Equity Division
Supreme Court
New South Wales

Case Name:	Wigmans v AMP Ltd Fernbrook (Aust) Investments Pty Ltd v AMP Ltd Wileypark Pty Ltd v AMP Ltd Georgiou v AMP Ltd Komlotex Pty Ltd v AMP Ltd
Medium Neutral Citation:	[2019] NSWSC 603
Hearing Date(s):	6 and 7 December 2018
Date of Orders:	23 May 2019
Date of Decision:	23 May 2019
Jurisdiction:	Equity – Commercial List
Before:	Ward CJ in Eq
Decision:	(1) Pursuant to r 28.5 of the Uniform Civil Procedure Rules 2005 (NSW), order that proceeding 2018/310118 (the Komlotex proceeding) be consolidated with proceeding 2018/309329 (the Fernbrook proceeding) and that the consolidated proceeding be known as Komlotex Pty Ltd v AMP Limited (Consolidated proceeding). (2) Order that the plaintiff in the Komlotex proceeding and the plaintiff in the Fernbrook proceeding (together, the joint plaintiffs) be, respectively, the first plaintiff and the second plaintiff in the Consolidated proceeding. (3) Order that the joint plaintiffs be represented by one firm of solicitors (being, until further order, the current solicitors for the plaintiff in the Komlotex proceeding, Maurice Blackburn). (4) Order that the costs to date of each of the Komlotex proceeding and the Fernbrook proceeding be treated as costs in the Consolidated proceeding. (5) Order that the joint plaintiffs have liberty to seek, on any application for approval of a settlement of the Consolidated proceeding or for approval of costs following judgment, orders for approval of

the costs referred to in order 4 above.

(6) Subject to the payment into Court on behalf of the joint plaintiffs of the sum of $5 million as security for the defendant's costs (without prejudice to the defendant's ability from time to time to seek the provision of further security) order, pursuant to s 67 and s 183 of the Civil Procedure Act 2005 (NSW) and in the inherent power of the Court, that the following proceedings be permanently stayed:
    (i) 2018/00145792 (Wigmans v AMP Limited);
    (ii) 2018/310082 (Wileypark Pty Ltd v AMP Limited); and
    (iii) 2018/310103 (Andrew Georgiou v AMP Limited).

(7) Reserve the question of the costs of the various motions brought by the plaintiffs in each of the proceedings referred to in order 6 above and the costs of the plaintiff in the Komlotex proceeding in respect of its notices of motion seeking a stay of the proceedings referred to in order 6 above; with a view to dealing with the question of costs on the papers.

(8) Liberty to apply on 48 hours' notice.

Catchwords: REPRESENTATIVE PROCEEDING – CIVIL PROCEDURE – multiplicity of proceedings – whether commencement of subsequent proceedings an abuse of process – application of case management principles – consideration of relevant factors to determine what is in best interest of overall group members

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 56-58, 67, 162, 166, 171, 173, 183 and Pt 10
Corporations Act 2001 (Cth), s 1337P
Evidence Act 1995 (NSW), ss 79(1), 91
Federal Court of Australia Act 1976 (Cth), ss 33N and 33ZF
Uniform Civil Procedure Rules 2005 (NSW), r 28.5

Cases Cited: Australian Securities and Investments Commission v Richards [2013] FCAFC 89
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256; [2006] HCA 27
Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3) [2017] FCA 330, (2017) 343 ALR 476
Branir Pty Ltd v Wallco Pastoral Co Pty Ltd [2006] NTSC 70; (2006) 203 FLR 115

Brewster v BMW Australia Ltd [2018] NSWSC 1602
Brewster v BMW Australia Ltd [2019] NSWCA 35
Cantor v Audi Australia Pty Ltd (No 2) [2017] FCA 1042
Commissioner of State Revenue v Aidlaw Pty Ltd (No 2) [2010] VSC 405
Courtney v Medtel Pty Ltd (2002) 122 FCR 168; [2002] FCA 957
Darwalla Milling Company Pty Ltd v F Hoffman-La Roche Ltd (No 2) [2006] FCA 1388
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588; [2011] HCA 21
Hassid v Queensland Bulk Water Supply Authority t/as Seqwater [2017] NSWSC 599
Henry v Henry (1996) 185 CLR 571; [1996] HCA 51
Honeysett v The Queen (2014) 253 CLR 122; [2014] HCA 29
Inabu Pty Ltd v Leighton Holdings Ltd (No 2) [2014] FCA 911
Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75; [2009] HCA 43
Johnson Tiles Pty Ltd v Esso Australia Ltd [1999] FCA 56; (1999) ATPR 41-679
King v AG of Australia Holdings Ltd [2002] FCA 1560
Kirby v Centro Properties Ltd (No 6) [2012] FCA 650
Lidden Composite Buyers Ltd (1996) 67 FCR 560; (1996) 139 ALR 549
Locking v Armtec Infrastructure Inc 2013 ONSC 331
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305
McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd [2017] FCA 947
Melbourne City Investments Pty Ltd v Myer Holdings Ltd (2017) 53 VR 709; [2017] VSCA 187
Melbourne City Investments v Leighton Holdings Ltd [2015] VSCA 235
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48
Money Max Int Pty Ltd (as trustee for the Goldie Superannuation Fund) v QBE Insurance Group Ltd [2018] FCA 1030; (2018) 358 ALR 382
Moore v Inglis (1976) 9 ALR 509
Oliver v Commonwealth Bank of Australia (No 2) (2012) 205 FCR 540; [2012] FCA 755
Perera v GetSwift Ltd [2018] FCA 732; (2018) 127 ACSR 1
Perera v GetSwift Ltd [2018] FCAFC 202
Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd [2017] FCA 699
Pownall v Conlan Management Pty Ltd (1995) 12

	WAR 370 R v Turner [1975] QB 834 R v Uduma (2013) 115 SASR 318; [2013] SASCFC 2 Ringrow Pty Ltd v BP Australia Ltd (2003) 130 FCR 569; [2003] FCA 933 Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42 Sharma v Timminco Ltd (2009) 99 OR (3d) 260 Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited [2016] NSWSC 17 Thirteenth Corp Pty Ltd v State [2006] FCA 979; (2006) 232 ALR 491 Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28 Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd (2014) 45 VR 585; [2014] VSCA 351 Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd [2000] OJ No 4594 Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; [1990] HCA 55 Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77 Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55 Westpac Banking Corporation v Lenthall [2019] FCAFC 34 Wigmans v AMP Ltd (No 4) [2019] NSWSC 257 Wigmans v AMP Ltd [2018] NSWSC 1045; (2018) 128 ACSR 534 Wigmans v AMP Ltd (No 3) [2019] NSWSC 162 Wigmans v AMP Ltd [2018] NSWSC 1118 Wileypark Pty Ltd v AMP Ltd [2018] FCAFC 143; (2018) 359 ALR 43 Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34
Texts Cited:	Vincent Morabito, An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives (Sept 2010)
Category:	Procedural and other rulings
Parties:	Marie Wigmans (Plaintiff in Wigmans proceeding) Fernbrook (Aust) Investments Pty Ltd (Plaintiff in Fernbrook proceeding) Wileypark Pty Ltd (Plaintiff in Wileypark proceeding)

	Andrew Georgiou (Plaintiff in Georgiou proceeding) Komlotex Pty Ltd (Plaintiff in Komlotex proceeding) AMP Limited (Defendant in all proceedings)
Representation:	Counsel: R Lancaster SC with A Hochroth and P Meagher (Plaintiff in Wigmans proceeding) D Rappoport (Solicitor) (Plaintiff in Fernbrook proceeding) A Leopold SC with W Edwards and D Fahey (Plaintiff in Wileypark proceeding) I Pike SC with J Burnett (Plaintiff in Georgiou proceeding) C Moore SC with G Donnellan (Plaintiff in Komlotex proceeding) E Collins SC with I Ahmed and E Bathurst (Defendant in all proceedings) Solicitors: Quinn Emanuel Urquhart & Sullivan (Plaintiff in Wigmans proceeding) Slater & Gordon Limited (Plaintiff in Fernbrook proceeding) Phi McFinney McDonald (Plaintiff in Wileypark proceeding) Shine Lawyers (Plaintiff in Georgiou proceeding) Maurice Blackburn (Plaintiff in Komlotex proceeding) Herbert Smith Freehills (Defendant in all proceeding)
File Number(s):	2018/00145792 2018/00309329 2018/00310082 2018/00310103 2018/00310118
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR**: Before me on 6 and 7 December 2018 were a number of interlocutory applications (referred to variously in the submissions as the multiplicity or carriage motions) brought in five sets of proceedings that have been commenced as open class representative proceedings against the defendant, AMP Limited (AMP); together with an application, not opposed by AMP, for the consolidation of two of the sets of representative proceedings (to which I will refer as the Komlotex and Fernbrook proceedings, respectively) (the consolidation motion). In essence, the respective multiplicity motions seek a determination, in light of the multiplicity of proceedings arising out of substantially the same factual background, as to which one (or more) of the representative proceedings should continue; and on what basis.

2 In practical terms, and assuming consolidation of the Komlotex and Fernbrook proceedings, there are now four competing sets of representative proceedings (the Wigmans, Komlotex/Fernbrook, Wileypark and Georgiou proceedings), as referred to in more detail below.

3 The dispute between the respective parties as to which one (or more) of the representative proceedings should be permitted to continue was characterised by AMP in its written submissions as more a dispute between service providers than one concerning the interests of the parties and group members and by Ms Wigmans, colloquially, as a "beauty parade" or auction process. Certainly, the process has had its unedifying aspects (insofar as I am being called upon to make an assessment of the comparative skills and experience, or "track record", of the respective legal teams). Nevertheless, the present applications before me fall to be dealt with as part of the ordinary case management processes of the Court. The suggestion (see Ms Wigmans' submissions in chief) that this process has led to an "unseemly debacle" apt to lead the administration of justice into disrepute does not in my opinion sufficiently take into account the need for close consideration to be given to the comparative merits of the respective proceedings (and, in particular, the proposed funding models put forward by the competing

representative plaintiffs) with a view to selecting the most suitable vehicle(s) to prosecute group members' claims. Nor can it be accepted that there will be no ultimate benefit to the group members, going forward, from the focus that has been paid by the respective legal teams in the course of these applications on issues such as the ambit of the claims to be made against AMP (and, hence, the scope of the relevant representative class). That process has, in fact, already led to clarification of aspects of various of the parties' allegations and to a refinement (and in the case of the Komlotex proceeding substantial revision) of the respective funding proposals; matters which ultimately must be in the interest of the group members. Moreover, one would hope that, as the principles governing case management of multiple and overlapping representative proceedings, and their application, come more frequently to be considered both in the Federal Court of Australia (the Federal Court) and in this Court (including at appellate level), the need for a lengthy and elaborate process of the kind here undergone will surely diminish. In that regard, there is substance to Komlotex' submission that at present there is a process of working through the applicable principles to deal with overlapping representative proceedings of this kind.

4 Quite properly, AMP broadly takes no position on the present applications other than to emphasise certain factors put forward as relevant, as a matter of fairness, to its position as defendant (such as the adequacy of the various funding proposals on the issue of security for its costs) and to argue forcefully that only one proceeding should now be permitted to continue (and that this should be in a manner that will determine with finality the claims of all group members), with the remaining sets of proceedings to be permanently stayed.

5 AMP submits (and I agree) that the stay of all but the preferred vehicle for the prosecution of group member claims is consistent with the overriding purpose mandated by s 56 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*) of the just, quick and cheap resolution of the real issues in dispute. In that regard, AMP says that each of the representative proceedings concerns essentially the same factual matters and that each, in large part, is brought on behalf of the same group members (both of those propositions being

disputed, to a lesser or greater extent, by one or more of the representative plaintiffs – see below from [234]). AMP submits that permitting all proceedings to continue: would not be in the interests of group members; would necessarily involve vexation and oppression to AMP; and would needlessly require the diversion of court resources "in a manner that could only be of commercial benefit to the litigation funders and solicitors that promote these proceedings".

6 With one qualification (see Wileypark's submissions), the representative plaintiffs in the respective proceedings do not cavil with the first two of those propositions, it being broadly agreed between them that only one set of representative proceedings should be permitted to continue. The qualification to which I here refer is that, while Wileypark accepts in its written submissions that it is inappropriate that the multiple open class representative proceedings "constituted as they are" should continue in that form (by which I understand it to mean as open class proceedings) (see its submissions at [2]), and hence that overlapping group members "ultimately" cannot remain in multiple proceedings (see its submissions at [10]), it does not accept that it would be appropriate for its own proceeding to be permanently stayed in the event that its proceeding were not to be the one identified as the vehicle to go forward for the prosecution of the representative claims. Wileypark's position, as I understand it, is that if it is not chosen as the sole representative proceeding to go forward as an open class action then its proceeding nevertheless should not be stayed and should be permitted to continue (whether as a second open class proceeding or as a large closed class proceeding) (see T 61.12ff) – something that it maintains would be in AMP's interest as well as in the interest of its group members. Its argument in this regard is that to do otherwise would be to interfere with its group members' freedom of contract (see T 60.41ff). None of the other representative plaintiffs supports such a course (and AMP argues strongly against it).

Background

7 The commencement of the competing representative proceedings followed disclosures made during evidence given by AMP executives at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) on 16 and 17 April 2018, after which AMP's share price fell sharply. That evidence has given rise to allegations that AMP contravened its continuous disclosure obligations and statutory prohibitions on misleading or deceptive conduct by failing to disclose to the market that it had deliberately charged its customers fees for ongoing financial advice and related services where no such services were provided; and had misled the regulator, Australian Securities and Investments Commission (ASIC), as to the nature and extent of that misconduct over an extended period. There is also now a claim of unconscionable conduct in relation to those matters in one of the proceedings (the Wigmans proceeding).

8 On 23 April 2018, media announcements were made by various legal firms that they were investigating a potential class action against AMP; namely, by those now acting in each of: the Wigmans proceeding, Quinn Emanuel Urquhart & Sullivan (Quinn Emanuel); the Georgiou proceeding, Shine Lawyers (Shine); and the Fernbrook proceeding, Slater & Gordon Limited (Slater & Gordon).

9 From as early as 9 May 2018, through up until 7 June 2018, the respective sets of representative proceedings now before the Court were commenced. The first in time (albeit only by a matter of hours), the Wigmans proceeding, was commenced in this Court in the commercial list. The remaining sets of proceedings were commenced in the Federal Court and subsequently transferred to this Court (see further below). The respective proceedings are presently at different stages in terms of their preparation for hearing, the most advanced being the Wigmans proceeding, which has been case managed since its commencement with the usual expedition in the commercial list (a matter on which Ms Wigmans places no little weight on the present applications).

10 Various of the representative plaintiffs have indicated their intention to seek leave to amend the manner in which the existing claims are pleaded and, where that is the case, the present applications have been conducted on the basis of the foreshadowed amended claims.

11 The factual allegations in the competing proceedings (as summarised by AMP in its submissions at [7]) are allegations, in respect of alleged policies of AMP as to the payment of ongoing service fees by clients, to the effect that: AMP did not provide to some clients the services to which those fees related; AMP made misleading statements to ASIC in connection with the charging of those fees and a report in relation to those matters prepared by Clayton Utz (matters which are alleged to falsify representations made by AMP to the Australian Securities Exchange (ASX)); and that AMP's conduct was material and should have been disclosed by AMP to the ASX as part of its ongoing disclosure obligations. It is alleged that AMP's conduct inflated the price of its shares; and that some group members relied on the alleged representations in acquiring AMP shares. (I interpose here to note that Wileypark cavils with the proposition by AMP that there is uniformity between the factual allegations made in each of the proceedings, highlighting differences between its pleaded case and that of other representative plaintiffs (see [43], [60] and [72] of Wileypark's written submissions in chief; and Wileypark's submissions in reply at [26]).)

12 There is considerable overlap in the claims periods in the competing proceedings but they are not identical. In the Wigmans proceeding, the claim periods are: from 10 May 2012 to 17 April 2018 (in relation to the continuous disclosure and misleading or deceptive conduct claims) and prior to 17 April 2018 (in respect of the unconscionable conduct claim). In the remaining proceedings, the claim periods (as revised where an amended pleading has been foreshadowed and, in Wileypark's case, to be further revised having regard to its acceptance of AMP's submissions on the relevant limitations period) are as follows. In the Wileypark proceeding: 10 May 2012-17 April 2018 (in the case of group members who acquired AMP ordinary shares) and 7 June 2012-17 April 2018 (in the case of group members who acquired

American Depositary Receipts (ADRs)). In the Georgiou proceeding: 10 May 2012-13 April 2018 (in the case of AMP ordinary shares) and 7 June 2012 - 13 April 2018 (in the case of ADRs). In the proposed Komlotex/Fernbrook proceeding: 10 May 2012-15 April 2018 (in the case of AMP ordinary shares) and 7 June 2012-15 April 2018 (in the case of ADRs).

13 Thus, in none of the representative proceedings other than the Wigmans proceeding does the claim period extend back before 10 May 2012; and it is only in the Wigmans and Wileypark proceedings that the claim period includes the period from 16 April 2018-17 April 2018 (that being the period in which the relevant disclosures were being made at the Royal Commission). The difference between the end date of 13 April 2018 in the Georgiou proceeding and of 15 April 2018 in the Komlotex/Fernbrook proceeding relates to whether the end date is the last business day before 16 April 2018 (when the relevant disclosures commenced) or the day immediately before the day those disclosures commenced (that being a Sunday).

14 After some interlocutory stoushes between the plaintiffs in the competing representative proceedings (see *Wigmans v AMP Ltd* [2018] NSWSC 1045; (2018) 128 ACSR 534; *Wigmans v AMP Ltd* [2018] NSWSC 1118, *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143; (2018) 359 ALR 43 (*Wileypark v AMP*)), the detail of which it is neither necessary nor particularly instructive here to recount (though I note that reference is made in some of the submissions on the present applications to certain of the parties' conduct in that regard and I did regard that aspect of the matter as an "unseemly debacle"), orders were made by the Full Court of the Federal Court (the Full Court) on 29 August 2018, transferring to this Court each of the proceedings that had been commenced in the Federal Court.

The proceedings and present applications

15 The proceedings, and the applications now before me in each of them, may be summarised as follows.

Wigmans proceeding (2018/00145792)

16 Ms Wigmans commenced proceedings in this Court on 9 May 2018 (the Wigmans proceeding). The solicitor on the record in the Wigmans proceeding is Mr Damian Scattini of Quinn Emanuel. Mr Scattini was formerly a partner in Maurice Blackburn (the solicitors acting for Komlotex – see below).

17 By notice of motion filed 29 August 2018, Ms Wigmans seeks, relevantly, an order that each of the other four representative proceedings (referred to in the notice of motion as the "transferred FCA proceedings"):

> (a) be permanently stayed;
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> (b) in the alternative, no longer continue as a representative proceeding; or
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> (c) in the further alternative, continue as a closed class limited to the applicant in each of the respective transferred FCA proceedings and such persons as have, as at the date the order is made, signed a funding agreement in respect of one of the transferred FCA proceedings, provided that such persons have not also, as at that date:
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> (i) retained the lawyers for the plaintiff in these proceedings to act for them in these proceedings; and/or
>
> (ii) signed a funding agreement in respect of these proceedings; or
>
> (d) in the further alternative, be stayed pending the resolution of the common questions in these proceedings.

18 By amended notice of motion filed 24 October 2018, Ms Wigmans also seeks, pursuant to s 183 of the *Civil Procedure Act*, a common fund order (CFO), namely an order equalising, as between group members, the funder's costs.

Wileypark proceeding (2018/310082)

19 The second set of representative proceedings was commenced by Wileypark Pty Ltd (Wileypark) also on 9 May 2018 (but around seven hours after the Wigmans proceeding at approximately 11:00 pm) in the Federal Court (the Wileypark proceeding). The solicitor acting for Wileypark in the proceeding is Mr Tim Finney of Phi Finney McDonald (Phi Finney).

20 By amended notice of motion filed 9 November 2018, Wileypark seeks orders both as to the resolution of the multiplicity of suits and the making of a CFO. As to the former, what is sought (comparable in some respects to the orders sought in the Wigmans proceeding), is:

> 1. An order in each of the Georgiou Proceeding, Wigmans Proceeding, Komlotex Proceeding and Fernbrook Proceeding (Related Proceedings), having regard to the Court's findings as to what is in the best interests of Group Members (including those Group Members in multiple of the Related Proceedings, but who have not registered or signed litigation funding agreements with particular litigation funders):
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> a. case managing that proceeding to an initial trial either alone or with any one or more of the Related Proceedings or this Proceeding; and/or
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> b. closing the class of that proceeding (by limiting it only to group members who have signed litigation funding agreements with the respective funder); and/or
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> c. consolidating (in whole or in part), that proceeding with any one or more of the Related Proceedings or this Proceeding, together with other incidental orders appropriate or necessary to facilitate the just conduct of the proceedings so consolidated; and/or
>
> d. staying (whether permanently or temporarily) that proceeding.

Georgiou proceeding (2018/310103)

21 Mr Georgiou commenced proceedings in the Federal Court, some two weeks after the first two sets of proceedings were commenced, on 25 May 2018 (the Georgiou proceeding). The solicitor acting for Mr Georgiou in that proceeding is Ms Vicky Antzoulatos of Shine.

22 By notice of motion filed 24 October 2018, Georgiou seeks orders both as to the resolution of the multiplicity of suits and the making of a CFO. As to the former, what is sought is broadly the same as that sought by Ms Wigmans:

> 1. Pursuant to ss 33N and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (FCA) and/or pursuant to ss 67, 166 and 183 of the *Civil Procedure Act 2005* (NSW) (CPA) and/or pursuant to the inherent jurisdiction of the Court, each of the Wigmans proceeding, the Fernbrook proceeding and the Komlotex proceeding:
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> a. be permanently stayed;

b. in the alternative, no longer continue as a representative proceeding; or

c. in the further alternative, continue as a closed class limited to:

i. the plaintiff in each of the respective proceedings and such persons as have, as at the date the order is made, signed a funding agreement in respect of each of the proceedings, provided that such persons have not also, as at the date of the relevant order:

1. retained the lawyers for the plaintiff to act for them in these proceedings; and/or

2. signed a funding agreement in respect of this proceeding; or

d. in the further alternative, be stayed pending the resolution of the common questions in these proceedings.

Fernbrook proceeding (2018/309329)

23 On 6 June 2018, Fernbrook (Aust) Investments Pty Ltd (Fernbrook) commenced proceedings in the Federal Court (the Fernbrook proceeding). The solicitor presently acting for Fernbrook is Mr Benedict Hardwick of Slater & Gordon.

24 As adverted to above, Fernbrook now seeks to be consolidated with the Komlotex proceeding. Mr Hardwick has deposed (see his affidavit affirmed 20 November 2018 at [13]) that, in the days following learning of the Komlotex funding proposal and Komlotex' proposal to seek leave to amend its claim period to match that in the Fernbrook and Wigmans proceedings (i.e., 10 May 2012-15 April 2018), he formed the view that the Komlotex "no win, no fee" funding proposal (which now does not involve "a litigation funder seeking a commercial return on funds put at risk during the proceeding") meant that, absent a very substantial difference between the legal costs of Komlotex' solicitors (Maurice Blackburn) and the legal costs of an alternative firm, the Komlotex proposal was likely to provide better returns to group members than any funded alternatives. In other words, Mr Hardwick has deposed to having formed the view that the Komlotex proposal is superior to that of both Fernbrook and of each of the competing proceedings; and that the Komlotex

funding proposal is therefore in the best interests of group members (a matter to which Komlotex points in its submissions but which others of the representative plaintiffs submit should carry no weight) (see Komlotex' submissions in chief at [56]).

Komlotex proceeding (2018/310118)

25 Finally, Komlotex Pty Ltd (Komlotex), as trustee for Breda Sinclair Industries Superannuation Fund, commenced proceedings in the Federal Court on 7 June 2018. The solicitor on the record in this proceeding is Mr Andrew Watson of Maurice Blackburn.

26 By separate notices of motion, each filed 24 October 2018, Komlotex seeks orders in each of the other four proceedings as to the resolution of the multiplicity of suits. Komlotex does not now press for a CFO (since it is no longer proposed that a third party funder be involved in the matter) and, in light of the decision of the Full Court in *Perera v GetSwift Ltd* [2018] FCAFC 202 (*GetSwift Appeal*), Komlotex also does not now press for the alternative relief set out in prayers 2, 3 or 4 of its 24 October 2018 notices of motion, pressing only for an order that the competing proceedings be permanently stayed (prayer 1 in each of those notices of motion). Unsurprisingly, since Fernbrook supports the consolidation motion, Komlotex does not press its stay application in relation to the Fernbrook proceeding. (It cavils, however, with the criticism by Ms Wigmans in her submissions that it has 'abandoned' its 24 October 2018 motions or that it has been guilty of any "dilatory conduct" in that respect.)

Overview

27 The primary basis on which Ms Wigmans seeks a stay of the competing representative proceedings is that the commencement and/or continuation of those proceedings is an abuse of process. In this regard, Ms Wigmans invokes the principle that a person may not pursue multiple legal proceedings seeking the same relief against the one defendant. Ms Wigmans argues that the same principle applies in the context of representative proceedings; and

submits that it will ordinarily be an abuse of process for a member of one group (here, the Wigmans group) to commence a later representative proceeding seeking the same relief against the same defendant on behalf of the same persons.

28 Ms Wigmans submits (though this is by no means accepted by the other representative plaintiffs) that none of the plaintiffs in the competing representative proceedings has identified any deficiency in the (regularly commenced and first-filed) Wigmans proceeding, nor any juridical advantage that its (or his) proceeding has over the Wigmans proceeding, so as to warrant any different conclusion.

29 Contradicting Ms Wigmans' submission as to the absence of any identification of deficiencies in her proceeding, Mr Georgiou in his submissions has summarised the deficiencies identified by him and the other representative plaintiffs in relation to Ms Wigmans' proceeding as being: the inclusion of an unconscionable conduct claim; the non-inclusion of a claim relating to ADRs; the extension of the relevant period to 17 April 2018; an "inexplicable rush" to serve evidence and otherwise progress the proceedings, notwithstanding that multiplicity issues had not been resolved and orders for service of evidence had not been made; the objectively higher funding commissions; the potential for the funder for the Wigmans proceeding to obtain a "windfall gain"; and an inferior projected return to group members on a variety of likely scenarios (and Mr Georgiou submits that the supervision of the Court could not be relied on to remedy all those deficiencies in the Wigmans proceeding). I deal with those criticisms of the Wigmans proceeding in due course.

30 In the alternative to her primary (abuse of process) argument, Ms Wigmans presses her claim for a stay of the competing representative proceedings on the basis of case management principles, arguing that it is in the interests of the just, quick and cheap resolution of the real issues in dispute for the Wigmans proceeding (which is further advanced in terms of preparation for mediation or an ultimate hearing) to be the one representative proceeding that is permitted to continue. That said, Ms Wigmans submits that this should be

the outcome without the Court embarking upon a multifactorial "*GetSwift*-style" analysis.

31 In this regard, Ms Wigmans submits: that the approach envisaged by the competing plaintiffs is inconsistent with the principled exercise of judicial power; that it is unedifying for the Court to play, or be perceived as playing, the role of "entreating bids from group members to conduct the case on better terms than those offered in the Wigmans Proceeding"; that such a procedure is inimical to the just, quick and cheap resolution of group members' claims and therefore contrary to the edict in ss 56–58 of the *Civil Procedure Act*; and that the Court's statutory supervisory powers in respect of representative proceedings under Pt 10 of the *Civil Procedure Act*, in particular ss 171, 173 and 183, provide adequate and appropriate mechanisms to ensure that a representative plaintiff conducts the proceeding in the best interests of group members (including through the Court's control over any funding commission to be paid to a litigation funder on settlement or judgment).

32 Ms Wigmans submits that it is both unnecessary and inappropriate for the Court to entertain or undertake the kind of "auction" procedure contemplated by the competing representative plaintiffs and that the "unseemly debacle precipitated by the commencement of the Subsequent Proceedings ought not to be condoned or encouraged". (The description by Ms Wigmans of the respective proceedings to date as an "unseemly debacle", to the extent that it encompasses the applications for an anti-suit injunction and an anti-anti-anti-suit injunction in the Wigmans proceeding itself, is in turn the subject of criticism of Ms Wigmans' conduct in the Wigmans proceeding – see Mr Georigou's submissions at [4].)

33 I will return in due course to the concerns raised by the various competing plaintiffs as to the multiplicity of proceedings and by Ms Wigmans as to the process here being undertaken to deal with the multiplicity issue. While I share the view that aspects of the process involved in the comparisons made of the respective proceedings and the funding models proposed by the competing plaintiffs were indeed unedifying (in particular, as adverted to

above, the comparison of the "track record" and abilities of the respective law firms to conduct litigation of this kind and the criticism by various of the law firms of the others in this regard), I do not accept that a multifactorial analysis of what is likely to be the most suitable vehicle through which group members' claims may be advanced, in the best interests of group members, does not involve the principled exercise of judicial power. (Nor did the Full Court suggest otherwise in *GetSwift Appeal*. See also the discussion by the Court of Appeal in *Brewster v BMW Australia Ltd* [2019] NSWCA 35 (*Brewster Appeal*) from [96]-[102], albeit in a different context, as to the submission there made that the making of a CFO on an interlocutory basis would not be an exercise of judicial power.) Rather, what is here required (once the abuse of process argument has been determined) is an assessment of the most appropriate remedial response to the competing class actions, having regard to the interests of group members (and the need to ensure fairness to the defendant).

34 The two bases (i.e., as an abuse of process and on case management principles) on which a stay is sought by Ms Wigmans of the competing proceedings reflect, in essence, the distinct sources of power on which the stay of competing representative proceedings was granted (and later upheld) in the Federal Court in the *GetSwift* proceedings (see below at [44]ff), the first instance and appeal decisions in those proceedings understandably being the subject of much focus on the present applications.

35 If Ms Wigmans' proposition that a multifactorial analysis should not here be undertaken is not accepted (and I interpose here to note that I do not accept it), then Ms Wigmans argues that the multiplicity issue should not be resolved based on a "simplistic" analysis of which proceeding would return more to group members at a given level of settlement or judgment (which, it is submitted, would promote a "race to the bottom"). Ms Wigmans argues that such a race cannot be expected to advance the interests of group members in achieving the maximum possible settlement or judgment sum) (see submissions at [11]). Rather, Ms Wigmans advances several other matters in

support of the conclusion that the Wigmans proceeding is the superior vehicle for the prosecution of group members' claims.

36 First, that the Wigmans proceeding adopts the funding structure which best aligns the financial incentives of those conducting and funding the proceedings with the interests of group members in obtaining as high a recovery as possible (reliance here being placed on the analysis carried out by Professor Michael Perino in his two reports that were only provisionally admitted by me at the hearing of these applications, over the objections of Wileypark, as Exhibits A and B – see from [131] below). Second, that the Wigmans proceeding is brought on behalf of more group members than any of the competing proceedings (a proposition that is challenged by Wileypark) and offers an additional cause of action (the unconscionable conduct claim) to the competing proceedings (a proposition broadly accepted but discounted as a relevant factor by the other representative plaintiffs). Third, that the Wigmans proceeding: was commenced first; has been prosecuted with appropriate diligence by those conducting it; is now at a more advanced stage of preparation than any of the subsequent proceedings and, subject to the opt-out and registration process, is ready to proceed to mediation, Ms Wigmans noting that the issue as to security for costs is already resolved in the Wigmans proceeding, where the sum of $5 million was deposited in Court by her funder on 1 June 2018 (I note here that this factor is now effectively mirrored by the undertaking proffered in the Komlotex proceeding). Fourth, that the Wigmans proceeding is being conducted by appropriately experienced solicitors and counsel, and is backed by an experienced litigation funder with the means to ensure that the proceedings will be conducted properly (a feature, I note, that is put forward by each of the competing plaintiffs in respect of his or its legal team and/or funder, in support of his or its own proceeding). Fifth, that in each of the other representative proceedings, unresolved issues in relation to the provision, or adequacy, of adverse costs cover suggests that there will need to be further interlocutory steps to test the sufficiency of the proposed arrangements, with consequent delay (though this issue cannot now be said to arise in relation to the Komlotex proceeding). Finally, Ms Wigmans says that the conduct of the other representative

proceedings to date "does not inspire confidence" that any of those proceedings is as likely as the Wigmans proceeding to promote the just, quick and cheap resolution of the proceeding.

37 As can be seen from the above, there is a degree of overlap between, on the one hand, the abuse of process basis on which a stay is primarily sought by Ms Wigmans of the other representative proceedings and, on the other hand, the reasons put forward by Ms Wigmans as to why, on case management principles (and even if there be a multifactorial analysis), the Wigmans proceeding is the "superior vehicle" for the claims brought against AMP.

38 Each of the plaintiffs in the competing representative proceedings (Fernbrook in effect largely adopting Komlotex' submissions on the multiplicity motions) contends: that neither the commencement nor the continuation to date of the subsequent proceedings constitutes an abuse of process; that the emphasis placed by Ms Wigmans on her proceeding being first in time (and further advanced in terms of preparation) is misplaced; and that, on a multifactorial analysis, its or his own proceeding is the one which should be permitted to continue. Each also points to aspects of the other competing representative proceedings which it is contended make those proceedings an inferior vehicle for the prosecution of group members' claims against AMP.

39 In summary, each of the plaintiffs in the representative proceedings places emphasis on different factors by reference to which it is submitted that that plaintiff's proceeding is superior to that of the others.

40 Ms Wigmans, as already noted, emphasises: what might be called the "first mover advantage"; the additional (unconscionable conduct) cause of action in her proceeding; the extended definition of group members (to 17 April 2018; a date matched only in the Wileypark proceeding); the "superior progress" in the Wigmans proceeding; and the perceived advantage of a staged funding model in terms of incentivisation of the funder to achieve the highest recovery for group members.

41 Komlotex emphasises its “no win, no fee” funding model and the experience of its solicitors, Maurice Blackburn (and, in particular, Mr Watson of that firm), in the conduct of representative proceedings of this kind (in particular, emphasising the “niche” comprised by securities class action proceedings), as well as the certainty, going forward, of its funding structure (since Komlotex no longer seeks a CFO and is prepared to match the present security for costs arrangements in the Wigmans proceeding).

42 Wileypark emphasises the size of its group in terms of the institutional group members who have already signed funding agreements with its funder (IMF Bentham Limited) (IMF)) and, in particular, the “informed choice” that this is said to represent in terms of the signing up of “repeat” institutional group members; and the provision of the expertise of its funder in the analysis of financial data (and, provision of other project management services) “at no cost” to group members. (Against the last of those matters is the argument put by others of the representative plaintiffs that the cost of those services is built into the funder’s commission and that such expertise will not obviate the need for independent expert evidence in due course.)

43 Finally, Mr Georgiou emphasises the “overall package” put forward by his solicitors (Shine) and funder(Augusta Ventures Limited (Augusta)), including that the estimate as to legal costs has been vetted by a costs consultant and comprises the lowest rates of those proposed by the respective firms of solicitors (which is estimated by Shine to result in the highest recovery for group members) and that (since those responsible for the matter within Augusta are qualified solicitors) its proposal effectively places control of the decision-making in the hands of solicitors (who, it is noted, unlike funders owe paramount obligations to the Court in their capacity as officers of the Court).

The GetSwift proceedings

44 As there was much emphasis on the decisions both at first instance and on appeal in the *GetSwift* proceedings, it is convenient at the outset briefly to

consider what was there said as to matters of relevance to the applications presently before me.

45 In the *GetSwift* proceedings, there were three competing open class representative proceedings in which the cases proposed to be advanced were found by the primary judge to be substantially the same. At first instance (*Perera v GetSwift Ltd* [2018] FCA 732; (2018) 127 ACSR 1) (*GetSwift*), Lee J concluded that it would be an abuse of process for more than one of those proceedings to continue and ordered that two of the proceedings be permanently stayed (see at [306]ff; [345]-[347]). On appeal, the Full Court (Middleton, Murphy and Beach JJ) did not consider it necessary to determine the question whether the continuation of competing proceedings was an abuse of process, concluding that there was power to stay one or more competing class actions pursuant to the Court's inherent case management powers (see *GetSwift Appeal* at [121]ff; [136]). Relevantly, the Full Court also noted (at [33]) that the Court "would not condone such a complex, elaborate and expensive exercise in other cases when the issue of competing class actions needs to be dealt with" and that questions of the kind there raised "require to be dealt with less elaborately and more efficiently".

46 In *obiter*, the Full Court considered that: the mere existence of competing class actions does not give rise to an abuse of process (*GetSwift Appeal* at [145]-[148]; [154]); it is not an abuse of process for competing class actions to continue "if all but one are closed and overlap is eliminated" (*GetSwift Appeal* at [149]) or otherwise "where the duplication of group membership is eliminated" (*GetSwift Appeal* at [151]); the continuation of non-overlapping class actions is not an abuse (*GetSwift Appeal* at [153]); the commencement of a subsequent *bona fide* set of representative proceedings prior to the Court giving substantive directions in existing but overlapping representative proceedings does not of itself establish an abuse of process (*GetSwift Appeal* at [150]); *prima facie*, it is vexatious or oppressive to bring a second proceeding where an existing proceeding is on foot and the subject matter of those proceedings is the same or substantially overlaps, though it has also been recognised that the fact that the parties are not identical, or the relief

sought is different, does not necessarily disentitle relief under this principle (*GetSwift Appeal* at [155]); and that an open class representative proceeding is not, or does not become, an abuse of process merely because a duplicative proceeding is subsequently commenced offering purportedly better costs and funding terms (*GetSwift Appeal* at [156]).

47 Of the remedial options available to manage overlapping open class proceedings (which include not only a permanent stay but also orders for: consolidation, class closure to eliminate the existence of overlapping group members in two or more competing class actions, joint hearings (the so-called "wait and see" approach), or a temporary stay), the Full Court: considered that consolidation should generally only be used where there is agreement between the applicants, the funders and the solicitors (*GetSwift Appeal* at [51]); doubted whether there was power to "declass" one or more proceedings in order to resolve multiplicity pursuant to s 33N or s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (the equivalent provisions in this jurisdiction being ss 166 and 183 of the *Civil Procedure Act*) (*GetSwift Appeal* at [64]-[65]); said that orders "closing the class" were an appropriate discretionary response in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (***Bellamy's***) due to the very large number of signed up group members in both competing proceedings in that case and the fact that that case was the first time in which the Court had utilised the class closure approach (such that the parties could not have known that the Court would discourage bookbuilding prior to the issue of proceedings in that and subsequent decisions) (*GetSwift Appeal* at [62]ff); and said that the "wait and see" approach adopted by Foster J in *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042 was an appropriate discretionary response in that case because the primary judge had declined to find that allowing the continuation of two class actions would, at that stage of the proceeding, unduly oppress the respondent or that it was productive of undue costs, confusion or delay (*GetSwift Appeal* at [62]ff).

48 The Full Court observed, in this context, at [66] that where "there are multiple open class proceedings, numerous group members signed up in each of the

proceedings to different funding arrangements, and the prospect of a common fund application being made in each of the proceedings, it may be desirable that clarity be injected sooner rather than later as to the proceedings to go forward and their constitution"; and said that it was obvious that permitting the three overlapping class actions in that case to continue would increase costs and that it was open to the primary judge to find that it would be against the broader interests of justice if this were to occur. (A number of those features present themselves on the present applications albeit with certain differences, namely that there are multiple open class proceedings; in some (but not all) of those proceedings there are numbers of group members who have signed up to different funding arrangements; and there is the prospect of a CFO application in some, though again not in all, of the proceedings.)

49 The Full Court noted a number of features which it considered supported the exercise of the discretion in that case to order a permanent stay, including that: it was unnecessary to allow the continuance of duplicative class actions to permit access to justice as the group members in each case were the same; neither of the stayed parties had expressed a willingness to proceed as a closed class rather than being stayed; there was no evidence that the interests of the applicants or of any group members would be best served by more than one open class action progressing; and it was in the interests of the applicants and the group members to have their claims advanced in the "most potentially beneficial vehicle".

50 The Full Court concluded that the primary judge had the power, on multiple bases, permanently to stay two of the three competing proceedings in order to avoid a multiplicity of proceedings ventilating the same claims (see at [118]-[157]). The Full Court nevertheless recognised (see at [165]) that different cases and facts would call for different responses and said (at [274]) that:

> … there is no one right answer to the case management questions that arise when dealing with competing class actions. There cannot be a 'one size fits all' and different judges will take a different view of some of the incommensurable and conflicting considerations that may arise. It should also be kept in mind that there is no 'silver bullet' solution to the case

> management problems of competing class actions and each of the 'solutions' can be said to have some or other problem.

51 At [277], the Full Court expressed the view that, where there is a multiplicity of competing class actions, the focus should be "less on achieving the lowest possible costs and funding charges in any selection process" and more on selecting the proceeding with a funding and costs model likely best to motivate the solicitor and funder "to work assiduously to achieve the best outcome for the applicant and group members and to take responsible risks in that regard".

52 At [278], the Full Court went on to say that:

> … the single most important determinant of the net recovery achieved by group members is not the quantum of legal costs but the amount of the settlement or judgment achieved, and where the settlement or judgment is large the legal costs are usually not material to net recovery. The Court should be astute to select the proceeding with the legal team that is most likely to achieve the largest settlement or judgment, i.e. the most experienced and capable. We accept that differentiating between legal firms or solicitors will often be difficult but the Court should not dodge that question if there is a basis for differentiation.

53 At [279]-[280], the Full Court emphasised the importance of strongly discouraging a rush to the Court in large and complex class proceedings (because it carries the consequent risk of insufficient due diligence and the commencement of unmeritorious, or at least weak, cases), noting that:

> … recently a number of securities class actions have been issued very speedily following a share price collapse. *Wileypark* [*Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143] is a good example of this. … 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.
>
> It may be time for the Court to consider a procedure, in relation to securities class actions at least, such that upon the filing of the first proceeding the Court orders a standstill in that proceeding for, say, 90 days to allow a reasonable time for other solicitors or funders to undertake a proper due diligence. In order to reduce the incentive to rush to the Court, and to reduce any incentive to speedily follow another party that does so, any book building

> that occurs during the standstill period should be given no weight by the Court. We note that a 90 day standstill period is imposed under s 77z-1 of the Private Securities Litigation Reform Act 1995 in the USA.

Differences between the competing representative proceedings in the present case

54 The differences between the competing representative proceedings presently before me (by reference to which one or other of the representative plaintiffs maintains that its proceeding has a juridical advantage or that others pose a juridical disadvantage) are broadly as to the relevant group members and the causes of action sought to be advanced on behalf of group members. Those differences in essence are: the inclusion of the unconscionable conduct claim in the Wigmans proceeding (not elsewhere reproduced – that being a conscious forensic decision on the part of the competing representative plaintiffs' lawyers) it being said by Ms Wigmans that this offers a different theory of loss and damage to market-based causation (T 13.20)); the inclusion of a claim in respect of shares acquired off-market or the acquisition by ADR's (first expressly raised in the Fernbrook proceeding though proposed to be mirrored elsewhere and said by Ms Wigmans, but disputed by other plaintiffs, already to be encompassed in her existing pleading); and the inclusion in the Wileypark proceeding of a claim arising out of the receipt by AMP of legal advice to the effect that its conduct was not lawful (a claim that Ms Wigmans again says, but which is also disputed, is already encompassed in her commercial list statement). (See below at [89]; [234]ff.)

Proposed funding models

Wigmans proceeding

55 The funder for the Wigmans proceeding is Burford Asia Pty Ltd (Burford), a subsidiary of Burford Capital UK Ltd (Burford Capital). Under the proposed funding terms, Burford is to: pay legal costs and disbursements; meet any adverse costs order; and provide security for costs. All of Quinn Emanuel's professional fees are to be met by Burford (thus, the firm is not at risk in respect of its costs) but Quinn Emanuel will not be entitled to any uplift on its professional fees in the event of a successful outcome (thus, it is not undertaking any part of the legal work on a conditional basis). On a

successful resolution of the proceedings, Burford is to be paid (subject to Court approval) the legal costs and disbursements it has incurred, plus a maximum commission on a sliding scale, dependent on when resolution of the proceedings is achieved, of: 10% of the net resolution sum if the proceedings resolve on or before 30 June 2020; 15% of the net resolution sum if the proceedings resolve between 1 July 2020 and 30 June 2021; and 20% if the proceedings resolve after 1 July 2021. Burford will forego approximately $300,000 attributable to past interlocutory disputes (T 14.20).

56 Ms Wigmans notes that the proposed CFO in the Wigmans proceeding provides that the Court has ultimate power to fix the funder's commission in such lower amount than is proposed in the terms of the CFO that the Court considers reasonable and points to the acknowledgement by Burford that it contemplates that "in determining what is a reasonable funding commission, the Court may have regard to the commissions or alternative funding models reasonably and credibly proposed by other litigation funders in connection with the Wigmans Conduct Application" (see the affidavit affirmed 7 November 2018 of the managing director of Burford Capital, Mr Craig Arnott, at [38]).

Komlotex (and, if consolidated, Komlotex/Fernbrook) proceeding

57 For Komlotex, as adverted to above, Maurice Blackburn now proposes to conduct the proceeding without a litigation funder, on a "no win, no fee" basis. On a successful resolution of the proceedings (but provided the resolution sum exceeds an identified figure), Maurice Blackburn will (subject to Court approval): charge an uplift fee of 25% on its professional fees; and recover the costs of obtaining "after-the-event" (ATE) insurance (the cost of which it estimates at $1.25 million).

58 Further, as part of the arrangement reached with Fernbrook for consolidation with the Fernbrook proceeding, if the proceedings are consolidated: Maurice Blackburn will make payments of $250,000 each to Fernbrook's solicitors (Slater & Gordon) and to its funder (Therium Litigation Finance (Australia)

Limited (Therium)) in the amount of $500,000; Fernbrook and Komlotex will apply for orders approving payment from the resolution sum of up to $350,000 in respect of legal costs and disbursements incurred by Slater & Gordon and/or Therium in conducting the Fernbrook proceeding prior to consolidation; and Maurice Blackburn will indemnify Therium against any adverse costs order made against Therium in the Fernbrook or Wigmans proceedings, and will indemnify Therium against any liability it has to indemnify Fernbrook (see affidavit of Fernbrook's solicitor, Mr Hardwick of 20 November 2018, referring to a Deed of Cooperation setting out those arrangements). Only the second of those amounts (i.e., the sum of up to $350,000), is to be the subject of an application for payment out of the ultimate resolution sum.

Wileypark proceeding

59 The funder for the Wileypark proceeding is IMF. Under the proposed funding terms, IMF is to: pay Phi Finney's reasonable disbursements (but not Phi Finney's professional fees – thus, Phi Finney will conduct the proceedings on a conditional basis); meet any adverse costs order; and provide any security for costs.

60 On a successful resolution of the proceeding, and subject to Court approval, IMF is to be entitled to payment of its expenses together with a maximum commission based on the lesser of: 10% of the net claim proceeds (the resolution sum net of costs); or 2.5 times the amount of "Multiple Expenses" (i.e., the disbursements paid by IMF) capped at $4.5 million (not inclusive of insurance costs); and Phi Finney will be entitled under the proposed funding terms to a 25% uplift on its professional fees incurred from 9 November 2018 (see the affidavit affirmed 12 November 2018 of Timothy Finney at [55]). The funding proposal imposes a cap on the amount of costs that the solicitors may recover from any resolution sum. The "Solicitor Costs Cap" is expressed as the higher of: the "Estimated Professional Fees Total" plus 10%, plus any Uplift Fee payable in respect of that amount or 10% of the Resolution Sum. (The IMF cap is described in submissions as a "hard cap", the Phi Finney as a soft cap (in the sense of being "not a cap") (see T 127).)

61 In oral submissions, Wileypark indicated that Phi Finney would not seek to recover any costs associated with bookbuilding (T 64.43ff) and that no cost of the multiplicity motions would be passed on to group members (T 71.35).

Georgiou proceeding

62 The funder for the Georgiou proceeding is Augusta. Under the proposed funding terms, Augusta is to: be responsible for paying legal costs and disbursements (up to an identified limit which can be varied); meet any adverse costs order; and provide any security for costs. 50% of Shine's professional fees for project investigation and 25% of Shine's professional fees for the proceeding (excluding project investigation) will be incurred on a conditional fee basis (see the affidavit of Vicky Antzoulatos sworn 6 November 2018 at p 3). Thus, Augusta will not pay Shine for a portion of its professional fees, but those amounts will be sought to be recovered by Shine out of the net claim proceeds on a successful resolution of the proceeding.

63 On a successful resolution of the proceeding, Augusta is to be entitled to repayment of the credit it has deployed in the proceeding (the "deployed credit"), together with a commission based on the lesser of: 8% of the net claim proceeds; 1.2 times the amount of "deployed credit" in the event the matter is resolved within 12 months after the proceeding was filed; 1.5 times the "deployed credit" in the event the matter is resolved within 12-24 months after the proceeding was filed; and 1.8 times the "deployed credit" in the event the matter is resolved more than 24 months after the proceeding was filed. Further, on a successful outcome of the proceedings, Shine is entitled to a 25% uplift on its professional fees that were incurred on a conditional basis (i.e., the 50% project investigation fees and 25% other professional fees).

64 Mr Georgiou's solicitor has deposed that the deployed credit cannot exceed $6,604,418 (being the "total funding to be provided") (see the affidavit sworn 6 November 2019 of Ms Antzoulatos at p 3), unless the funder agrees to a variation of that limit.

Abuse of process argument

65 It is convenient first to deal with Ms Wigmans' abuse of process argument, before considering her argument that the competing representative proceedings should be stayed, without undertaking any multifactorial analysis, by reference to the operation of case management principles; before turning, finally, to the multifactorial analysis that (contrary to her submissions), I propose to undertake of the comparative benefit to group members of the respective proceedings.

66 The relevant principles applicable in considering an application to stay a proceeding on the basis that its commencement (or continuation) constitutes an abuse of process are well known and are not in dispute between the parties. What is disputed is the application of those principles in the context of representative proceedings; in particular, where the legislature has contemplated the possibility of more than one proceeding (as is apparent from the relevant provisions in relation to representative proceedings in both the *Federal Court Act* and the *Civil Procedure Act*).

67 In summary, as Ms Wigmans notes, proceedings have been held to be an abuse of process where: the Court's processes are invoked for an illegitimate or improper purpose (*Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34; *Rogers v The Queen* (1994) 181 CLR 251; [1994] HCA 42); the use of the Court's processes is unjustifiably oppressive to one of the parties or vexatious (*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55); and the use of the Court's processes in the manner contemplated would bring the administration of justice into disrepute (*Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77 (*Walton v Gardiner*)). As Ms Wigmans also notes, the categories of abuse of process are not closed (*Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28; *GetSwift Appeal* (at [144]); *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; [2011] HCA 48) and it has been recognised that the doctrine of abuse of process is fluid and adaptable (*Batistatos v Roads and Traffic Authority of New South*

Wales (2006) 226 CLR 256; [2006] HCA 27; *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; [2009] HCA 43).

Ms Wigmans' position

68 Ms Wigmans points to the following instances of abuse of process as having particular relevance in the circumstances of the present applications: the bringing of two proceedings where one will lie, such as where the plaintiff bringing the second proceedings may obtain complete relief in the first (*Moore v Inglis* (1976) 9 ALR 509; *Henry v Henry* (1996) 185 CLR 571; [1996] HCA 51 (*Henry v Henry*); *Thirteenth Corp Pty Ltd v State* [2006] FCA 979; (2006) 232 ALR 491; *Lidden Composite Buyers Ltd* (1996) 67 FCR 560; (1996) 139 ALR 549; *Branir Pty Ltd v Wallco Pastoral Co Pty Ltd* [2006] NTSC 70; (2006) 203 FLR 115; *Commissioner of State Revenue v Aidlaw Pty Ltd (No 2)* [2010] VSC 405); the commencement of proceedings for the predominant purpose of generating income for a legal practitioner (*Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585; [2014] VSCA 351; *Melbourne City Investments v Leighton Holdings Ltd* [2015] VSCA 235) or generating income for a litigation funder (*Melbourne City Investments Pty Ltd v Myer Holdings Ltd* (2017) 53 VR 709; [2017] VSCA 187 (*Melbourne City Investments v Myer*)); and the commencement of ordinary *inter partes* proceedings by a person who has not opted out of a representative proceeding (when the opt-out time has passed) against the same defendant and dealing with substantially the same subject matter as the representative proceeding (*Oliver v Commonwealth Bank of Australia (No 2)* (2012) 205 FCR 540; [2012] FCA 755 (*Oliver v CBA*)).

69 Ms Wigmans identifies, in particular, the following characteristics of representative proceedings: that the proper purpose of such representative proceedings is not limited to the vindication of the substantive rights of the plaintiff, but also involves "laying the groundwork" for the vindication of the substantive rights of the group members, through the determination of common questions; that, where a representative proceeding has been commenced, the substantive rights of a group member may be vindicated in

that proceeding without the need for the group member to commence its own subsequent proceeding; and that a representative proceeding is, by its very nature, a "commercial enterprise" through which the lead plaintiff, group members, solicitors and (if there is one) litigation funder advance, by use of the Court's processes, the shared purpose of vindicating group members' rights in order to obtain some financial benefit for each of them (referring to *GetSwift* at [341]-[343]; [17]-[18])).

70 Having regard to those characteristics, and the legislative regime provided for in Pt 10 of the *Civil Procedure Act*, Ms Wigmans maintains that an abuse of process will arise where: a group member in an open class action (here, the Wigmans proceeding) subsequently commences, as representative plaintiff, another open class action on behalf of the same, or substantially the same, group members as the first-filed class action; the claim(s) of the representative plaintiff and the group members in the subsequent class action may adequately be vindicated in the first-filed class action; the first-filed class action is an appropriate vehicle for the determination of the common issues and issues of commonality raised therein at an initial trial; and the subsequent class action is "essentially duplicative" of the first-filed class action (in that there are no significant differences in the scope, additional causes of action or material variations in the case theories proposed to be advanced, and there is otherwise no legitimate juridical advantage to group members in vindicating their claims through the subsequent class action rather than the first-filed class action).

71 Ms Wigmans submits that, in the circumstances postulated above, the subsequent proceeding is not necessary for the vindication of the plaintiffs' substantive rights, nor is it necessary in order to lay the groundwork for the enforcement of the substantive rights of other group members; and, hence, that the subsequent proceeding does not fulfil the proper purpose of a representative proceeding. Thus, she submits, it should be inferred that the *only* purpose advanced by the subsequent proceeding is the purpose of the litigation funder and/or solicitors promoting the proceeding in pursuing financial benefit by use of the Court's processes. The competing

representative plaintiffs cavil with this proposition (see, in particular, Fernbrook's submissions that, when considering the purpose for which a proceeding is commenced in the context of considering whether it is an abuse of process, the focus must be on the predominant purpose of the plaintiff, reference here being made to *Melbourne City Investments v Myer* at [50]) and that, even if consideration is given to the purpose of a plaintiff's solicitors, there is no basis on the evidence to find that the only purpose, or the predominant purpose, for which Fernbrook's proceeding was commenced, was to pursue financial benefit for the solicitors, let alone the funder. (It must surely, however, be accepted that it is unlikely that any litigation funder or solicitor, other than one conducting litigation on a purely pro bono basis, is not expecting some financial benefit from so doing.)

72 Ms Wigmans argues that the commencement and/or continuation of the subsequent class action in the above circumstances constitutes an abuse of process, submitting that the subsequent proceeding: is likely to impact adversely on the progression of the claims of group members through the first-filed proceeding; is contrary to the overriding purpose in s 56 of the *Civil Procedure Act* and increases costs for group members (who would likely ultimately have to bear those costs through any resolution of their claims); is vexatious and oppressive upon the defendant; and thus "undermines and brings into disrepute the administration of justice".

73 Ms Wigmans submits that an argument of this kind (i.e., that the commencement of proceedings, after the regular commencement of an open class proceeding, in which the subsequent plaintiff seeks essentially the same relief and where that proceeding offers no juridical advantage to the first-filed proceeding) was not advanced to the Federal Court in the *GetSwift* proceedings (either at first instance or on appeal) and is not foreclosed by the respective judgments in those proceedings.

74 Ms Wigmans notes that (at [150] in *GetSwift Appeal*) the Full Court cited, with apparent approval, the decision in *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56; (1999) ATPR 41-679 (*Johnson Tiles*) (at [11]-[16]), where

Merkel J considered it relevant to consider whether substantive directions had been made in the first-filed representative proceeding in determining whether subsequent representative proceedings should be characterised as an abuse of process. Ms Wigmans says that, on that approach, each of the Georgiou, Fernbrook and Komlotex proceedings (though she accepts this would not include the Wileypark proceeding) should be considered an abuse of process, since each of those proceedings was commenced after substantive directions had been made (on 18 May 2018) in this Court for the progress of the Wigmans proceeding. (I pause here to note that what Merkel J said in *Johnson Tiles* at [16] was that "prima facie, the commencement of a bona fide representative proceeding prior to the Court giving substantive directions […] in an existing but overlapping representative proceeding will not, of itself, be vexatious and oppressive". His Honour's reference to the giving of substantive directions, as I read it, was there putting into a temporal context the question of abuse of process (i.e., the point at which any abuse of process would be seen as having arisen).)

75 In the present context, the significance of the making of what are said to have been procedural directions on 18 May 2018 in the Wigmans proceeding is said by Komlotex not to carry any weight, noting that the relevant directions in *Johnson Tiles* were as to the giving of notice to group members (i.e., at a time before the conclusion of the opt-out regime) (see T 40.33ff).

76 Ms Wigmans accepts that, in the context of a multifactorial comparison, "undue" weight should not be placed on the mere fact of filing first as a proxy for efficiency or competence (noting that in *GetSwift Appeal* the Full Court found that the primary judge was correct in giving little weight to the relative priority in the commencement of the competing proceedings – see at [170]), but she nevertheless maintains that the fact of filing first is still relevant in this context (citing Ball J in *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17 (*Smith v Australian Executor Trustees*) (at [42])).

77 Ms Wigmans submits that any concerns to the effect that rewarding the first in time proceeding may lead to "important strategic decisions and analytical work [being] performed hastily, resulting in '*poorly thought through originating applications and pleadings*'" (see Lee J in *GetSwift*) are unwarranted in the present case. (However, I interpose to note that the proposition that, in a particular case, a concern against encouraging a "race to the courtroom" is not well founded says nothing to address policy concerns as to the effect of such an incentive in other cases in future.

78 In particular, Ms Wigmans submits that there are other safeguards against the risk of a race to the courthouse (referring in this regard to the professional obligations of legal practitioners to act responsibly in the preparation of their client's case and to ensure that it is adequately and properly pleaded). It is said that it would be unreasonable to criticise Ms Wigmans for commencing proceedings promptly in circumstances where group members' claims stretch back beyond the potential limitation period such that, with every day that passed, claims of potential group members would be barred. Ms Wigmans further argues that any perceived undesirability of encouraging a race to the courthouse must be balanced against the policy considerations in favour of resolving multiplicity of overlapping class actions through an abuse of process analysis rather than the multifactorial approach adopted in *GetSwift* (referring to the matters set out at [64] of her outline of submissions in chief).

79 (Pausing here, while all competing representative plaintiffs disavowed any suggestion that the lawyers acting for their counterparts would act otherwise than in accordance with their professional obligations, all also placed emphasis, to a greater or lesser extent, on features of one or other of the funding proposals that it was said would give rise to incentives so to do, which they submitted for policy reasons should not be encouraged.)

80 Ms Wigmans argues that none of the subsequent proceedings has articulated the case against AMP in a way that is claimed to be superior to the Wigmans proceeding (a proposition disputed by the competing representative plaintiffs – in particular, Wileypark), noting that two of the subsequent proceedings (the

Komlotex and Georgiou proceedings) have been amended to adopt the "superior features" of the Wigmans proceeding (namely, the adoption in both of those proceedings of the class period commencement date in the Wigmans proceeding, and, in the Georgiou proceeding, the adoption of substantial parts of the allegations in the Wigmans proceeding concerning the identity of relevant officers of AMP). Ms Wigmans places emphasis on her unconscionable conduct claim, which is said to give a material juridical and forensic advantage in the claim against AMP.

81 Ms Wigmans submits that the conclusion that subsequently commenced representative proceedings seeking the same relief as that sought in an earlier regularly commenced proceeding will ordinarily be an abuse of process is underscored by the provisions of Pt 10 of the *Civil Procedure Act*, noting that these provide "ample" remedies for a group member who considers that a representative proceeding is not being prosecuted efficiently and in that group member's interests (including: seeking to take over the conduct of the proceeding from the representative plaintiff, and objecting to or making submissions about the appropriate amounts of legal costs and funding commission that may be deducted from any recovery). It is submitted that Parliament's intention is that group members avail themselves of those provisions, rather than seeking to commence their own representative proceedings on behalf of the represented group. Ms Wigmans further notes that there is also the opportunity for group members to opt out if they do not wish to participate in the group proceeding and to pursue their own proceedings (whether individually or with other persons who opt out of the Wigmans proceeding).

Competing representative plaintiffs' position

82 The competing representative plaintiffs argue that Ms Wigmans' abuse of process contentions are contrary to authority (having been rejected both as a matter of principle and as a matter of public policy), emphasising the observations of the Full Court in *GetSwift Appeal* at [279] (set out above at [53]), and submitting that, consistent with earlier authority, no advantage

should flow to the first-filed proceeding, as that would encourage a rush to the courthouse (see in this regard the observations of Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 (*Petersen*)).

83 There was much debate as to whether the extended claim periods are likely to yield productive claims for any group members, or materially to increase aggregate group member claims (see for example Mr Georgiou's submissions at [36]; Komlotex' submissions at [16] and submissions in reply at [50]), which I consider in due course (see, for example, [247]ff below). Similarly, there was debate as to the proposition that the Wigmans proceeding has any juridical advantage in terms of the causes of action pleaded, which I consider later in these reasons (see [234]ff below).

84 The competing representative plaintiffs argue that the observations in *GetSwift Appeal* were not made in a circumstance divorced from any consideration of whether a second in time proceeding might be an abuse of process; rather, the "first in time" factor was of no weight because the second in time proceeding is not an abuse of process (see the analysis in *GetSwift Appeal* at [135]-[157]) and that, were it otherwise, the question of who was first could not be ignored and hence the two issues are interrelated (see for example the Komlotex submissions at [14]; T 32ff).

85 Reference is made to the reasoning of the Full Court in *GetSwift Appeal*, and in particular, the observations that the legislation: specifically contemplates the possibility of multiplicity of proceedings by allowing a representative party to bring proceedings on behalf of "some or all" group members and because it allows group members to opt out and pursue their own individual or representative claims; and does not evince a purpose to restrict or prevent claims involving a common issue being the subject of more than one class action, particularly given that one of the key mischiefs which the statutory regimes were enacted to prevent was a respondent facing voluminous individual claims (a far less efficient outcome); as well as to the observations that the commencement of a duplicative class action proceeding does not of

itself establish any vexation, oppression or an abuse of process because the lead representatives are not the same parties, and the group members (who are not parties) "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".

86 It is noted that the Full Court rejected the application of the general case of abuse of process arising from the commencement of duplicative proceedings (of the sort referred to by Brennan J in *Walton v Gardiner*), on the footing that the applicants are different, and therefore said it could not be apposite to describe the subsequent proceedings in that case as an abuse of process at the time they were filed (see *GetSwift Appeal* [156]); nor could their continuation, even in the face of the superior funding of the earlier proceeding be abusive (see *GetSwift Appeal* [155]-[156]); and it is submitted that this reasoning does not admit of the "fine distinctions" sought to be drawn in Ms Wigmans' submissions.

87 The other representative plaintiffs, thus, argue that the suggested resolution of the issue of multiplicity by the application of principles of "first in time" and abuse of process is at odds with the conclusion in *GetSwift Appeal* and earlier authorities that the proper resolution of any overlapping class actions is a case management exercise utilising the Court's power to manage cases before it, whether in its inherent power, its express and implied power to manage cases before it in the interest of justice, or in its equitable jurisdiction.

88 As to the weight placed by Ms Wigmans on the supervisory role of the Court under Pt 10 of the *Civil Procedure Act*, it is submitted (see the submissions by Mr Georgiou) that: many of the mechanisms within Pt 10 require a sufficiently motivated group member to intervene in the proceedings at the relevant time (such as s 171 of the *Civil Procedure Ac*t) or take some relevant action (such as "opting out" under s 162 of the *Civil Procedure Act*). It is said that there is no guarantee that group members will take such steps; and that, in contrast, the Court now has the benefit of funding proposals and submissions from the plaintiffs in the four competing class actions, which provides the Court with a

level of assistance in determining what is likely to be in the best interests of group members that will not be available at any later time in the proceedings.

89 Other perceived flaws in Ms Wigmans' abuse of process argument identified by the competing representative plaintiffs include the contention (disputed by Ms Wigmans) that the Wigmans proceeding does not encompass persons who acquired AMP shares off-market or who acquired ADRs that represent AMP shares. In particular, Wileypark contends that its proposed amended pleading is significantly broader in scope than the claims pleaded in any of the other proceedings (referring to the causes of action pleaded in its commercial list statement at [37](g), (h), (i), (n) and (o), [39](c)-(i) or [40](aa), (c), (d), (e), (f), (h) and (ha) read with [43]-[62] of the proposed Wileypark amended statement of claim, which raise allegations based on the receipt of legal advice). It alleges, in summary, that AMP had received legal advice that there was no lawful basis for implementing a policy whereby ongoing service fees would be charged and that it continued to charge those fees despite having received that legal advice; and that it had committed breaches of its Australian Financial Services Licence). Wileypark maintains that such disclosures at the Royal Commission received specific media attention which coincided with the significant diminution in the AMP share price. Ms Wigmans in response argues that the claimed additional causes of action in the proposed amendments to Wileypark's pleading do not advance any new cause of action; rather, that, those paragraphs essentially plead evidence (designed, it is asserted, to avoid a request for particulars from AMP; Ms Wigmans noting that in the Wigmans proceeding particulars were requested and provided "long ago").

90 Further, it is submitted that it cannot be an abuse of process (based on an argument as to duplication of proceedings) where the representative plaintiff in the second proceeding commences its proceeding, in circumstances where the plaintiff and its solicitors may well be unaware of the precise scope, causes of action and case theories advanced in the earlier proceeding (as Fernbrook says is the case with its proceeding).

91 As noted earlier, the other representative plaintiffs cavil with the proposition that there is no juridical advantage in their respective proceedings (and, conversely, point to perceived disadvantages in the Wigmans proceeding).

AMP's position

92 While AMP does not make any submissions expressly in response to the abuse of process argument raised by Ms Wigmans, it is inherent in AMP's argument that only one proceeding should be permitted to continue and that AMP maintains that it would be an abuse of process for all proceedings to continue through to a contested hearing.

Determination of the abuse of process argument

93 In *Wileypark v AMP*, Allsop CJ (with whom Middleton and Beach JJ agreed) said the following (at [17]-[18]):

> The decision as to how to manage competing class actions is quintessentially a case management issue to be answered by reference to all the circumstances at hand. Such circumstances will involve the kinds of considerations to which I have already referred, including the definition of the classes, whether they are open or closed, the issues raised in the causes of action pleaded, the apparent quality of the pleading, the terms of any funding agreement and any other surrounding and relevant circumstances. The timing of any such decision will likewise depend on all the circumstances.
>
> Ordinarily, little weight should be given to the factor of reaching the Court first in circumstances where all courts should be astute to protect the best interests of all group members, not the desires of the promoters and managers of the litigation (in particular, the commercial funders and the lawyers) to be first to the filing gate. Beyond that broad recognition of the position of those involved, there are specific dangers involved in giving weight to first filing. It involves an encouragement for hasty preparation and lack of mature reflection. In some cases, mature reflection enables it to be appreciated that there is a need for preliminary discovery to assess the strength of a possible case. Further, commercial decisions about funding made in haste to get in first may interfere with decisions about the interests of group members. Haste may also lead to less focused pleading and preliminary analysis which may undermine, not reinforce, the policy objectives of modern dispute resolution and court statutes. Using such a first-is-best approach may deny the Court the ability to make a considered and balanced case management decision as to which action or actions proceed conformably with the interests of all group members and any properly considered prejudice of the respondent. This is not to countenance delay; it is to deprecate any approach where any real weight is given to the first-in-best-dressed approach for those promoting and managing this kind of litigation.

94 Further, at [23], his Honour said:

> ... What does need to happen, however, is that a careful and balanced case management analysis be made as to which one or more of the five proceedings go ahead to resolve the issue for the lead plaintiff or plaintiffs and group members, and on what terms. This is an important decision, not without its commercial and professional aspects. To this question the interests of group members are paramount. At the risk of criticism for repetition, it should be obvious that this important decision, so vital to group members, should not be forestalled by an anti-suit injunction seeking to protect the first suit filed.

95 Unsurprisingly (given the views I have already expressed albeit in a different context – see the decision in *Wigmans v AMP Ltd* [2018] NSWSC 1118) as to the importance of the principle of comity, and having regard to the desirability of a uniform approach as between the Federal Court and this Court to issues of this kind, it would take some persuading for me to be convinced that I should not follow the approach so readily discernible from the above considered *dicta* of the Full Court. As it is, that issue does not arise, since I am firmly in agreement with the proposition that the issue of multiplicity of proceedings in the present case gives rise to an issue to be determined by reference to case management principles (and that the commencement of the subsequent proceedings and their continuation up to the point is not an abuse of process).

96 In *Henry v Henry*, the plurality (Dawson, Gaudron, McHugh and Gummow JJ) (at 591) said that it is *prima facie* vexatious and oppressive, in the strict sense of those terms, for a party to commence a second or subsequent action if there is already an action pending with respect to the matter in issue. I accept that the dicta there was not limited to the position where the same plaintiff was one of the parties in the second proceeding and that one of the considerations there taken into account was the stage the proceedings had reached. However, as Perram J observed in *Oliver v CBA* (at [2]), representative proceedings give rise to complexities in this area, pointing to the possibility of proceedings brought by the representatives on the one hand and proceedings brought by those represented on the other (which is precisely the case here) and that the proposition to be drawn from *Henry v Henry* is that it is not

necessarily the case that the proceeding filed first will go forward. Perram J further noted that members of a class are not parties to the proceedings unless they choose to be one of the nominated representative parties (and see *King v AG of Australia Holdings Ltd* [2002] FCA 1560 at [9] (Moore J) and *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957 at [35]-[36] (Sackville J, as his Honour then was).

97 At the time each of the subsequent representative proceedings was commenced, the opt-out regime had not been concluded in the Wigmans proceeding (it had not even been commenced). None of the competing representative plaintiffs can, therefore, be said to be a party to the Wigmans proceeding (albeit that each is a member of the class that Ms Wigmans seeks to represent). Nor is it apparent that any of the competing representative plaintiffs were aware of precisely the way in which Ms Wigmans' claims were couched in her commercial list statement (so as to be able to form a view as to whether his or its subsequent proceeding was "essentially duplicative"); and in fact there is now a live debate as to whether that is the case in any event. (Pausing here, I note that Ms Wigmans does not put her abuse of process argument on a subjective awareness basis, it is submitted that the argument would have the same force if the timing was "purely co-incidental" thought it was accepted that resolution of the issue as to abuse of process might be a "matter of debate" where there was only a small difference in timing (see T 21). Further, it was submitted that one could infer that the commencement of the first proceeding was well known to informed observers (T 21).)

98 I do not accept that the commencement of any of the competing representative proceedings was an abuse of process. My conclusion in that regard is reinforced by the fact that the legislation in relation to representative proceedings contemplates that there may be more than one proceeding in relation to the same dispute (if, for example, a member of the class opts-out of the representative proceeding but maintains a separate claim in his, her or its own right). The point at which an abuse of process argument would in my view have force would be after the conclusion of the opt-out regime (assuming more than one of the open class proceedings were permitted to continue to

that stage), if a member of the class in one set of proceedings chose not to opt out of that proceeding but also at the same time sought to pursue a separate proceeding seeking substantially the same relief arising out of substantially the same set of facts against the same defendant. As this has not here occurred, I am not persuaded that there is at this stage any abuse of process.

Case management principles – Ms Wigmans' "first-filed" argument that there should be no multifactorial analysis

99 As to the second basis on which Ms Wigmans seeks a stay of the competing proceedings (namely, by invoking the general power the Court has to control its own process), Ms Wigmans points to the observations by the Full Court that this power extends to ordering a permanent stay "as the occasion demands", not constrained by any necessity for the case to fit into a specific category (see *GetSwift Appeal* at [125]-[126]); and (at [122]) that the power is enlivened where multiple class actions brought primarily against the same respondent, in respect of substantially the same claims, and on behalf of the same group members, are likely to:

> … (a) involve increased use of judicial and Court resources; (b) move more slowly and less efficiently through the interlocutory stages; (c) incur increased legal costs on the applicants' side which (if the cases are successful) will ultimately be paid by group members out of the same pool of available settlement or judgment monies; and (d) incur increased legal costs on the respondent's side through the requirement to defend three proceedings rather than one....

Ms Wigmans' position

100 In a similar vein to the submissions made by her as to abuse of process, Ms Wigmans submits that, in determining which proceeding(s) should be stayed and which should be permitted to continue, and having regard to the overriding purpose in s 56 of the *Civil Procedure Act*, the Court should ordinarily favour the first-filed proceeding where: the subsequent proceedings offer no juridical advantage to the first-filed proceeding; the first-filed proceeding is more progressed; the continuation of the subsequent proceedings would interfere with and impede the progress of the first-filed

proceeding; and legitimate concerns of group members may adequately be addressed through the ordinary interlocutory mechanisms of Pt 10 of the *Civil Procedure Act*. It is submitted that such an approach is preferable, from a case management perspective, to inviting and conducting a "complex, expensive and unseemly auction process".

101 Ms Wigmans argues that there are good policy reasons for the adoption of a clear cut approach that the first in time, regularly commenced, proceeding is to prevail, namely to avoid the need to speculate about the future conduct of the proceedings at an early stage on information which will be incomplete at best; to promote the just, quick and cheap resolution of the proceedings by avoiding the lengthy delay that applications of the present kind inevitably otherwise involve; to promote certainty for representative plaintiffs, their lawyers and funders at the time of commencement of a representative proceeding; and to maximise the period of recovery for group members where pleaded claims are subject to a statute of limitations.

Competing representative plaintiffs' position

102 Broadly speaking, all of the competing representative plaintiffs submit that Ms Wigmans' alternative argument (that the Wigmans proceeding should be preferred on case management grounds because of a principle favouring the first-filed proceeding) should be rejected. It is submitted that such an argument does not strike an appropriate balance between the important overriding purpose mandated under the *Civil Procedure Act* for the just, quick and cheap resolution of disputes and the Court's "onerous" protective and supervisory role in relation to group member interests.

103 As to the case management procedures relied upon by Ms Wigmans (see [56]-[58] of Ms Wigmans' submissions) in this regard, concern is raised by the competing representative plaintiffs as to the limitations of such process (see, for example, Fernbrook's reply submissions). For example, it is submitted by Wileypark that, if it were to eventuate that incentives regarding the incurring, and level, of legal costs were in fact having an inappropriate influence on the

conduct of proceedings, by the time this became evident it would be unlikely to be feasible to install a different funding structure or a different solicitor and funder, without undue expense and delay.

Determination

104 I have no difficulty with the proposition that the issue of multiplicity of proceedings should be approached by reference to case management principles (and that in so doing the overriding purpose mandated by s 56 of the *Civil Procedure Act* must be steadfastly borne in mind). What I do not accept is that the present applications should be determined without consideration of the factors articulated as being of relevance in cases such as the *GetSwift* proceedings. In this context, Fernbrook's submission (that, if Ms Wigmans' submission on abuse of process were to be a correct statement of the law then the other proceedings should not have been commenced (or at least not on an open class basis), in which case there would be no alternative funding models proposed by other solicitors and funders before the Court at the time a funding commission is set; and hence acceptance of Ms Wigmans' submission would reduce the competition amongst solicitors and funders which is beneficial to group members) has obvious force.

105 To accept a principle favouring the first in time proceeding would, in my opinion, fail to give weight to the admonition (on understandable policy grounds) in *GetSwift Appeal* against encouragement of a "first mover" advantage. Rather, I consider that the circumstances in which the respective proceedings were commenced should be taken into account as part of the suite of factors to be considered in determining what is in the overall best interests of group members (having regard also to an outcome what will not occasion unfairness to the defendant in the particular case; here, AMP).

Consolidation motion

106 It is convenient at this point to deal with the consolidated motion. The circumstances leading to the consolidation application are outlined in the affidavit affirmed 21 November 2018 of Fernbrook's solicitor, Mr Hardwick,

and [7] to [10] of the affidavit sworn 22 November 2018 of Komlotex' solicitor, Mr Watson. As noted earlier, Mr Hardwick has deposed that in his opinion the terms on which the solicitors for Komlotex propose to conduct the proceeding offer the best likely result for group members. Fernbrook has agreed to retain Maurice Blackburn if the two proceedings are consolidated. Fernbrook submits that in those circumstances its solicitors and funder have acted responsibly in reaching an accommodation with Komlotex and its solicitors. Fernbrook submits that neither AMP nor other group members will be prejudiced by the consolidation. It is noted that in *GetSwift Appeal* the Full Court spoke approvingly of consolidation of competing class actions (see at [46]-[51]; [161]; [274](a)), particularly where there will be only one set of applicant's solicitors going forward.

107 There was no opposition by AMP to the consolidation of the two proceedings.

108 Some criticism is made by others of the representative plaintiffs as to the manner in which the costs of the Fernbrook proceeding are proposed to be dealt with under the funding arrangements proposed by Komlotex. Mr Georgiou, for example, submits that the consolidation provides no substantial benefit to the Court (as the Court is still required to adjudicate in respect of the remaining four competing class actions) and that the proposed payments to Slater & Gordon and Therium do not advance the interests of group members. It is submitted that the proposal to seek to recover an amount for Slater & Gordon's costs on a successful resolution can only be to the disadvantage of the group members; and that there is no clear explanation on the evidence as to why Slater & Gordon, Therium and Maurice Blackburn entered into the relevant arrangement.

109 In that regard, Fernbrook submits that the commercial agreement reflected in Maurice Blackburn's commitment to pay $500,000 toward Fernbrook's pre-consolidation costs, in the event of a successful resolution of the proceeding, is to the advantage of group members in that it reduces the amount of Fernbrook's pre-consolidation costs for which approval for payment out of the resolution sum may be sought. Fernbrook says that pre-consolidation costs

becoming costs in the consolidated proceeding is an ordinary aspect of consolidation of proceedings. It is noted that whether any amount of Fernbrook's pre-consolidation costs is approved for payment out of a resolution sum is a matter the Court would consider at the time of settlement approval. Fernbrook, thus, says that the proposal that on consolidation of the Fernbrook and Komlotex proceedings, a sum in respect of Fernbrook's pre-consolidation costs will be paid from the resolution sum (beyond the amount that will be paid by Maurice Blackburn) is no reason to stay the Fernbrook proceeding at this stage or not to grant the application to consolidate it with the Komlotex proceeding. (Reference is here made to the situation with which Merkel J dealt in *Johnson Tiles*.)

110 Further, insofar as Ms Wigmans has suggested that the obvious alternative to consolidation would have been for the Fernbrook proceeding to be stayed (and where both Wileypark and Mr Georgiou have "cast aspersions" on the proposal for consolidation), Fernbrook submits that none of the reasons identified in *GetSwift Appeal* as supporting the primary judge's decision permanently to stay the two competing proceedings in that case has application in the context of the proposed consolidation of the Fernbrook and Komlotex proceedings, noting that the Full Court there said (at [122]):

> In the present case the primary judge reached the view that allowing the continuance of three competing class actions was likely to be more expensive for the parties and group members and less efficient than staying two of the cases and allowing only one to proceed. We would respectfully agree.

111 Fernbrook submits that none of those adverse effects will be present if the Fernbrook and Komlotex proceedings are consolidated and that the occasion to consider a stay of the Fernbrook proceedings does not arise.

Determination as to consolidation

112 I consider that there should be an order for the consolidation of the Komlotex and Fernbrook proceedings. I see no relevant prejudice to AMP by an order for consolidation (and there was no opposition by AMP to such an order). Nor do I see any relevant prejudice to group members in circumstances where the

issue of the pre-consolidation costs of the separate Fernbrook proceeding will fall to be dealt with in due course as part of the approval of any settlement or in the final judgment after a contested hearing. I will, therefore, make the consolidation order as sought.

Multi-factorial analysis

113 I have outlined already Ms Wigmans' position that the issue as to the multiplicity of suits should not be resolved by way of a multi-factorial "*GetSwift*-style" analysis. While I consider there to be substance in the complaints made by Ms Wigmans as to the some of the aspects of such an exercise (at least as it has been carried out in the present case), I do not accept that undertaking such an exercise is not here warranted; nor do I accept that it is inimical to the overriding purpose mandated in the *Civil Procedure Act*. True it is that there has been delay (and inevitable cost) occasioned by the preparation for, and hearing of, the multiplicity motions. However, even if the abuse of process/"first in time" case management submissions put for Ms Wigmans were to have been adopted, it would still have been necessary (on Ms Wigmans' articulation of the principles) to carry out an analysis of the respective proceedings in order to identify any relevant juridical advantage or juridical disadvantage (since on her argument it is only where the subsequent proceedings are essentially duplicative and offer no juridical advantage that there is an abuse of process by reason of their commencement and/or continuation).

114 I have broadly summarised Ms Wigmans' position in relation to any such analysis if, contrary to her submissions, were such an exercise to be undertaken. Before turning to a consideration of the factors that have been recognised as being of relevance on such an exercise (and the parties' submissions in that regard), it is convenient at this stage briefly to summarise the position of the other representative plaintiffs on the issue as to how to deal with the multiplicity of proceedings.

115 Komlotex submits that the similarities between the circumstances now facing the Court and those recently considered by the Full Court in *GetSwift Appeal* are such that, consistently with the Full Court's reasons, a stay of all but one of the competing proceedings is the appropriate remedial response to the current multiplicity issue; and that (assuming the consolidation motion to be successful) the consolidated Komlotex/Fernbrook proceeding should be found to be the preferred vehicle for advancing group member claims when regard is had to the Full Court's observations as to the preferred case selection process (in particular, its primary focus on which vehicle is most likely to maximise group member recoveries).

116 In this regard, Komlotex argues that it is the preferred vehicle for two main reasons: first, the experience of its solicitors, Maurice Blackburn, in conducting large shareholder class actions and the preparedness of Maurice Blackburn to conduct the proceeding at its own risk without the support of a third party funder; and, second, that its proposal to conduct the proceeding without a third party funder or CFO means that group members will be better off in any settlement or judgment scenarios involving a substantial payment to group members, when the costs of the competing proceedings are modelled on a standardised basis. Komlotex also points to the certainty going forward as to its funding structure compared with the position of those other funding models which contemplate the seeking of CFOs (in light of the challenges made to the respective Court's power to make CFOs that were before the Court of Appeal and the Full Court earlier this year – *Brewster Appeal* and *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34, respectively; from which decisions the High Court has now granted special leave to appeal – cases S102/2019 and S105/2019 respectively).

117 Komlotex submits that: it is unnecessary to allow the continuance of duplicative class actions to permit access to justice as the group definition in the Komlotex/Fernbrook proceeding covers all group members in the competing proceedings (other than a small number of potential group members in the Wigmans proceeding, (namely those who acquired shares on 16/17 April 2018, whose losses it submits are doubtful or, at best, marginal –

propositions which are disputed by Ms Wigmans); there is no compelling evidence to suggest that the interests of the plaintiffs or of any group members would be best served by more than one open class action progressing; and, if multiple proceedings are allowed to proceed, this will lead to increased costs and inefficiencies which will be visited on AMP and (ultimately) group members, and will place additional strain on Court resources. (In this regard, Komlotex does not dispute AMP's evidence.)

118 Wileypark contends that Ms Wigmans' position as to how to deal with the multiplicity of proceedings is contradictory (and not in the best interests of group members), in the sense that Ms Wigmans asserts that her proceeding is superior but nevertheless calls for the Court not to embark upon a multifactorial "*GetSwift*-style" analysis (in which differences in the proceedings would be examined). It is submitted that Ms Wigmans' position in this regard cannot be reconciled with her obligation to act in the best interests of group members or the Court's paramount concern for the interests of group members (noting that, in representative proceedings, the role of the court has been recognised as important and onerous, and protective; referring to what was said in *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8]). Wileypark maintains that if the Wigmans proceeding (and not the Wileypark proceeding) were to go forward as the only open class proceeding, there would be causes of action that have been pleaded in the Wileypark proceeding that would not be ventilated on behalf of the group members constituting the open class; and there would be a significant number of group members within the scope of the Wileypark proceeding (who acquired shares off-market) who would not be within the scope of the Wigmans proceeding.

119 Mr Georgiou's position is that an outcome in which all but one of the competing class actions is stayed is the best way to advance the administration of justice, on the basis that this: minimises or reduces the duplication and waste that necessarily occurs if multiple proceedings advancing substantially the same claims for the same group members are permitted to continue; and causes no prejudice to group members (and is

likely to advantage group members) if the proceeding that is most likely to achieve the best result for group members is permitted to proceed. He submits that any alternative remedial response is likely to result in inferior outcomes for group members.

120 Mr Georgiou submits that the Georgiou proceeding is to be preferred in circumstances where: the claims made in the Georgiou proceeding are an appropriate vehicle to advance the interests of group members; based on the experience of the competing class actions to date, there can be confidence that Mr Georgiou's legal team will act in the best interests of group members (noting that it has not engaged in any conduct that provides limited or no benefit to group members such as the seeking of any anti-suit injunction or an unnecessary bookbuild); that Augusta has an advantage over other funders in that its staff are admitted legal practitioners in this jurisdiction (and noting that Maurice Blackburn, as funder of the Komlotex proceeding, has adduced no evidence of its financial capacity to meet its funding obligations); that the funding model proposed for the Georgiou proceeding provides an appropriate balance between risk and reward, avoids the possibility of windfall gains that exist in the other funding models, and reduces the risk of conflict that is particularly evident in the Komlotex proceeding; and that the solicitors in the Georgiou proceeding have advanced the most detailed costs estimate (especially compared to the Wileypark proceeding estimate and the Wigmans proceeding estimate). It is submitted that the costs incurred in the Georgiou proceeding are likely to be similar to that estimate, and substantially less than the costs incurred in the Komlotex proceeding; and that the likely return to group members in the Georgiou proceeding is at least similar to, if not superior to, the likely outcomes in the other proceedings (other than the Wigmans proceeding which, on most realistic scenarios, is said to produce an inferior result).

Relevant factors

121 At the outset, it is worth setting out the factors to which Lee J had regard in comparing the competing proceedings in *GetSwift* (though the Court is not

confined in the factors to which it may have regard in this exercise and not all of those considered by his Honour may here be relevant). At [169], his Honour identified those factors, as relied upon by the parties in those proceedings, as follows (in some cases by reference to the judgment of Beach J in *Bellamy's*):

(a) the experience of the legal practitioners involved in each of the actions (see *Bellamy's* at [71(a)]);

(b) the resources made available by each firm of solicitors and their accessibility to clients (see *Bellamy's* at [71(d)]);

(c) the state of preparation of each proceeding (see *Bellamy's* at [71(e)]);

(d) the position offered by each funder on security for costs and the resources available to fund the costs of the applicant and adverse costs (so as to provide certainty for group members) (see *Bellamy's* at [71(h)], [74]);

(e) the respective merits of the common issue cases as pleaded or as foreshadowed (including the contention the Perera Proceeding and Webb Proceeding are subsets of the McTaggart Proceeding);

(f) the respective strength of the individual cases of the representative applicants;

(g) the decision or choice of some group members to enter into funding agreements (in the case of the Perera Funded GMs and the McTaggart Funded GMs) and retainer agreements (in the case of the Perera Funded GMs);

(h) the relative numbers of the Perera Funded GMs and the McTaggart Funded GMs (and the absence of any funded Webb group members) (see *Bellamy's* at [71(f)]);

(i) the lack of a contractual deadlock provision in the Webb Proceeding funding arrangements and the alleged existence of a 'moral hazard';

(j) the estimated costs deposed to by each of the applicants' solicitors (see *Bellamy's* at [71(b)]);

(k) proposals made or adopted by the applicants to reduce and control costs, including 'caps';

(l) proposals made or adopted by the applicants to reduce and control expert costs;

(m) public policy issues bearing upon Mr Webb's position;

(n) the comparative consequences of a permanent stay, closure or declassing order in each proceeding would have on those affected by such an order.

122 Two considerations that his Honour expressly omitted from that list were: first, the common fund structure proposed by each of the applicants (which his Honour considered an important issue but dealt with later in his reasons) (see [170]); and, second, the order in which the proceedings were commenced (which his Honour considered was not to be given any weight). His Honour there identified the deleterious consequences from a public policy standpoint "if 'first in time' was a consideration in and of itself" as including, not only that it would encourage a race to the Registry but also that it would:

> … (a) potentially reward and serve to encourage the analytical work I described at [11]-[12] above to be performed hastily; (b) force decisions to be made as to whether a case should proceed (and if so, how) under pressure and without mature reflection; (c) require funding terms to be negotiated against the metaphorical background noise of a 'tick-tock'; (d) likely result in poorly thought through originating applications and pleadings; and (e) undermine the policy objectives of the *Civil Dispute Resolution Act 2011* (Cth) and pose a real risk that insufficient attention would be given by an applicant to making a sincere and genuine attempt to resolve the dispute prior to commencement.

123 His Honour went on, at [170] to say:

> This does not mean that delay could not be relevant in considering the respective merits of competing class actions. It is easy to imagine circumstances where delay (in the sense of tardiness) would be an important, indeed decisive, consideration. The important point is not to reward or encourage the opposite vice, that is, haste. In any event, for present purposes, any considerations as to timing can be put to one side as there was no delay evident here, as each applicant moved promptly and with evident care.

124 In the Full Court, the relevant factors "to be considered and balanced in a qualitative appraisal" were identified (at [195]) as including:

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

(b) the theories advanced by counsel as being supportive of the claims advanced;

(c) the state of each class action including preparation;

(d) the number, size and extent of involvement of the proposed representative applicant;

(e) the relative priority of commencing the class action;

(f) the resources, experience and competence of counsel; and

(g) the presence of any conflict of interest.

their Honours there citing *Sharma v Timminco Ltd* (2009) 99 OR (3d) 260 at [17] per Perell J referring to *Vitapharm Canada Ltd v F. Hoffmann-La Roche Ltd* [2000] OJ No. 4594 at [49]).

125 Relevantly, the Full Court observed (at [195]) that, on a carriage motion, "the predominant theme underpinning the decision as to which proceeding goes forward is what is in the best interests of all group members, although fairness to the respondent is a consideration" (citing *Locking v Armtec Infrastructure Inc* 2013 ONSC 331 at [7] and [8] per Molloy J) and said that:

> The primary concern is to determine which of the competing actions is more likely to advance the interests of the class: *Mancinelli v Barrick Gold Corporation* (2015) 126 OR (3d) 296 at [18] per Harvison Young J.

126 I propose to address the relevant factors identified by the parties on the present applications in the following order: first, the competing funding proposals, costs estimates and net hypothetical return to members; second, the proposals for security; third, the nature and scope of the causes of action advanced (and relevant case theories); fourth, and to some extent following on from the third, the size of the respective classes; fifth the extent of any bookbuild; sixth, the experience of the legal practitioners (and funders, where applicable) and availability of resources; seventh, the state of progress of the proceedings; and, lastly, the conduct of the representative plaintiffs to date.

1. Funding proposals, costs estimates and net hypothetical return to group members

127 I address this factor first, noting the emphasis placed by the Full Court in *GetSwift Appeal* on the identification of the proceeding with a funding and costs model likely "best [to] motivate the applicant's solicitor and funder to work assiduously to achieve the best outcome for the applicant and group

members and to take reasonable risks in that regard" (see at [277]); the admonition against focus on the lowest possible costs and funding charges in any selection process (the Full Court having cautioned at [276] that "undue focus" to lower costs and funding charges is likely to promote a "'rush to the bottom' by funders and solicitors keen to win the tender"); and the emphasis by the Full Court that the single most important determinant of the net recovery achieved by group members is not the quantum of legal costs but the amount of the settlement or judgment achieved (at [278]).

128 I have already summarised the funding model proposals put forward by the competing representative plaintiffs (see [55]ff). Below, I set out the advantages perceived to arise from (and, conversely, the criticisms raised against) each of the different funding models, as outlined in the respective written submissions and articulated in oral submissions; and consider the application of those models in the present case (by reference to the estimated costs of the respective proceedings).

129 First, however, I address the admissibility of the two expert reports relied upon by Ms Wigmans, namely, the two reports prepared by Professor Michael Perino: an initial report of 6 November 2018 and a supplementary report of 22 November 2018 (after Professor Perino had been provided with additional information regarding the competing proposals). Objection was taken by Wileypark at the hearing of the present applications to the admission of those reports into evidence and they were only provisionally admitted on the basis that I indicated I would rule on that issue in my final reasons. (Even if admitted, the competing representative plaintiffs generally submit that little weight should be placed on them.)

130 For the reasons that follow, I am of the view that Professor Perino's reports should not be admitted into evidence but that, even if they were, they would not have affected the conclusions I have reached as to which of the competing representative proceedings should be permitted to proceed.

Professor Perino's reports

131 Ms Wigmans argues that this evidence supports the conclusion that the funding proposal in the Wigmans proceeding best advances the interest of group members, because the incentives it creates best align the interests of group members and those who conduct and fund the proceeding on their behalf. In Professor Perino's words (see [1.5] of the initial report) the CFO proposal submitted by Ms Wigmans "promises to create the best incentives because it is the only proposal based on a rising scale that is effectively tied to the amount recovered for the class".

132 In order to consider Wileypark's objection to the two Perino reports, it is necessary to consider in some detail the content of the reports in question.

133 The initial report was written with the assistance of Professor Silver. Both Professor Perino and Professor Silver are academics who have written in the area of class action litigation in the United States; and they together collaborated on an empirical study of fee awards in securities fraud class actions (see [3.3] of the initial report). Both have served as expert witnesses "in many class actions in the United States" (see [3.4]). It is not apparent from the reports that either has conducted class action litigation (or securities class action litigation, for that matter) as a practitioner. Professor Perino makes clear that his expertise involves primarily United States class actions "which operate under different procedural rules" than those in this country. Wileypark emphasises that there is no evidence that Professor Perino has any experience in the actual conduct of class action proceedings – his experience being in "studies of class actions" (see T 52) and as a professional expert witness. Wileypark also emphasises that such experience as Professor Perino has is in relation to US class actions, which operate in a different litigious regime.

134 Professor Perino was asked to opine, with respect to the economic incentives on litigation funders, representative plaintiffs and the plaintiffs lawyers, as to

which of the following four different funding models better advances the interest of group members (see [4.1.1]):

(a) a percentage of the settlement sum, where the percentage increases over time (**staged percentage**);

(b) a percentage of the settlement sum which is fixed (**fixed percentage** or **flat percentage**);

(c) a multiple of costs incurred, where the multiple of costs increases over time (**staged multiple**); or

(d) a multiple of costs incurred, where the multiple is fixed (**fixed multiple**)?

135 The short answer to that question (see [6.2]) by Professor Perino was:

> … The increasing commission model tied to the recovery for the class best incentivizes the entity funding the proceeding to continue to provide funds needed to obtain a higher overall recovery because the funder's commission grows as litigation progresses This provides the motivation needed to continue to bear the added costs and risks that the aggressive pursuit of higher recovery levels entails.

136 In addressing that question, Professor Perino started by discussing four general principles that he considered relevant to setting funding terms in class actions: the importance of setting those terms when the litigation commences; the limitations inherent in any compensation structure to align perfectly the incentives of principals and their agents – see the heading to [6.8]-[6.16]; the incentive advantages that apply to funding scales that rise with the size of recovery; and the effect of risk on litigation incentives. (Professor Perino suggests that Australian funders bear larger risks than US class action attorneys because in the United States there is not a “loser pays” system (see [6.6]).)

137 As to the third of those four general principles, Professor Perino points out that none of the proposed CFOs submitted in this litigation contains a scale of commission percentages that rises with recovery alone ([6.20]) but considers that the CFO proposed by Ms Wigmans resembles such a scale “because it ties the commission percentage to the duration of the case”. Professor Perino opines that:

> The connection to time is important because cases that generate large recoveries tend to take longer to resolve than others and to require more resources. Indeed, case length is a particularly salient characteristic to consider here because there is evidence to suggest that class actions take longer to resolve in Australia than they do in the U.S.. [reference omitted]

138 Pausing here, I note that Wileypark objects to the reliance on one empirical study referred to in [6.20] of the report to conclude that class actions take longer to resolve in Australia (referring to *Ringrow Pty Ltd v BP Australia Ltd* (2003) 130 FCR 569; [2003] FCA 933 for the proposition that the opinion rule does not trump the hearsay rule so as to allow Professor Perino "just to refer to another author and say what they [sic] say". In any event, the complaint is that there is no transparency in Professor Perino's reasoning process (see T 52-T 53) here or elsewhere in the report.

139 Professor Perino refers (at [6.21]) to empirical research by Cornerstone Research (described as "a leading economic consulting group that follows securities class actions closely") that, he said, "connects recovery size to case duration" and to the observation that he says was made by that consulting group that "[h]istorically, cases that have taken longer to settle have been associated with higher settlements". (Professor Perino states that the research quantified the difference by reference to the median settlement amount for cases that settled within two years and those that settled after more than two years.) Professor Perino refers to his own research by reference to the number of "docket entries" associated with a case at the time of settlement, using this as a measure of litigation effort and says that "class members recover larger amounts and a greater percentage of the dollars at stake as effort increases" ([6.22]). His conclusion at [6.23] is that:

> In short, larger litigation outlays enable shareholder classes to litigate for longer periods and to hold out for larger settlements. Ms Wigmans' CFO is the only one with a scale that ties the funder's compensation to the duration of the case. Consequently, it compares favourably to the other proposed CFOs

140 Wileypark again complains that the reference to research does not identify what that research was and simply leads to bare assertions (or submissions) – see T 54, referring to [6.28]).

141 Professor Perino then addresses the effect of risk on litigation expenses, considering the differences in incentives created by flat scales as opposed to scales that rise as litigation continues; saying (at [6.25]) that:

> … The settlement amounts are not sure things. Whenever the funder spends more, the defendant may counter by working more aggressively to defeat the plaintiffs' claims. There is always a risk, which the funder must assess in real time, that additional outlays will be lost.

and at [6.26]-[6.27]:

> Whether the funder will expend the resources needed to climb from lower recovery levels to higher ones depends on an assessment of whether the expected gain exceeds the expected loss, given the risk involved. This condition is more likely to be met under the rising scale.
>
> …
>
> On the rising scale, by contrast, the gamble becomes more favourable as the case ages, precisely the right incentives *because the last dollars in the case are likely the ones that will be the most difficult to obtain*. In the first year, the incentives are the same as those created by the flat scale. … To be sure, these amounts [an additional return postulated on the additional outlay in following years where there is a rising scale] must also be reduced for time and risk. But the point remains that by awarding an increasing percentage the agent now has more reason to spend that time and bear those risks. [my emphasis]

142 At [6.29], Professor Perino, apparently referring to the observation in his previous paragraphs ([6.27] and [6.28]) states:

> This observation raises a particularly crucial point about the funding arrangements in this matter. Because these arrangements are specified in a CFO, the defendant will be fully aware of what they are and the incentives they create. This knowledge gives the defendant significant negotiating leverage. For example, if the defendant knows that an agent's compensation will be capped at a specified amount regardless of any additional recovery for the class, it will know that the agent will have little appetite for a fight to obtain those extra dollars. By contrast, when the defendant knows that the agent's compensation rises with time and recovery, the agent can credibly commit to litigating the case fully.

143 At [6.30], Professor Perino says:

> A rising scale is also beneficial because the agent's temptation to settle strengthens as a lawsuit progresses. One of the most robust findings of behavioural economics is loss aversion. Loss aversion, which causes agents to weigh losses more heavily than they value equivalent sized gains,

> intensifies as sunk costs increase. This makes opportunities to recoup sunk costs by settling for less than the maximum possible settlement seem increasingly attractive as litigation progresses and costs mount. To offset loss aversion, potential gains must increase as well. Because the rising scale offers higher rewards over time, it better motivates agents to bear risks that class members would rationally want them to take. [reference omitted]

144 That point is again emphasised at [6.32]:

> It bears repeating that the rising scale is superior because monitoring is expensive and imperfect. If class members could monitor their agent perfectly, a compensation plan based on hourly rates or dollars expended might work very well. The class members could simply tell the agent to keep working until the optimal point was reached. In fact, monitoring is highly imperfect. The incentive arrangement must therefore carry the bulk of the load by yoking the class' fortunes and the agents' fortunes together. Rising percentages do this better than flat or declining percentages.

145 Professor Perino was next asked to apply the principles he had described to the specific proposals. His short answer at [7.2] is that:

> … Because Ms. Wigmans' CFO contains a staged percentage model that rises with the class' recovery and with the time it takes to obtain that recovery, it best aligns the incentives of the class and the funders.

146 As to his assessment of the competing proposals (see from [7.3]), Professor Perino notes the following:

> 7.3.1. Ms. Wigmans' CFO contains a rising scale of percentages, according to which the funder's commission starts at 10 percent of the recovery if the litigation resolves on or before 30 June 2020, rises to 15 percent the following twelve months, and rises to 20 percent if the resolution occurs at any time on or after 1 July 2021. The funder's compensation is tied directly to the overall size of the judgment or settlement obtained for the class.
>
> 7.3.2. Mr. Georgiou's CFO proposal does not disclose the precise percentages the funder would charge, making it impossible to assess whether it is better or worse for the class. Nonetheless, other aspects of this proposal are superficially similar to Ms. Wigmans' CFO. It is reasonable to presume that the percentages the funder obtains would rise over time. And the relevant time periods are similar to those contained in Ms. Wigmans' CFO.
>
> 7.3.3. There is, however, a key difference. Rather than tying the commission percentage to the amount recovered for the class, Mr. Georgiou's CFO ties the funder's compensation to the amount spent on the litigation. This compensation method can create an obvious conflict by rewarding the funder for spending additional amounts that

> are not reasonably calculated to increase the recovery for the class. … Recognizing this problem, Mr Georgiou's CFO proposes to engage a Legal Costs Consultant (Costs Consultant) who will regularly review the reasonableness and fairness of the legal costs that the solicitors charge or propose to charge. The Cost Consultant, whose fees will be deducted from the class' recovery, is a poor substitute for a compensation plan that rewards a funder only for spending dollars that are expected to make class members better off.
>
> 7.3.4. The Wileypark-Fernbrook CFO is based on the lesser of (a) a flat 10 percent of the net recovery, regardless of its size or (b) three times the Multiple Expenses, a defined term that is capped at $4.5 million. The maximum compensation the Wileypark-Fernbrook funder can earn is $13.5 million, which may take the form of a 10 percent commission on the first $135 million recovery or three times $4.5 million in Multiple Expenses. Once the recovery reaches $135 million, the funder gains nothing by holding out for more. Once the Multiple Expenses exceed $4.5 million, the funder gains nothing by spending more.

147 Professor Perino also considers it notable about "all of these CFOs" "appear to be considerably below the funder commissions that are typical in Australian class actions" (see [7.4]). He accepts that he knows less about the customary size of funders' commissions in Australia than about lawyers' fees in the United States, but says that both appear to fall into the same range. He refers to the reference by Lee J in *GetSwift* (at [37]) citing *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 to the effect that "the percentage a funder receives varies from case to case, but most commonly falls within a range of 25% to 40%" and to a 2010 report by Professor Vincent Morabito, of Monash University to the effect that litigation funders received "[approximately 29.61% of the $311 million in proceeds recovered in the cases they assisted" (Vincent Morabito, *An Empirical Study of Australia's Class Action Regimes, Second Report: Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (Sept 2010)), noting that Professor Morabito's finding is consistent with Lee J's observation.

148 Professor Perino says that the reason for the disparity between the fee proposals in this matter and traditional class action funding fees is not clear, postulating as one reason that commissions are declining because the market for funding is becoming more competitive but, as another possibility, that funders may be caught up in a "race to the bottom" whereby they gain control

of cases by accepting smaller commissions than their competitors, then earn profits and minimise risks by settling cheaply and quickly (see [7.5]-[7.8]). At [7.8] he says:

> A "race to the bottom" is likely to emerge when judges treat funders as bidders in reverse auctions, where the bidder who agrees to charge the smallest amount for funding services wins the competition. It is important to consider the possibility that a reverse auction is playing out here. Just as the cheapest surgeon may not be the best surgeon, the lowest-priced funder may not be the best funder. It may instead be a funder that uses low prices to gain control of cases, which it then settles for a fraction of their value.

149 Professor Perino's view is that compensation tied to expenses creates poor incentives for agents (see the heading to [7.10]-[7.26]). He considers that this compensation method creates a weak alignment of interests between the funder and the class because it endows the funder with a limited interest in the upside potential of the litigation. He also considers that the arrangement proposed by Mr Georgiou creates a conflict when a settlement seems likely (see [7.13], giving as an example a situation where he says the funder's incentive would be to "pour money into the case, whether or not the expenditure increases the lawsuit's value"). As to the proposal (in Mr Georgiou's CFO) that a costs consultant review all litigation activities, Professor Perino says that the US experience with similar arrangements "provides little cause for optimism that this one will work well" ([7.15]) for the following reasons. First, because external monitoring fosters uncertainty about the time and expenditures that will be allowed (which he says causes lawyers "to be overly conservative by triggering their aversion to risk"). Second, because external monitoring encourages gaming as lawyers inflate their billings in anticipation of having some of their charges disallowed. Third, on the basis that Mr Georgiou's proposal anticipates that the class will bear the cost consultant's fees, adding another layer of expenses that will reduce their net recovery. Fourth, because external monitoring assumes that the reviewer "has both good information and appropriate incentives, neither of which is likely to be true". Professor Perino's view is that it is "[b]etter to get lawyers' and funders' incentives right (or as nearly right as circumstances permit) than to rely on monitoring by third parties".

150 From [7.16], Professor Perino reviews the "Wileypark-Fernbrook" proposal (as I understand it, a proposed joint proposal before Fernbrook chose instead to consolidate its proceeding with Komlotex). For present purposes, Professor Perino's review of this proposal is no longer directly relevant.

151 At [7.26], Professor Perino says that, for class representation to work well, at least one agent working for a class should have a financial interest in maximising the recovery; that in Australia, lawyers cannot have this interest because they cannot earn contingent percentage fees and therefore it is essential that funders have this interest and hence that "when it comes to funders the percentage approach should be employed".

152 In his supplementary report, Professor Perino takes into account additional information as to the Georgiou and Wileypark funding models and the information not previously to hand as to the Komlotex proceeding. He says that the changes made to the CFOs in the Georgiou and Wileypark proceedings have not altered the opinions he expressed in the initial expert report.

153 As to the Georgiou proceeding, he says:

> 4.2. The basic structure of the CFO in the Georgiou Proceeding remains unchanged; it is a fixed percentage of the net recovery or a multiple of expenses, whichever is less. A flat percentage fee does not align incentives nearly so well as a fee that rises with increasing recoveries. As I explained in my original report, because agents only capture a portion of the value they create, they may have incentives to stop working before the maximum recovery for the class is achieved. Increasing the percentages agents earn as recovery increases reduces the agent's incentives to skimp on effort.
>
> 4.3. The alternative – compensation based on a multiple of expenses – creates two primary problems. First, it provides a weak alignment of interests between the funder and the class, because it endows the funder with a limited interest in the upside potential of the litigation. Second, it creates a conflict when a settlement seems likely because the funder now has an incentive to increase its expenditures in order to increase its ultimate compensation.

154 As to the Wileypark proposal, Professor Perino says that it is "nearly identical" to the original proposal he reviewed; that the only differences are a minor

change to the definition of Multiple Expenses and a small reduction in the multiple from three to two and a half; and that these changes are "immaterial" ([4.5]). He emphasises that placing a cap on the funder's compensation makes it highly unlikely that the funder will have an incentive to pursue higher recoveries for class members, saying again that:

> 4.6 [c]ompensation caps create poor bargaining leverage with the defendant because the defendant knows that the agent will have little incentive to fight to obtain extra dollars. They effectively create fees that decline with increases in recovery size. As I explained previously, declining percentages create enormous incentives to accept cheap settlements. Reducing that cap, as the final proposal does, merely exacerbates this incentive mismatch.

155 As to his assessment of the Komlotex proposal his opinion is that the proposal to proceed on a "no win, no fee" basis without the aid of a funder does not better advance the interests of group members than Ms Wigmans' proposed CFO ([5.1]). Professor Perino says:

> 5.2. In my original opinion, I commented on the incentives that a "no win, no fee" structure create. While this arrangement gives the solicitors a strong interest in securing a recovery, it does not encourage solicitors to maximize the recovery because it only weakly ties their compensation to the recovered amount. Indeed, by tying the uplift to an $80 million threshold, the proposal in the Komlotex Proceeding gives Maurice Blackburn an incentive to pursue recoveries up to, but not above, that amount. For example, the difference between an $80 million recovery and a $100 million recovery would have no effect on Maurice Blackburn's fee, assuming a constant number of hours expended. The proposed arrangement therefore encourages Maurice Blackburn to accept a smaller settlement instead of holding out for a larger one because, by rejecting the smaller amount, the firm would risk losing its fee without gaining an offsetting share of the case's upside potential. [highlighting in original omitted]

156 Professor Perino goes on to say:

> 5.3. To be clear, I have been provided no assumptions and I have reviewed no evidence about whether $80 million would be a good or poor recovery in this matter, and I express no opinion on that question. However, the relevant funding structure in the Wigmans Proceeding creates an incentive to pursue recoveries above this amount. The no-win, no-fee structure with a 25 percent uplift at $80 million in the Komlotex Proceeding does not. [highlighting in original omitted]

> 5.4. As I explained before, this fee structure is similar to the lodestar method, which had been used for many years in the U.S. The lodestar method, however, is now greatly disfavoured because it is difficult to administer, creates incentives to expend time needlessly and to delay settlement, and makes it easy to game the review process by falsifying hours. Most importantly, by failing to tie compensation to the recovery, the lodestar method creates weak incentives to maximize recovery for the class.

157 Professor Perino's conclusion remains that:

> 5.5. Because the proposed CFO in the Wigmans Proceeding is the only one that provides a rising scale that is effectively tied to the amount recovered for the class (as explained in my initial report), it better advances the interests of Group members.

Determination as to admissibility of Professor Perino's reports

158 To fall within the exception under s 79(1) of the *Evidence Act 1995* (NSW) (*Evidence Act*), evidence must satisfy two conditions: first, the witness must have specialised knowledge based on his or her training, study or experience (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [32] (*Dasreef*); *Honeysett v The Queen* (2014) 253 CLR 122; [2014] HCA 29 at [23]); and, second, the opinion must be wholly or substantially based on that knowledge (*Dasreef* at [32]; *Honeysett* at [23]-[24]). Relevantly, in *Dasreef*, the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Heydon JA, as his Honour then was, in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 at [85] (*Makita*), said (at [37]) that "the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study, or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded". Their Honours later observed that "[a] failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight" (at [42]).

159 In *Makita*, Heydon JA referred (at [67]) to the need for an expert fully to expose the reasoning relied on and went on (at [71]) to say that "[e]xamining the substance of an opinion cannot be carried out without knowing the

essential integers underlying it" and (at [80]) cited Anderson J in *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 (at 390):

> Expert opinion is to be judged like any other evidence. It must be comprehensible and reach conclusions that are rationally based. The process of inference that leads to the conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about the reliability of them.

160 Among other authority, his Honour cited (at [69]) the following remarks of Lawton LJ in *R v Turner* [1975] QB 834 (at 840):

> … Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.

161 In the present case, Professor Perino's report expresses a number of opinions that cannot be tested (including the correlation between higher settlement sums and duration of the proceeding; or between higher litigation outlays and higher settlement outcomes) based as they are on conclusions drawn from empirical research that is not before me. To some extent his conclusions appear to be the product of theorising as to the connection between legal costs and ultimate outcome. Those theories might well prove to be sound on a proper examination of the statistical data on which they are based but they, and Professor Perino's views about the incentives posed by various of the funding models, are difficult here to test (in circumstances where his conclusions appear to be drawn from empirical or anecdotal evidence not exposed in the body of his reports and his reasoning is not transparent). A glaring example of this is the reference in Professor Perino's research materials to a not yet published but said to be forthcoming article.

162 Ms Wigmans refers to what was said by White J in *R v Uduma* (2013) 115 SASR 318; [2013] SASCFC 2 (at [49]-[50]) as to the permissibility of an expert basing an expression of opinion on research documents of others. I do not have any difficulty with that proposition. However, if that is to be the case

there needs to be more than a broad statement or conclusion attributed to empirical or other research, where the basis for the statement or conclusion is not made apparent in the expert report. It is one thing to rely on authoritative data published by other experts. It is another to do so without exposing the reasoning adopted or the particular studies and research to which reference is made.

163 I am of the opinion that Professor Perino's reports do not satisfy the requirements for admissibility as expert opinion evidence and should not be admitted. I have in mind the statement by the plurality in *Dasreef* (see [158] above) that a failure to expose the basis of an expert opinion goes to the admissibility of the evidence, not to its weight (see at [42]). For completeness, however, I note that even had I concluded that the reports were admissible I would nevertheless have placed limited weight on Professor Perino's conclusions because they appear to be based on anecdotal evidence and empirical studies that are not before me and because a number of the propositions – such as the correlation between the length of the case and the amount of the return – seem to me problematic in terms of the incentives to which it should be inferred they give rise. The fact that there might be an expectation of a higher return the longer the litigation takes to run or the more funds are expended in the conduct of the litigation or the more complex the issues in dispute does not gainsay the proposition that a funding model with funder's commission which increases by reference to matters such as the duration of the proceeding or the time spent on the litigation will arguably carry with it an incentive to prolong the litigation or to incur additional costs. In other words, there are potential disincentives operating at the same time as the potential incentives identified by the various representative plaintiffs with each funding model. Even assuming that Professor Perino's reports were to have been admitted into evidence, they would not have led me to reach any different conclusion than I have otherwise reached (without the benefit of Professor Perino's opinions).

Claimed advantages (and criticisms) of the respective funding models

Wigmans funding model – staged percentage model tied to duration of proceeding

164 Ms Wigmans argues that her staged percentage model, with no caps placed on the funder's commission and the marginal return for Burford increasing as the case progresses, provides a stronger financial incentive for the pursuit of the maximum value of group members' claims (rather than settlement of those claims "quickly and cheaply") than does any funding proposal in the competing proceedings. In particular, criticism is made by Ms Wigmans of a fixed percentage model under which it is said that the funder's marginal return on effort diminishes as the case progresses (and as the maximum claim value approaches).

165 Ms Wigmans argues that the staged increase in the commission as the litigation progresses incentivises the funder to "stay the distance"; and that, as the solicitors under this model do not bear any risk of loss in the event of an unsuccessful outcome (as their professional fees are paid by the funder as and when those fees are due), the solicitors similarly have no financial incentive to prefer an early and cheap settlement. Ms Wigmans maintains that under her proposed funding model there is a higher degree of control in the hands of the plaintiff and away from the funder (see T 13.148; Mr Scattini's affidavit affirmed 7 November 2018 at [49]).

166 (I interpose here to note that the Wigmans funding model is not the staged percentage model endorsed by Professor Perino because the increases occur as the duration of the litigation increases rather than being a stepped percentage of greater recovery sums where increases occur by reference to the ultimate resolution sum.)

167 Criticisms raised by others of the representative plaintiffs in respect of this funding model are that the time-based increase in commission provides a strong financial incentive for a funder to defer settlement (see T 45.18 – Komlotex' oral submissions) and hence gives rise to a real potential conflict between the commercial interests of the funder and group members' interests;

and, insofar as the solicitors' costs are paid by the funder throughout the litigation, it creates no incentive on the solicitors to minimise costs or keep to their budgets "as they will be paid anyway for as long as the litigation goes on" and hence creates the incentive for solicitors to "overservice" or prolong the litigation.

168 Ms Wigmans' response to this is to note that both the funder's commission and the costs recoverable by the solicitors from any resolution sum, though uncapped on her proposal, will be subject to the Court's oversight and approval and to emphasise that Burford is a "natural and motivated regulator" of Quinn Emanuel's costs (Burford's costs of such costs supervision being borne by it and not by group members (see submissions at [101])). It is submitted that this arrangement is superior to an independent costs assessor (*cf* the Georgiou model), "who lacks any such financial interest or motivation in ensuring that his or her task is executed properly, and whose involvement gives rise to further cost that ultimately is visited upon group members".

169 Wileypark emphasises that the funding fee payable to Burford will be much higher than the funding fee payable to IMF (and submits that it is in the interests of group members that the lower funding fee payable to IMF be preferred).

Wileypark/Georgiou proceedings model – fixed percentage/multiple of expenses commission

170 In both the Wileypark proceeding and the Georgiou proceeding it is proposed to adopt a similar funding model (though with differences between the two), namely a structure under which the funder will be remunerated by a commission calculated as the lesser of a percentage of the net claim proceeds and a multiple of the expenses (or "deployed credit") incurred by it (in the Wileypark proceedings there is a cap on the amount recoverable by the funder on the multiple of expenses amount). In each case, the solicitors bear the risk of their professional fees (to be recovered out of the resolution sum, with a 25% uplift, though under the Wileypark model this is subject to the solicitor costs cap). (The adoption of the "lesser of" formula is identified as a

mechanism to prevent a "windfall" to the funder – see Mr Georgiou's submissions.) The fixed sums under these funding models are said to give certainty to the representative plaintiffs and the group members.

171 Wileypark emphasises that its funding terms are unique in setting a cap on the calculation of commission payable both to the funder and to the solicitors. In particular, the advantage of the solicitor costs cap, as emphasised by Wileypark, is that it has flexibility which is tied to proportionate outcomes. It is said that it operates as an incentive to the solicitors "to dig in deeper and for longer" to achieve the highest possible settlement or judgment sum (and that the additional layer – of 10% of any judgment or settlement sum, if that be higher than the cap – is intended to prevent any disincentive to incur additional cost once the costs estimate is or would with that additional cost be exceeded).

172 The contrary argument is that a capped funding and legal fee structure creates a financial incentive on the funder and solicitors to settle the proceeding "quickly and cheaply", which in turn creates a conflict of interest between the funder/solicitors on the one hand and the interests of the group members on the other. So, for example, it is said that the funder has no financial incentive in pursuing a resolution sum any greater than the "Multiple Expenses" cap because that is the level at which it may recover its maximum commission and it will take no additional share of any recovery thereafter (see, for example, Komlotex' submissions at T 45). Similarly, it is submitted that a solicitor costs cap creates a disincentive upon the solicitors to incur costs unless the deployment of those costs is likely to result in an increase to the resolution sum that will generate an extra amount for the solicitors (see Wigmans' submissions at [108]ff).

173 Further, even leaving aside the perceived disincentives flowing from a capped commission structure, it is said that where solicitors bear a risk of loss in the event of an unsuccessful outcome (as they do under a structure where their professional fees are recoverable only in the event of a successful outcome), where risk increases as their professional fees increase, this creates a

financial incentive on the solicitors to settle quickly and cheaply to recoup their professional fees, rather than to pursue the maximum value of group members' claims (see Wigmans' submissions at [107]). (This is a criticism that is also applied to the Komlotex "no win, no fee" model.)

174 Various responses are made to the above criticisms of the "fixed percentage/multiple of expenses" funder's commission models, under which the solicitors bear the risk of their professional fees.

175 Apart from the general observation as to the difficulty of accurately estimating costs in advance (with which only Mr Georgiou really seems to cavil – on the basis that the budget for costs in his proceeding has been vetted by a costs consultant), those supporting this kind of funding model point variously to: the requirement under the Wileypark funding terms, upon an application to the Court for settlement approval, for the provision to the Court of an independent opinion by Counsel to the effect that the settlement is in the best interests of group members (according to the operative funding and legal cost terms); the recognition that ultimately the Court has a supervisory role and would be required to approve any settlement (which is said to operate as an incentive to funders and solicitors to achieve the best possible outcome for group members); the provision in the funding package in the Georgiou proceeding for independent verification of costs and contemplation of a Court-appointed costs referee; and, in the Georgiou proceeding, the fact that the Augusta staff involved in the proceeding are legal practitioners who owe professional responsibilities to the Court in their capacity as such.

176 In this regard, I interpose to note that there was no suggestion by any of the representative plaintiffs that any of the solicitors involved in the competing proceedings would act in a manner contrary to their professional obligations to the Court or their obligations to their clients; or would act contrary to the best interest of group members in the conduct of the litigation. Any such suggestion was expressly disavowed in the respective submissions. Rather, what is emphasised is the potential for this to occur, in the context of

considering the incentives/disincentives to which the respective funding models are said to give rise.

177 For completeness, I note that there was an issue raised as to the funding fee applicable in the Georgiou proceeding if there is an appeal (of which Wileypark submits there is a real risk having regard to the fact that there still remains no intermediate or ultimate appellate authority considering the "market-based causation" theory at the heart of securities class actions, or the methodology for quantifying loss on such a theory) (see [67] of Wileypark's submissions). Wileypark says that in this event, the funding fee of Augusta rises to 20% of the claim proceeds (not exceeding a total of $20 million) (referring to Ms Antzoulatos' affidavit sworn 6 November 2018 at p 3), which it is said does not appear to be confined to appeals in respect of final orders and appears to extend to appeals by leave from interlocutory orders. It is submitted that if the claim proceeds were to be $100 million, this would represent a funding fee well in excess of that payable to IMF. In response to this, Mr Georgiou says that this involves a misreading of the proposed funding terms which do not specify a percentage commission for appeals. By way of clarification, it is said that on an appeal from final orders a further commission will be sought in an amount to be determined by the Court and that there is no intention to seek any further commission from any application for leave to appeal from an interlocutory order.

Komlotex/Fernbrook proceeding model – "no win, no fee"

178 As outlined above, in the Komlotex proceeding a "no win, no fee" funding model (without a third party funder and hence without any separate funding commission) is now put forward as the preferable funding model.

179 While it appears to be accepted (see Wigmans' submissions, for example) that such a model provides a financial incentive for the solicitors to achieve a settlement at least equal to the uplift entitlement threshold, that model is criticised on the basis that this is a weak financial incentive (that does not adequately align the solicitors' interests with group members' interests) on the

basis that the incentive diminishes once the threshold is reached. Furthermore, it is said the solicitors are financially disincentivised to spend on disbursements (such as counsels' fees) because such expenditure represents risk without any prospect of reward (the uplift being limited to the professional fees; with recovery of disbursements at a dollar for dollar rate.

180 Furthermore, Ms Wigmans raised policy concerns (and the precedent that may here be set for future cases) attached to adopting a "no win, no fee" model, namely (see submissions in reply at [32]):

> There is a risk of substantial market distortion if a funded action can be commenced, with historically low funding rates, only to be stayed in favour of an action commenced much later in which the firm of solicitors, having lost the support of its litigation funder, offers to conduct the case on a 'no win no fee' basis. The Court should not presume, on the basis of purported cost comparisons, that a no win no fee action is superior to a funded action. It has been recognised in the literature that litigation funders have enhanced access to justice in levelling the playing field in terms of resources between class action plaintiffs and defendants.

181 (Pausing there, Komlotex cavils, among other things, with the suggestion that it has "lost the support of its litigation funder", pointing to the evidence as to the consideration given by its solicitors to the best form of funding model and the decision reached in that regard to proceed without a third party funder.)

182 Similar to the criticism raised in this regard of the Wileypark/Georgiou funding models, the "no win, no fee" structure is criticised on the basis that it creates no incentive on the solicitors to "keep to their budgets" in terms of the professional work carried out by the lawyers engaged on the matter or in terms of how many lawyers are engaged on the matter. In this regard, the spectre is invoked of cashflow demands (either as to receipt of income or as to the avoidance of incurring unnecessary disbursements) having the potential to give rise to a conflict or interest or to affect the solicitors' perception of the desirability of settlement for particular sums and/or at particular times. (In this regard, Mr Georgiou further says that a model where a funder pays solicitors' costs implements a further level of cost control, in the form of the funder's oversight and supervision, that does not exist where proceedings are conducted on a "no win, no fee" basis.)

183 Insofar as reference was made by various of the parties to the personal exposure of Komlotex' solicitors to an adverse costs order; and the impact of this or other litigation on its balance sheet, I note that Komlotex, in response, pointed to the latest financial statements of Maurice Blackburn as evidencing sufficient financial resources to meet the indemnity it proposes to give in respect of adverse costs orders.

Net hypothetical return to members

184 Ms Wigmans argues that, in comparing the competing fund proposals, placing "undue focus" upon costs and funding charges will distract from the more important question of which funding proposal is likely to result in the largest settlement or judgment; and says that the "cheapest" funding proposal is not necessarily the best proposal.

185 Ms Wigmans further argues that speculation at this stage of the proceedings as to the precise quantum of funding costs is moot, insofar as various of the funding proposals contemplate seeking a CFO that expressly subjects the funder's commission to Court approval; that an attempt to estimate likely funding costs by reference to headline funding rates is a superficial exercise (referring to what was said by Lee J in *GetSwift* at [195] as to the need to identify the aggregate amount to be paid to the funder); that there is added complexity where funding costs are expressed as a multiple of legal costs; that there is uncertainty as to the ultimate cost of ATE insurance); and points to the inherent unreliability in costs estimates having regard to the notorious difficulty of estimating with any precision such costs and the inutility of comparing costs estimates in the absence of common assumptions about the conduct of the case. For example, Ms Wigmans points to her solicitors' proposal to use another firm to provide administrative services at "a cost much lower" than lawyers' hourly rates (see T 14.35).

186 Wileypark similarly (by reference to the costs approved in other class action proceedings to which reference is made in Mr Watson's affidavit sworn 22 November 2018 at [32](b) – namely, *Kirby v Centro Properties Ltd (No 6)*

[2012] FCA 650 (*Centro*)) points to the difficulty in estimating costs at this stage, noting that the costs approved in *Centro* were materially higher than Maurice Blackburn's budget in the present Komlotex/Fernbrook proceeding.

187 Thus, Ms Wigmans submits that no weight should be placed on the comparative tables advanced by other representative plaintiffs (which seek to compare net returns to group members across a range of resolution outcomes). Ms Wigmans says that, aside from their essentially speculative nature, the focus should be on which action is most likely to achieve the largest settlement or judgment (rather than on comparing costs which she submits are "relatively at the margins in a high stakes case like this one").

188 Relevantly, on a comparison of the solicitor rates to be charged by each firm (as summarised in Mr Watson's affidavit sworn 22 November 2018), it can be seen that in general the rates charged by Quinn Emanuel are the highest, followed by those of Maurice Blackburn, Shine and then Phi Finney. Thus, Wileypark emphasises that the hourly rates charged by its lawyers are, at each level, at the low end of, or lower than, the rates or the range of rates proposed to be charged by the solicitors for the applicants in the other proceedings (see Mr Finney's affidavit affirmed 21 November 2018 at [8]-[9]). That said, it is acknowledged by Komlotex that the range of quoted rates is "relatively confined", both for the firm principals and for more junior lawyers in the respective firms (see submissions at [40]).

189 The respective estimates of costs for each proceeding (are summarised in Mr Watson's affidavit sworn 22 November 2018 at [25]ff). However, as Komlotex points out, comparison is difficult because those estimates are based on varying assumptions (such as, for example, the estimated length of the trial and the assumed disbursements) and do not include the funding costs (where payable) to third parties. Criticism is made by Mr Watson as to those estimates of the costs which the solicitors in the competing proceedings anticipate will be incurred (at [12]-[13] and [25]ff) as being overly optimistic and, in many cases, based on unrealistic assumptions and not in accordance with costs commonly incurred in proceedings of this type (at [15] and [32]).

That criticism is rejected by the parties to whom it relates (see for example the response made by Wileypark in its submissions) and there is little benefit in here addressing whether, or to what extent, it is justified.

190 Suffice it to note at this point that I accept the proposition put by Komlotex to the effect that any comparison of net hypothetical returns to group members can only sensibly be made if there is some standardisation of the assumptions on which it is based (i.e., there is a need to compare apples with apples). Thus, Komlotex has sought in its comparative tables (to which I refer below) to equalise the effect of possible differences in approach of the competing firms in order to compare legal rates and funding models on a like-for-like basis. In principle, I see nothing wrong with that approach; though I accept that the standardising assumptions (such as likely hours by the different legal teams) may not prove to be correct; and may, even at this stage, be unlikely to be correct at least insofar as they do not take into account the provision of services outside the legal firms which might obviate the need for or reduce the number of hours to be spent by the solicitors on the conduct of different aspects of the litigation.

191 Mr Watson has made an estimate, for the purpose of making a standardised legal and funding cost comparison, as to the time likely to be required to be spent by solicitors and support staff if the matter proceeds through to completion of an eight week trial of common issues, and says that it is reasonable to assume that approximately 15,000 hours will be required (see his affidavit affirmed 22 November 2018 at [40]). Based on this and other standardised assumptions (including as to an appropriate spread of work based on staff seniority), Mr Watson has modelled the outcome of a range of settlement or judgment scenarios, applying the proposed solicitor rates and funding costs from each of the competing proposals. Komlotex relies on that modelling as showing that the Komlotex/Fernbrook proceeding will result in better returns to group members for any resolution sum (whether achieved at trial or by agreement reached prior to 30 September 2019) in the range of $40 million to $500 million (see the affidavit of Mr Watson sworn 22 November 2018 at [47]).

192 As adverted to above, others of the representative plaintiffs criticise various of the standardised assumptions made by Mr Watson; and they caution against reliance on the standardised comparative tables. For example, Wileypark submits that it is unsafe to assume that its solicitors would spend the same number of hours in the conduct of its proceeding, since Wileypark will uniquely have the benefit of the involvement of IMF in the provision of a range of project management services, such as damages calculations and collation and management of group member data, and data analysis. Nevertheless, Wileypark emphasises that, even on the Komlotex standardised assumptions, its proceeding will still have the "leanest" aggregate costs and disbursements, either in the event of a settlement prior to the commencement of a trial (referring to Mr Watson's affidavit sworn 22 November 2018 at [47]) or in the event that the matter does not settle prior to the conclusion of trial (referring to Mr Watson's affidavit sworn 22 November 2018 at p 117).

193 For his part, Mr Georgiou points to the higher estimate of costs provided for the Komlotex proceeding, compared with the estimate provided for in each of the Georgiou, Wileypark and Wigmans proceedings (said to be higher by a "considerable margin") and argues that, based on the estimate for the Komlotex proceeding, any additional funds potentially available to group members will be largely absorbed by the additional legal costs that Maurice Blackburn expects to incur compared to the other proceedings.

194 Mr Georgiou submits that any suggestion that his solicitors have underestimated the costs of the proceedings should not be accepted in the face of the fact that the legal budget in the Georgiou proceeding has been reviewed by an independent costs consultant. It is said that the legal budget in his proceeding is more transparent and includes a greater level of detail than the costs estimates provided by any of the other solicitors; and that, on an ongoing basis, the mechanisms that exist in the Georgiou proposal mean that there is likely to be a more significant level of costs control in its proceeding (that being the proposal for a Court-appointed referee to review legal costs, together with the ongoing supervision of Augusta).

195 Mr Georgiou seems to support the conclusion drawn by Mr Watson as to the estimates provided for both the Wileypark and Wigmans proceedings, insofar as he says that they underestimate the work required (see Ms Antzoulatos' affidavit sworn 26 November 2018 at [19]-[23]); and, thus, he argues that a comparison of the likely costs of conducting the respective proceedings means that the Georgiou proceeding should be preferred (as likely to be substantially less than in any of the other proceedings), this being relevant in that it affects the assessment of the likely return to group members.

196 Augusta has prepared "adjusted waterfalls", as to the expected return to group members (the adjustments relating to matters such as the numbers of hours worked, the level of seniority involved and the hours likely to be spent by counsel, i.e., the level of disbursements), which Mr Georgiou submits best reflect the likely outcomes in the competing class actions. Those adjustments are: in the case of the Wileypark proceeding, the inclusion of additional professional fees and disbursements that Mr Georgiou says were omitted from the estimate provided by Phi Finney (noting that the estimate provided by Phi Finney only included disbursements for counsel and expert fees); in the case of the Wigmans proceeding, the inclusion of an additional amount for professional fees and disbursements (albeit that Mr Georgiou says that such an assessment is difficult in the case of the Wigmans proceeding because of the lack of detail in the information provided in respect of its estimate); and, in the case of the Komlotex proceeding, the inclusion of additional professional fees and disbursements that it is said were omitted from the estimate provided by Maurice Blackburn.

197 Mr Georgiou submits that the likely return to group members is similar under most scenarios in each of the Georgiou, Wileypark and Komlotex proceedings, but is inferior in the case of the Wigmans proceeding for any resolution sum exceeding around $100 million. He says that, on a lower resolution sum scenario, the Georgiou proceeding produces the best outcome but where the resolution sum is $150 million or greater, the outcome produced for group members in the Georgiou, Wileypark and the Komlotex proceedings is broadly comparable. (It is submitted by Mr Georgiou that this demonstrates

that the fact that there is no funder in the Komlotex proceeding does not of itself mean that there will be a superior return to group members in the Komlotex proceeding compared to the Georgiou proceeding; and, thus, he says that there is no sound basis for a finding that the Komlotex proceeding will produce a better outcome for group members on the basis that no commission is payable to a funder.)

198 Komlotex in response says that Mr Georgiou's "adjusted" waterfall (which maintains budgeted differences for hours worked) contains errors in relation to the Komlotex proposal but Komlotex attaches significance to the fact that, even if Mr Georgiou's adjusted waterfall modelling were to be accepted, the return to group members in the Komlotex, Wileypark and Georgiou proceedings, for any outcome above $150 million, is broadly comparable. Komlotex argues that what Mr Georgiou's submissions fail to acknowledge in this regard is that group members in the Komlotex/Fernbrook proceeding would in any of these scenarios have the benefit of: a significantly larger portion of the amount deducted from their return being used to fund additional hours of legal work rather than on funding commission (said to be of significance given the sophistication of and resources available to the defendant); and the legal team "most likely to achieve the largest settlement or judgment". The main difference that Komlotex identifies between the proceedings when standardised assumptions are used is that all of the other funding models include payment of commission to a litigation funder (T 28). (Komlotex also points to the uncertainty and/or delay as to the position of IMF, Augusta and Burford, in the event that the Court is ultimately found to lack the power to make a CFO; as to which I say more below.)

CFOs

199 The representative plaintiffs in each of the competing representative proceedings (other than the proposed consolidated Komlotex/Fernbrook proceeding) have indicated that they will seek a CFO. It was, however, made clear in oral submissions by various of the representative plaintiffs that they intended to continue the proceedings irrespective of whether such an order is

made and/or would defer an application for such an order until a later date. For example, Wileypark indicated that it would defer an application for a CFO to the time an order is made to approve settlement or judgment (see T 64), arguing that this distinguishes its position from that of Ms Wigmans; and that it will progress the matter irrespective of the CFO issue. Wileypark proffered undertakings during the course of the hearing (T 64.26-45) in the following terms:

> Wileypark undertakes
>
> That [Phi Finney] will not seek to recover from any applicant or any group members part or future, at any time, any costs associated with book building. (noting that such costs are not recoverable by IMF in any event)
>
> [and]
>
> Of the legal costs incurred by [Phi Finney] associated with the transfer and multiplicity processes, [Phi Finney] undertakes not to seek to recover those costs up to the sum of $300,000.

200 Mr Georgiou takes a similar position (see at T 83ff), namely that a CFO is not sought at this stage; but that the funding terms annexed to his notice of motion are those on which, at an appropriate time, he will seek such an order, depending on the outcome of the appeals in and where the power of the Court to make CFOs is being challenged; and that he is not "wedded" to an ATE policy or deed of indemnity and, if chosen as the vehicle to proceed, he will deal promptly with the question of security for costs.

201 The terms of the CFO sought by Ms Wigmans are contained in the application filed on 24 October 2018. It is submitted by Ms Wigmans that there is nothing unusual about the terms or structure of the CFO or funding terms sought by Ms Wigmans.

202 In this regard, Wileypark submits that in circumstances where Burford (unlike IMF and Augusta) has not unequivocally stated that it is content to defer any CFO application until after resolution of the Wigmans proceeding has occurred (by settlement or judgment), there is a risk that the progress of the Wigmans proceeding will inevitably be delayed by the issue which has arisen

as to the power of the Court to make CFOs and the constitutional validity thereof. It is submitted that the Wileypark proceeding will not be so delayed because IMF has made it clear that it is content to have the application for a CFO dealt with after settlement or judgment (referring to Mr Saker's affidavit at [64]). Wileypark argues that this is a substantial factor against selecting the Wigmans proceeding as the proceeding which should proceed as an open class proceeding. (It also argues that, as a consequence of that likely delay the funding fee referred to by Mr Scattini in his affidavit affirmed 7 November 2018 "is likely to be pushed towards the higher end of the range" and very likely to end up in the 17.5% to 20% range; with a funding fee, if no CFO is granted, of either 22% or 25%. It is submitted that these are very large funding fees, likely to amount to windfalls to Burford (see submissions at [58]).)

203 Wileypark says that it has instructions that if it be awarded carriage of the open class proceeding, then IMF will continue to fund the proceeding on the basis that, at the time of the Court being asked to approve any proposed settlement of the proceeding, a "funding equalisation order" will be sought from the Court.

204 As to the position of any uncertainty about the power of the Court to make a CFO, Mr Georgiou submits that this is not a basis for preferring the Komlotex proceeding over the other proceedings in which a CFO is sought. He says that it is the intention of the solicitors and funders in the Georgiou proceeding that, if necessary, a bookbuild will be undertaken seeking to retain group members on the same terms as those contained in the proposed funding terms attached to his proceeding and that there is no reason to assume, prior to any such process being undertaken, that the Georgiou proceeding would cease to be commercially viable.

205 Komlotex on the other hand says that the Court and group members will be faced with "considerable uncertainty" in the event that any of the proceedings, other than the Komlotex/Fernbrook proceeding, is chosen as the preferred vehicle for group member claims, since it is only in its proceeding that no CFO

will be sought. In this regard it is not insignificant that the High Court has granted special leave last week for an appeal from the intermediate appellate decisions on this issue; thus, it is not unreasonable to think that there may be some delay in the consideration of any CFO application at the present stage.

Costs to date

206 Before turning to other factors, I should note that Wileypark has raised as a relevant matter to be taken into account the level of "sunk costs" to date. It is said that by 8 November 2018 approximately 1,350 professional fee hours had already been expended on the Wileypark proceeding by Phi Finney and that many hours had also been expended by counsel (referring to Mr Finney's affidavit affirmed 12 November 2018 at [42] and [46]; affidavit affirmed 28 November 2018 at [18]; where Mr Finney deposes to professional fee hours totalling some 1,345 hours). Wileypark says that these "sunk costs" should not lightly be, in effect, thrown away.

207 As to any suggestion by Wileypark that the Wileypark proceeding should be preferred on the basis that, unless that proceeding is permitted to proceed, there will be wasted costs, Mr Georgiou points out that it is a factor that applies equally to all the proceedings (and criticises the expenditure of significant costs amending the pleadings in the Wileypark proceeding when further substantial amendments were made after that amended pleading was drafted).

Conclusion as to first factor

208 Insofar as weight is to be placed on the incentives/disincentives created by particular funding models on solicitors and/or funders working assiduously to achieve the best possible outcome for group members, the difficulty is that many of the incentives identified could, from a different perspective, equally be seen as disincentives. For example, if commission increases the longer a case runs, then there is an obvious incentive to delay ultimate resolution of the case; just as there is an obvious incentive to perform additional work if commission (or fees) are calculated on hourly rates and, hence, a disincentive

to conduct the litigation efficiently and cost-effectively (albeit that those factors might produce a higher resolution sum). One would need a way to measure the potential increase in the settlement sum referrable to duration/additional costs against the downsides of that delay and additional costs.

209 The most likely incentive for a funder/litigator to press for a higher settlement might intuitively be said to be the calculation of a commission based on an increasing percentage of settlement or resolution sums likely to be achieved, but whether those sums would necessarily or even probably increase the longer a case runs is something with which I have some doubts and which cannot here be tested. That would provide a disincentive against early settlement but there is nothing to say that a higher settlement might not equally be able to be achieved at an earlier point of the settlement/resolution sum.

210 In a sense, I consider that the "no win, no fee" model balances the potential incentives and disincentives by putting the risk of the litigation squarely with the solicitors but incentivising additional work (which might be likely to produce a higher settlement sum) by reference to an uplift on fees to be achieved only when the stipulated threshold for a resolution sum is achieved. That said, insofar as it ties remuneration to hourly rates one can also see the creation of an incentive to perform additional (and perhaps unnecessary) work that might not objectively produce any higher net return for group numbers.

211 Similarly, the capped feature of the Wileypark and Georgiou funding models can be viewed both positively and negatively, for the reasons advanced in the submissions summarised above.

212 In circumstances where I consider that there are arguable incentives and disincentives in relation to each of the possible funding models, it is relevant to consider the expected net return to group members. I accept that this should be done having regard to standardised assumptions such as the likely length of trial (even though difference in the underlying "non-standardised" assumptions may have arisen for valid reasons which render the

standardisation process of arguably less weight – such as the assumption as to the experience level at which particular legal or case management work will be carried out). The most significant feature of the comparative tables in this regard, in my opinion, is that they show that there is a broad comparability of outcome across all funding models with the notable exception of the Wigmans model.

213 On balance therefore, I consider that this final factor favours the Komlotex, Wileypark and Georgiou proceedings and not the Wigmans proceeding.

214 As to the proposals by various of the representative plaintiffs (but not Komlotex) to seek a CFO (at some stage) I accept that this may be productive of some delay in the future (though that factor is minimised to the extent that Wileypark and Mr Georgiou appear to be prepared not to seek such orders until a much later stage (and perhaps not until the settlement/approval of costs stage)) but, in the absence of anything to suggest that the funders will not continue with the proceeding in the absence of a CFO this is probably not a significant factor. Suffice it to say that insofar as this is a relevant factor, it favours (at least marginally) the Komlotex proceeding where no CFO is sought.

215 Overall, I consider the first factor favours Komlotex marginally over the Wileypark and Georgiou proceedings and, to a greater extent, over the Wigmans proceeding. I do not accept the proposition that attaching significance to the Komlotex standardised tables would create an incentive to solicitors/funders to prepare funding proposals at low rates with an intention or expectation of later departing from those rates. I accept that there is a risk that placing emphasis on the costs side of the ledger might encourage a "race to the bottom" (as has elsewhere been suggested) though the factor of costs needs in my view to be taken into account at least to some extent insofar as there is a benefit to group members of competition in the setting of funders' commissions.

216 Ultimately, I do not suggest that a "no win, no fee" model will always (or necessarily) lead to the conclusion that such a funding proposal is likely to provide the best return for group members and I do not consider that this should create a precedent going forward as each case will turn on its own facts. However, in the present case the combination of: 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 standardised assumptions; and the fact that no CFO is being sought (which minimises uncertainty and delay associated therewith), seems to me to point in favour of the combined Komlotex/Fernbrook funding model.

2. The proposals for security

217 In summary, there are two broad ways in which the competing representative parties propose to address the position in relation to the provision of security for AMP's costs: by way of security paid into Court (the Wigmans and Komlotex/Fernbrook proceedings); and by deed of indemnity and/or ATE insurance (the Wileypark and Georgiou proceedings).

218 As to the first, security for costs was paid into Court by Burford in the Wigmans proceeding on 1 June 2018, in the amount of $5 million; pursuant to consent orders which do not limit the ability of AMP to seek further security in due course. The cost of providing security for costs in the Wigmans proceeding will be borne by Burford and will not be passed on to group members, either directly or indirectly, in any circumstances, including in the event of a successful outcome (see the affidavit of Mr Arnott affirmed 7 November 2018 at [54]). Ms Wigmans points to this factor as being in favour of her proceeding.

219 While the position in the Komlotex proceeding, initially, was that Maurice Blackburn would indemnify Komlotex against any adverse costs order and it was contemplated that an ATE insurance policy might be obtained (see the affidavit of Andrew Watson sworn 7 November 2018 at [30](d)). Komlotex' position as at 4 December 2018 was that Maurice Blackburn was willing to

provide security for costs in whatever form and in whatever amount it was able to agree with AMP or, failing such agreement, as it was ordered to provide by the Court (see Mr Watson's affidavit sworn 4 December 2018 at [15], reply submissions 4 December 2018 at [32]). By the time of the hearing of the present motions, the position of Komlotex was that if its proceeding were permitted to proceed then it would make a payment into Court of a sum mirroring the amount paid into Court in the Wigmans proceeding by way of security. Senior Counsel for Komlotex proffered an undertaking on behalf of Maurice Blackburn that they would pay into court the amount of $5 million if successful on the (multiplicity) motions (T 5.29-36) and would accept an order that continuation of the proceedings be conditional on that payment. AMP has indicated that this is acceptable to it. The provision of such security would again be without prejudice to AMP's ability to seek further security in due course. (Komlotex also apparently contemplates an ATE insurance policy but only seeks to recover the cost of obtaining such a policy if the resolution sum exceeds a certain amount and says in practical terms that amount is now limited to $1.25 million – see T 27).

220 As to the second, in each of the Wileypark and Georgiou proceedings, the proposal is for security for costs to be provided by way of a deed of indemnity and/or an ATE insurance policy.

221 In the Wileypark proceeding, pursuant to the funding terms in the proposed CFO, IMF is required to pay (and indemnify the plaintiff or any group member for) any adverse costs order (see the affidavit of Mr Yang Phi affirmed 31 May 2018 at [60]).

222 In the Georgiou proceeding, pursuant to the funding terms in the proposed CFO, the funder is required to pay any adverse costs order (see the affidavit of Mr Brennan affirmed 6 November 2018 at [49]). The funder's ability to meet any adverse costs order is said to be supported by a draft ATE insurance policy which provides for cover of up to $5.5 million. The cost of obtaining the ATE insurance is estimated to be $308,000 upfront and a further $1,232,000 following resolution. Security for costs is proposed to be provided

by way of a deed of indemnity between the insurer and the defendant. All those costs are to be borne by group members. In addition, if the "Multiple Option" funder's commission is applicable, group members will pay the funder a commission on the upfront cost of ATE insurance and the cost of the deed of indemnity, both of which form part of the "Project Costs" by reference to which the funder's commission is determined.

AMP's position

223 AMP's position, in essence, is that the sufficiency of the security that the respective plaintiffs are prepared to offer for AMP's costs, one of the considerations (i.e., fairness to the defendant) that is properly to be taken into account on this application; and that it can readily be concluded that AMP's costs will be substantial (having regard to the evidence filed by the plaintiffs as to their own estimated costs of the proceedings). AMP accepts as sufficient for the present time the arrangements for the provision of security by way of payment into Court (already put in place in the Wigmans proceeding and agreed to be put in place if the Komlotex/Fernbrook proceedings continues).

224 AMP has, however, raised concerns as to the funding proposals which contemplate the provision of security for its costs by a combination of reliance upon ATE insurance. AMP says that the need for a proper regime for security to be provided is underscored by the fact that the representative plaintiffs in the Wileypark, Komlotex and Georgiou proceedings recently took the position that there was no power to award costs against them in relation to their unsuccessful applications (*Wigmans v AMP Ltd* [2018] NSWSC 1045) for the transfer of the Wigmans proceeding to the Federal Court, because they are also group members in the Wigmans proceeding (and as such immunised from any costs order by operation of s 181 of the *Civil Procedure Act*), which led to the filing of a motion against the third-party funders who, in turn, denied any liability for AMP's and Ms Wigmans' costs by reason of s 181 of the *Civil Procedure Act*. (That dispute has now been resolved – see *Wigmans v AMP Ltd (No 3)* [2019] NSWSC 162 (*Wigmans v AMP (No 3))*; *Wigmans v AMP Ltd*

(No 4) [2019] NSWSC 257 (*Wigmans v AMP (No 4))*.) Thus, AMP submits that it should be a condition of carriage that the successful plaintiff provide security for its costs in the form of cash paid into Court, or a bank guarantee, in the sum of $5 million in the first instance, and without prejudice to AMP's right to seek an order from the Court for further security for its costs.

225 The difficulties identified by AMP with the proposal for the provision of security in reliance upon an ATE policy, in the case of the Wileypark and Georgiou proceedings, are as follows.

226 First, as to the Wileypark proceeding, that the terms of any proposed ATE insurance policy have not been disclosed. AMP argues that, in the absence of such disclosure, it could not be concluded that the ATE insurance proposal in the Wileypark proceeding will provide sufficient security (pointing to what was said by Yates J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 (*Petersen*) as to the complexities and ambiguities of ATE insurance arrangements of the kind there being considered) and noting that his Honour there observed that, in determining whether an ATE insurance policy could provide sufficient security for costs, it was necessary for the Court to undertake an assessment of the risk that the policy might be avoided so as to prevent payment under it (see [95]); and that this would involve an assessment of the terms and conditions of the policy as well as the practical risks that payment under the policy would be denied (see [96]). AMP notes that, in the Wileypark proceeding, it is stated only that such insurance is held with an "A rated insurer". It is submitted that in circumstances where the identity of the relevant insurer and the terms of any proposed policy have not been disclosed, this does not establish an ability to meet any adverse costs order. Further, insofar as the ATE policy proposed to be relied upon in the Wileypark proceeding is said to be a "global" policy in place for IMF (i.e., covering multiple proceedings that IMF funds), with a total limit on the policy of $30 million, AMP submits that in the absence of evidence of the other proceedings that IMF funds that may require payment under the policy, it is not possible to form a view as to whether that policy will ultimately be sufficient to meet any costs liability to AMP. (Wileypark's response to this

is that, while it is a global policy, IMF's position is supported by its balance sheet – see T 65.)

227 Second, in the case of the Georgiou proceeding, AMP again complains that no substantive details have been provided as to the proposed insurers (other than their identities); and says that the financial position of those insurers is not clear nor is it clear whether they will be able to meet their obligations. Again, it is submitted that this prevents any assessment as to whether it is likely that further security will be available. Further, it is noted that the proposed ATE insurance policy is for only a limited amount ($5.5 million). AMP argues that the costs in this matter are clearly likely to exceed those amounts and, as such, it will be necessary for the plaintiffs in those proceedings to obtain further insurance but that no reliable plan to obtain such further insurance is disclosed.

228 Thus, AMP submits that the proposal of the plaintiffs in the Wileypark and Georgiou proceedings to rely on ATE insurance as a form of security for costs does not, on the basis of the current evidence, provide sufficient security for AMP's costs. (AMP also made submissions as to the reliance that had been proposed to be placed by Komlotex on the balance sheets of its instructing solicitors. It is not necessary to consider those in light of the fact that the proposal now put for Komlotex, to provide security by way of payment into Court, is acceptable to AMP.)

Competing plaintiffs' position

229 Turning then to the position of the competing representative plaintiffs on this factor, I note as follows.

230 Ms Wigmans maintains that the proposals that involve ATE insurance as part of the provision of security (Wileypark and Georgiou proceedings) give rise to the possibility of further delay in the proceedings, it not being clear that they will be acceptable to AMP or to the Court having regard to the considerations taken into account in *Petersen* at [107]-[127]). Furthermore, it is submitted that the Wigmans proceeding is the only proceeding in which the costs of

providing security for costs will not be visited upon group members, either directly or indirectly, in any circumstances and where there can be "absolute certainty" that there will be no delay arising from an interlocutory dispute over security for costs. Thus, it is submitted that the approach taken to security for costs in the Wigmans proceeding is superior to the proposed approaches in the other proceedings.

231 Wileypark says that, on its funding proposal, apart from the ATE insurance, AMP has the comfort of the substantial financial/cash position of IMF, a large, listed entity based in Australia (referring to Mr Saker's affidavit, especially at [33]-[35]).

232 Mr Georgiou submits that the difference in the form of security proposed in his Georgiou proceeding compared to the Wigmans proceeding, is not a basis for differentiating between those proceedings. Mr Georgiou argues that the proposal in the Georgiou proceeding to provide security by way of deed of indemnity provides sufficient protection to AMP should it seek security and says that there is no reason to think provision of security in the Georgiou proceeding would involve any material delay. As to the further submissions made on behalf of Ms Wigmans concerning the cost of ATE insurance in the Georgiou proceeding, again it is said that this misstates the evidence and that no multiple is charged on the deferred insurance premium in the proposed funding terms in the Georgiou proceeding. Reference here is made to [5](b) of the Funding Terms (Annexure A to the notice of motion filed 24 October 2018) which states that the funder will pay any adverse costs order or other costs order which the Court makes in the proceedings "against the Plaintiff in favour of the Defendants and Other Parties (or any one or more of them), in each case in so far as those costs were incurred during the term that these Funding Terms are operative".

Conclusion as to second factor

233 Having regard to the concerns raised by AMP as to reliance by the representative plaintiffs on an ATE insurance policy as security for its costs, in

circumstances where the provisions of the policy are not in evidence (which I accept have force), this second factor favours the Wigmans and Komlotex proceedings equally over the remaining proceedings (albeit that the position of Mr Georgiou ultimately seemed to be that, if this were to be an issue, then he would seek to reach agreement with AMP as to the manner in which security could be provided).

3. Nature and scope of the causes of action advanced (and relevant case theories)

234 I have indicated above the differences identified by the respective parties as to the nature and scope of the causes of action advanced in the respective proceedings. There are four main areas of difference, or arguable difference, in the pleadings that have been identified: the unconscionable conduct claim in the Wigmans proceeding; the claim on behalf of those who acquired AMP shares off-market or who acquired ADRs; the claim sought to be brought on behalf of those who acquired shares on 16/17 April 2018; and the claim based on the impugned conduct of AMP having regard to the receipt of legal advice as to its lawfulness (in the Wileypark proceeding).

235 Ms Wigmans contends that the unconscionable conduct claim presents a "real, material, forensic negotiating advantage" (T 23.40), arguing that it is not limited in time to the period six years before commencement of the representative proceeding.

236 The other representative plaintiffs contend that the inclusion of an unconscionable conduct claim does not provide any real advantage. It is said that the unconscionable conduct claim is based on substantially the same conduct that forms the basis of the continuous disclosure obligation and the misleading conduct claims advanced in each of the other proceedings, and, hence, that there is no realistic prospect that the unconscionable conduct claim could succeed in circumstances in which the other claims failed and, therefore, the bringing of that claim may result in additional and unnecessary costs for group members (see *Smith v Australian Executor Trustees*, where Ball J considered that there was at least a theoretical risk that one of the two

competing class actions could succeed, while the other failed, given the differences in the claims there made (at [16])).

237 Further, it is submitted that any claim for unconscionable conduct is misconceived in a securities class action because, unlike breach of the continuous disclosure obligations and unlike misleading or deceptive conduct, unconscionable conduct does not deceive the market (Wileypark submissions at [**65**]). Indeed, Wileypark submits that submits that the "costly distraction" of such a claim is a reason for the Court declining to select the Wigmans proceeding as the open class proceeding to continue.

238 As to the criticism by the competing representative plaintiffs of her unconscionable conduct claim, Ms Wigmans maintains that they have misunderstood the nature of her claim (and accuses the critics of her claim as not wishing "to pursue AMP with anything other than the comfortable orthodoxy"). Ms Wigmans says that because the essence of her unconscionable conduct claim is not a fraud on the market it offers a different causation theory and hence a longer claim period. Ms Wigmans articulates her claim as being that: by engaging in a course of conduct that was unconscionable, AMP caused itself significant reputational damage which was reflected in the diminishment of its share price that occurred when the conduct was revealed to the market. Ms Wigmans says that the relevant counterfactual is not that AMP should have disclosed its actions earlier but, rather, that it should not have engaged in the conduct at all; and hence that shareholders suffered loss at the time the share price diminished, not at the time of purchasing AMP shares. Thus, Ms Wigmans says that her unconscionable conduct claim offers two main advantages to group members: first, that it does not depend upon a theory of market-based causation; and, second, that it is not confined to shareholders who bought their shares in any particular period.

239 As to the inclusion in each of the Georgiou, Komlotex and Wileypark proceedings of off-market acquisitions of shares and persons who acquired ADRs, Ms Wigmans cavils with the submissions by the other representative

plaintiffs (and AMP) that her pleading excludes: persons who purchased an interest in ordinary AMP shares other than on the ASX; and persons who held ADRs in respect of AMP shares. Ms Wigmans says that these submissions are based upon a misreading of the group definition in the commercial list statement filed in the Wigmans proceeding and a misunderstanding of the nature of ADRs.

240 As to the off-market acquisitions, Ms Wigmans points to the group definition in the Wigmans proceeding as including persons who "acquired an interest in ordinary shares in [AMP] … on the financial market operated by the [ASX]". Ms Wigmans says that the phrase *"*on the financial market operated by the [ASX]" describes the shares, rather than the acquisitions. Ms Wigmans says that there was no intention to exclude off-market acquisitions (and that, to make the matter "absolutely clear", the word "listed" can be inserted before the words "on the financial market").

241 As to the ADRs, Ms Wigmans says that insofar as the group definition includes persons who acquired "an interest" in ordinary AMP shares, that includes ADR holders (noting that the US Securities and Exchange Commission (SEC) describes an ADR as "a negotiable certificate that evidences an ownership interest in American Depositary Shares ("ADSs") which, in turn, represent an interest in the shares of a non-U.S company that have been deposited with a U.S bank"" and that this definition is similar to ASIC's treatment of the equivalent securities in Australia). Ms Wigmans says that, consistent with this description, the ADR certificates in respect of AMP issued by the depository give the holder of an ADR the right to receive the underlying AMP shares and, hence, persons who hold ADRs in respect of AMP shares hold an "interest" in the underlying shares and fall within the group definition in the Wigmans proceeding. Ms Wigmans says that if this needs clarifying, that can be done by simple amendment.

Conclusion as to third factor

242 AMP has noted the "outliers" in terms of the pleaded claims as being: first, the unconscionable conduct claim; second, the extension of the claim to purchasers of shares on 16 and 17 April 2018; and, third, the claim based on the receipt of legal advice. The simple answer to much of the debate as to pleading differences is the proposition (not here challenged by AMP, subject only to any limitations issue to which it might give rise) that if there were to be a real forensic advantage in the alternative ways in which the claims are sought to be brought it might be expected that they would be explored by those representing whichever of the representative proceedings is ultimately to go forward.

243 As to the claimed juridical advantage of the unconscionable conduct claim (being, the extension of the claim period to purchasers of shares prior to 10 May 2012), this seems to me to be problematic from a limitations point of view but that is a question that should not be determined at this stage (see *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; [1992] HCA 55 (*Wardley*)). In any event, it is difficult to see how a claim of unconscionable conduct would succeed if the remaining claims were to fail (and although it was submitted that the difficulties with a market-based causation theory of loss would not attend the unconscionable conduct claim postulated by Ms Wigmans, it was not made apparent how that would broadly translate into higher returns for group members other than as representing a negotiating advantage).

244 As to the inclusion of claims in respect of 16/17 April 2018 purchasers, again AMP does not dispute that whoever might be chosen to continue with the representative proceeding could amend to encompass such a class. The real difficulty it seems to me with the inclusion of the 16/17 April 2018 claims is that there would surely be a need to explore precisely what knowledge, if any, purchasers on those dates had as to the disclosures that had by then been made at the Royal Commission. It seems to me likely that this would render

the representative proceedings an unsuitable vehicle for the prosecution of those claims (even as a subset of the overall class of AMP shareholders).

245 As to the legal advice claim, there is a dispute as to whether this is in fact encompassed in the other plaintiffs' pleadings (see Komlotex' argument at T 49ff, for example; or that of Ms Wigmans at T 156ff). Again, however, to the extent that this is not encompassed by an existing pleading, it might be expected that if it has force there would be an amendment to reflect that additional claim.

246 I, therefore, see this third factor as broadly neutral as between the respective representative proceedings.

4. Size of the respective classes

247 As to the relevant claim periods, while there is substantial overlap in the definitions of group members in the competing proceedings they are not identical.

248 Ms Wigmans submits that a clear "forensic advantage" to the Wigmans proceeding is that it is brought on behalf of the broadest group of persons. In this regard, Ms Wigmans emphasises that her proceeding is unique in its inclusion of: persons who purchased shares in AMP on 16 and 17 April 2018 and (in respect of the unconscionable conduct claim) persons who purchased shares in AMP prior to 10 May 2012.

249 Ms Wigmans points out that over 11 million AMP shares traded on 16 April 2018, and over 20 million AMP shares traded on 17 April 2018. It is submitted that there is a basis to think that persons who purchased those shares did so at an inflated price because the information disclosed to the Royal Commission on 16 and 17 April 2018, or the full extent of it, was not known to the market; and, hence, there is very real substance to the extension of the class period. Further, Ms Wigmans submits that, notwithstanding that (at least on 17 April 2018) such group members may have been partially aware of AMP's conduct, the relevant misconduct was not wholly revealed to the

market until after market close on 17 April 2018 and, until that time, the share price was inflated.

250 Thus, it is submitted that the Wigmans proceeding is the vehicle which permits the largest aggregate amount of losses to be claimed on behalf of group. It is said that there is no basis to stay the Wigmans proceeding insofar as it is brought on behalf of group members who are not represented in any subsequent proceeding; and that, conversely, all group members in the subsequent proceedings may vindicate their rights in the Wigmans proceeding. It is submitted that it will be more efficient, and, therefore, in the interests of group members, to prosecute group members' claims in one proceeding (which can only be the Wigmans proceeding) than in two proceedings.

251 As to the start date, the claim period in the Wigmans proceeding does not include any start date in respect of its unconscionable conduct claims. In this regard, Mr Scattini has deposed to his view that the cause of action did not accrue until the fall in AMP's share price and ends on 17 April 2018 (see his affidavit affirmed 22 November 2018 at [24]). In relation to other claims, the relevant period in Ms Wigmans' proceeding commences on 10 May 2012 (that being six years before the filing of the initiating process).

252 The position of the competing representative plaintiffs has now largely eliminated the differences between them as to the start date. In relation to the start date for the relevant period, each of the other representative plaintiffs now contemplates a start date of 10 May 2012 (in the case of the acquisition of AMP ordinary shares) (and 7 June 2012 for the acquisition of off-market shares or ADRs). Thus, the only difference is as to the pre-10 May 2012 purchasers of shares.

253 Doubt has been expressed by various of the competing representative plaintiffs as to the proposition by Ms Wigmans that claims in relation to conduct before 10 May 2012 would not be statute-barred because the loss occurred when that conduct was revealed to the market on 16 and 17 April

2018 (and hence with Ms Wigmans' proposition that the cause of action accrued with the revelation of that information) (see Komlotex' submissions at [50]).

254 As to the end date for the relevant claim periods, in the Wigmans and Wileypark proceedings there is now a proposed end date of 17 April 2018; in the remaining representative proceedings the claim period ends before 16 April 2018 (in most of the competing proceedings it is 13 April 2018, that being the last business day before the relevant disclosures commenced; in the Fernbrook proceeding, that being 15 April 2018 (the day, a Sunday, before the disclosures at the Royal Commission commenced). As I understand it, the end date proposed for the consolidated Komlotex/Fernbrook proceeding will be 15 April 2018.

255 As to the end date, it is submitted by others of the representative plaintiffs that extension of the claims period to 17 April 2018 is likely to result in only a small increase in the overall number of group members and it is said that this may require a significantly more complicated factual analysis for those group members compared to that required for group members that acquired shares on or prior to 13 (or for that matter, 15) April 2018 (see, for example, Mr Georgiou's submissions at [**36**]). (I interpose to note that this criticism is dismissed by Wileypark on the basis that it is not unusual for there to be different factual scenarios amongst group members and that such differences can be satisfactorily dealt with by adopting the device of identifying sample group members who acquired shares at relevant times; emphasis is also placed on the number of shares traded on 16/17 April 2018 to counter the submission that there would only be a "small" increase in overall group members by reason of that extension.)

256 Further, it is submitted that insofar as shares were purchased in the period prior to the cross examination of the relevant AMP officer, (which AMP notes commenced at 2.00 pm on 16 April 2018), or prior to the revelation of any of the relevant misconduct, it is likely that losses arising from this part of the claim period are marginal. As to those who purchased shares on 16 and

17 April 2018, after the relevant misconduct had been partially revealed, it is submitted that the contention that they have suffered loss based on their purchases is problematic (insofar as that persons who are aware of misconduct cannot ordinarily be said to have suffered loss in reliance on it, including in the case of a "market-based" reliance theory of causation (see Komlotex' submissions at [50]).

257 AMP's position in respect of the divergence of the time periods is that both the unconscionable conduct and 16/17 April 2018 claims can be incorporated by other representative plaintiffs if they are so minded; it is only the ADRs and off-market acquisitions where a limitations period difference might arise (in that there is a question as to whether those claims are picked up by the group definition in the Wigmans proceeding and, if they are not, then the limitations period would run by reference to the date in the Fernbrook proceeding).

Conclusion as to fourth factor

258 I am not persuaded that the size of the respective classes is a factor that points towards any particular one of the competing proceedings. The main difference in terms of the size of the classes is as to whether the class encompasses those who acquired shares prior to 10 May 2012 and whether it encompasses those who acquired shares in the period 16/17 April 2018. I have referred above to the problems I see with those claims. In circumstances where I have concluded that the suggested juridical advantage of causes of action extending before 10 May 2012 is by no means clear and the likely complexity arising from the inclusion of the 16/17 April purchasers is problematic, I do not consider that this fourth factor carries weight in determining which of the proposed representative proceedings is the most suitable vehicle to proceed.

5. Extent of any bookbuild

259 Wileypark places much weight on this factor and emphasises in this context that the fact that IMF has received signed funding agreements from substantial numbers of sophisticated repeat clients means that there is a risk

of significant reputational damage if IMF were to advocate for a settlement that did not appear to its repeat clients to be the best settlement reasonably able to be achieved and that this is an incentive against such conduct. Wileypark submit that, in contrast, the absence of evidence that the funders in the Wigmans or Georgiou proceedings have any repeat clients makes available an inference that there is a much smaller long-term commercial risk to those funders in agreeing to a lower settlement.

260 Wileypark acknowledges that the Full Court in *GetSwift Appeal* (at [178](a)) said that the number of group members who signed up to funding agreements (or retainers) was a relevant (but, there, not significant) consideration, and that the level of real "choice" exercised by "small" claimants that sign up to a funding agreement or retainer may be overstated. However, it argues that their Honours clearly regarded "a repeat claimant in class actions such as an institutional investor" as being in a different category.

261 Wileypark notes that, as to institutional investors, the Full Court pointed out at [265] that in *Bellamy's*, not only was there a significantly greater number of funded group members, but the relevant group included "sophisticated institutions, investment managers, global asset managers, sovereign wealth funds and superannuation funds, including investors with large claims by value, investors with repeat experience in participating in funded securities class actions, and investors with sufficient knowledge, sophistication and leverage to properly negotiate the terms of the funding agreements entered into and to make informed choices between competing funding agreements on offer". The Full Court noted that, in contrast, in the case at hand, there was no evidence that the group members shared those characteristics. Wileypark says that, plainly the Full Court was of the view that significant weight should be placed on the fact that group members in a proceeding included numerous persons having the characteristics there described by the Full Court.

262 Wileypark submits that "professional litigants", such as institutions, can be relied upon to ensure that the solicitors retained to represent them in the

proceeding will adhere to the highest standards of skill and efficiency (and that they value the commercial benefits provided to them by a particular litigation funder); and submits that (at [13]):

> [t]he corollary of this, of course, is that the Court should not lightly compel such institutions to participate in an alternative class action being run by solicitors not of their choosing (and require them to have their litigation funded by an entity with which they did not choose to have commercial dealings).

263 It is submitted that Ms Antzoulatos' affidavit sworn 26 November 2018 (at [39]) does not reflect the way in which large, sophisticated institutions "go about retaining professional advisors". (As to [13] of the Wileypark submissions, it is said that this mischaracterises Ms Antzoulatos' evidence: that Ms Antzoulatos is not giving opinion evidence of the way in which institutional investors retain professional advisers; rather, Ms Antzoulatos is giving factual evidence of her contact with institutional advisers during the course of the proceedings to date. Mr Georgiou says that the solicitors and funder in the Georgiou proceeding have not engaged in a bookbuild at this stage on the basis that undertaking such a process is wasteful and not in the interests of group members.)

264 Wileypark notes that in addition to those who have signed retainer and funding agreements, 1,288 other group members (that is, persons who either acquired AMP shares within the relevant period covered by the filed statement of claim in the Wileypark proceeding or else acquired securities in AMP within the proposed expanded relevant period), representing between $166 million and $209 million of value in a damages claim, have registered their claims with IMF and have provided relevant transaction data, but have not entered into formal funding agreements (referring to Mr Finney's affidavit affirmed 21 November 2018 at [26](a)).

265 Wileypark says, by contrast, that: in the proposed Komlotex/Fernbrook proceeding, Maurice Blackburn have been retained by only 231 clients in respect of 435 shareholdings, only 46 of which clients are institutional investors (in respect of 230 shareholdings); and the institutional investors acquired and retained between just over 26 million shares and just over

35 million shares; there is no suggestion that any person who had previously signed a retainer agreement with Slater & Gordon in the Fernbrook proceeding when it stood apart from the Komlotex proceeding may have now signed a retainer agreement with Maurice Blackburn; there is no evidence that anyone apart from Mr Georgiou has signed a retainer agreement with Shine or a funding agreement with Augusta; and that it is evident from Mr Scattini's affidavit of 7 November 2018 (at [73]) that there are very few persons who have signed Litigation Funding Agreements in the Wigmans proceeding. It is said that even the combined number of those who have signed such agreements and those who have merely made expressions of interest (500) is relatively small. Further, it is said that, in contrast with the Wileypark proceeding, none of the persons in either category is in the nature of a "sophisticated institutional investor".

266 Wileypark says that although Mr Watson deposes that these figures are premised on the claim period currently adopted in the Komlotex proceeding (referring to Mr Watson's affidavit sworn 22 November 2018 at [22]-[23]), that is also the fact with the figures given by Mr Saker in his affidavit. In other words, it is said that even if Maurice Blackburn's clients will have larger claims for an enlarged claim period, this will also be true of Phi Finney's clients; and that the number of Phi Finney's clients constitutes a much larger starting base.

267 In this context, Wileypark notes that as to the making of class closure orders in *Bellamy's* (at [168]-[169]) the Full Court said that the decisive consideration was that there were over 1,000 group members who had entered into funding agreements with the relevant funder and signed retainer agreements with the relevant solicitors in each of the two competing class actions (compared to the much lower numbers in *GetSwift*, 103 having signed retainer agreements with the solicitors in one case and 208 having signed funding agreements with the funder in the other; see [19] and [21]; [178](c); [264]).

268 The evidence relied upon by Wileypark in this regard is that clients representing some 4,699 individual shareholdings have retained Wileypark's

solicitors, 4,506 of whom have entered into retainer agreements with Phi Finney and funding agreements with IMF; including approximately 3,700 accounts registered by 97 institutional investors who acquired AMP securities within the period between 10 April 2012 and 17 April 2018. Wileypark says that this is more than eight times the number of institutional investor accounts that have retained the solicitors for the plaintiff in the Komlotex proceeding and more than double the number of institutional investors (referring to Mr Watson's affidavit sworn 22 November 2018 at [22]). It emphasises the volume of shares acquired by Phi Finney's clients during the claim period currently pleaded in the Wileypark proceeding, (see Wileypark submissions at [17]) and argues that it is at group member account level that references to group members in other class action proceedings should be understood given that it is at that level that separate entitlements to a settlement sum fall to be assessed (referring to *GetSwift Appeal* at [264]); (*Blairgowrie Trading Co Ltd v Allco Finance Group Ltd* (2017) 343 ALR 576 at [20], [70]); (*Money Max Int Pty Ltd (as trustee for the Goldie Superannuation Fund) v QBE Insurance Group Ltd* [2018] FCA 1030; (2018) 358 ALR 382 (*Money Max*) at [17]); and (*Inabu Pty Ltd v Leighton Holdings Ltd (No 2)* [2014] FCA 911 at [2]). Komlotex argues that the size of the class must be considered at client or holding level (see T 28) and, hence, as I understand it, that the 4,506 figure is not the relevant figure when comparing class size.

269 Wileypark submits that "[t]he institutional investors are not clients who have wandered into a representative proceeding without any substantial thought". It is submitted that the inference can be firmly drawn that sophisticated institutional investors (including those acting on behalf of numerous underlying account holders who have entrusted their funds to them) would only have signed up with Phi Finney and IMF (in many cases as repeat clients) "after careful examination of the issues in the proceeding and the terms and conditions of the retainer and funding agreements"; and that they made a very deliberate choice that they wish to have their claims propounded in that particular proceeding by particular solicitors on the funding terms offered by a particular funder, "and quite probably regardless of the fact that a CFO may be in the offing" (referring to Mr Finney's affidavit affirmed 21

November 2018 at [27]-[29]). It is submitted that that considerable weight should be given to that informed choice.

270 Wileypark further says that the standards expected of lawyers by large institutional clients are "notoriously very high indeed" and submits that the fact that Phi Finney has so many clients (including accounts registered by institutional investors) with very large claims is one which of itself is a sufficient basis for selecting the Wileypark proceeding to go forward as an open class proceeding.

271 Wileypark notes that in addition to those who have signed retainer and funding agreements, 1,288 other group members (that is, persons who either acquired AMP shares within the relevant period covered by the filed statement of claim in the Wileypark proceeding or else acquired securities in AMP within the proposed expanded relevant period), representing between $166 million and $209 million of value in a damages claim, have registered their claims with IMF and have provided relevant transaction data, but have not entered into formal funding agreements (referring to Mr Finney's affidavit of 21 November 2018 at [26](a)).

272 Pausing here, I note that AMP submits that the fact that some group members have elected to make expressions of interest in a particular proceeding, or have signed funding or retainer agreements in respect of those proceedings, does not mean that it is appropriate to permit more than one proceeding to continue. Citing *GetSwift Appeal* (at [178]), AMP argues that such matters are entitled to little weight where there is no evidence that the decision to enter into any such arrangements was the product of an informed choice and where there is a significant "informational asymmetry" between the funder and group members in relation to the costs and risks associated with the action; and where as a practical matter there is or may be little opportunity for group members to negotiate the terms of the funding or retainer agreement, or where any funding agreement may be superseded by a prospective CFO.

Wileypark says that Pt 10 of the *Civil Procedure Act* explicitly contemplates that group members represented in a particular class action may opt out and pursue their own actions and that the legislature did not contemplate that such actions would necessarily be actions in each of which there was only one individual plaintiff. It submits that it is more efficient for larger groups of individuals to combine and to instruct a particular firm of solicitors to propound their claims and for a particular funder to fund them.

273 As to the Georgiou proceeding, Wileypark emphasises, in effect, the lack of a bookbuild, namely that no group member other than Mr Georgiou has "manifested an interest" in being represented by Mr Georgiou or his lawyers in a class action against AMP.

274 Wileypark says that *GetSwift Appeal* cannot be relied on by Mr Georgiou to support his position on the issue of bookbuild, having regard to the emphasis by the Full Court (see [163]-[165]), that the case turned on its own facts. It is said that in that case there was a *de minimis* number of persons who had registered with the various class actions, none of whom was an institutional or sophisticated investor, and there was no evidence that those funded group members were aware that, by entering into a funding agreement or retainer in respect of their claim, they were expressing a preference for one funder and solicitor over any other (see [178](a)). Wileypark insists that the situation is different in the present case.

275 Ms Wigmans says that this factor should be viewed as irrelevant, noting that where a CFO is sought (as in the Wigmans, Wileypark, and Georgiou proceedings), it has been said that the number of group members who have signed a funding agreement or retainer is not a significant matter to the exercise of the Court's discretion and referring to the observation of Lee J in *GetSwift* at [212] that:

> … in circumstances where each party now submits it is in the interests of group members to make a common fund order [as Wileypark does], the earlier book build and subsequent creation of the funding agreements serve[s] no useful purpose (other than to gather information as to identity and

quantum, which could be obtained without group members entering into a series of promises with funders).

276 Ms Wigmans notes that, of the other representative plaintiffs, only Wileypark has sought to undergo a large scale bookbuilding exercise and says it has done so in full knowledge that it would seek a CFO in these proceedings and despite the clear indication of Lee J in *GetSwift* (at [213]-[215], [316]) that bookbuilding should not be encouraged in those circumstances as it is wasteful, costly and serves no useful purpose (referring also to the Full Court's comments in *GetSwift Appeal* at [178]).

277 It is submitted that the reliance placed by Wileypark on the fact that it has signed up institutional investors should be rejected. Ms Wigmans says that there will be institutional investors in the class no matter which action is chosen to go forward and that any institutional investor who is unhappy with that choice can opt out; and, further, that there is no evidence from which it could be inferred that institutional investors made a considered and informed choice to commit to the Wileypark proceeding. Hence, it is submitted that no weight should be placed on Wileypark's bookbuilding; and that the conduct of attempting to sign up as many group members as possible since the proceedings were commenced (of which she accuses Wileypark) should not be endorsed and should be discouraged.

278 Komlotex, as noted above, argues that this factor should be given little weight. It points out that Maurice Blackburn has been retained by a significant number of large institutional investors and submits that this reflects the regard in which it is held in the market. Komlotex also points to the observations made by the Full Court in *GetSwift Appeal* discouraging bookbuilding. (Komlotex nevertheless points to the "apparently limited current sign up" in the Georgiou proceeding, and the fact that no bookbuilding has occurred to date, in the context of its submission that it is difficult to see how Shine and/or Augusta could sign up sufficient group members to make its proceeding commercially viable without closing the class or threatening to do so (which Komlotex says would undermine any order giving it sole or predominant carriage of group member claims); and it is submitted that insofar as Shine and Augusta

consider that Augusta's commercial interests would be advanced by a CFO, they have misapprehended the effect of such orders (which do not divert any of the resolution sum to the funder, but merely redistribute funds between funded and non-funded group members in order to equalise the returns as between them).)

279 Mr Georgiou submits that the fact that some law firms and funders appear to have entered into retainers or funding agreements with a number of group members is a factor that should be disregarded. It is submitted that the bookbuilds undertaken in some of the competing class actions do not serve the interests of group members. As to the Wileypark proceeding, Mr Georgiou says that the more extensive bookbuild that has been undertaken in the Wileypark proceeding is, in fact, a reason to prefer the other proceedings on the basis that the bookbuild is work undertaken with no apparent benefit for group members.

280 Mr Georgiou says that a particular reason for discounting the significance of retainers and funding agreements in the present case is that there cannot be satisfaction that any of the persons entering retainers or funding agreements did so with full knowledge of the competing funding packages, or the possibility that the Court might permanently stay the proceedings to which the person had committed. It is noted that various of the funding terms have been amended in the course of the multiplicity issues being resolved; and that the full details of all the proposed funding terms were not public. In particular, it is noted that the proposed funding terms in the Georgiou proceeding were not disclosed to the other plaintiffs until service of Mr Georgiou's affidavit on 6 November 2018. Thus, it is submitted that the contention that group members have exercised any informed choice in entering into any retainers or funding agreements in the present case may be discounted (referring to the observation of the Full Court in *GetSwift Appeal*, at [178](a)).

281 Mr Georgiou further argues that any submission that group members made an informed choice to enter retainers with Phi Finney and funding agreements with IMF should not be accepted, on the basis that the information provided to

investors by IMF does not appear to mention the detail of the competing actions, including any reference to the legal teams involved or proposed funding terms, or the possibility that the Court may stay the Wileypark proceeding (or any of the other competing class actions); and that the "Information Pack" circulated by IMF from 1 May 2018 to 9 November 2018 does not appear to have been updated despite further information becoming available in relation to the competing actions and the funding terms.

282 Mr Georgiou also notes that during the period in which Wileypark says that investors made an informed choice to retain Phi Finney and sign funding agreements with IMF, there were discussions as to a proposed joint representation arrangement with the solicitors and funders in the Fernbrook proceeding and says that those negotiations do not appear to have been disclosed to the group members in either proceeding (and hence Mr Georgiou argues that it should not be accepted that investors made an informed choice in that respect).

283 Mr Georgiou says that the submission by Wileypark that institutional investors have "repetitively participated in IMF funded securities class actions as funded group members" says "very little" about the choice in this particular case, and is likely to reflect nothing more than that IMF has previously funded a number of securities class actions "and already has the contact details for those investors from previous class actions".

284 It is submitted that in this case, all five proceedings were commenced on an open class basis and with the intention that a CFO would be sought, such that the terms of any funding agreements would be superseded in any event; and it is noted that all funding arrangements were entered into at a time when the parties were aware of the likelihood of competing proceedings. Mr Georgiou submits that, in those circumstances, it is difficult to discern any good reason why any of the lawyers or funders should have engaged in a substantial "bookbuild" in this case; and that it should be inferred that this time-consuming and expensive exercise was undertaken for the purpose of advancing the position of the relevant funders and lawyers in the multiplicity application (and

this is something that should be discouraged - reference here being made to the observations made in *Bellamy's* per Beach J (at [97]); in *GetSwift* per Lee J (at [213]); and in *GetSwift Appeal* (at [176]-[177])).

Conclusion as to fifth factor

285 I consider that the weight sought to be placed by Wileypark on this factor is contrary to the admonition in *GetSwift Appeal* against the adverse consequences of bookbuilding.

286 Criticism was made by various of the other representative plaintiffs, with some force in my opinion, as to how "informed" the choice really was – see, for example the submission by Fernbrook that there is no evidence as to when group members signed with IMF as compared with the time at which Komlotex changed its funding proposal (which is said to impact on the informed choice argument); and the submission for Komlotex that the "Information Pack" distributed by IMF on 1 May 2018 had nothing about other potential class actions (other than a "subtle" reference to a funding agreement - see T 32). Wileypark accepted that its submission as to "informed choice" was not that the clients wanted IMF as funder by reference to a comparison with other funding terms (see T 135) but, in effect that those repeat institutional investors, knowing the proposed IMF funding terms, were happy to sign funding arrangements with IMF whatever the other funding models might happen to be.

287 I consider the "informed class" argument to be overstated. Apart from the fact that it is not clear that institutional investors made the decision to retain Phi Finney (and sign the IMF funding agreements) based on any comparative analysis of the respective pleadings in the various proceedings, nor of the funding arrangements in those proceedings (and may simply have done so on the basis of previous experience or reputation); it is not clear that those institutional investors would not wish to proceed with an alternative funding model if the Wileypark proceeding were not to continue. At most, it provides

some evidence as to their faith in the ability of Phi Finney and IMF to conduct class action litigation of this kind.

288 I give this factor no weight.

6. Experience of legal practitioners (and funders); availability of legal resources

Ms Wigmans' submissions

289 In written submissions, Ms Wigmans says that this factor is neutral in the present case and that, just as in *GetSwift*, "it is plain on the evidence that each firm of solicitors and the counsel they have retained are highly experienced in complex commercial litigation and also in the sub-speciality of securities class actions" and that "there is no reason to doubt that any of the … firms would have difficulty in running the litigation on behalf of the open class".

290 It is submitted that the focus ought to be upon which of the solicitors, or which team of solicitors and funder, is or are best incentivised to deploy expertise and resources to achieve the optimal outcome for group members "as opposed, for example, to diverting that expertise and those resources to some other endeavour offering a better return or lower risk". It is submitted that the more advanced state of preparation of the Wigmans proceeding is indicative of the diligence with which it has been litigated and the commitment of its solicitors and funder to resolving group members' claims.

291 Ms Wigmans dismisses the evidence put forward by Maurice Blackburn of its "unparalleled" track record of achieving large settlements as "boastful" and says that it "tells very little". Ms Wigmans says that "the fact that Maurice Blackburn is capable of running class actions does not mean that no one else is capable of doing so" and emphasises that the Court ruling on a carriage motion should only differentiate between legal firms "if there is a basis for differentiation" (*GetSwift Appeal* at [278]) arguing that there is none here (see reply submissions at [45]). In this context, however, it is worth noting that Ms Wigmans points out that Komlotex was the last to file proceedings against

AMP and criticises both the timing of that filing and the case theory with which the case was commenced (see [141]). Further, Ms Wigmans points to the fact that Komlotex chose to commence its proceeding as a funded class action, pursuant to which the funder would assume liability for adverse costs orders and provide security for costs in return for a commission of 12.5% of any resolution sum, and says that it "abandoned that structure after the funder terminated the agreement, and is now in a position only to offer a 'no win no fee' proposal without the involvement of a funder". Thus, Ms Wigmans submits that the Court would be slow to place much weight on Maurice Blackburn's experience and that the firm's conduct to date in the context of the present proceedings is more relevant (and, it is said, would not give the Court great confidence – see below).

292 As to the respective experience of the solicitors, Ms Wigmans takes issue with Wileypark's submission (at [61]) that Mr Scattini "does not appear to have any experience in securities class actions", pointing to his experience both prosecuting and defending securities class actions; and to the experience of the managing partners at Quinn Emanuel in securities class actions (noting that, among other matters, they act for GetSwift). Further, it is submitted that "there is nothing particularly 'niche' about securities class actions, compared to other kinds of class actions" (a proposition with which the Australian Law Reform Commission seems to differ).

293 Similarly, as to the submission by Komlotex that the Komlotex proceeding should be preferred on the basis that Maurice Blackburn has the most experience, Mr Georgiou submits that this can be discounted (see Mr Georgiou's submissions at [55]-[57]), maintaining that there is no reason to doubt the experience of any of the firms with conduct of any of the proceedings and reiterating that the lawyers with conduct of the matter at Shine have significant experience in class actions and in the sub-speciality of securities class actions. Further, it is submitted that there is no reason advanced, either in the evidence filed by Komlotex or in the Komlotex submissions that offers an explanation as to how Maurice Blackburn's greater experience will result in a better outcome for group members; and it is said

that if the Komlotex proceeding were to be preferred on the basis that Maurice Blackburn had the most experience out of otherwise appropriately qualified law firms, "this would simply entrench a monopoly for securities class actions".

294 As for the funder, Ms Wigmans points to Mr Arnott's evidence (see his affidavit at [12]) to the effect that the Burford group is a very large group with a highly diversified portfolio involved in all kinds of litigation finance solutions (T 15)).

Komlotex' submissions

295 Komlotex on the other hand, emphasises the "track record" of its legal team and notes that in *GetSwift Appeal* the Full Court observed that the focus on selecting the proceeding likely to achieve the largest settlement or judgment (the biggest single determinant of group member returns) meant that the Court was required to choose the proceeding with the legal team "most likely to achieve the largest settlement or judgment, i.e. the most experienced and capable"; and, relevantly, that the Court "should not dodge that question if there is a basis for differentiation". Komlotex submits that in the matters presently before the Court there is a basis for differentiation and, hence, that the task of differentiating between legal firms cannot be shirked.

296 In that context, Komlotex relies on evidence as to: the establishment of Maurice Blackburn's class actions practice in about 1998; the number of lawyers across various offices in that practice; statistics as to the successful prosecution and settlement since 2003 of seventeen securities class actions (or proposed class actions) involving ASX-listed entities, resulting in substantial group member payments; statistics (not including matters where the amounts were confidential) as to the aggregated settlement sums obtained in cases in which Maurice Blackburn acted for the representative applicant/plaintiff(s) over a period of some 24 years, out of the total payments to group members pursuant to judicially-approved settlements in class action proceedings over that period; and as to the experience of those solicitors

assisting Mr Watson in the Komlotex proceeding (see the affidavit of Mr Watson sworn 7 November 2018).

297 Komlotex emphasises that Maurice Blackburn is the only law firm in Australia to have acted in a class action involving listed securities where the claims of the class members it represented settled for more than $100 million, and that is has done so on seven separate occasions (contrasting this with the experience of the other plaintiff law firms involved in this dispute).

298 Mr Watson has deposed to Maurice Blackburn having conducted many class actions on a "no win, no fee" basis, and says that, despite the fact that the firm remained on risk for substantial fees in many such cases the firm rejected settlement offers that the firm considered did not properly reflect the strength and value of the group members' claims notwithstanding that those "inferior" offers of settlement would have resulted in Maurice Blackburn's costs being paid in their entirety, together with a reasonable return to group members. Emphasis was placed on the fact that Maurice Blackburn achieved these settlements on a "no win, no fee" basis (see T 32).

299 Reference is also made by Komlotex to the criticism made by Murphy J in recent proceedings as to the disproportionality between legal fees and group member recoveries in a class action that had been conducted by Ms Wigmans' "solicitor team" (see *Petersen*).

300 Insofar as Komlotex refers (at [33]-[34] of its submissions) to the judgment in *Petersen* with reference to the contest in that case about how Quinn Emanuel conducted the case, Ms Wigmans says that no evidence in relation to those matters has been adduced in these proceedings and Komlotex cannot rely upon the judgment as proof of facts that were in issue (referring to s 91 of the *Evidence Act*). Ms Wigmans notes that the observation of Murphy J quoted by Komlotex (at [24] of its submissions) was a general observation about class action litigation, not specifically about Quinn Emanuel.

Wileypark's submissions

301 Like Ms Wigmans, Wileypark says that the historical achievements of Maurice Blackburn in class action litigation say very little about the likelihood of Maurice Blackburn adding any particular value to the outcome for the group members of their claims against AMP, noting that settlements are the product of the work done by a particular team of solicitors and barristers working on a particular case (supported by a particular litigation funder). It is submitted that in the absence of analysis at a greater level of detail, the Court is not assisted by "headline claims of historical successes". Further, it is submitted that the size of a settlement is principally a reflection of the value of the underlying claims (i.e., it must be presumed that it reflects the realistic quantum of damages). It is submitted that it is hardly surprising that a law firm which historically has held a large market share in the conduct of Australian class actions will have had the conduct of a number of larger value claims, which in turn give rise to larger value settlements. Wileypark further submits that in the Komlotex proceeding there is "a marked absence of any costs structure that explicitly addresses the subconscious or unconscious incentives that may otherwise operate on lawyers in the conduct of those proceedings".

302 That said, Wileypark does engage in a comparison of the experience of the solicitors at least in the context of arguing that a factor that does not assist the Wigmans proceeding is that, while Mr Scattini has general class action experience, he does not (according to his 7 November 2018 affidavit at [79]-[83]), appear to have had any experience in securities class actions, which Wileypark describes as something of a niche area; nor the Georgiou proceeding (noting that Ms Antzoulatos deposes to having been involved in the conduct of only one securities class action previously in her 6 November 2018 affidavit at [10](c) and there being no evidence of any other securities class action experience in the relevant team of lawyers acting in the Georgiou proceeding).

303 Wileypark says that the provision of free project management services is only one of a number of advantages of being a group member in a proceeding

funded by IMF. It notes that IMF operates on the basis of a rigorous set of corporate governance guidelines (see Mr Saker's affidavit at [29]-[32]; pp 43-140); that it is one of the oldest and most respected litigation funders in Australia (Mr Finney's affidavit of 12 November 2018 at [66]), with an excellent track record (Mr Saker's affidavit at [28]; pp 1-42) and with very solid financial resources (Mr Saker's affidavit at [33]-[43]; pp 141-264). (It is submitted that IMF's track record, corporate governance guidelines and reputation (as evidenced by the number of repeat clients it has) is such that the criticism made by Ms Wigmans as to the dispute resolution procedures under its funding model (see Mr Scattini's affidavit of 22 November 2018 at [26]-[28] and [33]-[37]) "can be left to one side".)

304 Further, Wileypark submits that IMF's extensive experience in funding (and resolving) securities class actions (see Mr Finney's affidavit of 21 November 2018 at [30]) allows IMF to provide additional strategic input and oversight as to the conduct of the litigation for the purpose of maximising the return to group members and to itself, having regard to and drawing on the lessons of past securities class actions which IMF has funded. Wileypark says that, by contrast, there is no evidence of the litigation funders in the Georgiou and Wigmans proceedings having funded any securities class actions in Australia, and, hence, Wileypark argues that it should be inferred that they have limited capacity to provide any meaningful strategic input or oversight specific to the conduct of such proceedings. (Wileypark notes that in *GetSwift Appeal* the Full Court reaffirmed the selection by the primary judge of the proceeding conducted by Phi Finney as the proceeding which should continue as an open class proceeding. It is said that it is hardly likely that that would have occurred if there was doubt about Phi Finney's relevant experience.)

305 In addition, it is said that IMF's strategic input and oversight role ensures that it has a voice in the litigation decision-making process; and that this will be "in a language" that reflects the fact that IMF's financial incentives align more closely with those of group members than do the financial incentives of the solicitors (because IMF's recoverable commission amounts are at least partly tied to the extent of returns to group members).

306 Wileypark says these various benefits in the Wileypark proceeding, resulting from the participation of IMF as the funder, are absent from the Komlotex/Fernbrook proceeding (the conduct of which is funded by the lawyers for the plaintiff); and that it may also be inferred that these various benefits are significantly reduced or impaired in the Georgiou proceeding and the Wigmans proceeding due to the lack of relevant experience, in the funding of class actions (including securities class actions) in Australia, of the funders of those proceedings.

Mr Georgiou's submissions

307 Mr Georgiou submits that this is not a case where it is necessary to differentiate between legal firms or solicitors; submitting that each of the legal firms with conduct of the competing actions is appropriately experienced and capable. It is submitted that there is no basis for the Court to conclude that the skill and experience of the legal practitioners in any one of the competing class actions would be likely to achieve a superior outcome compared to the other proceedings. Mr Georgiou submits in particular that even if one firm has conducted more securities class actions, that is not a reason to prefer that firm. It is submitted that the contrary may be the case "given risks of complacency, inflated fees and the development of a monopoly if any firm is favoured solely because it has conducted more securities class actions in the past".

308 Mr Georgiou nevertheless says that, by reference to the conduct of the legal teams in the course of these proceedings to date, the Court can have confidence that the legal team engaged in the Georgiou proceeding will act in the best interests of group members, noting that: in the case of the competing transfer applications, Mr Georgiou sought to have AMP's transfer applications in the Federal Court determined before the hearing of any application to transfer Ms Wigmans' proceedings to the Federal Court (which, had that occurred may have rendered the transfer applications in this Court unnecessary); Mr Georgiou did not file any anti-suit injunctions (which it is said cannot rationally be considered to be in the interests of the group

members in the overlapping proceedings); Mr Georgiou's legal team has prepared the most detailed and transparent budget for the costs of the proceedings, and have disclosed that to the other plaintiffs; Mr Georgiou's legal team has not engaged in any expensive and unnecessary bookbuild that does not serve the interests of group members in an "open class" representative proceeding (considered further below); and Mr Georgiou did not pursue a consolidation of some of the competing proceedings (which it is said confers no benefit on group members and only results in additional costs).

309 Mr Georgiou cavils with the proposition that IMF is a superior funder to Augusta and says that such a submission suffers from the same defects as identified in respect of the possibility of preferring the Komlotex proceeding based on Maurice Blackburn's experience. It is submitted that where there is evidence that each funder (here not including Maurice Blackburn) has the capacity to meet its funding obligations, there is no reason to prefer a more "experienced" funder and that the consequence of so doing is likely to result in increased fees, complacency on the part of the funder and the development of a monopoly. It is accepted that Augusta is a relative "newcomer" to funding in Australia but Mr Georgiou says that it has already funded a number of class actions; employs staff with experience as commercial litigators; and has the ability to provide informed assistance and oversight on both the strategic and costs-related aspects of a securities class action.

310 In terms of the specific advantages Wileypark has identified of IMF, Mr Georgiou says those benefits are overstated in that: while IMF may perform damages calculations, independent expert evidence is still likely to be required and, hence, the benefit therefore likely to be marginal, at best; and there is no reason to believe that IMF can provide a higher level of "strategic input and oversight" compared to Augusta (Mr Georgiou submitted that the contrary is likely to be the case, given the relevant Augusta staff are admitted legal practitioners). Further, Mr Georgiou says that, as IMF is funding disbursements only, there is a possibility of IMF receiving a windfall.

Conclusion as to sixth factor

311 This factor, in my opinion, is neutral. I consider there is no sensible basis for differentiation between the experience or abilities of the respective legal/funding teams and I give this factor no weight.

312 This is not a case where one is comparing the ability on the one hand of a sole practitioner in some rural or suburban practice (and I mean no disrespect to any of those practitioners) to conduct complex litigation of the present kind against a well-resourced defendant against the ability on the other hand of firms of the kind here involved in the litigation to do so. Nor is the comparison of the experience of the respective sets of lawyers in the conduct of class actions or their track record to date in such matters particularly instructive, at least without much more information (no doubt confidential and unable to be provided) as to the conduct of the settlement negotiations and basis on which settlements were reached in those matters (much of which would in any event be likely to be anecdotal and difficult to test).

313 That conclusion is reinforced by the fact that Mr Scattini (now at Quinn Emanuel) was formerly a partner at Maurice Blackburn, which shows the difficulty of comparison of the experience of the particular individuals running the litigation.

314 Similar observations can be made about the respective funders. In my opinion, it is inappropriate for the Court here to partake in a "beauty parade" (to adopt Ms Wigmans' phrase) which compares the respective legal/funding teams according to anecdotal and empirical data that I cannot properly test. I am satisfied that the respective legal teams each have the skill and capacity to conduct proceedings of this kind in the interests of class members.

7. State of progress of the proceedings

315 Ms Wigmans submits that this factor points in favour of the Wigmans proceeding. It is noted that in none of the representative proceedings, other than the Wigmans proceeding, has the matter progressed beyond the filing of

a pleading; whereas, in the Wigmans proceeding: security for costs has been agreed and provided; particulars have been sought and obtained; AMP has filed a defence; Ms Wigmans has served her lay evidence and has also served, on a without prejudice basis, an expert report for mediation.
Ms Wigmans argues that the fact that the Wigmans proceeding is more advanced means that it is more likely to promote the just, quick and cheap resolution of the proceedings.

316 Ms Wigmans says that, subject to the completion of an opt-out and registration process, the Wigmans proceeding is ready to proceed to mediation and that this is a key point of distinction that was not present in *GetSwift* (since, there, Lee J found that each of the proceedings was at a sufficiently equal state of preparation and there was no reason to conclude that anything about any of the proceedings meant that one would proceed to a mediation or an initial trial earlier than the other).

317 Each of the other competing representative plaintiffs argues that this is a factor which is neutral or should be given no weight.

318 Komlotex submits that the "eagerness" of Ms Wigmans' solicitors: to proceed with opt out, registration and CFOs within the first month of issuing the Wigmans proceeding; and to serve preliminary expert evidence for mediation just over three months after commencement and prior to any discovery or the filing of any evidence, does not align with the conduct of a team prepared "to work assiduously to achieve the best outcome for the applicant and group members and to take responsible risks in that regard"; and says that the fact that these steps were taken shortly after the commencement of the competing proceedings (and prior to the orderly resolution of the multiplicity question by the Court in its protective role vis-a-vis unrepresented group members) raises additional concerns.

319 Komlotex argues that, other than the steps taken by Ms Wigmans to advance an early mediation, there is no material difference in the state of preparation of the various proceedings. In that regard, Mr Watson has deposed that

Maurice Blackburn has undertaken considerable work to investigate and develop the claim (including prior to the issue of its proceeding) and has engaged in "mature reflection" to determine the appropriate claim period (see the affidavit of Mr Watson sworn 7 November 2018 at [55]-62]).

320 Wileypark, pointing out that the Wigmans proceeding was only marginally first in time, submits that (at [54]):

> [i]f the courts were to favour the first proceeding in time, that would be contrary to the public interest because it would encourage proceedings reflecting, amongst other unsatisfactory characteristics, shallow forensic analysis. The Court should discourage any thought in the class action community that there is to be any reward for speed in getting to the Registry or any handicap for those who engage in more careful forensic analysis.

citing the observation of Allsop CJ in *Wileypark v AMP* at [18], to the effect that, ordinarily, little weight should be given to this factor "in circumstances where all courts should be astute to protect the best interests of all group members, not the desires of the promoters and managers of the litigation (in particular, the commercial funders and the lawyers) to be first to the filing gate". It is noted that his Honour recognised that there are "specific dangers involved in giving weight to the first filing", namely that it "involves an encouragement for hasty preparation and lack of mature reflection".

321 Mr Georgiou similarly submits that there should be no differentiation between the competing class actions based on the order in which the proceedings were commenced, arguing not only that there are good public policy reasons why the Court should not encourage a rush to file proceedings (see *GetSwift Appeal* at [279]), but also that there is no basis to find that any of the plaintiffs was dilatory (all the proceedings being commenced within about eight weeks of the disclosures at the Royal Commission and, in Mr Georgiou's case, there being evidence indicating that preparatory steps were being taken in the period prior to those proceedings being commenced) and that the solicitors acting in all the competing proceedings were on notice that other firms and litigation funders were investigating claims prior to any of the proceedings being commenced.

322 In those circumstances, where all parties were on notice of the competing class actions at all relevant times, it is submitted that there should also be no differentiation between those competing class actions based on the state of preparation of any one or more of the proceedings. Mr Georgiou accepts that the Wigmans proceeding appears to have the most advanced state of preparation but says that his solicitors have made a conscious decision not to advance preparation of the proceedings to any great extent pending the resolution of multiplicity issues and that the rush to advance the Wigmans proceeding "is inexplicable at best" (the submission being that such steps were taken primarily to improve the position of the Wigmans proceeding in the present multiplicity hearing, in circumstances where Ms Wigmans was aware of the competing class actions and had applied for an anti-suit injunction to restrain the other proceedings). It is submitted that an approach which differentiates between proceedings based solely on the state of preparation of proceedings, where that work is undertaken with knowledge that the multiplicity issues were still to be resolved, would encourage potentially unnecessary and rushed work for the purpose of improving a firm's position in a multiplicity application, which is not in the overall interest of group members. Mr Georgiou also submits that an early mediation, as proposed by Ms Wigmans, is not necessarily in the best interests of group members.

323 In response to the criticism by Mr Georgiou and Komlotex in respect of the progress of the Wigmans proceeding, Ms Wigmans argues that the submission by Mr Georgiou reflects a fundamental misunderstanding of how litigation is conducted in the commercial list of this Court (noting that it was made clear by the Court from an early stage that the Wigmans proceeding should be progressed, despite the existence of the subsequent proceedings). (Ms Wigmans also notes that Burford has foregone any entitlement to recover from any resolution sum the costs or disbursements incurred in connection with the transfer applications commenced by the representative plaintiffs in the subsequent proceedings in this Court.)

Conclusion as to seventh factor

324 I am not persuaded that the more advanced state of preparation of the Wigmans proceeding is to such an extent as to warrant the conclusion that this proceeding should be the vehicle to go forward. Had all other factors been equal this might have provided a basis for differentiation but I am not persuaded that all other factors are equal.

325 I give this factor little weight. While in some cases the state of progress of the matter may be a relevant factor, I do not consider this is one of those cases.

8. Conduct of the representative plaintiffs to date

326 Again, Ms Wigmans says this factor points in favour of the Wigmans proceeding. In particular, Ms Wigmans points to matters relating to the conduct of the present applications as relevant to the diligence with which it could be expected that the respective solicitors are likely to conduct their respective proceedings should it go forward (see the affidavit evidence of Mr Scattini). Criticism is made of "tactical manoeuvring amongst Fernbrook, Wileypark and Komlotex that has plagued these applications".

327 Ms Wigmans says that she is the only representative plaintiff that has complied fully with the orders of 10 October 2018 and she emphasises the delay of Komlotex in amending its class period pleaded (as adverted to above at [297]). Ms Wigmans points to the observation in *GetSwift* that delay (in the sense of tardiness) might in some circumstances "be an important, indeed decisive, consideration".

328 In response to the assertion by Ms Wigmans of "dilatory" conduct on Komlotex' part (arising from the fact that it filed an application dealing with multiplicity on 24 October 2018, later "abandoned" it on 16 November 2018, and did not file a new application until 22 November 2018), Komlotex notes that: it filed four identical notices of motion on 24 October 2018 (one in each of the competing proceedings); it "abandoned" only one of those motions on 16 November 2018 (being the one filed in the Fernbrook proceeding, and only

because it had reached a compromise of its dispute with Fernbrook by an in-principle agreement to consolidate the two proceedings); and, in the period between 16 November and 22 November 2018, Komlotex and Fernbrook formalised the terms of their agreement. Komlotex says that it can hardly be criticised for advancing the overriding purpose by reaching agreement with Fernbrook's solicitors to resolve part of the present dispute (and says that this also explains why Fernbrook did not file any evidence until 21 November 2018 when it filed a short affidavit in support of the consolidation motion filed on 22 November 2018).

329 Insofar as Ms Wigmans refers to Komlotex' alleged delay in finalising its class period and in serving a pleading, Komlotex says that the fact that Maurice Blackburn engaged in investigations before satisfying itself that it was appropriate to plead the longer class period is not a matter that should be criticised; and that there was no delay in serving Komlotex' draft pleading. Komlotex notes that it validly commenced its proceeding in the Federal Court by concise statement (a procedural step deemed by s 1337P of the *Corporations Act 2001* (Cth) to have taken place in this Court) and that, although there has been no order for Komlotex to replace the concise statement in this Court, it has prepared a draft commercial list statement to be filed in the proposed Komlotex/Fernbrook proceeding in anticipation that it may be required to do so in the event that it is successful in the present applications. It is submitted that, because the competing proceedings have effectively been "on hold" pending the resolution of multiplicity question, there has been no operative delay in comparison to the other competing proceedings. Komlotex argues that there has been careful thought given to the pleading issues and rejects the suggestion that there has been delay on its part such as to warrant a conclusion that it would not prosecute the proceeding with due diligence if its proceeding matter were to go forward.

330 Mr Georgiou submits that the lawyers and funders in the Georgiou proceeding have adopted the most reasonable and transparent approach out of all the plaintiffs in the course of the multiplicity issues to date, which demonstrates the focus of acting in the best interests of group members; which he submits

reflects the manner in which the Georgiou proceeding will be conducted in the future and a key reason why the Georgiou proceeding should be the preferred vehicle for the advancement of group members' claims against AMP.

Conclusion as to eighth factor

331 I do not consider that the conduct of the respective legal/funding teams to date points in favour or against any one or more of them. All the legal teams are in my opinion suitably qualified and resourced to be in a position competently to conduct the proceedings and there is nothing to suggest that they would not do so, going forward, efficiently and in the best interests of group members.

Determination

332 As earlier noted, I have more than a little sympathy for the proposition that a "beauty parade" of the kind that has taken place involves making invidious comparisons between those involved in the litigation in the various competing proceedings. I do not, however, accept that such a process brings or is likely "to bring the administration of justice into disrepute because it encourages idiosyncratic choice in each individual case" (as Ms Wigmans has suggested).

333 Certainly, as Ms Wigmans notes, there have been many pages of written submissions, numerous affidavits and volumes of documentary evidence before me on the present applications. The criticism might well be made that the process could have been undertaken less elaborately than it has (see the Full Court in *GetSwift Appeal*). However, I do not accept the suggestion that the cases have not developed, or that this process does not assist the development of, a "principled framework for the resolution of multiplicity disputes" (see Ms Wigmans' reply submissions at [1]); nor is it necessarily the case that the cost incurred in these applications will have been of no benefit to group members (at least insofar as the exercise has focussed the parties or their legal representatives' minds on the optimum funding models to be put forward and even more relevantly, the ambit of the claims properly to be made).

334 The power to stay one or more proceedings, so as to resolve the existence of a multiplicity of proceedings, pursuant to either s 67 of the *Civil Procedure Act* or the Court's inherent power to control its own processes is not in dispute. Nor is it in dispute that that power must be exercised having regard to the overriding purpose in s 56 of the *Civil Procedure Act* so as to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

335 AMP has emphasised that in the particular context of representative proceedings a central aim of statutory representative proceeding provisions such as those contained in Pt 10 of the *Civil Procedure Act* is facilitated by allowing a common, binding decision to be made in one proceeding instead of in multiple proceedings (see its submissions at [15]ff) (hence the concern to avoid unnecessary duplication of proceedings), noting that in *Wileypark v AMP* at [2], Allsop CJ, with whom Middleton and Beach JJ agreed, said:

> As was clear, the running of multiple actions by different lawyers, with different funders was, in principle, potentially inimical to the administration of justice and, in particular, potentially inimical to the interests of group members, and potentially oppressive to AMP.

336 I further note the emphasis placed by Mr Georgiou on the fact that, on approval of settlement, the Court is required to assess what is "fair and reasonable", which requires assessment of the settlement proposal being put before the Court without the benefit of any competing alternative proposal, noting what was said by Jessup J in *Darwalla Milling Company Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388 at [50]:

> There will rarely, if ever, be a case in which there is a unique outcome which should be regarded as the only fair and reasonable one... So long as the agreed settlement falls within the range of fair and reasonable outcomes, taking everything into account, it should be regarded as qualifying for approval...

and Mr Georgiou's submission in that context that there are potential benefits of considering the respective funding proposals in the context of the present applications, rather than leaving any such assessment to some later stage of the proceedings.

337 I am firmly of the view that, absent some factor making it appropriate to allow for the continuance of duplicative proceedings, it is appropriate that only one of the competing representative proceedings should be permitted to proceed and that the remaining proceedings should be stayed.

338 In that regard, there is clearly a substantial overlap (albeit not complete uniformity) in the factual allegations and group membership in each of the proceedings. There is also a substantial overlap in the causes of action being sought to be prosecuted.

339 Although the proceeding with the widest class period appears to be the Wigmans proceeding, considerable doubt has been expressed as to the claims for shareholders prior to May 2012 (but in any event other representative proceedings would be in a position to mirror those claims) and claims for those who acquired shares on 16/17 April 2018 seem to me likely to fall into a separate class or sub-set of the class so as potentially to warrant exclusion of those from the group members in the present proceeding. The ambit of the class in the Komlotex, Georgiou and Wileypark proceedings seems to be wider than the Wigmans proceedings insofar as the class in each of those proceedings includes those who purchased ADRs (though Ms Wigmans' response to that is to assert that the definition of group member in her proceeding does encompass those persons and that she will amend if necessary to clarify that that is the case). AMP's position on this is that, if the group definition in the Wigmans proceeding does indeed include those group members, then there is no limitation issue; if not, then a limitation point may be taken but that this should not now be determined in light of the admonition in *Wardley*.

340 As to the causes of action advanced in the respective proceedings Ms Wigmans maintains that the unconscionable conduct claim is a distinct juridical advantage because it offers a different causation theory of loss. The other representative plaintiffs cavil with this but say that it would be open for them to seek leave to amend to include such a claim if (now having the

benefit of Ms Wigmans' further argument on this aspect) it were considered to have merit (and AMP does not suggest that it would oppose this).

341 It is difficult at first blush, in my opinion, to accept that there is a realistic possibility that the unconscionable conduct claim would succeed where the other claims would fail; or that it would sound in substantially different relief so as to deprive the group members in the other representative proceedings of a benefit by way of remedy that might not otherwise be available to them as members of the competing proceedings.

342 As to the Wileypark claim based on the receipt of legal advice, again it is not apparent to me that this would add to the ambit of likely relief (and there is, in any event, an argument that the particular allegations are already subsumed in the particularisation of the relevant causes of action in the other proceedings). If not so subsumed, then it would be open to the other representative plaintiffs to amend to include those claims if so adduced (and subject to any limitation issues in this regard). Mr Georgiou's submission, that it is unlikely that simply the existence of legal advice will be determinative in contrast to the failure of AMP to disclose the actual policy it was applying (see T 96), has some force in my opinion.

343 What the above means is that I am not persuaded that group members will be deprived in any real sense of access to a particular remedy (or case theory) if only one proceeding (whichever it may be) is now permitted to proceed, particularly where AMP accepts that there is no barrier to the claims of all group members being maintained through the vehicle of one proceeding (and only seems to cavil with the proposition that there be an amendment to introduce claims that it says were statute-barred at the time of the filing of the Wigmans proceeding).

344 There is no doubt that the bringing of multiple representative proceedings has the potential to increase costs, waste court resources and unnecessarily vex defendants. In this regard, AMP points to the criticism that has been made by various of the competing plaintiffs of the other plaintiffs' costs estimates as

emblematic of the fact that the plaintiffs in each of the competing proceedings have different litigation strategies and case theories (referring, by way of example, to the different positions taken by the solicitors in the Wigmans and Georgiou proceedings as to the ambit of the likely discovery in this matter; and the different approaches taken to the anticipated timing of any mediation of the disputes) and submitting that the existence of these divergences highlights that permitting more than one proceeding to continue could only result in tension between the proceedings and consequent disruption and inefficiency.

345 Another matter raised by AMP in this context is AMP's concern that the maintenance of multiple proceedings is likely to impede any attempt to mediate the proceedings, since the continuation of the competing proceedings would require AMP to deal with multiple proceedings, law firms, teams of counsel and litigation funders (reference here being made to the observations of Beech-Jones J in *Hassid v Queensland Bulk Water Supply Authority t/as Seqwater* [2017] NSWSC 599).

346 AMP's concern as to the incurring of unnecessary or duplicated costs is not unreasonable. The kinds of additional costs that have been recognised as arising from multiple proceedings were considered in ***Bellamy's*** by Beach J (see at [44]). AMP says, and I accept, that at least a portion of costs of that will not likely be recoverable by whichever party is ultimately successful in the proceedings and, hence, the concern to avoid additional costs being incurred unnecessarily. Moreover, it raises a concern as to the ability to recover costs already incurred having regard to the stance taken by various of the parties in relation to the costs of the unsuccessful applications that were made before Stevenson J for the transfer of the Wigmans proceeding to the Federal Court (now determined by his Honour in *Wigmans v AMP (No 3)* and *Wigmans v AMP (No 4)*).

347 Therefore, I consider that it is not necessary (to permit access to justice) for what are essentially duplicative proceedings to be allowed to continue. No one, other than Wileypark, has expressed a willingness to proceed as a

closed class if is proceeding were otherwise to be stayed (it says, as I apprehend it, that it should continue either as a second open class or as a very large closed class). Considering that the continuation of more than one of the competing representative proceedings would be inimical to the facilitation of the just, quick and cheap resolution of the real issues in these proceedings; and would, in the words of Lee J in *GetSwift* (at [309]) "involve an element of vexation to be occasioned to [AMP] when there is no justifiable reason why it should face [four] open class actions rather than one", this should not be permitted.

348 I accept AMP's submission that the course proposed by Wileypark (to the effect that its proceeding should go forward as an open class proceeding, but that the other proceedings should be permitted to continue as closed classes; or that, if another proceeding goes forward as an open class proceeding its proceeding should nevertheless not be stayed) could only lead to unnecessary duplication, inefficiency and wasted costs and resources; and that the appropriate course is to permit only one proceeding to continue and for there to be a permanent stay of the remaining proceedings. I do not accept Wileypark's submission that so doing amounts to an unreasonable or impermissible interference with group members' freedom of contract.

349 The issue then is as to which of the competing proceedings should be permitted to continue (in the interests both of justice and of group members, and consistent with the overriding purpose of achieving the just, quick and cheap resolution of the real issues in the proceedings) or, as AMP put it, looking to the best and most efficient result for group members and the fairness to the defendant.

350 After much consideration, I have formed the view that the consolidated Komlotex/Fernbrook proceeding should proceed. In reaching that conclusion I have taken into account the voluminous submissions and material put forward by the respective representative plaintiffs and have concluded in summary, that: the first mover advantage should be given no weight; there is no sensible basis to differentiate between the respective legal teams (each of

which I am satisfied has the skill and capacity to conduct proceedings of this kind in the interests of class members); the bookbuilding efforts of some of the representative plaintiffs should be disregarded; the emphasis placed on the "informed choice" made by institutional investors who have signed up to the Wileypark/IMF proposal has been overstated; and that both the perceived advantage of the "no additional cost" expertise of IMF in statistical analysis of data or project management services (for which it ultimately would be remunerated by way of its funding commission) and the fact that the staff with the decision-making role in Augusta are qualified lawyers have been overstated; and that there is no real juridical advantage in the pleading put forward by any of the parties over that of the others.

351 I consider that there are potential incentives and corresponding disincentives in all of the funding models; and that, ultimately, it is the inevitability of court scrutiny of the overall costs at the time of any settlement or, if the matter proceeds to a contested hearing, judgment that will provide the most sure incentive for solicitors and funders to act responsibly and in the best interests of group members.

352 I accept that the Wigmans proceeding is the most advanced (and that this reflects an admirable preparedness by Ms Wigmans to meet the stringent demands on matters commenced in the commercial list in this Court for the efficient preparation of matters for hearing) but I consider that the remaining proceedings will quickly be able to "catch up" when equally under the case management of this list; and I have regard to the fact that there is a legitimate difference of opinion in terms of litigation strategy as to whether an early mediation would be in the best interests of group members.

353 I have placed no weight on the complaints made by various of the representative plaintiffs as to the conduct to date of the other competing proceedings (it seems to me that most, if not all, share part of the responsibility for the debacle that occurred at the time of the various foreshadowed anti, anti-anti, and anti-anti-anti suit injunctions; and that there

is no proper basis otherwise to criticise as dilatory the conduct of any of the proceedings to date).

354 The factor on which I have placed most weight is that the "no win, no fee" model proposed by Komlotex/Fernbrook involves no funding commission; that the modelling undertaken as to costs and returns (accepting the limitations of any process which involves standardising the different assumptions or which the respective costs estimates are based) indicates that, on most scenarios, the net return for group members is likely to be the highest or around the highest on the Komlotex/Fernbrook scenario; and that Maurice Blackburn is prepared to proffer security for costs to match that provided by Ms Wigmans in the Wigmans proceeding. (If there are real concerns as to its balance sheet position, or as to the sufficiency of that amount as security for its costs, no doubt AMP will make use of the liberty to apply for further security to be provided in due course.)

355 As I have noted (more than once), I consider that the process of seeking to adjudicate between the abilities of well-qualified and experienced litigation lawyers to conduct proceedings of this kind (and the "slings and arrows" cast by them against each other) was unedifying and I do not consider that there is a sensible basis on which to differentiate between the abilities of the respective firms (or the reputations of their funders).

356 I accept that the process in which I have been engaged is one that inevitably involves cost and delay. However, it is a process that it is not possible to avoid (particularly in light of the admonition of the Full Court). Moreover, part of the delay in the present case, for which I accept responsibility was occasioned by my view that it was appropriate to await a determination at intermediate appellate level as to the challenge to the making of CFOs.

Orders

357 I propose to make orders as sought by Komlotex in its notices of motion for the consolidation of its proceeding with that of Fernbrook and for the stay of the other representative proceedings. Those orders will be conditional on the

payment into Court on behalf of Komlotex and Fernbrook of the sum of $5 million as security for the defendant's costs, without prejudice to the ability of AMP to seek additional security as the matter progresses. I propose to reserve the question of costs in case there are submissions to be made in that regard. It may also be that there are consequential orders to be made (I have in mind the payment out of the security paid into Court by Burford, for example). For that purpose, I will give liberty to apply. I will also list the matter for directions for the further case management of the Komlotex/Fernbrook proceeding.

358 The orders I make are as follows:

(1) Pursuant to r 28.5 of the Uniform Civil Procedure Rules 2005 (NSW), order that proceeding 2018/310118 (the Komlotex proceeding) be consolidated with proceeding 2018/309329 (the Fernbrook proceeding) and that the consolidated proceeding be known as *Komlotex Pty Ltd v AMP Limited* (Consolidated proceeding).

(2) Order that the plaintiff in the Komlotex proceeding and the plaintiff in the Fernbrook proceeding (together, the joint plaintiffs) be, respectively, the first plaintiff and the second plaintiff in the Consolidated proceeding.

(3) Order that the joint plaintiffs be represented by one firm of solicitors (being, until further order, the current solicitors for the plaintiff in the Komlotex proceeding, Maurice Blackburn).

(4) Order that the costs to date of each of the Komlotex proceeding and the Fernbrook proceeding be treated as costs in the Consolidated proceeding.

(5) Order that the joint plaintiffs have liberty to seek, on any application for approval of a settlement of the Consolidated proceeding or for approval

of costs following judgment, orders for approval of the costs referred to in order 4 above.

(6) Subject to the payment into Court on behalf of the joint plaintiffs of the sum of $5 million as security for the defendant's costs (without prejudice to the defendant's ability from time to time to seek the provision of further security) order, pursuant to s 67 and s 183 of the Civil Procedure Act 2005 (NSW) and in the inherent power of the Court, that the following proceedings be permanently stayed:

(i) 2018/00145792 (Wigmans v AMP Limited);

(ii) 2018/310082 (Wileypark Pty Ltd v AMP Limited); and

(iii) 2018/310103 (Andrew Georgiou v AMP Limited).

(7) Reserve the question of the costs of the various motions brought by the plaintiffs in each of the proceedings referred to in order 6 above and the costs of the plaintiff in the Komlotex proceeding in respect of its notices of motion seeking a stay of the proceedings referred to in order 6 above; with a view to dealing with the question of costs on the papers.

(8) Liberty to apply on 48 hours' notice.

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