HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Nov 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S67/2020
File Title:	Wigmans v. AMP Limited & Ors
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument-Outline of Oral Argume
Filing party:	Respondents
Date filed:	10 Nov 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MARION ANTIONETTE WIGMANS**
Appellant

AMP LIMITED
First Respondent

KOMLOTEX PTY LTD
Second Respondent

FERNBROOK (AUST) INVESTMENTS PTY LTD
Third Respondent

Second and Third Respondent's Outline of Oral Submissions

Part I: Certification

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

Part II: Outline

Ground 1

2. The primary judge did not conduct an "elaborate, auction-type exercise". Her Honour dealt with applications by each representative party seeking that each other proceeding be stayed pursuant to the Court's powers, including pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) (**CPA**): Second and Third Respondents' Submissions (**2RS**), **[21]-[22]**.

3. The power to stay is a broad power. Section 67, in particular, may expressly be exercised by reference to any matter which "the court considers relevant" (s 58(2)(b)(vii)). There is nothing in Part 10 that expressly cuts down or is inconsistent with this power, and nor is it appropriate to read provisions conferring jurisdiction or granting power by making implications or imposing limitations

which are not found in the express words: *Owners of the Ship "Shin Kobe Maru"* (1994) 181 CLR 404 at 421; **2RS, [23]**.

4. Part 10 does not operate as a code regulating multiple proceedings. It permits the bringing of a representative proceeding, but does not prohibit any proceedings. It is consistent with the scheme that more than one proceeding may be filed, including more than one representative proceeding: **2RS, [31]**.

5. Section 171, in particular, has a limited operation to circumstances in which the representative plaintiff has an inability to represent the class, such as because of an incapacity, conflict, or lack of representative status, and does not apply to circumstances such as the present: **2RS, [34]**.

6. The factors relied upon by the primary judge were neither irrelevant nor impermissible in some way. In particular, the rate or level of costs and commission is not only a relevant matter but a mandatory matter, since s 58 of the CPA requires the court to have regard to ss 56 and 57, which require the facilitation of the just, quick and cheap resolution of proceedings: **2RS, [23], [30]**. Further, consistent with the scheme of Part 10, the Court has a role in relation to supervising costs in representative proceedings.

7. There has been no wholesale or uncritical adoption of principles from a different jurisdiction shorn of their statutory context: on the contrary. Factors that are relevant in Australia may also be relevant in other jurisdictions. The Canadian carriage motion is based on a similar test in any event.

8. The decision of this Court in *Brewster* is not analogous to the present circumstances. That involved the use of a more limited gap filling power to order a CFO, being an order that imposes liabilities on unfunded group members outside of any contractual consent and which effects a somewhat radical alteration of rights.

9. In relation to abuse of process:

(a)There is no authority to suggest that the commencement by a different plaintiff of a further representative proceeding is an abuse. The position under the general law was to the contrary (as exemplified by *McHenry v Lewis*), and that is not altered by Part 10.

(b) None of the other categories of cases relied upon by the appellant are analogous.

(c) The appellant's invocation of equitable principles, and the concept of "juridical advantage", from transnational litigation is inapt and (as observed by Bell P at [89]) tends to obscure the breadth of power and discretion to grant a stay under the CPA: **2RS, [39]-[48]**.

10. In relation to invocations of public policy, the appellant's approach is clearly inferior. It promotes a problematic rush to the court, and would suppress the beneficial competition between lawyers and funders that reduces the costs of proceedings, contrary to the objectives of the CPA: **2RS, [50]-[53]**.

Ground 2

11. No issue of principle arises. The approach of the primary judge was based on the facts of the particular case. The appellant's argument starts at the wrong point. Having found there was no relevant reason for distinguishing between matters from the standpoint of pleadings or legal teams (which were well-funded), the prima facie position was there would be no reason to distinguish between the proceedings in likely outcomes. In those circumstances, the appellant's higher commission rate was significant: **2RS, [54]-[55]**.

12. It was the appellant who sought to say that her funding model (with commission rising with the length of the proceedings) would produce better returns. That was far from self-evident. It was not supported by evidence. Therefore, there was nothing before the Court to distinguish between matters on the basis of gross proceeds, and there is no requirement for the Court to speculate without grounds to do so: **2RS, [56]-[58]**.

Dated: 10 November 2020

Cameron A. Moore SC

Guy A. Donnellan

Jerome K S. Entwisle

Counsel for the Second and Third Respondents