HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

MARION ANTOINETTE WIGMANS APPELLANT

AND

AMP LIMITED & ORS RESPONDENTS

Wigmans v AMP Limited
[2021] HCA 7
Date of Hearing: 10 November 2020
Date of Judgment: 10 March 2021
S67/2020

ORDER

1. Appeal dismissed.

2. The appellant pay the respondents' costs of the appeal to this Court.

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with A M Hochroth and P A Meagher for the appellant (instructed by Quinn Emanuel Urquhart and Sullivan)

E A Collins SC with I J M Ahmed for the first respondent (instructed by Herbert Smith Freehills)

C A Moore SC with G A Donnellan and J Entwisle for the second and third respondents (instructed by Maurice Blackburn Lawyers)

CATCHWORDS

Wigmans v AMP Limited

Practice and procedure – Representative action – Stay – Where five open class representative actions commenced against same defendant in relation to same controversy – Where considerable overlap between claims made in proceedings – Where representative plaintiff in four proceedings filed notice of motion in Supreme Court of New South Wales seeking orders that each other proceeding be permanently stayed – Whether Supreme Court's power to grant stay is confined by rule or presumption that representative proceeding issued first in time is to be preferred – Whether litigation funding arrangements can be relevant consideration under s 67 of *Civil Procedure Act 2005* (NSW) – Whether Supreme Court erred in considering litigation funding arrangements.

Words and phrases – "abuse of process", "auction process", "certification and carriage motion procedures", "class actions", "competing funding proposals, costs estimates and net hypothetical return to members", "competing representative proceedings", "conflicts of interest", "contradictor", "duplicative proceedings", "equitable principles concerning test actions", "first-in-time rule or presumption", "funding model", "litigation funding arrangements", "multifactorial approach", "multiplicity", "one size fits all", "power to grant a stay", "prima facie vexatious and oppressive", "representative proceedings", "special referee".

Civil Procedure Act 2005 (NSW), ss 56, 57, 58, 67, Pt 10.

1 KIEFEL CJ AND KEANE J. On 16 and 17 April 2018, executives of the first respondent ("AMP") gave testimony to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to the effect that AMP had deliberately charged some of its clients fees for no service, and that it had misled the Australian Securities and Investments Commission as to the extent of this conduct. Following this testimony, there was a sharp fall in the price at which shares in AMP traded on the Australian Securities Exchange ("the ASX").

2 Shortly thereafter, five open class representative proceedings were commenced in quick succession on behalf of shareholders in AMP who had made investments during periods of time in which the representative parties allege AMP ought to have disclosed to the market the information that emerged during the Royal Commission. All the representative parties sought compensation for loss caused by AMP's alleged breach of the continuous disclosure obligations imposed on it by the *Corporations Act 2001* (Cth) together with the ASX Listing Rules. Misleading and deceptive conduct and statutory unconscionable conduct claims were also advanced.

3 The appellant, Ms Marion Wigmans, was first off the mark. On 9 May 2018, proceedings on her behalf were commenced in the Supreme Court of New South Wales. Seven hours later, Wileypark Pty Ltd ("Wileypark") commenced proceedings in the Federal Court of Australia. Mr Andrew Georgiou did likewise on 25 May 2018, as did the third respondent ("Fernbrook") on 6 June 2018 and the second respondent ("Komlotex") on 7 June 2018. Each lead plaintiff or applicant was a group member in each of the other proceedings. The different proceedings were brought by a different lead plaintiff or applicant because different arrangements were made for the sponsorship of the proceedings by litigation funders or solicitors willing to act on a "no-win, no-fee" basis. The proceedings that had been commenced in the Federal Court were transferred to the Supreme Court[1]. The Fernbrook proceedings were consolidated with the Komlotex proceedings ("the Komlotex/Fernbrook proceedings")[2]. Each of Ms Wigmans, Wileypark, Mr Georgiou and Komlotex applied to the Supreme Court for a stay of the proceedings in which the others were plaintiffs.

4 AMP, in the courts below and in this Court, was relevantly neutral as between the competing representative proceedings. Not surprisingly, however, it

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1 *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1.

2 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [112].

supported an outcome in which it would face only one set of proceedings. The issue before this Court is as to the basis on which that outcome should be achieved.

The primary judge

5 The primary judge (Ward CJ in Eq) ordered, ostensibly pursuant to ss 67 and 183 of the *Civil Procedure Act 2005* (NSW) ("the CPA") and the inherent power of the Supreme Court, that the proceedings of Ms Wigmans, Wileypark and Mr Georgiou be permanently stayed[3]. While the primary judge exercised the power to stay proceedings conferred by s 67 of the CPA, the issue resolved by that order was as to which of the proceedings should be allowed to proceed. The answer to that question was ultimately found, not in the identification of a deficiency in each of the proceedings ordered to be stayed as a vehicle for the doing of justice between the plaintiffs and the defendant, but by an assessment as to which sponsor offered the prospect of the highest return to group members. Accordingly, the purpose and effect of the order made by the primary judge was to afford the solicitors acting for Komlotex and Fernbrook the exclusive opportunity to continue their proceedings for the benefit of group members.

6 The primary judge approached the determination of the four stay applications by an assessment of the relative potential benefits expected to flow to group members from each of the competing representative proceedings. Her Honour proceeded by reference to "case management principles" derived from the "overriding purpose" in s 56 of the CPA[4] using a "multi-factorial analysis" of the kind endorsed by the Full Court of the Federal Court in *Perera v GetSwift Ltd*[5]. The primary judge identified as relevant the following eight factors drawn from the judgment of the Full Court in *GetSwift*[6] as well as that of Lee J at first instance in that case[7]. They were[8]:

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3 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [358].

4 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [104].

5 (2018) 263 FCR 92 at 136 [195]; *Wigmans v AMP Ltd* [2019] NSWSC 603 at [113].

6 *Perera v GetSwift Ltd* (2018) 263 FCR 92 at 135-136 [188]-[197].

7 *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 48-50 [169], itself referring to *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [71].

8 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [126]; see also at [121], [124].

(1) the competing funding proposals, costs estimates and net hypothetical return to group members (assessed "having regard to standardised assumptions such as the likely length of trial"[9]);

(2) the proposals for security for AMP's costs;

(3) the nature and scope of the causes of action advanced;

(4) the size of the respective classes;

(5) the extent of any bookbuild;

(6) the experience of the legal practitioners (and funders) and availability of resources;

(7) the state of progress of the proceedings; and

(8) the conduct of the representative plaintiffs to date.

7 The primary judge concluded that Ms Wigmans' proceedings and the Komlotex/Fernbrook proceedings ought to be preferred to the proceedings of Wileypark and Mr Georgiou because of their superior proposal with respect to the provision of security for AMP's costs[10]. Her Honour went on to hold that it was decisive as between the remaining two proceedings that the Komlotex/Fernbrook proceedings were to be "funded" by the solicitors acting for Komlotex and Fernbrook, Maurice Blackburn, on a "no-win, no-fee" basis with a 25 per cent uplift on professional fees if the resolution sum exceeded $80 million[11]. This funding model was expected to produce a better net return for group members than that proposed for Ms Wigmans' proceedings. Ms Wigmans' proceedings, in which the solicitors Quinn Emanuel act for her, were to be funded by a commercial litigation funder on terms pursuant to which the funder stood to recover up to 20 per cent of any recovery[12].

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9 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [212].

10 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [220]-[222], [228], [233], [354].

11 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [57]-[58], [350]-[354].

12 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [55]-[56], [354].

The Court of Appeal

8 The Court of Appeal of the Supreme Court of New South Wales (Bell P, Macfarlan, Meagher, Payne and White JJA) dismissed Ms Wigmans' appeal[13]. The Court of Appeal found no error in the reasons of the primary judge. The "only real point of difference" in reasoning between Bell P (with whom Macfarlan, Meagher, Payne and White JJA agreed) and the primary judge was that Bell P considered that, because a stay application ultimately turns on whether the ends of justice require such a remedy, it cannot aptly be said to be dictated by "case management principles"[14].

9 In the Court of Appeal, Bell P found particular guidance in *McHenry v Lewis*[15], a case concerned with two "representative proceedings" of the kind permitted by the Court of Chancery where more than one person had the same interest in a claim[16]. Bell P considered that *McHenry v Lewis* anticipated the solution offered by *GetSwift* to the problem of modern competing representative proceedings with "remarkabl[e] similar[ity]"[17].

10 It will be necessary to consider more closely the considerations said by Jessel MR in *McHenry v Lewis* to be relevant to the solution of the problem posed by the pendency of multiple proceedings against the same defendant. For the moment, it is sufficient to observe that Bell P was clearly right to conclude that the order made by the primary judge was not supportable as an exercise in case management.

The appeal to this Court

11 Ms Wigmans submitted that the order made by the primary judge in accordance with the "multi-factorial analysis" endorsed in *GetSwift* was not authorised by s 67 or s 183 of the CPA or by the inherent power of the Supreme Court. Ms Wigmans urged instead that, where later-in-time proceedings have no discernible juridical advantage over the proceedings first commenced, the later proceedings should be stayed as vexatious in accordance with the settled approach

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13 *Wigmans v AMP Ltd* (2019) 373 ALR 323.

14 *Wigmans v AMP Ltd* (2019) 373 ALR 323 at 344 [95].

15 (1882) 22 Ch D 397. The case also considered whether to stay one or both of the English proceedings in favour of a third proceeding brought in the United States in respect of the same events.

16 *Wigmans v AMP Ltd* (2019) 373 ALR 323 at 335-336 [55], 341-342 [84].

17 *Wigmans v AMP Ltd* (2019) 373 ALR 323 at 341-342 [84].

of the courts to the problem of multiple proceedings by the same plaintiffs seeking the same relief against the same defendant. On that basis, the Komlotex/Fernbrook proceedings, rather than Ms Wigmans' proceedings, should have been stayed.

12 Komlotex and Fernbrook submitted that s 67 of the CPA expressly conferred on the primary judge the power to stay proceedings. Komlotex and Fernbrook argued that the effect of s 58 is that the s 67 power must be exercised to further the dictates of justice, which themselves turn, in part, on the objectives of case management set out in s 57 and the overriding purpose of the CPA appearing in s 56. It was said that the "multi-factorial analysis" applied by the primary judge went to the just determination of the proceedings, the efficient disposal of the business of the court and use of judicial resources, the timely disposal of the proceedings at a cost affordable by the parties and such other matters as the court considers relevant.

13 In considering the arguments advanced by the parties, it must be appreciated that the issues presented by this case arise because the prospect of the profits to be made from the maintenance of representative proceedings by third party funders or by solicitors willing to act on a "no-win, no-fee" basis is apt to spawn multiple proceedings. Would-be sponsors of representative proceedings compete for what are called, in the United States of America, "carriage rights" in respect of the proceedings. In the United States, the competition to exploit the opportunity to control a class action is regulated by legislation, whereby the courts are specifically tasked with the selection of the sponsor of representative proceedings from the available candidates. By that legislation, the courts are required to make an evaluation of the competing claims of prospective sponsors in order to select the sponsor judged best able to maximise the return to class members. The CPA contains no equivalent provision.

14 The power to order a stay provided by s 67 of the CPA is available as a tool to resolve the problem presented by multiple proceedings. The problem of multiple proceedings is not novel. Indeed, the remedy of a stay of proceedings has long been recognised as an available means to protect a defendant vexed by multiple proceedings. But the power to grant a stay to end such vexation is exercisable by the courts according to principles concerned to do justice between plaintiffs and defendants. The first of these is that "a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise"[18]. Secondly, "the rationale for the exercise of the power to stay is the avoidance of

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18 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

injustice between parties in the particular case"[19]. Accordingly, where multiple proceedings are brought by the same plaintiffs seeking the same relief against the same defendants, if the plaintiffs do not make an election as to which action should proceed, the court will stay all but one proceeding[20]. Where the plaintiffs do not make the election, the court will stay the proceedings brought later in time unless they offer some legitimate juridical advantage for the plaintiffs or the defendants over the proceedings brought earlier in time[21]. The point is that these principles are concerned with the doing of justice between plaintiffs and defendants; they are not concerned to determine the competing claims of financiers and lawyers to sponsorship of the proceedings on behalf of those on the plaintiffs' side of the record. Legislative direction is required to enlist the courts to determine matters of that kind. The courts may mould their established procedures to do justice between the parties to litigation, but the court must proceed by reference to settled principles and bearing in mind that the parties cannot invest a court with a jurisdiction it does not have.

15 Neither the CPA nor the Supreme Court's inherent power to prevent abuse of its processes authorises the Supreme Court to make a selection of the sponsor of representative proceedings. That is emphatically so where the proceedings to be so sponsored are to be determined by the same court[22]. The Supreme Court's fundamental function as the independent arbiter of the merits of the group members' claims as between them and the defendant sits awkwardly with the assumption, without legislative direction, of a role whereby the Court makes a reputational investment in the choice of sponsor.

16 The courts below erred in failing to give effect to the prima facie entitlement of Ms Wigmans to insist upon the determination of her proceedings. The proceedings brought later in time offered no legitimate juridical advantage to group members or to the defendant. That being so, Ms Wigmans' appeal should be allowed and the later-in-time proceedings stayed.

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19 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

20 *Carron Iron Co v Maclaren* (1855) 5 HLC 416 at 437-439 [10 ER 961 at 970-971]; *McHenry v Lewis* (1882) 22 Ch D 397 at 404; *Henry v Henry* (1996) 185 CLR 571 at 591; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390-394.

21 *McHenry v Lewis* (1882) 22 Ch D 397 at 404.

22 See *Re Perrot Mill Pty Ltd [No 1]* (2013) 11 ASTLR 125 at 127 [4].

The CPA

17 It is necessary to refer at some length to the provisions of the CPA that deal both with case management and with representative proceedings. This comprehensive review is necessary in order to demonstrate that the CPA does not contemplate the exercise performed by the primary judge.

Case management

18 Section 67 of the CPA, appearing in Pt 6 "Case management and interlocutory matters", provides that:

> "Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day."

19 Section 58(1) provides that, in exercising this power, the Supreme Court[23] must follow the "dictates of justice". It provides:

> "In deciding –
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> (a) whether to make any order or direction for the management of proceedings, including –
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> (i) any order for the amendment of a document, and
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> (ii) any order granting an adjournment or stay of proceedings, and
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> (iii) any other order of a procedural nature, and
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> (iv) any direction under Division 2, and
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> (b) the terms in which any such order or direction is to be made,
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> the court must seek to act in accordance with the dictates of justice."

20 Section 58(2) provides guidance as to "the dictates of justice", stating that:

> "For the purpose of determining what are the dictates of justice in a particular case, the court –
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> (a) must have regard to the provisions of sections 56 and 57, and

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23 See *Civil Procedure Act 2005* (NSW), s 4(1), Sch 1.

(b) may have regard to the following matters to the extent to which it considers them relevant –

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56(3),

(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,

(vii) such other matters as the court considers relevant in the circumstances of the case."

21 Section 56, referred to in s 58(2)(a), sets out the "overriding purpose" of the CPA, to be furthered by the Supreme Court with the assistance of persons involved in proceedings. It provides:

"(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

...

(4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3) –

(a) any solicitor or barrister representing the party in the proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

(6) For the purposes of this section, a person has a ***relevant interest*** in civil proceedings if the person –

(a) provides financial assistance or other assistance to any party to the proceedings, and

(b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings."

22 Section 57, also referred to in s 58(2)(a), sets out the objects with regard to which the Supreme Court's case management is to be exercised. It provides that:

"(1) For the purpose of furthering the overriding purpose referred to in section 56(1), proceedings in any court are to be managed having regard to the following objects –

(a) the just determination of the proceedings,

(b) the efficient disposal of the business of the court,

(c) the efficient use of available judicial and administrative resources,

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated,

> as best to ensure the attainment of the objects referred to in subsection (1)."

23 It is to be noted that these "case management" provisions are not in any way directed to the making of a choice as to which of the sponsors of multiple proceedings should have the exclusive carriage of the proceeding allowed to progress to a determination by the court. None of these provisions contemplates a comparison between sponsors of proceedings with a view to determining which is likely to afford the greatest measure of relief to those on whose behalf the proceedings are brought. That this is so is hardly surprising, given that the focus of these provisions of the CPA is, consistently with the context in which they appear, upon the steps that need to be taken to achieve justice quickly and cheaply between plaintiffs and defendants, and not upon the respective strengths and weaknesses of the candidates for the sponsorship of the proceedings on the plaintiffs' side of the record.

Representative proceedings

24 Part 10 of the CPA permits, and regulates the conduct of, representative proceedings in the Supreme Court. Part IVA of the *Federal Court of Australia Act 1976* (Cth) ("the FCA") is its federal analogue. The material provisions of Pt 10 of the CPA appear in a context concerned with the resolution of proceedings between plaintiffs and defendant. A selection of the best candidate as sponsor of group members' claims against the defendant is not within the contemplation of Pt 10. Part 10 of the CPA contains no provision that purports to enlist the Supreme Court in the performance of that function, much less does it contain any guide to the Supreme Court in relation to the performance of that function. It is not necessary for present purposes to determine whether such a role is so inimical to the judicial function that a Ch III court might not be tasked with such a role by the legislature. It is sufficient to say that the tasks contemplated by Pt 10 of the CPA[24] do not include, as one of the functions of the Supreme Court under that Part, the selection of the sponsor most likely to enhance the recovery of those on the plaintiffs' side of the record.

25 Section 157(1) provides that where seven or more persons have claims against the same person, the claims are in respect of the same or similar circumstances and the claims give rise to a substantial common question of law or fact, proceedings may be commenced by one or more of those persons as representing some or all of them. Section 158(1) provides that a person has a

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24 *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51 at 68 [69]; 374 ALR 627 at 643.

sufficient interest to commence such proceedings if the person has standing to commence proceedings on their own behalf.

26 Section 159(1) provides that the consent of a person to be a group member, being a person on whose behalf representative proceedings have been commenced[25], is not required. Section 162 provides that a group member may opt out of the representative proceedings before the date fixed for opting out by the Supreme Court.

27 Section 171(1) provides that:

> "If, on application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and make such other orders as it thinks fit."

28 Importantly, s 171(1) is the only provision in Pt 10 of the CPA that contemplates intervention by the Supreme Court to alter the manner in which a proceeding is constituted on the plaintiffs' side of the record. It is addressed to the concern that representation of group members by a representative plaintiff may be "inadequate". As a matter of the ordinary meaning of language, s 171 presents a binary question: is a representative plaintiff able adequately to represent the interests of group members or is it not? Section 171 does not contemplate an inquiry as to whether more effective representation may be available to group members by some other representative plaintiff by reason of that person's association with a different sponsor. In *Mobil Oil Australia Pty Ltd v Victoria*[26], in the course of summarising the features of the Victorian equivalent of Pt 10, Gleeson CJ stated in reference to the equivalent to s 171 that:

> "The Court has power to substitute another group member for the plaintiff if it appears that the plaintiff is not able adequately to represent the interests of the group members. This is not a mechanism for the plaintiff to be replaced on the application of group members who disagree with the way the case is being run."

29 The text of s 171 does not contemplate a contest between the would-be sponsors of representative proceedings. The context in which s 171 appears is concerned with the doing of justice between the plaintiffs and the defendant. Whether one sponsor might be likely to secure a greater level of recovery than another because it is more experienced or better resourced or more highly

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25 See *Civil Procedure Act 2005* (NSW), s 155.

26 (2002) 211 CLR 1 at 21 [5(8)].

incentivised financially is no doubt a matter of lively interest to those on the plaintiffs' side of the record; but it has nothing to do with the doing of justice between the plaintiffs and the defendant according to their respective merits in relation to the dispute to be resolved by the Supreme Court.

30 It is noteworthy that, even on the argument advanced by Komlotex and Fernbrook, it was not said that s 171 provided a "remedy" for a person in the position of Komlotex or Fernbrook. Komlotex and Fernbrook accepted, and indeed argued, that the power to replace a representative plaintiff under that provision is limited to cases where the plaintiff ceases to have sufficient interest in the dispute to bring a claim or is otherwise incapable of performing or refuses to perform the role of representative plaintiff[27]; the power does not extend to cases where another proceeding is simply "better" or where group members disagree with the way the proceeding is being run.

31 Section 183 permits the Supreme Court to make any order, of its own motion or on application by a party or group member, in a representative proceeding it "thinks appropriate or necessary to ensure that justice is done in the proceedings". Once again, it is important to appreciate that this provision is concerned with the doing of justice as between the parties on either side of the record[28]. Whether those on the plaintiffs' side of the record might be better served by proceedings sponsored by another funder is not a question as to whether "justice is done in the proceedings" as between the plaintiffs and the defendant. The observations of the plurality in *BMW Australia Ltd v Brewster*[29] are applicable here:

> "It is reasonably to be expected that legislation intended to enlist the court in a task of this kind would make specific provision in that regard. That it has not done so is itself some contextual indication that the power to make such an order is not to be discerned in 'gap-filling' provisions such as s 33ZF [of the FCA] or s 183 [of the CPA]." (footnote omitted)

32 It may readily be acknowledged that the power conferred on the Supreme Court by s 183 is wide, but as the plurality observed in *BMW Australia Ltd v*

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27 See *Revian v Dasford Holdings Pty Ltd* [2002] FCA 1119 at [8], [14], [23]; *Tongue v Tamworth City Council* (2004) 141 FCR 233 at 235 [11], 240 [52]; see also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 21 [5(8)].

28 Compare *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51 at 58 [3], 65 [50]; 374 ALR 627 at 630, 639.

29 (2019) 94 ALJR 51 at 68 [69]; 374 ALR 627 at 643.

Brewster, s 183 is a "supplementary or gap-filling provision"[30] which does not authorise the Court to rewrite Pt 10 of the CPA in order to pursue objectives outside the scope of the provisions[31]. The selection of the best sponsor for representative proceedings is a matter quite outside the concerns of Pt 10 in general and of s 183 in particular. In this regard, it is readily apparent that the CPA does not follow the United States model, which does address that concern.

Carriage motions and the CPA

33 The "multi-factorial analysis" applied by the primary judge is appropriate to "carriage" and "certification" motions under United States law[32]. The difference between the provisions of the CPA and United States law pertaining to "carriage" and "certification" motions, from which the "multi-factorial analysis" applied by the primary judge was drawn, is instructive. Carriage motions are heard by United States courts under statutory provisions regulating the choice of persons to be tasked with the commencement and prosecution of representative proceedings[33]. In particular, in the United States, the *Federal Rules of Civil Procedure* provide by r 23(g) that the court must "appoint class counsel" to control the prospective proceeding on the plaintiffs' side of the record. Rule 23(g)(2) specifies that "[w]hen one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)", before providing that "[i]f more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class".

34 Rules 23(g)(1) and 23(g)(2) provide:

> "(g) Class Counsel
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> (1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
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> (A) must consider:

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30 (2019) 94 ALJR 51 at 68 [70]; 374 ALR 627 at 643.

31 (2019) 94 ALJR 51 at 70-71 [82]; 374 ALR 627 at 647.

32 Noting the reliance placed on United States cases in *Perera v GetSwift Ltd* (2018) 263 FCR 92 at 136-137 [193]-[196] and *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 32-33 [95]-[99].

33 See *Federal Rules of Civil Procedure* (US), r 23; see also *Class Proceedings Act 1992* (Ont), ss 5, 8.

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class."

35 These provisions stand in stark contrast to Pt 10 of the CPA. It is telling that, when the CPA was enacted, the Parliament of New South Wales had before it the example of the legislative regime that operates in the United States to facilitate the determination by the courts of the competition between would-be sponsors of class actions, but did not adopt that example or any relevant aspect of it.

36 A "multi-factorial analysis" of the kind conducted under a carriage motion is addressed to the interests of those on the plaintiffs' side of the record. So was the "multi-factorial analysis" applied by the courts below. Their analysis was not directed to "the just, quick and cheap" resolution of proceedings between parties to litigation as contemplated by s 56 of the CPA or to ensuring that justice is done

in them as contemplated by s 183. The stay order made by the primary judge did not involve the doing of justice in the proceedings, and nor was it a step towards a just, quick and cheap conclusion, as between plaintiffs and defendant. Rather it was an order the purpose and effect of which was to allow a different proceeding under the control of a different sponsor to go forward on the basis that control by that sponsor might produce the best recovery for group members. It is some indication of the alien quality of the process that the basis of the decision was a prediction by the Supreme Court, which is obliged ultimately to decide the case, that the worst possible outcome for the defendant would be achieved by the Court's preferred sponsor.

The inherent jurisdiction

37 Komlotex and Fernbrook submitted that *McHenry v Lewis* contemplates that, as Bell P held[34], the powers conferred by the CPA or the Supreme Court's inherent power to stay proceedings might be exercised by reference to matters of the kind set out in *GetSwift* as opposed to "traditional stay jurisprudence". But contrary to the view of Bell P, the approach was not justified by the principles stated in *McHenry v Lewis*.

38 In *McHenry v Lewis*[35], Jessel MR said:

> "In this country, where ... two actions are [brought] by the same [plaintiff] in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will do."

39 His Lordship recognised that this prima facie position may be displaced, and went on to speak of the well-settled "course of the Court" in the exercise of the power to stop all but one of several actions brought by representative plaintiffs[36]:

> "The defendants take out a summons to stay the actions which have been previously transferred of course to the same Judge or Court, and then the Court decides which of the actions is to go on as a test action, and which are to be stayed. You cannot tell until you have all the plaintiffs before you the right course to be taken. The first action may be a collusive action, one action may embrace further relief than another, one action may be better

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34 See [9] above.

35 (1882) 22 Ch D 397 at 400.

36 *McHenry v Lewis* (1882) 22 Ch D 397 at 404.

> framed than another to raise the questions in dispute, one action may be more perfect as to parties than another, in one action the plaintiff may be a solvent person, and able to answer costs, and in the other the plaintiff may be a pauper. Various considerations may arise, and until you get the whole of the actions before the Court the Court cannot decide which is to be allowed to proceed, or on what terms. It sometimes happens that we allow one action to proceed for one purpose and another for another purpose – that is that we excise from one action so much of the relief as can properly be attributed to an earlier plaintiff, and allow the second or third action to go on for the additional relief; but all that can only be discussed in the presence of all parties."

40 The considerations mentioned by Jessel MR relate to whether any of the proceedings against the defendant enjoys a juridical advantage over the others. So, for example, an action by a plaintiff who is unable to provide security for costs may be stayed even though it was brought first in time. None of these considerations mentioned by Jessel MR are concerned with whether one proceeding should be preferred over another upon an assessment of which promoter is likely to produce the best outcome for group members. Rather, the considerations mentioned by Jessel MR are entirely consistent with "traditional stay jurisprudence".

41 In *Voth v Manildra Flour Mills Pty Ltd*[37], Mason CJ, Deane, Dawson and Gaudron JJ said that "a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise". Their Honours went on to identify the general principle empowering a court to dismiss or stay proceedings which are vexatious and to say that the "rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case"[38].

42 In *Moore v Inglis*[39], Mason J approved the statement of Lord Esher MR in *The Christiansborg*[40] that where an action is prima facie vexatious "it would lie on the party who brings the second action to [show] that it was not so". As explained in *Voth*, that may be done by showing that the second action offers some

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37 (1990) 171 CLR 538 at 554.

38 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

39 (1976) 50 ALJR 589 at 592; 9 ALR 509 at 514.

40 (1885) 10 PD 141 at 148.

"legitimate ... juridical advantage" over the first[41]. By "legitimate juridical advantages", one refers to the advantages arising from the processes and remedies available in the courts. In *Spiliada Maritime Corporation v Cansulex Ltd*[42], Lord Goff of Chieveley instanced as examples of such advantage cases where "damages [are] awarded on a higher scale; a more complete procedure of discovery [is available]; a power to award interest [is available]; [or] a more generous limitation period [applies]". Lord Goff qualified the relevance of such factors with the statement that "the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice"[43].

43 The stay and cross-stay applications in the present case ought to have been determined, not by the "multi-factorial analysis", but by reference to the principle that it is prima facie vexatious to commence an action if an action is already pending in respect of the same controversy in which the same relief is available. This position may be displaced by some juridical advantage in the later-in-time proceeding. If the proceeding first in time is deficient in any of the respects noted by Jessel MR in *McHenry v Lewis*, then it will be stayed in deference to the later-in-time proceeding.

44 The conclusion that it was no part of the inherent jurisdiction to make a selection between the representative plaintiffs and their sponsors by way of the "multi-factorial analysis" is reinforced by reference to the recognised limits on the procedure whereby trustees are able to seek guidance from a court of equity in relation to the proper discharge of their trust[44]. If the representative plaintiffs in each of the proceedings had sought such guidance from the Supreme Court, those applications would not have been entertained. That would not have been because of any difficulty in ascribing to a representative plaintiff obligations to group members of a fiduciary character; nor would the problem have been that, historically, the courts of equity never resolved competing claims to engage in what were, until relatively recently, the torts of champerty or maintenance. Rather, a court of equity, presented with a request for guidance by the representative plaintiffs in the representative proceedings here in question, would not have acceded to a request to endorse one sponsor over another. Absent legislative

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41 (1990) 171 CLR 538 at 564-565.

42 [1987] AC 460 at 482-484.

43 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 483.

44 See *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

direction, the courts do not provide such endorsements, nor do they give such guidance to potential litigants.

45 The form of direction usually given upon an application by a trustee for the advice of a court of equity is that the trustee is justified in taking or abstaining from legal action. The court does not direct that the trustee "should" or "must" take or defend an action[45]. Quite apart from the practical difficulties involved in performing such an exercise at the outset of proceedings, it is no part of the jurisdiction of a court of equity to offer encouragement (or discouragement) to those who seek to submit their claims against others to the independent and impartial determination of a court. A court does not make a reputational investment in the outcome of the proceeding; it has never been accepted as an aspect of the inherent jurisdiction that a court should take on a role indistinguishable from that of counsel advising a trustee[46].

46 Komlotex and Fernbrook argued that the first-in-time presumption of "traditional stay jurisprudence" would encourage a "race to the courthouse" and inadequate preparation. It was also said that it would encourage overly broad framing of claims to avoid the identity of "complete relief" in competing proceedings. These outcomes were said to run contrary to the "overriding purpose" in s 56 of the CPA. Similarly, the primary judge noted[47] the concern expressed by the Full Court in *GetSwift* that[48]:

> "The Court must strongly discourage a rush to the Court in large and complex class proceedings, carrying as it does the consequent risks of insufficient due diligence and the commencement of unmeritorious, or at least weak, cases. Unless the hasty filing of such cases is effectively discouraged even those solicitors or funders who wish to take an appropriately cautious approach are likely to be dragged into the same practice. That is so because the first action filed is likely to obtain a 'first mover' advantage in terms of book building and, once one action is filed, other solicitors or funders are pressed to speedily follow or they may not be included in the mix when the Court considers the competing proceedings."

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45 *Plan B Trustees Ltd v Parker [No 2]* (2013) 11 ASTLR 242 at 253 [47].

46 *In the Application of NSW Trustee and Guardian* (2014) 12 ASTLR 513 at 519 [24]-[25].

47 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [53], [82].

48 (2018) 263 FCR 92 at 153 [279].

47 In truth, concern as to the unseemliness of a "race to the courthouse" is an irrelevant distraction. In this case, the proceedings brought by Ms Wigmans did not exhibit any juridical deficiency or disadvantage in comparison with the competing proceedings, whether because of the haste with which her proceedings were commenced or otherwise. More generally, it is ironic that the alacrity with which Ms Wigmans' proceedings were brought should be thought to be a matter of criticism, given the terms of s 56 of the CPA. Mindful that s 56 of the CPA regards speed in litigation as a positive virtue, it seems distinctly odd to regard the winning of the "race to the courthouse" as a negative factor in a case where no specific criticism can be made of the proceedings that have actually been brought by the winner. The inconsistency is troubling. Further, to object to the alacrity with which otherwise unobjectionable proceedings are commenced under the aegis of one sponsor, while accepting responsibility for choosing between competing would-be sponsors in terms of their likely efficiency and efficacy, is to "strain [out] a gnat, and swallow a camel"[49].

48 Komlotex and Fernbrook were unable to establish that their later-in-time proceedings offered any legitimate juridical advantage over Ms Wigmans' proceedings. On that footing, Komlotex and Fernbrook were unable to establish that their later proceedings were not vexatious. The Komlotex/Fernbrook proceedings should therefore have been stayed.

Orders

49 The appeal should be allowed. Orders 2 to 4 of the Court of Appeal should be set aside and, in their place, it should be ordered that:

(1) Leave to appeal be granted in respect of grounds 2 and 3(a) and (b) of the draft notice of appeal.

(2) The appeal be allowed.

(3) Order 6(i) of the orders made by the primary judge be set aside and in its place order that:

(a) the consolidated proceeding comprising 2018/310118 (Komlotex Pty Ltd v AMP Limited) and 2018/309329 (Fernbrook (Aust) Investments Pty Ltd v AMP Limited) be permanently stayed; and

(b) Ms Wigmans' costs of the hearing on 6 and 7 December 2018 before the primary judge be costs in the proceedings below.

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49 Matthew 23:24.

(4) Komlotex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd pay Ms Wigmans' costs of the application for leave to appeal and the appeal.

Komlotex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd should pay Ms Wigmans' costs of the appeal to this Court. There should be no order as to the costs of AMP Limited in this Court.

51 GAGELER, GORDON AND EDELMAN JJ. This appeal concerns the manner in which a court should respond to competing applications to stay one or more open class representative proceedings commenced under Pt 10 of the *Civil Procedure Act 2005* (NSW) ("the CPA")[50] in relation to the same controversy.

52 As will be explained, adopting the language of Bell P in the decision under appeal, there can be no "one size fits all" approach. There is no rule or presumption that the representative proceeding commenced first in time should prevail. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case.

53 In this matter, the primary judge's exercise of the power to stay proceedings did not miscarry. The appeal should be dismissed.

Facts

54 Evidence given by executives of AMP Limited ("AMP") at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 16 and 17 April 2018 gave rise to allegations that AMP failed to disclose to the market that it had deliberately charged its customers fees for ongoing financial services that were not provided. The evidence also gave rise to allegations that AMP misled the Australian Securities and Investments Commission as to the nature and extent of that conduct over an extended period, and improperly inflated the price of its shares. It was alleged that this conduct contravened the continuous disclosure obligations[51], the statutory prohibitions on

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50 Similar schemes are in the *Federal Court of Australia Act 1976* (Cth), Pt IVA; *Supreme Court Act 1986* (Vic), Pt 4A; *Civil Proceedings Act 2011* (Qld), Pt 13A; *Supreme Court Civil Procedure Act 1932* (Tas), Pt VII. See also *Uniform Civil Rules 2020* (SA), Ch 3, Pt 4; *Rules of the Supreme Court 1971* (WA), O 18, r 12; *Supreme Court Rules 1987* (NT), O 18; *Court Procedures Rules 2006* (ACT), rr 265-270.

51 *Corporations Act 2001* (Cth), s 674(2); ASX Listing Rules, r 3.1.

misleading and deceptive conduct[52] and the statutory prohibitions on unconscionable conduct[53].

55 In relation to these allegations, five open class representative actions were commenced against AMP within five weeks of each other. The first proceeding was commenced in the Supreme Court of New South Wales on 9 May 2018 by Ms Wigmans (represented by Quinn Emanuel). The second proceeding was commenced in the Victorian Registry of the Federal Court of Australia also on 9 May 2018, but about seven hours after the Wigmans proceeding, by Wileypark Pty Ltd ("Wileypark") (represented by Phi Finney McDonald). The third proceeding was commenced in the New South Wales Registry of the Federal Court on 25 May 2018 by Mr Georgiou (represented by Shine Lawyers). The fourth proceeding was commenced in the Victorian Registry of the Federal Court on 6 June 2018 by Fernbrook (Aust) Investments Pty Ltd ("Fernbrook") (represented by Slater & Gordon). And the fifth proceeding was commenced in the Victorian Registry of the Federal Court on 7 June 2018 by Komlotex Pty Ltd ("Komlotex") (represented by Maurice Blackburn).

56 There is considerable overlap between the claims made in the various proceedings, although they are not identical. There are differences in the relevant claim periods and, arguably, in the factual allegations made. There are also some differences in the causes of action brought: the inclusion of an unconscionable conduct claim in the Wigmans proceeding (but not in any other proceeding); the inclusion of a claim in respect of shares acquired off-market or the acquisition of American Depository Receipts ("ADRs") in the Fernbrook proceeding (but not in any other proceeding); and the inclusion of a claim arising out of the receipt by AMP of legal advice to the effect that its conduct was unlawful in the Wileypark proceeding (but not in any other proceeding). Ms Wigmans, however, contends that her existing claim encompasses the latter two causes of action.

57 In June 2018, the four Federal Court applicants approached the Commercial List of the Supreme Court of New South Wales seeking to transfer the Wigmans proceeding to the Federal Court. That application was ultimately refused[54].

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52 *Corporations Act*, s 1041H; *Australian Securities and Investments Commission Act 2001* (Cth), s 12DA(1); *Competition and Consumer Act 2010* (Cth), Sch 2 ("*Australian Consumer Law*"), s 18.

53 *Australian Securities and Investments Commission Act*, ss 12CA and 12CB; *Australian Consumer Law*, ss 20 and 21.

54 *Wigmans v AMP Ltd* (2018) 128 ACSR 534 at 536-537 [10]-[11].

AMP had earlier applied in the Federal Court to have the four Federal Court proceedings transferred to the Supreme Court of New South Wales. On 29 August 2018, the Federal Court granted that application and ordered that each of the Federal Court proceedings be transferred to the Supreme Court[55].

58 Between 29 August 2018 and 9 November 2018, the representative plaintiff in four of the proceedings (but not the Fernbrook proceeding) filed a notice of motion in the Supreme Court seeking orders that each other proceeding be permanently stayed. AMP took no position on these applications other than to argue that only one proceeding should be permitted to continue. At the same time, an application was made (and ultimately granted) for the Fernbrook proceeding and the Komlotex proceeding to be consolidated ("consolidated Komlotex proceedings").

Decisions below

59 The primary judge took the view that the consolidated Komlotex proceedings, which offered a "no win, no fee" funding model, should proceed, and the other proceedings should be stayed. Because none of the competing representative plaintiffs could be said to be parties to the Wigmans proceeding before the opt-out process[56] concluded, and because apparently they were not aware of the way in which the Wigmans claim was put, her Honour found that there was no abuse of process.

60 By reference to the submissions of the parties, the primary judge identified eight matters relevant to resolving the competing stay applications, consideration of which was described as a "multifactorial approach"[57]. They were:

> "[1] the competing funding proposals, costs estimates and net hypothetical return to members;
>
> [2] the proposals for security;
>
> [3] the nature and scope of the causes of action advanced (and relevant case theories);

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55 *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1 at 15 [56], 16 [58], 17 [65].

56 CPA, s 162.

57 See *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [71]; *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 48-49 [169] ("*GetSwift First Instance*").

[4] ... the size of the respective classes;

[5] the extent of any bookbuild;

[6] the experience of the legal practitioners (and funders, where applicable) and availability of resources;

[7] the state of progress of the proceedings; and,

[8] the conduct of the representative plaintiffs to date."

61 Her Honour gave most weight to the first consideration – a comparison of "competing funding proposals, costs estimates and net hypothetical return to members". That comparison was based on comparative tables provided by Komlotex that modelled the expected return to group members for each proceeding.

62 The primary judge found that Komlotex's funding model was likely to provide the best return for group members taking into account the combination of: the absence of a separate funding commission; the incentive created by an uplift in fees only once a specified resolution sum is achieved; the comparable return based on some standardised assumptions; and the fact that no common fund order was being sought by Komlotex[58]. Her Honour said she considered that "there [was] no sensible basis for differentiation between the experience or abilities of the respective legal/funding teams".

63 Ms Wigmans had submitted before the primary judge that the firms of solicitors and counsel each party had retained were highly experienced and that there was no reason to doubt that any of the firms would have any difficulty in running the litigation on behalf of the class. Ms Wigmans further submitted that the experience of legal practitioners (and funders where applicable) and the availability of resources was a neutral factor. The case being conducted on this basis, it is unsurprising that her Honour assumed that the solicitors in each proceeding were of equal experience and ability, that each of them would take the same number of hours of work to reach settlement or judgment, and, at least implicitly, that each of them had the same chance of achieving each given settlement or judgment sum. In relation to funding arrangements, her Honour assumed that the litigation funders were similarly equal and that each funding model provided incentives and disincentives to achieving the best outcome for group members.

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58 But see *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51; 374 ALR 627.

64 In relation to the second consideration, proposals for security for costs, the primary judge identified the key difference as being that the Wileypark and Georgiou proceedings relied on "after the event" or "ATE" insurance policies of which the provisions were not disclosed. Her Honour concluded that this favoured the Wigmans and consolidated Komlotex proceedings, in which $5 million in security for costs either had been or would be paid into court.

65 Her Honour found the other factors were neutral[59] or of little or no weight[60]. The "first mover advantage" was given no weight. The primary judge thus dismissed the application to stay the consolidated Komlotex proceedings and ordered that the three other proceedings be stayed.

66 Ms Wigmans appealed to the Court of Appeal of the Supreme Court of New South Wales on grounds that the consolidated Komlotex proceedings were an abuse of process and otherwise generally reagitating the submissions she had made before the primary judge.

67 The Court of Appeal (Bell P, Macfarlan, Meagher, Payne and White JJA agreeing) held that the consolidated Komlotex proceedings were not an abuse of process because Komlotex was not a party to the Wigmans proceeding and only the defendant, AMP, could have been vexed by the subsequent proceedings. Their Honours upheld the primary judge's multifactorial approach and analysis.

Ms Wigmans' submissions

68 In this Court, Ms Wigmans' central complaint was that the Court of Appeal erred in failing to apply a rule or presumption that it is prima facie vexatious and oppressive to commence an action if an action is already pending in respect of the same controversy. She submitted that the onus is on the party that commences the action second in time to show that its action is not vexatious and oppressive, and that to discharge the onus the second-in-time party must point to some legitimate juridical advantage that its proceeding offers over and above the first proceeding. And she argued that Komlotex had not discharged that onus.

69 Ms Wigmans identified several separate lines of authority that she submitted supported, or at least were not inconsistent with, the alleged first-in-time

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59 The nature and scope of the causes of action advanced and relevant case theories.

60 The size of the respective classes, the extent of any bookbuild, the experience of legal practitioners and funders and availability of resources, the state of progress of the proceedings, and the conduct of the representative plaintiffs to date.

rule or presumption – common law principles arising from *McHenry v Lewis*[61]; the inherent power to grant a stay; abuse of process principles from *Henry v Henry*[62] and *Moore v Inglis*[63]; and equitable principles concerning test actions.

70 Ms Wigmans contended that the "multifactorial approach" adopted by the primary judge improperly departed from the first-in-time rule or presumption and improperly imported a "carriage" or "certification" procedure from the United States and Canada that Pt 10 of the CPA does not authorise.

71 Ms Wigmans further submitted that the primary judge erred in acting upon the assumption that the proceedings brought by each of Ms Wigmans and Komlotex against AMP had an equal probability of achieving a possible settlement or judgment outcome within the range of possible outcomes.

Power to grant a stay

72 The source of the Supreme Court's power to grant a stay is found in s 67 in Pt 6 of the CPA. It is a power to "at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day"[64]. It encompasses, and overlaps with, the Supreme Court's inherent power to stay a proceeding to prevent abuse of its processes[65], which extends to staying proceedings that are frivolous, vexatious or oppressive[66].

73 The scope of the power is to be determined by considering the text of s 67 in its context. Section 67 confers a broad power on the Supreme Court to stay proceedings; it is *a* means by which that Court can regulate its processes and manage cases before it in accordance with the principles set out in Pt 6 of the CPA.

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61 (1882) 22 Ch D 397.

62 (1996) 185 CLR 571.

63 (1976) 50 ALJR 589; 9 ALR 509.

64 The power in s 67 of the CPA is expressed to be subject to the rules of the court.

65 See, eg, *Moubarak by his tutor Coorey v Holt* (2019) 100 NSWLR 218 at 233 [69]-[70], quoting *New South Wales v Plaintiff A* [2012] NSWCA 248 at [15].

66 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 74; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266-267 [14]-[15].

74 Section 67 does not provide for any particular criteria relevant to the exercise of the power[67]. But the power is not unconstrained. Some considerations are mandated by other provisions in Pt 6 of the CPA. Section 58(1) provides that in making any order or direction for the management of proceedings (including the grant of a stay), the court *must* seek to act in accordance with the dictates of justice. Section 58(2) provides that, in doing so, the court *must* have regard to s 56 (the overriding purpose of the CPA and the rules of court, being to facilitate the just, quick and cheap resolution of the real issues in the proceedings) and to s 57 (the objects of case management, including the just determination of the proceedings and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties). Part 6 of the CPA also provides that for the purpose of determining the dictates of justice in a particular case, the court *may* have regard, among other things, to the complexity of the issues[68], the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction[69] and "such other matters as the court considers relevant in the circumstances of the case"[70].

75 There is, however, nothing in s 67, read with Pt 6, that supports Ms Wigmans' contention that the considerations to which a court might have regard in exercising the power in s 67 are to be confined, or that the statutorily identified considerations (both mandatory and discretionary) applying to the exercise of the power are to be displaced, by reference to a first-in-time rule or presumption[71]. The provisions of Pt 6 do not disclose any legislative intent that the court must give predominant (or indeed any) weight to the order in which competing proceedings were filed.

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67 *Mao v AMP Superannuation Ltd* [2016] NSWSC 722 at [43]; *Moubarak* (2019) 100 NSWLR 218 at 233 [69], quoting *Plaintiff A* [2012] NSWCA 248 at [15]; *South Eastern Sydney Local Health District v Lazarus* [2019] NSWSC 649 at [14].

68 CPA, s 58(2)(b)(i).

69 CPA, s 58(2)(b)(vi).

70 CPA, s 58(2)(b)(vii).

71 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

76 The conclusion that there is no first-in-time rule or presumption is reinforced by the scheme of Pt 10[72]. There is nothing in Pt 10 that expressly cuts down or is inconsistent with the broad power of stay under s 67 and, in particular, there is no provision in Pt 10 that expressly or impliedly prevents the filing of a second representative proceeding against a defendant in relation to a controversy. To the contrary, where seven or more persons have claims against the same person[73], and the conditions in s 157(1)(b) and (c) are met[74], s 157 permits "one or more" of those persons to commence proceedings representing some or all of them. Under that statutory scheme[75]:

> "[t]he representative proceeding may represent some or all of those who have such a claim. The claims of the applicant and the group members must give rise to a substantial common issue of law or fact, *but the group members need not necessarily share a common interest*. Indeed, the claims need not be based on the same conduct." (emphasis added)

77 Moreover, Pt 10 forms part of the CPA and, like any other Act, the CPA must be read as a harmonious whole[76]. The introduction of Pt 10 into the CPA in 2010 did not remove or dilute the Supreme Court's existing powers, but provided

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72 See generally *Brewster* (2019) 94 ALJR 51 at 66-70 [60]-[81], 80-82 [136]-[145]; 374 ALR 627 at 641-646, 660-663.

73 CPA, s 157(1)(a).

74 "[T]he claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances" and "the claims of all those persons give rise to a substantial common question of law or fact".

75 *Brewster* (2019) 94 ALJR 51 at 80 [136]; 374 ALR 627 at 660 (footnotes omitted).

76 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 452; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70].

a more detailed regime[77] compared with the pre-existing rules of civil procedure[78] that provided for representative proceedings[79]. Contrary to Ms Wigmans' submission, recognition that there may be multiple representative proceedings which overlap in various ways is not inconsistent with one objective of Pt 10 being "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"[80]. That objective poses the question of how to resolve multiplicity when it arises. It does not answer it.

78 Nor does anything in Pt 10 evince an intention that a party to a representative proceeding (including a representative plaintiff) or a group member must use and only use the provisions of Pt 10 if dissatisfied with the conduct of an existing representative proceeding. Provisions in Pt 10, such as ss 171 and 162, do not detract from the Supreme Court's power to stay competing representative proceedings or impose any limitation of the kind contended for by Ms Wigmans.

79 Section 171 permits a group member to apply to replace a representative plaintiff where the existing plaintiff is "not able adequately to represent the interests of the group members". It is not concerned with, and does not address, a circumstance where competing representative plaintiffs believe they are able to *more adequately* represent the interests of all or some group members.

80 Section 162 provides that a group member may opt out of representative proceedings[81] and that, except with leave, the hearing of representative

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77 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at 28066. Part 10 of the CPA was substantially modelled on Pt IVA of the *Federal Court of Australia Act*, which was in turn introduced following Report 46 of the Australian Law Reform Commission ("ALRC"): ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). See also Australia, Senate, *Parliamentary Debates* (Hansard), 12 September 1991 at 1448; *Brewster* (2019) 94 ALJR 51 at 70-71 [82]; 374 ALR 627 at 647.

78 *Uniform Civil Procedure Rules 2005* (NSW), rr 7.4 and 7.5 as in force on 3 March 2011 ("*UCPR*").

79 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at 20866-20867.

80 *Brewster* (2019) 94 ALJR 51 at 70-71 [82]; 374 ALR 627 at 647.

81 CPA, s 162(2).

proceedings must *not* commence earlier than the date before which a group member may opt out of the proceedings[82]. The right to opt out preserves to the group member the ability to individually pursue proceedings outside the representative proceeding regime in Pt 10, to choose between representative proceedings or, for whatever reason, not to seek relief under Pt 10 or otherwise.

81 Part 10 also identifies other considerations which *may* be relevant in dealing with competing representative proceedings. Section 162, which has been addressed, provides one of them. Whether the date before which a group member may opt out of the proceeding has passed may be relevant. Section 166 provides another example. It stipulates that the Supreme Court may, on application by a defendant, or of its own motion, order that proceedings no longer continue under Pt 10 if satisfied that it is in the interests of justice to do so for one of a number of reasons. Those reasons include that: the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding[83]; the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members[84]; a representative party is not able to adequately represent the interests of the group members[85]; and it is otherwise inappropriate that the claims be pursued by means of representative proceedings[86]. In relation to the last of those matters, s 166(2) provides that it is not inappropriate for claims to be pursued by means of representative proceedings merely because the *persons identified as group members in relation to the proceedings* do not include all persons on whose behalf those proceedings might have been brought[87] or are aggregated together for a particular purpose such as a litigation funding arrangement[88].

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82 CPA, s 162(4).

83 CPA, s 166(1)(a).

84 CPA, s 166(1)(c).

85 CPA, s 166(1)(d).

86 CPA, s 166(1)(e).

87 CPA, s 166(2)(a).

88 CPA, s 166(2)(b). The phrase "litigation funding arrangement" is not defined.

82 Section 166 also thereby recognises important aspects of Pt 10: that in relation to representative proceedings there are group members who are not parties to the proceeding until after the opt-out process; that litigation funding arrangements are accommodated within the regime; and, consistent with principle, that in the exercise of its powers under the CPA, the Supreme Court must be mindful not only of the existence of group members but of what is in their best interests[89]. That is particularly the case where those interests may be prejudiced or, as Komlotex and Fernbrook submitted, "where there is a real risk – as [here] – that those interests may diverge from the interests of the representative party"[90].

83 Although strictly unnecessary to support the power to grant a stay, the general power of the Supreme Court under s 183 to make any order that it thinks "appropriate or necessary to ensure that justice is done in the proceedings" also shows that the overall concern of Pt 10 is the "just and effective resolution" of the issues in the proceeding[91]. In the context of competing representative proceedings, the grant of a stay may be necessary or desirable to achieve the just and effective resolution of the issues.

84 Unlike the United States and some Canadian provinces, which have adopted certification and carriage motion procedures to resolve multiplicity in class actions[92], Australian legislatures deliberately chose not to adopt such procedures[93]. That choice reflected a view that the proposed class actions scheme was adequate

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89 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 27 [21]; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8].

90 *Lopez v Star World Enterprises Pty Ltd* (1999) ATPR ¶41-678 at 42,670 [16]; *Kelly v Willmott Forests Ltd (In liq) [No 4]* (2016) 335 ALR 439 at 454 [63].

91 *Brewster* (2019) 94 ALJR 51 at 65 [51]; 374 ALR 627 at 639.

92 See, eg, *Federal Rules of Civil Procedure* (US), r 23; *Class Proceedings Act 1992* (Ont), ss 12 and 13. See also *Competition Act 1998* (UK), ss 47A and 47B and *Competition Appeal Tribunal Rules 2015* (UK), Pt 5, considered in *Merricks v Mastercard Inc* [2021] Bus LR 25.

93 ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at 63-64 [147]. See *Bellamy's* [2017] FCA 947 at [54]; *Perera v GetSwift Ltd* (2018) 263 FCR 92 at 137 [196].

to protect group members' interests[94] or, perhaps, competing class actions were not envisaged[95].

85 But the decision not to adopt the United States or Canadian procedures in Australia does not end, or dictate the outcome of, the process of identifying the relevant considerations for the Supreme Court in deciding which of the competing representative proceedings is to proceed. For as has been explained, the representative proceedings scheme in Pt 10 does not stand alone. It forms part of the CPA and it operates in conjunction with the CPA and the Supreme Court's inherent powers.

86 A first-in-time approach of the kind for which Ms Wigmans contended would also be unworkable. To adopt and adapt what Lord Templeman said in *The Abidin Daver*[96], a concern with avoiding or limiting a multiplicity of representative proceedings ought not be replaced by a presumption – a first-in-time criterion – that leads to an "ugly rush" to the court door, including but not limited to the framing of causes of action and claims for relief as broadly as possible to gain so-called "juridical advantages". And as the facts of this appeal demonstrate, multiple representative proceedings in respect of the same controversy are not necessarily "duplicitous". Here, there was overlap between the representative proceedings but the overlap was not complete. And, no less significantly, Ms Wigmans failed below to establish that the commencement of any of the later filed proceedings was an abuse of process, a finding from which she did not seek leave to appeal.

Authorities on which Ms Wigmans relied

87 It remains to address the several lines of authority on which Ms Wigmans relied in support of her contention that there is a rule or presumption that the representative proceeding issued first in time is to be preferred and that,

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94 ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at 63-64 [146]-[147].

95 ALRC, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No 134 (2018) at 102 [4.51].

96 [1984] AC 398 at 426. See also *EI Du Pont de Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 585 at 593; *GetSwift* (2018) 263 FCR 92 at 153 [279]; *Wileypark* (2018) 265 FCR 1 at 8 [18].

absent some other juridical advantage, any later proceedings should be stayed. As presented, there were five steps to the argument:

(1) 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, citing *Carron Iron Co v Maclaren*[97], *CSR Ltd v Cigna Insurance Australia Ltd*[98] and *Henry*[99];

(2) the relevant authorities are those relating to "duplicative" proceedings; authorities relating to proceedings which are "merely overlapping", such as *McHenry*[100], are not applicable;

(3) the onus is on the party commencing the second action to show that it is not vexatious and oppressive, citing *Moore*[101];

(4) the onus is typically discharged by establishing that the second action offers some legitimate juridical advantage over the first action, citing *Voth v Manildra Flour Mills Pty Ltd*[102]; and

(5) the fact that the parties to the second action are not identical to the parties to the first does not displace the presumption, citing *Moore*[103] and *Perera v GetSwift Ltd*[104].

88 Two points may be made at the outset. Ms Wigmans' argument is impermissibly selective and at various points merges different ideas from areas

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97 (1855) 5 HLC 416 at 437-439 [10 ER 961 at 970-971].

98 (1997) 189 CLR 345 at 393-394.

99 (1996) 185 CLR 571 at 591.

100 (1882) 22 Ch D 397.

101 (1976) 50 ALJR 589 at 592; 9 ALR 509 at 514.

102 (1990) 171 CLR 538 at 564-565.

103 (1976) 50 ALJR 589; 9 ALR 509.

104 (2018) 263 FCR 92 at 127 [155].

with different jurisprudential foundations. And, as will be seen, the authorities cited do not support a first-in-time rule or presumption.

Common law principles

89 Ms Wigmans' argument assumed that there is a common law principle that, if complete relief is available in a proceeding on foot, it is prima facie vexatious and oppressive to commence a second proceeding dealing with the same controversy. That proposition was rightly rejected by both the primary judge and the Court of Appeal.

90 By no later than 1589, the general "rule of law" was that "a man shall not be twice vexed for one and the same cause"[105]. Thus, at common law, an award of damages was said to be once-and-for-all[106] and even the pendency of an action for certain relief was a good plea in abatement to another action for the same relief in a court of concurrent jurisdiction[107]. By contrast, as Lord Hardwicke LC remarked in *Foster v Vassall*[108], although courts of equity adopted the same "general rule" at an early point, they applied it "with a more liberal discretion".

91 Prior to the *Judicature Acts*, a plaintiff who brought an action at law and a suit in equity for like remedies was ordinarily put to their election. But the earlier proceedings did not bar the later[109]. This principle of election was then extended

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105 *Sparry's Case* (1589) 5 Co Rep 61a at 61a [77 ER 148 at 148] (footnote omitted).

106 See *Fitter v Veal* (1701) 12 Mod 542 [88 ER 1506]. cf Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 163-164.

107 *Moyle v West* (1553) 1 Dyer 92b at 93a [73 ER 201 at 202]; *White v Willis* (1759) 2 Wils KB 87 at 87-88 [95 ER 701 at 701]; *Harley v Greenwood* (1821) 5 B & Ald 95 at 101-102 [106 ER 1128 at 1131]; *Ostell v Lepage* (1851) 5 De G & Sm 95 at 105 [64 ER 1034 at 1038]. See Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 473-474.

108 (1747) 3 Atk 587 at 589 [26 ER 1138 at 1140].

109 Beames, *The General Orders of the High Court of Chancery: From the Year 1600 to the Present Period* (1815) at 11-12, O 18; Bohun, *Cursus Cancellariae; Or, the Course of Proceedings In the High Court of Chancery*, 2nd ed (1723) at 349; *Jones v Earl of Strafford* (1730) 3 P Wms 79 at 90 [24 ER 977 at 980-981]; *Carwick v Young* (1818) 2 Swans 239 at 243-244 [36 ER 606 at 608]; *Ostell* (1851) 5 De G & Sm 95 at 105 [64 ER 1034 at 1038].

to cases where proceedings were pending in the English Court of Chancery and a foreign court[110], subject to recognition that differences of procedure and remedy, and the location of assets, might justify concurrent proceedings[111]. After a decree was made in the English proceedings, however – even one requiring further steps, such as an inquiry or accounting – the plaintiff was taken to have "already made his election"[112], and hence the defendant's only remedy was an injunction against the foreign proceedings. As Lord Cranworth LC observed in *Carron Iron*[113], "[w]here ... pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings".

92 Within a decade of the *Judicature Acts*, these equitable principles were adapted by courts jointly administering law and equity. In the seminal case of *McHenry*, the Master of the Rolls, Sir George Jessel, cited[114] the practice of the old Court of Chancery, of putting a plaintiff to their election by an order of course if they were suing for the same cause of action both at law and in equity, in support of the principle that, within England, "where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will do". His Lordship concluded[115] that the court had power to prevent improper vexation by concurrent local and foreign proceedings and that no "inference" of "*primâ facie* vexation" could be drawn from the multiplicity of proceedings where "[n]ot only is the procedure different, but the remedy is different" as between the courts.

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110 *Pieters v Thompson* (1815) G Coop 294 at 294 [35 ER 563 at 563].

111 *Wedderburn v Wedderburn* (1840) 2 Beav 208 at 213-214 [48 ER 1159 at 1161-1162].

112 *Wedderburn* (1840) 2 Beav 208 at 210 [48 ER 1159 at 1160]. See also *Harrison v Gurney* (1821) 2 Jac & W 563 at 564-565 [37 ER 743 at 744]; *Booth v Leycester* (1837) 1 Keen 579 at 580 [48 ER 430 at 431].

113 (1855) 5 HLC 416 at 437 [10 ER 961 at 970].

114 (1882) 22 Ch D 397 at 400.

115 *McHenry* (1882) 22 Ch D 397 at 399-400. See also *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225 at 232.

93 Shortly thereafter, in *The Christiansborg*, the Court of Appeal reiterated[116] the principles in *McHenry* but divided as to the proper remedy: whereas Lord Esher MR in dissent would have put the plaintiff to election and relied[117] on the absence of any "case in which the Court has stayed the second action without giving the plaintiff at least the right of election", Baggallay LJ concluded[118] that "the circumstances of the case may be such that instead of putting the plaintiff to his election the Court will stay one of the two actions". The latter view ultimately prevailed and, thereafter, the proper remedy was regarded as a matter within the court's discretion[119].

94 The principles stated in *McHenry* have previously been accepted in this Court[120]. The general law principles concerning multiple suits do not support the first-in-time rule or presumption. Multiple suits were and remain to be resolved by the exercise of discretion informed by all the relevant circumstances.

Inherent power to grant a stay on grounds of forum non conveniens

95 Ms Wigmans also sought to rely on cases concerning a court's power to stay proceedings on grounds of forum non conveniens. In *CSR*, six judges of this Court explained the nature of the power to stay proceedings on grounds of forum non conveniens[121]:

> "It is clear from the rationale for the exercise of the power to stay proceedings and, also, from the words 'oppressive', 'vexatious' and 'abuse of process' in *Voth*, in *Oceanic Sun* [*Line Special Shipping Co Inc v Fay*[122]] and in the earlier cases considered in *Oceanic Sun* ... that the power to stay

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116 (1885) 10 PD 141 at 145-147, 153.

117 (1885) 10 PD 141 at 148.

118 (1885) 10 PD 141 at 153.

119 See, eg, *The "Hartlepool"* (1950) 84 Ll L Rep 145 at 146; *The Soya Margareta* [1961] 1 WLR 709 at 716-717; [1960] 2 All ER 756 at 762.

120 See, eg, *Henry* (1996) 185 CLR 571 at 591; *CSR* (1997) 189 CLR 345 at 393, quoting *Carron Iron* (1855) 5 HLC 416 at 437 [10 ER 961 at 970].

121 (1997) 189 CLR 345 at 391.

122 (1988) 165 CLR 197.

proceedings on grounds of forum non conveniens is an aspect of the inherent or implied power which, in the absence of some statutory provision to the same effect, every court must have to prevent its own processes being used to bring about injustice".

96 In *Oceanic Sun*, Deane J explained that test in the following terms[123]:

"*[The] power [to dismiss or stay proceedings within jurisdiction on inappropriate forum grounds] is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment and, to a significant extent, matters of impression.* The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him." (emphasis added)

97 Contrary to Ms Wigmans' contention, those statements of principle do not suggest there is a first-in-time rule or presumption in the forum non conveniens context. Deane J's approach in *Oceanic Sun* was adopted in *Voth*[124] and applied in *Henry*[125] and *CSR*[126].

Reliance on Henry and Moore

98 Ms Wigmans emphasised the statement of four members of this Court in *Henry* that: "[i]t is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts *of this country* if an action is already pending with respect to the matter in issue"[127] (emphasis added). The authority cited for the proposition applying to two proceedings in the

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123 (1988) 165 CLR 197 at 247-248.

124 (1990) 171 CLR 538 at 564-565.

125 (1996) 185 CLR 571 at 587, 592-593.

126 (1997) 189 CLR 345 at 390-391, 400-401.

127 (1996) 185 CLR 571 at 591.

same country was *Moore*. But *Moore*, like *Henry*, concerned whether a second or subsequent action may be considered vexatious or oppressive in what their Honours in *Henry* referred to as the "strict sense"[128], of an abuse of process. The considerations involved in resolving a competition between representative proceedings are not so confined. Here, there was no abuse of process: the primary judge's finding that the consolidated Komlotex proceedings were not an abuse of process was upheld on appeal. And, even in the context of abuse of process, the time of filing is not determinative but one of a range of factors, personal to the parties, that are considered by a court[129].

Equity's approach to test actions

99 By contrast to the principles applicable to forum non conveniens cases, equitable principles concerning test actions *do* assist in identifying how a court should approach the issue of multiple representative proceedings. Those principles date back at least to *Amos v Chadwick*[130], where Jessel MR explained the court's approach to resolving 78 actions brought by shareholders of the Blochairn Iron Company against the company's promoters for fraudulent misrepresentation in these terms:

> "All the actions raise substantially the same question. Of course it would have been a scandal to the administration of justice if all the seventy-eight actions had been allowed to proceed, and in some way or other provision ought to have been made for the trial of the real question between the parties in a single action, if that was possible. Sometimes such a course is not possible, because people will not be reasonable and will not consent. In that case, I take it, the Court could stay the proceedings in all the actions but one, and see what becomes of that one."

100 The procedure anticipated by the Master of the Rolls was later applied in *Bennett v Lord Bury* by Field J, staying 37 of 38 shareholder actions against directors of the Colonial Trusts Corporation Limited[131]. In upholding that order on

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128 (1996) 185 CLR 571 at 591.

129 *Henry* (1996) 185 CLR 571 at 592-593. See also *De Dampierre v De Dampierre* [1988] AC 92 at 108.

130 (1878) 9 Ch D 459 at 462-463.

131 (1880) 5 CPD 339 at 340, 342.

appeal, Lord Coleridge CJ observed[132] that "the gist of the charge [was] the same in all" of the actions. Lindley J agreed with Lord Coleridge CJ and said[133] that:

> "the order prevents the defendants from being subjected to the unnecessary burden of the costs of thirty-eight actions, when the whole matter in controversy may be settled in one. As to our power to do what is done by this order, if authority were needed, *Amos v Chadwick* supplies it. I must confess I should have thought without that case that there was abundant power to make such an order. It comes therefore to a question of discretion; and I think my Brother Field has properly exercised his discretion in what he has done."

101 This approach was then explained by Jessel MR in *McHenry*[134], in a passage in part quoted by Bell P in the Court of Appeal in this matter:

> "You might have a hundred actions brought upon the same act or alleged breach of trust, and therefore of course the Court has power to stop all but one of the actions if they are all for exactly the same thing. But the course of the Court is well settled. The defendants take out a summons to stay the actions which have been previously transferred of course to the same Judge or Court, and then the Court decides which of the actions is to go on as a test action, and which are to be stayed. *You cannot tell until you have all the plaintiffs before you the right course to be taken.* The first action may be a collusive action, one action may embrace further relief than another, one action may be better framed than another to raise the questions in dispute, one action may be more perfect as to parties than another, in one action the plaintiff may be a solvent person, and able to answer costs, and in the other the plaintiff may be a pauper. *Various considerations may arise, and until you get the whole of the actions before the Court the Court cannot decide which is to be allowed to proceed, or on what terms. It sometimes happens that we allow one action to proceed for one purpose and another for another purpose – that is that we excise from one action so much of the relief as can properly be attributed to an earlier plaintiff, and allow the*

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132 *Bennett* (1880) 5 CPD 339 at 341.

133 *Bennett* (1880) 5 CPD 339 at 344 (footnote omitted).

134 (1882) 22 Ch D 397 at 404. See also *Commissioners of Sewers of the City of London v Gellatly* (1876) 3 Ch D 610 at 615; *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34 at 76. cf *Reynolds v Reynolds* [1977] 2 NSWLR 295 at 307.

> *second or third action to go on for the additional relief; but all that can only be discussed in the presence of all parties*." (emphasis added)

Unlike the position in *McHenry*[135], the applications for stay in this matter were not filed by the defendant, AMP – they were filed by the representative plaintiffs. But the principles in *McHenry* are instructive; they reflect the approach earlier taken in *Amos* and *Bennett*, which concerned applications by plaintiffs[136].

102 And Ms Wigmans' contention that these principles apply to multiple but not duplicative suits is misplaced. As has been observed, *Bennett* was a case where "the gist of the charge [was] the same in all" and the multiple actions were to be resolved in the court's discretion[137]. In *McHenry*, Jessel MR's approach was stated to apply where there are multiple actions which are "all for exactly the same thing"[138]. As these authorities demonstrate, the principles apply to proceedings that might be characterised as duplicative. No doubt one reason for this is that there can be no clear line between duplicative proceedings and those which overlap. Further, the multiple representative proceedings in issue in this appeal were not duplicative.

103 Likewise, the principle from *Carron Iron* provides guidance as to how a court should approach multiple representative proceedings. As will be recalled[139], in that case the Lord Chancellor stated that "[w]here ... pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings"[140]. This principle was understood to match the applicable law where the second proceedings were instituted in the same jurisdiction[141]. But importantly, it was subject to the

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135 (1882) 22 Ch D 397 at 401.

136 *Amos v Chadwick* (1877) 4 Ch D 869 at 872; *Bennett* (1880) 5 CPD 339 at 342.

137 (1880) 5 CPD 339 at 341, 344.

138 (1882) 22 Ch D 397 at 404.

139 See [91] above.

140 *Carron Iron* (1855) 5 HLC 416 at 437 [10 ER 961 at 970]. See also *McHenry* (1882) 22 Ch D 397 at 405.

141 *Carron Iron* (1855) 5 HLC 416 at 439 [10 ER 961 at 971].

qualification that it is not "the duty of the Court so to act [to restrain the second proceedings], if from any cause it appears likely to be more conducive to substantial justice that the [second] proceedings should be left to take their course"[142]. In other words, a court of equity would not restrain the second proceeding if that course would be "ill calculated to answer the ends of justice"[143] or "ill adapted to secure complete justice"[144].

104 Contrary to Ms Wigmans' submission, *Carron Iron* does not hold that, where proceedings are pending in which complete relief is available, any subsequent proceeding in respect of the same controversy is vexatious and should therefore be restrained or that, absent some other juridical basis, the first in time prevails. It directs attention to the need to consider what resolution of the competing proceedings will do justice.

Considerations relevant to the exercise of the power to grant a stay

105 Having thus rejected Ms Wigmans' contention that the breadth of the power to grant a stay of competing representative proceedings under the CPA is subject to a first-in-time rule or presumption, it remains to identify the considerations that are relevant to the exercise of the power.

106 The starting point is that multiplicity of proceedings is not to be encouraged and that competing representative proceedings run by different firms of solicitors, with different funders, may in principle be inimical to the administration of justice[145]. But, as was earlier stated, there is no "one size fits all" approach. Multiplicity may be addressed by a variety of means instead of, or in addition to, staying one or more of the proceedings[146].

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142 *Carron Iron* (1855) 5 HLC 416 at 439 [10 ER 961 at 971].

143 *Carron Iron* (1855) 5 HLC 416 at 437-438 [10 ER 961 at 970].

144 *Carron Iron* (1855) 5 HLC 416 at 438 [10 ER 961 at 971].

145 See, eg, *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR ¶41-679; *Kirby v Centro Properties Ltd* (2008) 253 ALR 65; *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17; *Bellamy's* [2017] FCA 947; *Cantor v Audi Australia Pty Ltd [No 2]* [2017] FCA 1042; *GetSwift* (2018) 263 FCR 92; *Wileypark* (2018) 265 FCR 1.

146 These include: consolidating the proceedings; de-classing one or more of the proceedings; holding a joint trial of all proceedings with each left constituted as open

107 Second, while a first-in-time rule or presumption has never been favoured as a means of resolving which of the competing proceedings should proceed at all, the order of filing has been and remains a relevant consideration, although less relevant in cases like this where the competing proceedings have been commenced within a short time of each other[147]. As the Full Court of the Federal Court said in *GetSwift*, the commencement of a subsequent bona fide set of representative proceedings prior to the court giving substantive directions in existing but overlapping representative proceedings[148]:

> "does not of itself establish any vexation, oppression or an abuse of process. Such is not established for the representative applicant in each of the proceedings, for they are different. And in respect of the group members in each of the proceedings in relation to the overlap, those overlapping group members are not *parties* as such. They have not engaged in any conduct with respect to their rights that could sensibly be characterised as amounting to vexation, oppression or an abuse of process."

By contrast, "the greater the gap in time between commencement of the sets of representative proceedings perhaps the stronger the case for a stay of the subsequent set of proceedings, all other matters being equal"[149].

108 Third, given the breadth of the mandatory and discretionary considerations in Pt 6 of the CPA informing the power to grant a stay, the relevant point in time is not limited to the time of filing and may, and often will, extend to facts and matters arising after filing. In the case of representative proceedings, the actions (or inaction) of group members, and, more generally, the degree of expedition with which the respective parties have approached the proceeding, including the degree

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class proceedings; and closing the classes in one or more of the proceedings but leaving one of the proceedings as an open class proceeding, with a joint trial of all: see, eg, *Bellamy's* [2017] FCA 947 at [9]; *Cantor* [2017] FCA 1042 at [75]; *GetSwift* (2018) 263 FCR 92 at 105-110 [44]-[70]; *Southernwood v Brambles Ltd* (2019) 137 ACSR 540 at 545 [20]; *Wigmans v AMP Ltd* (2019) 373 ALR 323 at 326 [7].

147 *Union Steamship Co of New Zealand Ltd v The Caradale* (1937) 56 CLR 277 at 281.

148 (2018) 263 FCR 92 at 126 [150].

149 *Wigmans* (2019) 373 ALR 323 at 341 [83].

to which they have been timely in their interlocutory activities[150], are likely to be relevant.

109 Fourth, the factors that might be relevant cannot be exhaustively listed. They will vary from case to case[151]. In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, it is necessary for the court to determine, by reference to all relevant considerations, which proceeding going ahead would be in the best interests of group members. In the present appeal, no party suggested that the second to eighth considerations identified by the primary judge were irrelevant[152].

110 Ms Wigmans' argument focussed primarily on the first consideration – the competing funding proposals, costs estimates and net hypothetical return to members. She challenged the power of the Supreme Court under s 67 to consider differing litigation funding arrangements, either alone or in conjunction with the identity of the solicitors and their relative experience, the estimated legal costs for the conduct of the respective proceedings and the likely return to group members.

111 Litigation funding arrangements are not a mandatory consideration under s 67, but they are not irrelevant. It would be inappropriate to read s 67 with Pt 10 as conferring jurisdiction or granting power subject to limitations not found in their express words[153]. Before the primary judge, litigation funding arrangements were raised directly by each representative plaintiff as a significant fact or matter. Part 10 recognises that litigation funding arrangements are a distinct feature of representative proceedings[154], and, evidently, there will be cases where the difference between litigation funding arrangements is so stark that to exclude it from consideration in determining whether to exercise the stay power would not be consistent with the court seeking to act in accordance with the dictates of justice

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150 CPA, s 58(2)(b)(ii).

151 See, eg, *GetSwift First Instance* (2018) 263 FCR 1 at 48-49 [169]; *GetSwift* (2018) 263 FCR 92 at 136 [195].

152 See [60] above.

153 *Shin Kobe Maru* (1994) 181 CLR 404 at 421; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 190-191 [103]; *Brewster* (2019) 94 ALJR 51 at 64 [43]; 374 ALR 627 at 637, quoting *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 261 [12].

154 CPA, s 166(2)(b).

under s 58. But that is not to say that litigation funding arrangements must always be relevant, still less determinative.

112 There is nothing foreign to the judicial process for a court to take into account likely success in proceedings or quantum of recovery. Those considerations, as well as preferences expressed by adult beneficiaries, are well established as potentially relevant matters when a court addresses whether bringing or defending litigation by trustees is proper or can be justified having regard to the best interests of those to whom fiduciary duties are owed[155]. Similar principles apply to liquidators seeking advice[156] or seeking approval to settle a proceeding or enter a funding agreement[157]. Those principles also apply to attorneys[158]. And they are centrally important when a court approves a compromise of a claim made by a person under disability[159]. Litigation funding arrangements may affect the likely success of representative proceedings commenced under Pt 10. They will directly affect the quantum of recovery. There is no reason to exclude those considerations

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155 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 85-86 [44]-[45]. See *In re Dallaway* [1982] 1 WLR 756 at 759; [1982] 3 All ER 118 at 121; *In re Evans* [1986] 1 WLR 101 at 107; [1985] 3 All ER 289 at 293. See also *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1224-1225; [1995] 1 All ER 431 at 434-435; *Application of Macedonian Orthodox Community Church St Petka Inc [No 3]* [2006] NSWSC 1247 at [62].

156 *Corporations Act*, Sch 2, ss 90-15 and 90-20. See *Re Great Southern Managers Australia Ltd (In liq); Ex parte Jones* (2014) 9 BFRA 555 at 568-569 [63]; *Re McDermott and Potts* [2019] VSCA 23 at [90].

157 *Leigh re King Bros* [2006] NSWSC 315 at [25]; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2011) 281 ALR 38 at 43 [24]; *Deputy Commissioner of Taxation, in the matter of ACN 154 520 199 Pty Ltd (In liq) v ACN 154 520 199 Pty Ltd (In liq) [No 2]* [2017] FCA 755 at [26].

158 *Application by Beaumont* [2018] NSWSC 1705 at [13]-[18].

159 See, eg, *Permanent Trustee Co Ltd v Mills* (2007) 71 NSWLR 1 at 5 [29]; *Fisher by her tutor Fisher v Marin* [2008] NSWSC 1357 at [29]; *Elderfield (by her litigation guardian Visentin) v Transport Accident Commission* (2010) 55 MVR 206 at 209 [20]; *Stephens-Sidebottom v Victoria (Department of Education and Early Childhood Development)* [2011] FCA 893 at [12]; *Fairhurst (bht NSW Trustee and Guardian) v Fairhurst* [2012] NSWSC 388 at [30]-[38].

in exercising the power under s 67 to stay one or more of representative proceedings in relation to the same controversy.

Court's approach to competing litigation funding arrangements

113 Ms Wigmans' alternative argument was that if competing litigation funding arrangements was a relevant factor, either alone or in conjunction with other considerations (the identity of the solicitors and their relative experience, the estimated legal costs for the conduct of the respective proceedings and the likely return to group members), the primary judge erred in her consideration of those factors by acting upon certain assumptions.

114 As has been seen[160], the primary judge did approach the issue by making assumptions. She assumed that the solicitors engaged were of equal experience and ability; that each of them would take the same number of hours of work to reach settlement or judgment; at least implicitly, that each of them had the same chance of achieving each given settlement or judgment sum; that the litigation funders were similarly equal; and that each funding model provided incentives and disincentives to achieving the best outcome for group members.

115 But, as noted earlier, Ms Wigmans had submitted before the primary judge that there was no basis for distinguishing between the competence or experience of the legal teams retained in each matter, and that the experience of the legal teams and funders and the availability of resources was a neutral factor. As Meagher and Payne JJA rightly said in the Court of Appeal, the primary judge was then entitled to test the likelihood of achieving particular results by applying the common assumptions to each case. Ms Wigmans' case having been conducted in the way it was, her submission that the primary judge should not have made the assumptions her Honour did should be rejected.

116 The task undertaken by the primary judge was not a judgment regarding a matter of "mere" case management[161] but a larger task of ensuring that justice is done in the competing representative proceedings which have been commenced

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160 See [63] above.

161 *Wigmans* (2019) 373 ALR 323 at 344 [95]. See also *Wileypark* (2018) 265 FCR 1 at 8 [17].

under Pt 10 of the CPA where all courts must be astute to protect the best interests of group members[162].

117 In undertaking that task the court must recognise that the representative plaintiff in each action typically undertakes fiduciary obligations of a representative party to the members of the group[163], some of which obligations arise from contractual obligations which directly or indirectly give a significant measure of control over the action to the person funding the litigation, be it a litigation funder or firm of solicitors. Here, there is nothing in the record to suggest that any of the representative plaintiffs even raised the possibility of, let alone addressed, the recognised conflicts of interest between the group members and the competing litigation funders or the representative plaintiff and a given litigation funder[164]. Thus, a court must be mindful of the existence of such conflicts of interest and bring them to account in assessing what is in the best interests of group members.

118 As explained, Ms Wigmans' case having been conducted in the way it was, there was no error in the primary judge's approach. However, that is not to say that the primary judge's approach was the only manner in which a court, faced with competing open class representative proceedings with several firms of solicitors and different funding models, might determine which proceeding going ahead would be in the best interests of group members. Is the court to act as inquisitor and as such investigate itself how choosing to stay one or more of the actions might affect group members, or should it use existing procedures, methods, steps and mechanisms to identify and resolve such issues on an adversarial basis? The answer to that question will invariably depend on the nature of the case in hand. But where there are complex and interrelated considerations and real potential for conflicts of interest, an adversarial approach is to be preferred.

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162 *Wileypark* (2018) 265 FCR 1 at 8 [18]; *Kelly v Scenic Tours Pty Ltd* [2019] NSWSC 1266 at [97]; *Wigmans* (2019) 373 ALR 323 at 337 [62]; *Stallard v Treasury Wine Estates Ltd* [2020] VSC 679 at [20].

163 See *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 524 [40]; *Dyczynski v Gibson* (2020) 381 ALR 1 at 50 [209].

164 *Kirby* (2008) 253 ALR 65 at 67 [4]-[6], 68 [9], 72 [30], [32]; *Wileypark* (2018) 265 FCR 1 at 4 [2], 8 [15]. See also *GetSwift* (2018) 263 FCR 92 at 120-121 [119]; *Impiombato v BHP Billiton Ltd [No 2]* (2018) 364 ALR 162 at 186 [111]; *Wigmans v AMP Ltd* [2019] NSWSC 603 at [335]; *Stallard* [2020] VSC 679 at [5]; *Merricks* [2021] Bus LR 25 at 57 [98].

119 A possible approach, not explored in argument on appeal, could be for the court to appoint a special referee to inquire into the litigation funding arrangements and the more particular questions the primary judge dealt with on the basis of assumptions. At any stage of the proceedings, the court may make orders for reference to a referee appointed by the court "for inquiry and report by the referee"[165], on "any question or issue arising ... whether of fact or law, or both, and whether raised by pleadings, agreement of parties or otherwise"[166]. And upon receipt of the referee's written report, the court may, among other things, "adopt, vary or reject the report in whole or in part"[167]. The use of special referees in representative proceedings is not new. They have frequently been used to ensure that group members' interests are best protected at the settlement approval stage of representative proceedings[168].

120 Alternatively, the court could require the parties making the applications to engage and fund a contradictor. That could be done by identifying and appointing a person who is a common group member of each proceeding to represent the interests of other common group members. If there were more than one candidate for the role of representative, the court would need to decide which common group member should be appointed[169]. The representative would ordinarily be appointed for the limited purpose of assisting in the determination of the stay applications and would not play a further role in the proceedings following that determination. The representative, after making necessary inquiries, could make submissions to the court recommending a particular course of action and giving the reasons for

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165 *UCPR*, rr 20.14 and 20.17.

166 *UCPR*, r 20.13.

167 *UCPR*, rr 20.23 and 20.24. See also *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 at 563-564; *Wenco Industrial Pty Ltd v W W Industries Pty Ltd* (2009) 25 VR 119 at 126-127 [17]; *Illawarra Hotel Co Pty Ltd v Walton Construction Pty Ltd* (2013) 84 NSWLR 410 at 412-414 [15]-[16].

168 See, eg, *Matthews v AusNet Electricity Services Pty Ltd (Ruling No 40)* [2015] VSC 131 at [29]; *Downie v Spiral Foods Pty Ltd* [2016] VSC 411 at [20]; *Dillon v RBS Group (Australia) Pty Ltd [No 2]* [2018] FCA 395 at [66]; *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527 at [122]-[123]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2018) 358 ALR 382 at 416 [156].

169 See Kirk, "The Case for Contradictors in Approving Class Action Settlements" (2018) 92 *Australian Law Journal* 716 at 728.

that recommendation[170]. If necessary, the representative could adduce evidence to substantiate the recommendation. The representative could engage independent solicitors and counsel with the costs of the solicitors and counsel funded by the competing firms of solicitors and funders, limited to solicitor–own client costs for work which is fair and reasonable[171]. The appointment of such a representative would be consistent with Pt 10, which has a statutory design protective of group members' interests[172].

121 In other cases, other steps might serve to meet the underlying difficulties that: the competition between funders is pursued in the name of the representative plaintiff; the interests of funders are not identical to the interests of group members; the inquiry into litigation funding arrangements is necessarily predictive; and the material before the court is chosen by the funders and the firms of solicitors they have retained[173].

122 Whatever procedure is adopted, however, notice may need to be given to affected group members under s 175(5) of the CPA, which relevantly provides for the court, "at any stage", to "order that notice of any matter be given to a group member or group members". Such notices, usually placed on relevant public websites and in newspapers[174], are not infrequently used to advise group members of a specific step, question or issue in relation to the proceedings and, on occasion,

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170 For examples of the appointment of contradictors to protect the interests of group members in representative proceedings, see *King v AG Australia Holdings Ltd* [2003] FCA 1420 at [15]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569 at 574 [11]; *Kelly v Willmott Forests* (2016) 335 ALR 439 at 443-444 [4].

171 *Legal Profession Uniform Law* (NSW), ss 199 and 200. See, eg, *Kelly v Willmott Forests* (2016) 335 ALR 439 at 443-444 [4].

172 See, eg, CPA, ss 162, 171, 173, 175, 176. See also fn 89 above.

173 See *Kirby* (2008) 253 ALR 65 at 67 [6], 72 [30], [32]; *Wileypark* (2018) 265 FCR 1 at 8 [15].

174 See, eg, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322 at 329-331 [20]-[24]; *Collin v Aspen Pharmacare Australia Pty Ltd* [2013] FCA 952 at [3]; *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622; *Brett Cattle Co Pty Ltd v Minister for Agriculture [No 3]* [2020] FCA 1628. See also *Lenthall v Westpac Banking Corporation [No 2]* (2020) 144 ACSR 573 at 588 [49]-[50].

to seek group members' response. Closing the class[175] and approval of a settlement proposal[176] are two examples of procedures requiring notice to group members.

123 Adopting one or more of these approaches, the court's task could not be characterised as an "auction process"[177]. It would instead be more akin to that used when considering the position of trustees, liquidators, attorneys or persons under disability and would include considerations such as prospects of success and cost of the proceedings[178]. No less significantly, it would allow for conflicts of interest and the best interests of the group members to be neutrally and squarely addressed.

Conclusion and orders

124 For those reasons, the appeal should be dismissed with costs.

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175 CPA, s 175(1)(a).

176 CPA, s 175(4).

177 *Kirby* (2008) 253 ALR 65 at 73 [34]; *Bellamy's* [2017] FCA 947 at [23]; *GetSwift* (2018) 263 FCR 92 at 102 [32(d)].

178 See [112] above.