HIGH COURT OF AUSTRALIA

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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

Third Respondent

APPELLANT'S 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 appeal presents the following issues:

   a. whether it is *prima facie* vexatious and oppressive for a group member in a representative proceeding to commence another representative proceeding that is duplicative of the original proceeding (ie, same controversy, same class, same defendant);

   b. whether the Supreme Court of New South Wales is empowered, when faced with two or more such "duplicative" representative proceedings, to make a forward-looking assessment as to which of the proceedings is likely to result in the highest net return to group members, and to permanently stay one or more of the other proceedings on that basis; and

   c. if the Supreme Court of New South Wales is so empowered, whether it is permissible, in making such an assessment, to assume that each proceeding will achieve the same settlement or judgment sum, in the absence of any evidence supporting such an assumption.

Part III: Section 78B Notice

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

Part IV: Citations of the decisions below

4. The decision of the primary judge is *Wigmans v AMP Ltd* [2019] NSWSC 603 (**PJ**).

5. The decision of the New South Wales Court of Appeal appealed from is *Wigmans v AMP Ltd* (2019) 373 ALR 323; [2019] NSWCA 243 (**CA**).

Part V: Relevant facts

6. Following evidence given by AMP executives to the Financial Services Royal Commission on 16 and 17 April 2018, there was a sharp fall in AMP's share price. On 9 May 2018, the Appellant, Ms Wigmans, filed a proceeding in the Commercial List of the Supreme Court of New South Wales under s 157 of the *Civil Procedure Act 2005* (NSW) (**CPA**) on behalf of an open class, being all persons who purchased

shares in AMP between 10 May 2012 and 15 April 2018 (**Wigmans proceeding**). A Commercial List Statement, in compliance with s 161 of the CPA, detailed the group members, the nature of the claims made on their behalf, the relief sought and the common questions of fact or law.[1]

7. Within short succession thereafter, four further representative actions were commenced in the Federal Court of Australia by persons who were already group members in the Wigmans proceeding. Those proceedings were found to be "essentially duplicative" of the Wigmans proceeding (PJ [347]) and to offer "no real juridical advantage" over the Wigmans proceeding (PJ [350]).

10 8. The Second Respondent (**Komlotex**) was the last to file, on 7 June 2018, after access to the Wigmans pleading[2] and without a full pleading of its own[3] (**Komlotex proceeding**). By that time, the Wigmans proceeding had advanced: directions had been made by the Commercial List judge,[4] and the funder, Burford, had paid into Court $5 million in security for costs.[5]

9. Komlotex (and representatives in other of the competing actions) applied, unsuccessfully, to transfer the Wigmans proceeding to the Federal Court.[6] At the end of September 2018, more than four months after the Wigmans proceeding was commenced, the four duplicative proceedings were transferred by order of the Federal Court to the Supreme Court of New South Wales.[7]

20 10. The substance of the contest that ensued was a series of cross-stay motions brought by the various representative plaintiffs. AMP, as defendant, argued that only one proceeding should go forward, but did not express a preference between them.

11. The form of the Komlotex proceeding evolved substantially in the six-month period between the filing of the cross-stay applications and the hearing. Komlotex abandoned its intention to use an external funder and instead Maurice Blackburn agreed to fund the entirety of the action on a "no win no fee" basis with an uplift (PJ [57]). It indicated that, if given carriage of the action, it would widen its class period (which

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[1] Ms Wigmans' Commercial List Statement filed 9 May 2018 (AFM 1:13-95).
[2] Affidavit of Damian Scattini affirmed 7 November 2018 at [21(d)(ii)] (AFM 1:109).
[3] Komlotex's Concise Statement filed 7 June 2018 (AFM 2:355-361).
[4] Orders made by Hammerschlag J in the Wigmans proceeding on 18 May 2018 (AFM 1:96-99).
[5] Affidavit of Damian Scattini affirmed 7 November 2018 at [13(b)] (AFM 1:105).
[6] *Wigmans v AMP Ltd* (2018) 128 ACSR 534; [2018] NSWSC 1045.
[7] *Wileypark Pty Ltd v AMP Ltd* (2018) 359 ALR 43; [2018] FCAFC 143.

was narrower than that in any other action) to match the Wigmans proceeding.[8] Komlotex also applied to consolidate its proceeding with another competing proceeding commenced by the Third Respondent (**Fernbrook**) (PJ [106]-112]). On the day of the hearing of the cross-stay motions, Maurice Blackburn undertook to provide $5 million in cash as security for costs, matching the security provided by Burford in the Wigmans proceeding (PJ [219]).

12. The primary judge, in resolving the dispute as to which proceeding should go forward and which proceedings should be stayed, undertook a "multifactorial" analysis (PJ [33], [113], [126], [127]-[356]), framed as an exercise in "case management" (PJ [3], [104]), purporting to follow the procedure employed in *Perera v GetSwift Ltd* (2018) 263 FCR 1; [2018] FCA 732 (***GetSwift First Instance***) and confirmed on appeal: *Perera v GetSwift Ltd* (2018) 263 FCR 92; [2018] FCAFC 202 (***GetSwift Appeal***). Her Honour rejected the Appellant's contention that the right of a group member to commence subsequent representative proceedings in respect of the same controversy as the representative proceeding in which they were already a group member and could enjoy complete relief was to be determined by reference to Part 10 of the CPA and common law principles concerning multiplicity of actions.

13. By the multifactorial analysis, the primary judge 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. Her Honour identified eight factors relevant to the analysis (PJ [126]), the most important of which are the first ("the competing funding proposals, cost estimates and net hypothetical return to members") and the sixth ("the experience for legal practitioners (and funders where applicable) and availability of resources").

14. Most factors considered by her Honour, including the relative experience and abilities of the solicitors involved (PJ [311]), were considered to be neutral; that is, they did not favour any one proceeding over the others (PJ [350]-[353]).

15. The factor on which Her Honour placed predominant weight was the hypothetical net return to group members (PJ [354]). Her Honour had regard (PJ [184]-[198], [208]-[213]) to comparative tables of legal costs and funding commissions prepared by Komlotex on the basis of assumptions as to how long the proceedings would take to

[8] Affidavit of Andrew Watson sworn 7 November 2018 at [22], [56]-[63] (AFM 2:372, 385-389).

run and the likely size of the judgment or settlement sum that would be achieved (a successful outcome being assumed).[9] These tables assumed that the Wigmans and Komlotex proceedings would achieve the *same* outcome within the range of possible outcomes, notwithstanding that, as her Honour found, there were "arguable incentives and disincentives in relation to each of the possible funding models" (PJ [212]) and that an argument based on comparative ability of Burford, as a large external funder, and Maurice Blackburn whose resources were stretched in other "no win no fee" matters, was not resolved (PJ [182]-[183]).

16. Her Honour preferred the Komlotex proceeding to the Wigmans proceeding essentially on the basis that, if one assumed that each proceeding would achieve the same settlement or judgment sum, the Komlotex proceeding would deliver a higher *net* return to group members than the Wigmans proceeding, because the Komlotex proceeding did not require payment of a funding commission to an external funder (PJ [354]). In the Komlotex proceeding, risk was rewarded solely by way of the statutorily permitted uplift on legal fees.

17. On that basis, the primary judge ordered a permanent stay of the Wigmans proceeding, sourced to ss 67 and 183 of the CPA and the inherent power of the Court (PJ [358(6)]). The Komlotex proceeding was consolidated with the Fernbrook proceeding, with Maurice Blackburn acting as the single firm of solicitors for the consolidated action.

18. The Court of Appeal found no appellable error in the primary judge's decision.

Part VI: Argument

A. Overview

19. This appeal concerns the proper approach to the problem of duplicative representative proceedings.

20. Duplicative representative proceedings arise where a group member in a regularly commenced "open class" representative proceeding commences (often at the instigation of a firm of solicitors or litigation funder) another open class representative proceeding against the *same* defendant, in respect of the *same* controversy, and on

[9] Affidavit of Andrew Watson sworn 22 November 2018, annexures AJW-19 and AJW-20 (AFM 2:493-496).

behalf of the *same* class of persons as the first-filed proceeding, albeit with different solicitors and/or funders.

21. Such multiplicity of actions is not tolerated by the common law. At common law, 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 action complete relief is available: see *Carron Iron Co v Maclaren* (1855) 5 HLC 416 at 437-439; 10 ER 961 at 970-971 (***Carron Iron***); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 393-394 (***CSR v Cigna***); *Henry v Henry* (1996) 185 CLR 571 at 591. The onus is on the party commencing the second action to show that it is not vexatious and oppressive: *Moore v Inglis* (1976) 9 ALR 509 at 514 (Mason J).

22. There is nothing in the statutory regime governing representative proceedings—Part 10 of the CPA—to suggest that representative proceedings warrant an exception to those long-standing principles. To the contrary, the statutory regime evinces a similar aversion to multiplicity. A core objective of the regime is "to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits", thereby *avoiding* a multiplicity of suits.[10]

23. Somewhat surprisingly, then, recent class action jurisprudence has proceeded in a different direction; one that embraces—and encourages—multiplicity of actions, in order to create a court-supervised marketplace for carriage of the claims of the class.

24. This direction, the Appellant submits, is the result of a wrong turning that ought now to be corrected. It has no basis in statute, it is contrary to long-standing principles of common law, and it is inconsistent with established judicial method.

B. The "multifactorial analysis" approach

25. It is convenient to begin by considering the essential character of the judicial exercise undertaken by the primary judge (summarised at paragraphs [12] to [17] above), and approved by the Court of Appeal below.

26. In the "multifactorial analysis", the Court in effect presides over an auction in which the prize is carriage of a single action on behalf of the common class.

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[10] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 94 ALJR 51; [2019] HCA 45 (***Brewster***) at [82].

27. Participation in the auction is secured by commencing a representative proceeding in respect of the same controversy as a pending representative proceeding of which carriage is sought.

28. In this auction, the representative in each action (or more realistically their solicitors and funders) each puts forward, on affidavit, its 'bid' for the right to win carriage of the claims of the class. In its bid, each bidder: identifies its proposed funding formulae and projected legal costs; promotes the competency of its chosen legal advisors; and otherwise seeks to prove why it has the better action.

29. Each bidder is entitled to improve its bid up until the conclusion of the hearing. Bidders may adopt or match features from other bids (eg, proposals on security for costs, causes of action, class definitions).

30. There is no apparent limit on the number of bidders who may compete for exclusive carriage. The logical premise of this "auction"-type approach is: the more duplicative proceedings that are commenced, the more competitive the bidding, the better for group members' interests. Once one representative proceeding has been commenced on behalf of the class in respect of a controversy, a second, third, fourth and so on are encouraged to follow (and join the bidding). The approach, logically and necessarily, embraces duplicative proceedings, up to the time of the auction.

31. There is no penalty for entering the bidding late. No real significance attaches to the order in which proceedings were commenced.

32. The Court presides over this marketplace of bidders for carriage of the claims of the class. At the hearing, the Court engages in a "multi-factorial" assessment of any and every matter which might bear upon which action will produce the highest net return for the class. This assessment is typically and necessarily "lengthy and elaborate" (PJ [3]). To conduct the assessment, the Court is required to speculate on a range of hypothetical issues, including, in regard to each individual action: the likely magnitude of any settlement or judgment sum that will be achieved (assuming success), the time in which any such settlement or judgment sum will likely be achieved; and the costs that likely will be incurred in achieving such settlement or judgment sum.

33. Once the court selects the winner, it stays all other actions.

34. The characterisation of this exercise as an auction process is a fair one. In *Kirby v Centro Properties Limited* (2008) 253 ALR 66; [2008] FCA 1505, Finkelstein J, confronted with multiple representative proceedings that were "substantially the same" (though not without points of difference) (at [3]) and asked by the respondent to select only one to proceed, observed that a "problem with acceding to the respondents' application is that, in a practical sense, it amounts to a choice between which lawyers and litigation funders should run the litigation and, as a consequence, obtain the not inconsiderable benefit that will result from a successful action" (at [32]). Having acknowledged (at [9]) that "there is no legislation in Australia that establishes procedures for handling multiple class actions", his Honour considered (at [32]) that he would be "better placed" to make such a selection if furnished with information, in respect of each action, as to the experience of the respective solicitors involved, the projected costs, and the proposed funding arrangements, including commission rates (at [32].) His Honour then stated (at [34]):

> "I appreciate that this approach has the hallmarks of an auction process, but with lawyer-driven class actions, there is no good reason why the case should not be auctioned. A workable procedure is to use a standard sealed-bid protocol. Any firm, including those who act in parallel proceedings, could lodge a bid. The successful bidder could be chosen by the judge, by a litigation committee appointed for that purpose, or (and this is my preference) by the judge who has the opinion of a litigation committee. For examples of sealed bid auctions, see *In Re Lucent Technologies Securities Litigation* 221 FSupp2d 472 (DNJ 2001), a securities fraud class action; see also *In re Auction Houses Antitrust Litigation* 197 FRD 71 (SDNY 2000); *In re Amino Acid Lysine Antitrust Litigation* 918 FSupp 1190 (NDIll 1996); *In re Wells Fargo Securities Litigation* 156 FRD 223 (NDCal 1994); *In re Oracle Securities Litigation* 131 FRD 688 (NDCal 1990).

35. As is immediately apparent, this kind of judicial exercise takes the Court into unfamiliar territory. Perhaps unsurprisingly, the primary judge did not undertake the task without some reluctance. Her Honour expressed the view that "aspects of the process involved in the comparisons made of the respective proceedings and the funding models proposed by the competing plaintiffs were indeed unedifying" (PJ [33], see also PJ [3].)

36. In *GetSwift First Instance*, Lee J expressed a similar concern:

> "It is inconsistent with the principled exercise of judicial power, and also unedifying, for the Court to be perceived as akin to a metaphorical auctioneer going around the room adopting the curial equivalent of entreating: "Are we all done? It's now going to go under the hammer!" The Court's role

> is to quell controversies in accordance with Ch III of the Constitution and, in doing so, ensure its processes are used for the purposes for which they were designed."

37. There is an important point of difference between the approach adopted as between the Federal Court and NSW Supreme Court. In the Federal Court, the focus is on picking the action estimated to produce the highest *gross* return. The Court focuses less on achieving the lowest possible costs and funding charges, and more on selecting the funding model, and legal team, most likely to produce the largest settlement or judgment for the class: *GetSwift Appeal* at [277]-[278].

38. By contrast, in the proceedings below, the focus was on *net* returns, with gross returns being assumed to be equal, and the determining factor being which action had the lowest estimated costs and funding charges; the very factor which the Full Court in the *GetSwift Appeal* said should not drive the analysis. In the Court of Appeal, Bell P rejected a comparative assessment of legal teams as "invidious" and taking the Court "into territory into which it is inappropriate for it to travel" (CA [98]) and stressed that a net return analysis did not prejudice AMP (CA [93]).

39. There is, thus, a substantial gulf between the approach of the two courts. However, both approaches—the gross return analysis and the net return analysis—involve error, and are a wrong turning which this Court should correct. Neither approach is authorised or empowered by the class action statutory regime. Both invite multiplicity, contrary to fundamental common law principle. And neither are capable of application in accordance with the judicial method.

C. Appeal Ground 1

40. Ground 1 is that 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.

Part 10 of the CPA

41. Part 10 of the CPA has the following relevant features. *First*, s 157 of the CPA confers authority upon a plaintiff (here, Ms Wigmans) to commence class action proceedings on behalf of all group members. Unlike certain overseas regimes, there is no requirement for a proceeding to be certified before it may continue as a class action. *Secondly*, a person's consent is not required to be a group member (s 159). *Thirdly*, the lead plaintiff has authority, with leave of the Court, to settle the class action on

behalf of group members (s 173). *Fourthly*, the Court may give judgment on the class action, which may (but does not necessarily) determine group members' claims (s 177). *Fifthly*, any judgment binds all group members other than those who have opted out (s 179). *Sixthly*, group members have a right to opt out (s 162). *Seventhly*, group members may apply to the Court for the replacement of the lead plaintiff if they are not able adequately to represent the interests of the group members (s 171). *Eighthly*, group members are also given the right to apply for "any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings" (s 183).

42. Those provisions, collectively, evince a legislative intention that a group member in an existing class action who is dissatisfied with the manner in which the action is being, or is proposed to be, conducted—including because it would prefer different solicitors or funding arrangements—is to avail themselves of the remedies provided by Part 10. They do not evince a legislative intention that dissatisfied group members may commence duplicative class actions. It may be accepted that nothing in Part 10 expressly *prohibits* a group member from commencing a duplicative representative proceeding. But that hardly bespeaks a policy in favour of multiplicity.

43. Part 10, and in particular s 171, contemplates (and provides a mechanism for) a contest between group members in a class action for the role of lead plaintiff where certain criteria are met. Such a contest is to be determined according to the criteria provided by the legislation, which a Court is well-placed to assess, namely whether the extant class representative is not able adequately to represent the interests of group members. Part 10, and in particular s 162, otherwise provides a group member with the right to opt out if it does not want to take part in the class action. If enough group members opt out, a class action could be brought on their behalf: *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [34] (Beach J).

44. What one does not find anywhere in Part 10 is any provision for the elaborate, auction-type exercise undertaken by the primary judge. Nor does one find in Part 10 any criteria to be applied by a Court in conducting such an exercise. It is reasonably to be expected that if that legislation intended to enlist the court in a task of that kind, it would make specific provision in that regard. That is has not done so is itself some contextual indication that the power to conduct such an exercise cannot be sourced to Part 10: see, analogously, *Brewster* at [69]. That Part 10 provides other solutions for

a group member who does not like how a class action is being run is another indication: *Brewster* at [59] (plurality), [125] (Nettle J), [138]-[140] (Gordon J).

45. Two conclusions may be drawn from the above analysis. First, the multifactorial approach adopted by the primary judge has no foundation in Part 10 of the CPA. Secondly, nothing in the scheme of Part 10 suggests that duplicative *representative* proceedings ought to be looked upon any more favourably than duplicative *non-representative* proceedings. Nothing in Part 10 operates to eviscerate or cut down traditional common law principles applicable to multiplicity of actions, to which principles we now turn.

Common law principles

46. As noted at paragraph 21 above, at common law, it is *prima facie* vexatious and oppressive to commence an action if an action is already pending in respect of the same controversy in which action complete relief is available. The fact that the parties to the second action are not identical to the parties to the first does not displace the presumption: see *GetSwift Appeal* at [155]; *Moore v Inglis* (1976) 9 ALR 509 (Mason J) (affirmed on appeal (1976) 51 ALJR 207).

47. The onus is on the party commencing the second action to show that it is not vexatious and oppressive: *Moore v Inglis* at 514. In traditional stay jurisprudence since *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (***Voth***), such onus is typically discharged by establishing that the second action offers some legitimate juridical advantage over the first action (see *Voth* at 564-565).

48. Having found, correctly, that: (i) Komlotex was a group member in the Wigmans proceeding; and (ii) the Komlotex proceeding was "essentially duplicative" of the Wigmans proceeding, the primary judge, in considering the cross-stay motions, ought to have started from the premise that the Komlotex proceeding was *prima facie* vexatious and oppressive.

49. The onus was then on Komlotex to establish that its proceeding was not vexatious or oppressive, and that the regularly-commenced Wigmans proceeding should be stayed so as to permit the controversy to be determined in (and only in) the Komlotex proceeding.

50. To discharge that onus, Komlotex was required to point to some legitimate juridical advantage that its proceedings offered over and above the Wigmans proceeding (thereby justifying the commencement and continuation of the Komlotex proceeding).

51. The exercise of assessing whether the Komlotex proceeding offered some legitimate juridical advantage over and above the Wigmans proceeding ought to have been conducted primarily, if not exclusively, by reference to the proceedings as they stood as at the date of commencement of the Komlotex proceeding.

52. At the time the Komlotex proceeding was commenced (7 June 2018), the Komlotex proceeding had no pleading and no articulated position on security for costs and was proposed to be an externally-funded action. Nothing which occurred in the Komlotex proceeding between commencement on 7 June 2018 and the hearing of the cross-stay motions six months later could have altered the assessment of whether the commencement of the proceeding was vexatious or oppressive. In any event, Komlotex's belated production of a pleading (PJ [329]), its last-minute offer to match Wigmans' security for costs (PJ [219]), and its assumption of a "no win no fee" funding model (PJ [57]) did not imbue it with any legitimate juridical advantage over the Wigmans proceeding.

53. The primary judge ought to have found that Komlotex had failed discharge its onus of justifying the commencement of the Komlotex proceeding. It follows that Komlotex's application for a stay should have failed and, consequently, Ms Wigmans' application to stay the Komlotex proceeding should have succeeded.

54. We turn now to examine the wrong turning that has led class action jurisprudence away from these traditional common law principles and towards a radically different approach.

The wrong turning

55. The origins of the "multifactorial analysis" conducted by the primary judge and approved by the Court of Appeal lie not in Part 10 of the CPA or the common law of Australia. Rather, they lie in the practice of "carriage" and "certification" motions in the United States and Canada (albeit implemented in a radically different way to the exercise carried out in those jurisdictions, as shown below): see *GetSwift First Instance* at [95]-[104]; *GetSwift Appeal* at [190]-[196]; *Melbourne City Investments*

Pty Ltd v Treasury Wine Estates Limited (2017) 252 FCR 1; [2017] FCAFC 98 at [62]; *Kirby v Centro Properties Limited* (2008) 253 ALR 66; [2008] FCA 1505 at [34].

56. In those jurisdictions, class actions may not proceed unless certified by the Court: see *Federal Rules of Civil Procedure*, rule 23 (US) (**FRCP**); *Class Proceedings Act 1992*, SO 1992, c. 6 (Ont.). The making of a certification order, of necessity, places the Court at the centre of determining whether, or how, a proceeding is to be conducted. A certification order, in the US, "must define the class and the class claims, issues, or defenses, and must appoint class counsel" (FRCP rule 23(c)(1)(B)). Similarly, in Ontario, a certification order must describe the class and state the nature of the claims asserted on behalf of the class, the relief sought by the class, and the common issues for the class (*Class Proceedings Act* s 8(1)).

57. The requirement for certification in Canada and the US reflects a fundamental legislative choice that individual litigants do not have any "right" to commence a class action on behalf of others or to define the class, issues or claims. Whether an action proceeds as a class action, and the metes and bounds of the action, lie in the discretion of the court. Just as the court in those jurisdictions will make choices about *how* a class action is to be run for the purposes of certification, the court may make a choice, where multiple persons file class actions with respect to the same subject matter, as to *which* action will be certified. The court makes those choices by reference to what is in the best interests of the class members (see *GetSwift First Instance* at [95], [99]). This occurs either at the certification stage, or in an earlier, pre-certification, "carriage motion" (see *GetSwift Appeal* at [193]-[195]).

58. The importation of a version of this US/Canadian practice here for the purpose of resolving competing duplicative class actions is a wrong turning for three reasons.

59. *First*, the US/Canadian practice occurs under a statutory framework which is directly inconsistent with the framework here. As outlined at paragraph 41 above, the Australian framework confers a positive right on the plaintiff to commence and prosecute class action proceedings on behalf of the class—and to define the class, the issues and the claims—while reserving to class members the right to opt out and the right to make certain applications within the class action.

60. *Secondly*, the full employment of the US/Canadian method would take the Court into areas which are incompatible with the traditional Australian judicial function, or are

impossible to apply consistently with that function. The US/Canadian approach prefers one side of the record (the class). It tasks the court with selecting which proceeding is likely to generate the largest recovery for the class—including by reference to the resources, experience and competence of counsel. As noted above, the Full Court in the *GetSwift Appeal* (at [278]) embraced the proposition that the Court should "select the proceeding with the legal team that is most likely to achieve the largest settlement or judgment, ie the most experienced and capable", while the Court of Appeal in the present case rejected that proposition (CA [98]). What the Court of Appeal failed to recognise is that the US/Canadian approach more generally does not accord with the traditional role of Australian courts.

61. *Thirdly*, the US/Canadian approach is inconsistent with the principles of traditional stay jurisprudence referred to at paragraphs 46 to 47 above, according to which the commencement of a second proceeding when complete relief is available in the first is *prima facie* vexatious and oppressive; those principles having no application in the US or Canada, where there is no right to commence a proceeding as a class action.

The Court of Appeal's approach

62. The Court of Appeal identified the Appellant's argument as to the structure of Part 10 at CA [45]-[46], but never returned to it thereafter.

63. The Court of Appeal never squarely identified any power within Part 10 of the CPA which authorised the course taken by the primary judge. The express stay power in s 165 was not relevant. Komlotex did not seek to make out the grounds for a discontinuance of the Wigmans action under s 166, or for substitution as representative under s 171 (on inadequacy grounds).

64. The primary judge identified s 183 of the CPA as a relevant source of power. Section 183 empowers the Court to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. The Court of Appeal, however, did not give any consideration to whether s 183 was a valid source of power.

65. Plainly it was not. Broad though its language may be, s 183 is not so broad as to support a permanent stay of the proceeding. Permanently staying a proceeding is not the doing of justice in the proceeding: *GetSwift Appeal* at [127]. Moreover, section 183 is an "essentially supplementary" provision designed to "ensure that the proceeding is brought fairly and effectively to a just outcome": *Brewster* at [46]-[47]

(plurality), [124] (Nettle J) and [147] (Gordon J). For reasons explained in paragraph 44 above, the context of Part 10, devoid as it is of any criteria by which to conduct the exercise undertaken by the primary judge, tells against s 183 authorising such an exercise. Such an exercise is, in truth, foreign to Part 10, and cannot be imported via a "gap filling" provision such as s 183: *Brewster* at [69] (plurality), [145] (Gordon J).

66. The primary judge also identified s 67 of the CPA and the Court's inherent power as relevant sources of power. But there is no discussion of the limits of s 67 or the inherent stay power in the Court of Appeal decision.

67. Bell P considered that 58 of the CPA, insofar as it obliges the Court, in exercising its case management powers (including s 67), to "act in accordance with the dictates of justice", provided a sufficiently broad discretion to support the exercise undertaken by the primary judge (CA [88]-[90]). But this expansive interpretation of s 58 displays error of a similar kind to that identified in *Brewster*. Section 58 cannot be used to fill the gap in power under Part 10. It must be read harmoniously with Part 10. Nothing in ss 58 (or s 67) gives the Court power 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.

68. Whilst it may be accepted that the Court has a protective jurisdiction in respect of group members, the jurisdiction must be sourced to the particular provisions of Part 10. There is no power at large to make any order the court thinks is in the interests of group members.

69. The Court of Appeal erred in failing to conclude that any approach that involved the Court in making a prediction as to which of the proceedings was likely to result in the highest net return to group members is not authorised by Part 10 of the CPA.

70. The Court of Appeal ought to have concluded that in the absence of any provision or policy in Part 10 favouring duplicative representative proceedings, such proceedings fall to be determined according to traditional common law principles (identified above at paragraph 46).

71. Bell P referred with apparent concern to the fact that the application of such common law principles would cast an onus on the proponent of a second or subsequent action to show that it was not vexatious or oppressive, which onus would "in practice be very difficult to discharge" (at CA [44]). Such onus, however (a) is consistent with the

common law's antipathy to multiple suits; and (b) is consistent with upholding the authority conferred upon the first-filed plaintiff to represent the group under s 157.

72. The Court of Appeal also failed properly to identify the relevant common law principles concerning multiplicity of suits. Bell P referred (CA [55]) to a passage from *McHenry v Lewis* (1882) 22 ChD 397 and said (at CA [84]) that the approach set out there was "similar" to that endorsed in *GetSwift* and undertaken by the primary judge in the present case. That is simply incorrect. *McHenry v Lewis* was not a case where the second action was *duplicative* in the sense that "complete relief" was available in the first action. Rather, as Jessel MR said at 404, "the two actions do not quite cover the same ground" (see also at 401, commenting that the second action was "wider"). Nothing in *McHenry v Lewis* cut down the principle articulated in *Carron Iron* and adopted by the High Court in *CSR v Cigna*, to the effect that where complete relief is available in the first action, it is vexatious to institute a second.[11]

73. The Court of Appeal's elision of the distinction between actions which are duplicative in the strict sense, and actions which are merely overlapping, pervades the Court's reasoning. The cases discussed at CA [53]-[59]—including *McHenry v Lewis*, *Union Steamship Co v The Caradale*, and *Reynolds v Reynolds*—are all cases where the second action commenced was wider than the first and offered some advantage that the first action did not. None were cases where "complete relief" was available in an action on foot when the second action was filed.

74. Thus, the passage in *McHenry v Lewis* cited by Bell P is instructive as to the kinds of factors courts may take into account in comparing proceedings where complete relief is *not* available in the first proceeding. Those factors are objective matters going to the identity of parties, the causes of action pleaded, etc, which the court is well placed to assess. Nothing in *McHenry v Lewis* treats the "experience" or "capability" of the respective legal teams as relevant, or places the Court in the position of trying to predict which case is most likely to produce the best outcome for the group.

75. Similarly, Bell P also asserted that the decision of the House of Lords in *Lubbe v Cape plc* [2000] 1 WLR 1545 illustrates that "financial considerations affecting … one side's ability to proceed" are a relevant factor to consider when resolving multiplicity

[11] In *McHenry v Lewis* itself, Cotton LJ referred (at 405) to *Carron Iron*. In *CSR v Cigna*, both decisions are cited (at 393, 394).

(CA [85]-[86]). That also is incorrect. In *Lubbe v Cape plc*, the House of Lords assessed the juridical advantages of one forum over another in providing for a complete and efficient resolution of the dispute.

76. By contrast, the exercise undertaken by the primary judge was very different. In that exercise, the Court is actively involving itself in the selection of the vehicle which it considers or predicts will produce the best result for those on one side of the record.

77. Bell P considered the "juridical setting" of the proceedings at hand to be different from the more traditional case of multiplicity, because Ms Wigmans and Komlotex are not parties in each others' proceedings, and the only party who would be vexed by multiple proceedings, AMP, was "agnostic" as to which set of proceedings went ahead (CA [72]-[81]). The fact that Ms Wigmans and Komlotex are not parties in each others' proceedings, however, does not belie the proposition that where complete relief is available in an action on foot, it is *prima facie* vexatious and oppressive to commence a second action in respect of the same controversy.

D. Appeal Ground 2

78. Ground 2 concerns the principles that apply if, contrary to ground 1, courts are authorised, when confronted with duplicative representative proceedings, to speculate as to which proceeding is likely to deliver the highest net return to group members (and to prefer that proceeding).

79. The task of ascertaining which proceeding is likely to deliver the highest net return to group members necessarily involves the consideration of two integers: (i) the gross settlement or judgment sum likely to be achieved in each proceeding (assuming success); and (ii) the recoverable costs likely to be incurred in each proceeding. The subtraction of the second figure from the first yields the hypothetical net return to group members.

80. The primary judge made an assumption that the first integer would be the same in the Wigmans proceeding and the Komlotex proceeding (and indeed in all the other competing proceedings). Her Honour did so after expressing, understandably, considerable reluctance to be drawn into speculating upon whether any one proceeding was, by reason of the skill of its solicitors or the incentives inherent in its proposed fee structure or funding model, likely to achieve a higher settlement or judgment sum than any other proceeding.

81. The Appellant contends, in Ground 2, that the making of such an assumption was an error of important principle.

82. The Appellant's primary contention is that it is erroneous to resolve duplicative representative proceedings by ascertaining and preferring the proceeding that is likely to deliver the highest net return to group members. That approach necessarily requires the Court to speculate on the judgment or settlement sum that will likely be achieved in each proceeding (if it is successful). This takes the Court into territory beyond that which is authorised by statute or the traditional common law.

83. If, however, that contention is rejected, then courts must grapple with the difficulties imposed by such an exercise as best they can, notwithstanding the grave challenge it poses to the judicial function. The Court cannot (*per* CA [96]-[98]) simply reject parts of that exercise (such as comparing the competency of the legal advisors) as distasteful or unedifying. Nor can the Court simply *assume*, as the primary judge did, in the absence of (or contrary to) evidence, that the different proceedings will achieve precisely the same result, in order to avoid unjudicial speculation on that matter. To do so would be to avoid the gravamen of the exercise.

84. The primary judge had before her evidence as to the respective funding models. Ms Wigmans argued that her funding model provided the best incentives to achieve the highest gross return for group members (the funder's commission was expressed as a percentage of the gross recovery, increasing over time). Komlotex, by contrast, placed primary reliance on what it claimed was the "superior experience" of its solicitors over the solicitors on the record in the other actions.

85. The primary judge was unable to reach any conclusion about either of these matters. Her Honour was not prepared to pass judgment on the abilities of the legal teams (PJ [311]-[313]). And, after consideration of the various funding models (PJ [208]-[211]), her Honour found that there were "arguable incentives and disincentives in relation to each of the possible funding models" (PJ [212]; see also PJ [351]).

86. On the basis of those findings, and having reached a state of radical agnosticism, her Honour ought to have declared that, on the evidence, it was not possible to reach a logical conclusion as to which proceeding would achieve the higher settlement or judgment sum, and therefore it was not possible to find that one proceeding would achieve a higher net return to group members than the other.

87. Instead, her Honour proceeded to assess which proceeding would achieve the highest *net* return to group members based upon an assumption that each proceeding would achieve the same *gross* return (ie settlement or judgment sum). Her Honour relied upon comparative tables tendered by Komlotex which estimated *net* return to group members from each of the competing actions on the basis of a given quantum of settlement or judgment, applied uniformly across the various proceedings.[12] Those tables impliedly assumed that each action would produce the same *gross* return.

88. There was no rational foundation for the assumption that each proceeding had an equal probability of producing a given judgment or settlement sum within a given range. The evidence before the Court and common experience suggests that the judgment or settlement achieved for the group by different representatives, solicitors and funders would differ, if only by reason of each taking a different approach and strategy to the litigation. By way of example, until the Court of Appeal held it to be beyond power, Komlotex pursued a strategy of agreeing with AMP to negotiate for settlement on the basis that group members be required to register prior to mediation, with those who do not register having their claims extinguished, a course Ms Wigmans opposed.[13]

89. The Court of Appeal never really grappled with this aspect of the case.

90. Bell P, at CA [32], said that it was "reasonable for the primary judge to proceed on the footing that 'equally competent' legal teams would bring 'equal competence' to the bargaining table in the mediation room". But that is not the same as making an assumption that those teams would achieve equal *results*. His Honour never addressed the proposition that different solicitors, with differing funding models, differing incentives and differing risk profiles, made the assumption of an equal result unsafe.

91. In the concurring judgment, Payne and Meagher JJ made at least four errors in relation to this issue. First, their Honours acknowledged that the Appellant's critique of the tables placed before the primary judge in reliance upon the common assumption adopted by the primary judge had "some force" (CA [108]), but said that they did "not regard the exercise as irrelevant and unable to be taken into account, albeit in the limited way the primary judge did." (CA [108]). However, the comparative exercise performed by the primary judge *was* irrelevant because a crucial integer of it was

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[12] Affidavit of Andrew Watson sworn 22 November 2018, annexures AJW-19 and AJW-20 (AFM 2:493-496).
[13] See *Komlotex Pty Ltd v AMP Ltd* [2020] NSWSC 504; *Wigmans v AMP Ltd* [2020] NSWCA 104.

unsupported by any evidence, and was contrary to her Honour's other findings. Furthermore, the primary judge did not take the exercise into account in a "limited way"; to the contrary, it was the decisive factor in her determination.

92. Secondly, at CA [107], their Honours wrongly assimilated the task of the Court in approving, at the *conclusion* of the matter, the reasonableness of funding charges (in connection with approving settlement), and the task of the Court in speculating, at the *beginning* of the matter, on the likely impact of funding models on the outcome of proceedings (in connection with "picking a winner" between duplicative actions).

93. Thirdly, at CA [108] their Honours correctly recognised that "litigation is a human process" such that the different proceedings may well (if allowed to proceed) achieve "a different judgment settlement sum and a different distribution to group members than suggested in those tables". But their Honours then identified no basis for the primary judge to make an assumption to the contrary, other than acknowledging the "difficult question" the primary judge was grappling with. If the making of an assumption that was contrary to inherent probabilities and the evidence before the Court was necessary in order to overcome the difficulty of the speculative exercise with which the primary judge was tasked, that rather suggests that the task itself is unsound, and supports Ground 1 of this appeal.

94. Fourthly, at CA [109], their Honours agreed with the observation of the primary judge that "a 'no win no fee' funding model will [not] always (or necessarily) lead to the conclusion that such a funding proposal is likely to provide the best return for group members". Simple arithmetic belies that statement. Returning to the two integers set out in paragraph 79 above, if one assumes that integer 1 (settlement or judgment sum) is the same for both actions, then the comparison will be determined by integer 2 (legal costs, including any uplift or funding commission). Given the limitations on solicitor uplift fees imposed by professional regulations, an uplift will almost inevitably be less than a funding commission if one makes the assumption for the sake of argument that the base fees of each solicitor are roughly equivalent. The assumption adopted by the primary judge and sanctioned by the Court of Appeal thus has important and troubling precedential consequences. There is no rational or evidentiary foundation for the conclusion that solicitors taking on risk themselves (including adverse costs risk) for the reward of their fees (with an uplift) will produce better results for the class than solicitors backed by the resources of a professional funder.

E. Resolution of the present case

95. The Komlotex proceeding ought to have been stayed because it was duplicative of the Wigmans proceeding and Komlotex could not point to any traditional juridical advantage of its proceeding to outweigh the *prima facie* vexation or oppression that the commencement of its proceeding created. The primary judge ought to have undertaken that analysis as at 7 June 2018, the date the Komlotex proceeding was filed. The primary judge should not have embarked on the speculative exercise of estimating which duplicative proceeding was likely to achieve the highest net return for group members. Such exercise was not authorised by any relevant source of power.

96. Alternatively, to the extent that that speculative exercise was authorised, it miscarried because it proceeded on the basis of an assumption which lacked any rational or evidentiary basis. That being the key factor upon which the primary judge based her decision (PJ [354]), the discretion falls to be re-exercised as at the date of the hearing before her Honour. On the remaining findings of the primary judge, the Wigmans proceedings as the first-filed and most advanced should not have been stayed (and, conversely, the Komlotex proceeding should have been stayed).

Part VII: Orders sought by Appellant

97. The Appellant seeks the orders set out in the Notice of Appeal at CAB 200.

Part VIII: Time required for presentation of oral argument

98. The Appellant estimates that she will need approximately 2 hours for oral submissions in chief and 15 minutes in reply.

Dated: 5 June 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. *Class Proceedings Act 1992 S.O. 1992* (Ontario) (current version)
3. *Federal Rules of Civil Procedure* (US) (current version)