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Clarity in Competing Class Actions: High Court reinforces that there is 'no one size fits all' approach to competing class actions

Over the years, courts have developed creative and innovative ways of dealing with multiplicity of proceedings born out of competing class actions.

One such method, now endorsed by the High Court of Australia in *Wigmans v AMP Limited* [2021] HCA 7, involves the Court taking into account various factors and the interests of group members in order to determine the appropriate course to curb multiplicity. In what will no doubt be a polarising opinion throughout the class action legal community, the 3:2 majority judgment re-enforces the views of the Supreme Court of NSW and its Court of Appeal that there can be no 'one size fits all' approach to dealing with competing class actions. Further, this judgment confirms that courts have power to grant a stay of one or more competing proceedings, among other mechanisms, to ensure that justice is done in a proceeding.

Key Takeaways

- In lieu of legislative intervention, costly and time-consuming beauty parades are here to stay, and winning the 'race to the bottom' in terms of overall cost to group members may well prove more decisive than winning the 'race to the court';
- The provisions of the Civil Procedure Act do not prohibit a discretionary, 'multi-factorial' analysis to inform a court's decision when dealing with competing class actions on a case by case basis;
- There is no rule or presumption that an earlier filed proceeding ought to continue over an action filed at a later time. However, the time between the commencement of each proceeding may be a relevant factor in a court's analysis;
- Multiplicity may be dealt with by a variety of means in addition to, or in the alternative to, staying all but one proceeding;
- While consideration of litigation funding arrangements is not mandatory, examining the funding arrangements of each proceeding in light of group members' best interests may be relevant to deciding issues arising out of competing class actions;
- The task of deciding appropriate orders dealing with competing class actions is an exercise in ensuring that justice is done in the competing representative proceedings and is not a matter of 'mere' case management.

Background

Evidence given by AMP executives at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry led to five class actions being commenced on behalf of AMP shareholders. The applicants alleged that AMP had breached its continuous disclosure obligations and misled its shareholders in that shares were said to have been purchased at inflated prices.

Supreme Court of NSW Proceedings

In May of 2018, Marion Wigmans commenced an open representative proceeding under Part 10 of the Civil Procedure Act 2005 (NSW) on behalf of affected AMP shareholders (**Wigmans Proceeding**). Around the same time, four other class actions were brought against AMP in the Federal Court of Australia. Each was an 'open' class action; meaning that the class in each proceeding automatically consisted of shareholders who purchased shares within a specific period. While there was significant overlap between each competing proceeding, some featured different claim periods, causes of action and made different factual allegations. One year later, on 23 May 2019, Ward CJ in Eq ordered that the Wigmans proceeding be permanently stayed, along with two other actions. Further, Ward CJ in Eq made orders consolidating proceedings brought by Fernbrook (Aust) Investments Pty Ltd and Komlotex Pty Ltd. In order to come to this decision, Ward CJ in Eq had regard to a

'multi-factorial analysis' employed by the Full Court of the Federal Court of Australia in *Perera v Getswift* [2018] FCAFC 202.

Her Honour considered:

1. each proceedings' competing funding proposals, costs estimates and net hypothetical return to group members;
2. 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.

Ward CJ in Eq's judgment had the effect of clarifying the approach courts may take to dealing with competing class actions and, in following the approach taken in *GetSwift*, highlighted the factors relevant to such a determination.

Ward CJ in Eq ultimately found that the Komlotex and Fernbrook consolidated action should go forward on the basis that they would achieve a greater net return for group members considering: the absence of a funding commission payable at the conclusion of the action, the incentive created by an uplift fee payable after a certain recovery threshold is surpassed, a comparable return based on 'standardised assumptions' and the fact that no common fund order would be sought. Importantly, Ward CJ in Eq found that it would not be an abuse of process for a competing class action to be commenced after others have already been filed.

NSW Court of Appeal

Following Ward CJ in Eq's judgment, Ms Wigmans appealed to the NSW Court of Appeal consisting of Bell P, Macfarlan, Meagher, Payne and White JJ.

The Court of Appeal found that Ms Wigmans' submission that in order for a competing class action to proceed, the competitors must show that the first-filed proceeding was 'clearly inappropriate' could not stand. Similarly, the Court found that the use of the 'clearly inappropriate' language; drawn from the *forum non conveniens* context was inapposite to competing class actions jurisprudence. In respect of Ward CJ in Eq's multi-factorial analysis, the Court of Appeal found that the sequence of filing competing proceedings was less relevant where those proceedings were commenced in relatively quick succession, that multiplicity of proceedings is to be avoided and that the primary judge exercised her discretion under the *Civil Procedure Act* without error. In doing so, the Court of Appeal upheld the Court's power to hold a so called 'beauty parade' and to engage in a multi-factorial analysis to decide case management and procedural orders dealing with competing class actions.

The Court of Appeal also found the argument that a second-in-time proceeding is an abuse of process because it would have the same group members was misconceived on the basis that group membership of a class action did not necessarily mean that a person was a *party* to a proceeding. This was so because group members had the option to opt-out of a proceeding if they so wished, even if they held a *prima facie* claim against a respondent.

Finally, the Court highlighted that priority ought to be given to the interests of group members over that of litigation funders or lawyers.

The High Court Appeal

Ms Wigmans then appealed to the High Court of Australia on two grounds:

1. That the Court of Appeal erred in failing to find that Part 10 of the *Civil Procedure Act* did not authorise the approach taken by the primary judge to the determination of the cross-stay applications concerning multiple, duplicative class actions; and
2. The Court of Appeal erred in refusing to grant leave to appeal in respect of whether the primary judge erred by acting upon the assumption that the proceedings brought by Ms Wigmans and Komlotex had an equal chance of achieving each possible settlement or judgment outcome within the range of possible outcomes, and should have found that in doing so, the primary judge had erred.

Ultimately, the majority, consisting of Gageler, Gordon and Edelman JJ dismissed Ms Wigmans' appeal. They found that the Court's power to stay proceedings which are said to be competing class actions is not confined by a purported rule that the first-in-time filed proceeding enjoys a *prima facie* presumption that it ought to be the one to continue the proceedings where others compete for carriage. The majority endorsed the approach that matters taken into account to resolve issues arising out of competing class actions ought to be examined on a case-by-case basis. The majority also found that while

consideration of litigation funding arrangements is not necessary to exercise the Court's stay power, they can be relevant to deciding such questions.

The Power to Grant a Stay under the Civil Procedure Act

In relation to the Court's power to grant a stay of competing class actions under the *Civil Procedure Act*, the majority found that the operation of s 67 is not constrained by any particular criteria relevant to the exercise of a stay. The Court found that s 67, read with the provisions of Parts' 6 and 10 of the *Civil Procedure Act* does not provide any basis upon which a Court must consider the sequence in which proceedings are commenced when deciding to stay one or more of those proceedings.

Importantly, the majority found that the fact that Part 10 of *Civil Procedure Act* recognises that there may be more than one competing representative proceeding is not inconsistent with its objective '*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*'.

Finding that the provisions of the *Civil Procedure Act* elucidate that not only must the Court be mindful of the existence of group members but also their interests, the majority highlighted that the granting of a stay may be necessary or desirable to achieve the just resolution of issues in dispute consistent with s 183 of the *Civil Procedure Act*.

In making a further finding that Ms Wigmans' 'first-in-time' submission was 'unworkable', the majority went all the way back to 1589 to establish that there is no common law principle that, if complete relief is available, it is *prima facie* vexatious and oppressive to commence a competing proceeding.

Considerations relevant to exercising the power to grant a stay

The majority endorsed the idea that there can be no 'one size fits all' approach to resolving questions of multiplicity arising out of competing class actions and provided examples of case management tools available to courts including:

- Consolidation;
- De-classing orders;
- A joint-trial of proceedings with each left as an open class; and
- A joint trial of proceedings in which only one proceeding remains an open class and the rest are closed with a joint trial of all.

Endorsement of the above approaches at the High Court level is likely to give case managers comfort that these innovative approaches developed in the absence of overt statutory guidance are valid.

Further, the majority found that while the order in which proceedings are commenced does not constitute a *mandatory* matter for consideration, it is a *relevant* consideration, particularly where proceedings are not commended in quick succession. Matters and circumstances arising *after* each proceeding is filed will also be relevant to deciding questions of multiplicity including the actions of group members, the degree of expedition with which the representative parties have approached the proceeding, including the way they have conducted themselves in relation to interlocutory matters.

Similarly, the majority found that litigation funding arrangements from law firms or private litigation funders alike are not mandatory considerations in a multi-factorial analysis. However they are relevant to the process of deciding questions of multiplicity with the best interests of group members in mind as such arrangements will directly affect each group member's possible recovery and may affect the overall success of a proceeding.

Guidance in relation to litigation funding arrangements

The majority highlighted that Ward CJ in Eq's approach to deciding which funding arrangement would be in the best interests of group members was not the only manner in which a Court may come to such a conclusion. Indeed, consistent with the no 'one size fits all approach', the majority held that questions of litigation funding arrangement superiority and group member best interests may be dealt with by an adversarial approach where there are complex and interrelated considerations and a real potential for conflicts of interest.

The majority put forward two potential approaches:

1. The appointment of a special referee to inquire into each proceedings' litigation funding arrangements; or
2. A requirement that competing applicants engage and fund a contradictor who is a common group member of each proceeding to represent the interests of other common group members.

By adopting one or more of these approaches, the majority stated that the Court would not be faced with a task akin to an 'auction process' but would instead be in familiar territory, treating the decision as one similar to consideration of the

position of trustees, liquidators, attorneys or persons under disability. This, the majority say, would allow for conflicts of interests and the bests interests of group members to be squarely addressed.

Dissenting opinion

Kiefel CJ and Keane J decided in favour of Ms Wigmans, finding that neither the *Civil Procedure Act*, nor the Supreme Court's inherent power to prevent abuse of its processes authorises it to make a selection of a litigation funder (in whichever form that may be) in a representative proceeding. The dissenters described any potential 'race to the courthouse' scenario as an 'irrelevant distraction', especially where there is no specific criticism which can be made about the case brought by the race's winner.

The dissenters called for 'legislative direction' enlisting the courts to determine matters arising between competing applicants and their associated representatives and/or funders. Because of this lack of legislative guidance, courts must give effect to the prima facie entitlement of a first-in-time filed proceeding's applicant to insist on the determination of their claim, the dissenters found.

The dissenters also found that while Ward CJ in Eq's multi-factorial analysis may be appropriate for determining carriage and certification motions in the United States of America, such an approach is not supported by the provisions of the *Civil Procedure Act* or the Court's inherent jurisdiction in Australia.

Conclusion

This case concerned the rules of engagement of participants in beauty parades. While firmly within the High Court's hands to re-write those rules, the 3:2 majority decided not only to maintain the status quo, but to re-inforce the creative and innovative approaches taken by judges throughout recent years to deal with competing class actions.