant that "it is plain on the evidence that each firm of solicitors and counsel they have retained are highly experienced…there is no reason to doubt that any of the…firms would have difficulty in running the litigation on behalf of the open class" (PJ [289]).

56. In those circumstances, it was unsurprising that the appellant sought to sidestep the consequences of this by contending that there was a particular feature of her proceeding that made it more likely to produce a higher judgment or settlement sum. She contended that her funding arrangement, under which the rate of commission rose the longer the case lasted, produced better incentives for a higher result. That proposition was not self-evident and required evidentiary support, and the appellant sought to adduce that in the form of an expert report from a Professor Perino. As the primary judge observed at PJ [166], a feature of that evidence was that it suggested that the model for producing a better return is to have funding commission rates rising with the level of return, whereas the funding commission structure in the Wigmans proceedings was that the rate of commission rose with the length of the proceedings. In any event, the primary judge rejected the evidence of Professor Perino and also held that even if it was admissible it would not have altered her views (PJ[163]). There was no appeal from that aspect of the decision. That meant that there was no evidence to suggest, and no reason to think, that the appellant's proceedings might produce a higher judgment or settlement.

57. In light of those particular factual circumstances, there is an air of unreality in suggesting that before the Court can compare two different funding proposals (for example, one with a high commission rate and one with a low commission rate) the

comparison "necessarily requires the Court to speculate on the judgment or settlement sum that will be achieved in each proceedings": AS [82]. There is rarely a need to speculate: Courts proceed on evidence. If there is no material, and no basis, to suggest that one proceeding is likely to produce a better judgment or settlement sum than another (as was the situation in the present case), then it could hardly be said to be erroneous to conclude that the proceedings that produced a smaller return to group members out of any given settlement sum or judgment was not to be preferred.

58. It will likely often be the case that there is nothing before the Court to suggest that one proceeding is likely to produce a different outcome from another proceeding. That may be the case not only if there is no evidence to support such a suggestion, but also if there is simply no reason why one matter is more likely to produce a higher return than another (however much evidence as to the detail of the respective matters is adduced). Courts frequently have to assess likelihoods or future probabilities. It cannot be said that such an assessment is unsound just because there is a possibility that with the benefit of hindsight it turns out not to be accurate. If there is nothing to separate the matters (as was the case here), it is not erroneous to assume they produce the same result. The inability to separate the matters on that basis is not a proper ground to say that the entire exercise is logically flawed or must be abandoned. The appellant's submissions in this regard involve significant overstatement.

59. Two further points should be noted. *First*, it is not correct, as suggested at AS [94], that a "no win no fee" funding model will always produce a higher return if one assumes the same settlement or judgment sum. Because the "no win no fee" funding model will usually be combined with the allowable 25% uplift in fees, it may be more, less or equally expensive to group members as a proceedings with no uplift and with a modest commission rate or capped commission. That is why, although the Komlotex matter was the only "no win no fee" matter out of the four proceedings before the primary judge, her Honour held there was "broad comparability of outcome across all funding models with the notable exception of the Wigmans model" (PJ [212]). The primary judge preferred the Komlotex proceeding to the Georgiou and Wileypark proceedings on other grounds.

60. *Secondly*, the reference to "evidence before the Court" in AS [88] is inaccurate. The matters referred to in that paragraph post-dated both the primary judgment and the Court of Appeal judgment. They have in turn been superseded by the Judgment referred to in AS [88].

D. Conclusion

61. The answer to the question posed in Part II, paragraph 3, is "no". The Supreme Court has ample power to grant a stay of competing proceedings pursuant to its express powers in sections 67 (together with section 183) or the inherent power. In exercising those powers, the court is guided by case management principles (CPA, section 56), the dictates of justice (CPA, section 58) and the group members' best interests (Part 10). The multi-factorial approach adopted by the primary judge accorded with that function and properly took into account matters to be taken into account by sections 56 to 58 of the CPA. The weight to be given to those factors is otherwise a matter for the primary judge and the Court would not accede to the appellant's attempt to re-write the relevant provisions by reference to non-statutory concepts, particularly given the potential adverse policy consequences of doing so.

62. Nor, in relation to the appellant's second ground (Part II, paragraph 4) would the Court overturn one aspect of that multi-factorial analysis, where the primary judge's conclusion was based on the particular factual matters before her and does not raise any issue of principle.

Part VII: Time required

63. The second and third respondents estimate that they will require approximately two hours for oral submissions.

Dated: 7 July 2020

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Annexure A

Constitutional provisions, statutes and statutory instruments referred to in submissions

Civil Procedure Act 2005 (NSW) No 28 (historical version 30 June 2018 to 22 March 2020).

GLEESON: Can I come to one step before your Honour's question? A slightly easier one. The primary focus, I submit, is on the suitability of each proceeding to raise all the legal issues in a controversy. Additionally to that, there can be matters of procedural fairness and proprietary across the record that are relevant. And the classic one is security for costs. So if one proceeding offered security and the other didn't, the injustice to the respondent of facing an action without security would weigh heavily in favour of allowing the security matter to proceed. Coming back to your Honour Macfarlan J's question, if the second matter was filed only a very short period of time afterwards, it would still be prima facie vexatious and oppressive but if it was the only that offered security, that would probably outweigh days or minutes.

And so that would show how the calculus would work. In your Honour the President's question where it gets a bit harder, firstly because you've now got a transnational context, we have to superimpose on stay jurisprudence the Voth test. So it has to come within clearly inappropriate forum. And within that test, one is then asking is that difference a legitimate juridical advantage and how does the balance weigh out. Recognising that sometimes the benefit to the one is the detriment to the other. Now a case that's close to point on that is Union Carbide which your Honours have in the authorities vol 2 at tab 27. It's not transnational but it's one proceeding in the Supreme Court and one in the High Court at a point in time where their jurisdiction was potentially different.

Your Honours will see from the headnote the ships collided. The first action was brought for damages in the Supreme Court in Victoria before a jury. And the second action was brought by the reverse party in the High Court in the admiralty jurisdiction with no jury and it was an in rem action. So in this case, the first filed was seeking to stay the second filed in the High Court in its in rem action. And it failed in that application. Now, why did it fail. If the Court goes to 279 point 5, the basis for the application for the stay was that the responsibility for the damage for the collision should be decided in the Supreme Court. So the applicant was saying that the substantive question here is who is responsible for the collision between two ships. It's a simple question, it should go to the Supreme Court.

But the other party argued, as we see a little further down, it wanted to bring its in rem admiralty claim in the High Court where there was definitely a jurisdiction available but there was a doubt whether the Supreme Court had an in rem jurisdiction. And his Honour said in the next paragraph that's a matter of doubt. So when he came to resolve the applications of 281 point 5, in the paragraph commencing, "The inconvenience and the embarrassment," et cetera. That first sentence, we submit, reflects the traditional approach to multiplicity of proceedings. "It is inconvenient and embarrassing to allow two independent actions involving the same question of liability to proceed in two different courts."

Now pausing there, what does his Honour mean by inconvenience and embarrassment. We would suggest inconvenience is referring to the vexation and oppression of duplicating an issue. And the embarrassment is referring to