



Supreme Court
New South Wales

Case Name: Komlotex Pty Ltd v AMP Ltd (No 2)

Medium Neutral Citation: [2020] NSWSC 1149

Hearing Date(s): 26 August 2020

Decision Date: 26 August 2020

Jurisdiction: Equity

Before: Ward CJ in Eq

Decision: Orders made as per Annexure A to these reasons.

Catchwords: CIVIL PROCEDURE — Representative proceedings — Conduct of proceedings — Group members — Opting out — Distribution of opt out notices and related matters

CIVIL PROCEDURE — Representative proceedings — Conduct of proceedings — Whether representative plaintiff in duplicative stayed proceeding should be provided access to documents and related matters

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 56, 176

Cases Cited: Akins v Abigroup Ltd (1998) 43 NSWLR 539
Findex Group Ltd v iiNet Ltd [2019] NSWSC 1198
Harman v Secretary of State for the Home Department [1983] 1 AC 280
Komlotex Pty Ltd v AMP Ltd [2020] NSWSC 504
Springfield Nominees Pty Ltd v Bridgelands Securities Ltd (1992) 38 FCR 217
Wigmans v AMP Ltd [2020] NSWCA 104

Category: Procedural and other rulings

Parties: Komlotex Pty Ltd (First Plaintiff)
Fernbook (Aust) Investments Pty Ltd (Second Plaintiff)
AMP Limited (First Defendant)

Marion Antoinette Wigmans (Interested Party)

Representation:

Counsel:

CA Moore SC with G Donnellan (Plaintiffs)

EA Collins SC with IJM Ahmed (Defendant)

A Hochroth (Interested Party)

Solicitors:

Maurice Blackburn Lawyers (Plaintiffs)

Herbert Smith Freehills (Defendant)

Quinn Emanuel Urquhart & Sullivan (Interested Party)

File Number(s):

2018/00310118

Publication Restriction:

Nil

JUDGMENT – EX TEMPORE

- 1 **HER HONOUR:** This matter has come before me today on an application by the plaintiffs in proceedings number 2018/00310118 for orders, including orders pursuant to s 176 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*) in relation to an opt out notice to be issued in relation to a class action brought against AMP Limited (AMP).
- 2 I have previously outlined the background to the proceedings (see *Komlotex Pty Ltd v AMP Ltd* [2020] NSWSC 504). The background to the current application can also be discerned from the decision of the Court of Appeal published on 4 June 2020 (see *Wigmans v AMP Ltd* [2020] NSWCA 104).
- 3 In the interests of time, I do not propose to go back over the background to the proceedings. In brief compass, effectively what happened in June 2020 was that the Court of Appeal set aside orders that had been made by me in May 2020 for the variation of orders in respect of earlier opt out notices to be issued.
- 4 Relevantly, for present purposes, their Honours (Macfarlan, Leeming and White JJA) said (see at [86]) that they agreed that if all that had occurred in May 2020 was that orders and notices concerning an opt out date and exhorted registration had been made then that would have been within power. Their Honours identified the vice in the orders and notices that had been made as lying in the "joint present and communicated intention to apply for orders

extinguishing the claims of group members who do not register if a settlement takes place". Their Honours went on to say that that that was "no small thing", and that the "present intention has a large practical effect on the content of the notice and the decision to be made by group members, and [that it was] apt to shape the negotiations at the mediation".

- 5 In that context, what has now occurred is that the plaintiffs and the defendant have agreed to a new opt out regime with notices which make clear to the group members that it is not compulsory for the group members to be registered and that it is not now the intention of the plaintiffs to apply for orders extinguishing the claims of group members who do not register if a settlement does take place. Senior Counsel for the plaintiffs has made clear that the plaintiffs no longer have the intention that was identified as the vice lying in the May 2020 orders and notices. Reasons have been put forward as to why it is in the interests of group members for registration notices to be issued at this stage in the proceedings. Those advantages were considered as part of the reasons given by the Court of Appeal in June 2020. They include for example (as noted at [44] of their Honours' reasons) that the share register is insufficient to identify group members, let alone the quantum of any claims they might have (their Honours there setting out four non-exhaustive reasons why that was so).
- 6 Their Honours also noted (see at [105]-[106]), and accepted this as according with common-sense, that a principal of the corporate law firm acting for the plaintiffs had given unchallenged evidence that it was necessary to know how many group members would be involved in a settlement and how many shares that they had acquired. That evidence included that this was the purpose of the orders that had then been proposed by the parties relating to registration of group members for the purposes of a mediation.
- 7 The plaintiffs here oppose the position adopted by Ms Wigmans, which is to suggest that the process of issuing opt out and registration notices be postponed to await the determination by the High Court of Australia of Ms Wigmans' appeal. In that connection, I have been given material that indicates that it is likely that the High Court appeal will be heard in the first two

weeks of November of this year. It is, of course, not known when the appeal, if heard in the first two weeks of November of this year, will be determined. However, Ms Wigmans appears to regard it as likely that it would be determined by April 2021, if not before.

- 8 Ms Wigmans has raised two issues going to the discretion whether or not to order the issue of the opt out and registration notices. Importantly, Ms Wigmans does not suggest that there is no power to make the orders that have now been sought. Indeed, Counsel for Ms Wigmans accepts that there is power to do so.
- 9 Rather, what Ms Wigmans submits is that the discretion ought not be exercised in circumstances where, it is submitted, it would be productive or likely to be productive of wasted costs and where there is a potential risk of confusion being occasioned to group members if the High Court appeal is ultimately successful.
- 10 It is submitted that the effect of delay in issuing the opt out notices, when balanced against the potential for wasted costs and confusion on the part of the group members, is not so great as to warrant the exercise of the discretion to make the orders that have here been sought. In particular, it is submitted that the implications from any delay are such that, rather than a mediation at the end of April 2021, any delay would only be to push the process out to the end of July 2021. That, to my mind, does not take into account the steps that are required under the process set out in the orders for the publication of the opt out notices, for registration then to take place, for that information then to be made available to the experts and for the evidence then to be provided in advance of the proposed mediation in April 2021.
- 11 I remain of the view that I expressed in May of this year: that is, I feel that the delay in the conduct of the proceedings to date is unsatisfactory, and does not accord with the statutory mandate for the just, quick and cheap resolution of the real issues in the proceedings (see s 56 of the *Civil Procedure Act*). I also remain of the view that there is utility in the continuing preparation of the matter and, in particular, that there may be utility in steps being taken to progress the matter to a mediation which may be before or after the determination by the

High Court of the appeal (even assuming, as has been indicated, that the appeal will be heard in November of this year).

- 12 I am of the view, balancing those factors, that the orders for the issue of an opt out and registration notice should be made.
- 13 The next issue that was raised this morning related to the form of the opt out notice and registration form. I have been provided with a marked up version of the document which contains the amendments suggested (not, they say, dictated) by the solicitors for Ms Wigmans in the event that, as I have indeed determined, the opt out notice is to be issued at this stage. I note that some of those suggested changes are more substantive than others.
- 14 The first suggested change is to paragraph [8] of the notice in section 1, with the suggested deletion of the word “[h]owever”. All parties appear to agree that this is not an earth shattering change. I do not see the necessity for it. I do not regard it as likely to lead to confusion. I would not require that change.
- 15 The next is to paragraph [10] of section 1. Although not the subject of objection by any of the parties, as I understand it there is no objection by the plaintiffs to a change to paragraph [10](c) in order to correct the split infinitive there appearing.
- 16 As to paragraph [10](d), there is complaint by Ms Wigmans to the words: “Fourthly, in the event of a successful settlement or judgment, there is a risk that Maurice Blackburn will not know about your claim or how to contact you, if you have not registered”. There is similar objection to a similar statement in paragraph [10] of section 2 of the notice under the heading “Option C - Do Nothing”. I do not accept the objection to those parts of the notice. Senior Counsel for the plaintiffs has satisfactorily explained the purpose for the inclusion of those words and I would allow the words to remain.
- 17 There is then a suggested change to include in paragraph [10](d) the words; “If you choose not to register now, then in the event of a successful settlement or judgment, you will be given a further opportunity to register in order to participate in the settlement or judgment”. That was the subject of some debate during the course of argument this morning.

- 18 The concern by the plaintiffs in relation to the addition of those words is that this may give a false picture of comfort to group members because it is a positive assertion that they will be given a further opportunity to register in circumstances where, at the moment, the notices will be issued to email and mail addresses and that there may not be an ability (if group members move addresses or change email addresses in the period of time between now and any further notice) for the plaintiffs to become aware of the new addresses. (Hence, it cannot be said that they “will” be given a further opportunity to register, from a practical perspective.)
- 19 Meanwhile, the concern identified by Counsel for Ms Wigmans is that group members should not be left with the impression that this is the last opportunity to register.
- 20 I accept that it would be preferable for there to be a statement contained in section 1 of the notice, albeit not necessarily positioned at the conclusion of paragraph [10](d), along the lines that it is likely that, if the matter settles at mediation or if there is a favourable judgment following the trial, the Supreme Court would require that a further registration notice be sent to group members who have not previously registered. I think that with the addition of a statement to that effect at some point in section 1 that would address the concerns that have been raised by Ms Wigmans and I would approve it with that insertion.
- 21 The next change is to paragraph [23], to which there is no objection. It relates to the anticipated timing of the High Court hearing. The words to be inserted are: “The parties presently anticipate the High Court hearing will occur in November 2020, although, this has not been confirmed and the hearing could occur later”. The insertion of those words is not objected to by the plaintiffs and the defendant. There was a suggestion by Counsel for Ms Wigmans that if, in the next few days, the actual hearing date or listing date becomes known, there could be an amendment to paragraph [23] to include that. I understand that the difficulty in relation to this is that, for the purposes of the timetable proposed by the orders, it will be necessary for the form of document to be printed to be sent out by the end of this week. In those circumstances, it seems to me that it is not practicable to suggest that there be further amendment to

paragraph [23]. If the statement is made as proposed, being that the parties presently anticipate that the High Court hearing will occur in November 2020, then that would not be misleading, even though this has not yet been confirmed and the hearing may occur later.

- 22 The next proposed change is to section 2 under the heading “YOUR THREE OPTIONS”. For the reasons that I have already indicated, I do not think that the words added at the end of paragraph [4](d) should be included, but there will be a statement in section 1 that will address the fact that it is likely that a further registration process will be undergone at a later stage. I have already made my views known in relation to paragraph [10](a) that I think that language should remain. I understand that these are the only complaints in relation to the notice. (In addition following the ex tempore reasons amendment was proposed and accepted to the form of the abridged notice. It is not necessary here to set that out.)
- 23 That brings me to the last of the issues raised today, being the proposal by Ms Wigmans (who is not a party to the present proceedings albeit that she is a registered group member in the proceedings) that the orders include orders 20 and 21.
- 24 Order 20 is an order requiring the plaintiffs, in the particular terms proposed, to provide to the solicitors for Ms Wigmans certain discovered documents, including material on quantum and materiality to be served pursuant to the orders that I will be making today. (In oral argument it was said that the reference to provision to the solicitors could be deleted.) Order 21 is expressed to impose a condition on order 20, namely that Ms Wigmans and her legal representatives undertake to the Court certain things including, significantly, that they will not use the documents, material or information provided pursuant to order 20 other than for the purposes of these proceedings or proceeding number 2018/00145792. That other proceeding is the very proceeding that has currently been permanently stayed. It will be recalled that that stay is the subject of the appeal before the High Court but, at the moment, the fact remains that Ms Wigmans proceeding has been stayed.

- 25 In any event, if documents were made available to Ms Wigmans in these proceedings pursuant to orders in these proceedings, then she would be receiving material the subject of an implied undertaking of the kind recognised in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 (*Harman*) and, as Counsel for Ms Wigmans properly concedes, she would need leave to use that material for the purpose of other proceedings. It is not appropriate to deal with an application for leave to be released from the *Harman* undertaking without the application being formally brought and supported by evidence going to the factors that must be taken into account when determining whether or not to give leave to be released from the *Harman* undertakings. Those factors have been set out in, for example, *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217, and have been considered in a number of decisions since then (including, for example, *Findex Group Ltd v iiNet Ltd* [2019] NSWSC 1198).
- 26 Furthermore, complaint is taken to the suggestion that Ms Wigmans should be provided (at least at this stage) with privileged material. That complaint is made by the holders of the privileged material and reference is made by Senior Counsel for AMP to the decision in *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 to the effect that the provision of an expert report does not waive privilege in the opinion unless and until that expert report is read in open court. It is submitted that the effect of orders 20(b) and (c), as proposed by Ms Wigmans, would have the effect that the parties were being ordered to provide privileged expert reports to a non-party. It is further noted by Senior Counsel for AMP that, at this stage, neither the plaintiffs nor the defendant have provided or served their experts' reports; and, it is not known what will be in those reports and, in particular, it is not known what reference there will be to discovered material or confidential material.
- 27 It seems to me that it is not unreasonable for the parties to wish to be heard at a later point of time as to what material, if any, should be provided to group members in respect of privileged expert material.
- 28 Finally, reference was made by Counsel for Ms Wigmans to, and reliance was placed on, a letter which was tendered and admitted as Ex 1. Specifically,

reliance was placed on this by way of submission, in particular as to a statement that had been made during the course of the hearing before the Court of Appeal on 25 May 2020, to the effect that the plaintiffs would be obliged to provide requested material to Ms Wigmans:

“That was resolved by this device of saying that the evidence will be on, on a without prejudice basis, which means that it would be used in the mediation. It clearly, as your Honour Justice Leeming has observed, because we are representing all group members, including Ms Wigmans — and, indeed, Ms Wigmans is not just a group member; she is a registered group member in our proceedings — *we would be obliged, if a group member requested to see that information, to provide that evidence to them.*

[Emphasis in original]

- 29 As may be observed, this relates to whether Ms Wigmans, as a group member, would be entitled to see material served on a “without prejudice” basis pursuant to the orders made in respect of the expert evidence and includes a statement to the effect that the plaintiffs would be obliged, if a group member requested, to see that information to provide that evidence to them.
- 30 For obvious reasons, I was not privy to the argument before the Court of Appeal in May 2020. I assume that this is an accurate statement of the transcript. Senior Counsel for AMP put in context that exchange by reference to the concern that had been raised in the course of argument in relation to ground 2 of the grounds of appeal by Senior Counsel appearing for Ms Wigmans on the appeal. It is not necessary for me to explore that issue or that debate in the context of the present application. It seems to me that no basis has been established that would require an order for the provision of discovered material or expert evidence at this stage when what is being said is that the purpose for which Ms Wigmans requires it or wants to see it at this stage is for its use, or to be ready for it to be used, in her proceedings in the event that the stay in respect of her proceedings is lifted as a result of her appeal to the High Court. That is an issue that can be determined once the outcome of the High Court appeal is known. I am not satisfied, particularly in the circumstances where provision of the material at this stage may well give rise to complex issues as to what use can be made of it and where no

application has been made for leave prospectively to be released from the *Harman* undertaking, that an order of this kind should be made at this stage.

- 31 Therefore, I will make the orders sought in the short minutes of order that have been provided other than the proposed additional orders 20 and 21; furthermore, the form of the opt out notice should be amended in accordance with these reasons and the amended version of the opt out notice should be forwarded to my associate by close of business today.
- 32 I add that, in accordance with these reasons, an updated opt out notice was duly provided and orders have now been entered accordingly.

Annexure A

Expert Evidence and Opt Out Date

1. On or before 18 December 2020, the Plaintiffs serve any material on quantum and materiality upon which they intend to rely at mediation on a without prejudice basis.
2. On or before 9 March 2021, the Defendant serve any material on quantum and materiality upon which it intends to rely at mediation on a without prejudice basis.
3. Nothing in orders 1 and 2 prevents either party from filing and serving supplementary evidence on quantum and materiality at a later stage in the proceedings, by a date to be ordered.
4. Pursuant to section 162 of the Civil Procedure Act 2005 (NSW) (the Act), 4.00pm (AEDT) on 23 November 2020 (the Class Deadline) be fixed as the date before which a Group Member (as defined in the Amended Commercial List Statement filed on 5 August 2019) may opt out of the proceeding.

Opt Out Notice

5. Pursuant to section 176(1) of the Act, the form and content of the notice (Notice to Group Members) in Schedule A, and the abridged notice (Abridged Notice) in Schedule B be approved.

6. Pursuant to s 183 of the Act, the notice set out in Schedule C to this Order that is a modification of Form 115 (Opt Out Notice) be approved for this proceeding for the purpose of r 58.2(1) of the Uniform Civil Procedure Rules 2005 (NSW).

7. Pursuant to s 176(2) of the Act, notice is to be given to group members by no later than 4pm on 14 September 2020 according to the following procedure:

a. the Plaintiffs are to display the Notice to Group Members and Opt Out Notice on the plaintiffs' solicitor's website, www.mauriceblackburn.com.au, continuously until the Class Deadline;

b. the Plaintiffs are to deliver the Notice to Group Members and the Opt Out Notice to the contact email address where an email is available, or failing that, by ordinary mail, to each Group Member who is a client of the Plaintiffs' solicitors or whom they are otherwise aware;

c. the Defendant is to cause the Notice to Group Members and the Opt Out Notice to be sent to each person or entity listed in the defendant's share register as having purchased shares in the defendant between 10 May 2012 and 13 April 2018 inclusive, such notices to be sent by email where an email address is available, or failing that, by ordinary mail;

d. the Plaintiffs are to cause an advertisement in the terms of the Abridged Notice (Schedule B) to be published in the legal notices or equivalent section in one week day edition of The Australian Financial Review.

8. The Defendant will provide to the Plaintiffs an estimate of the disbursement costs of the Defendant in complying with Order 7(c) above, and the costs shall be paid by the Plaintiffs in the first instance but shall be costs in the cause.

9. Pursuant to s 162(2) of the Act and r 58.2(1) of the UCPR, any Group Member who wishes to opt out of this proceeding must, on or before the Class Deadline, deliver an Opt Out Notice to the Registry of the New South Wales Supreme Court.

10. If, on or before the Class Deadline, the solicitors for any party receive a notice purporting to be an opt out notice referable to this proceeding, those solicitors are to file such notice in the Registry of the Supreme Court of New

South Wales within 7 days of receiving it and the notice shall be treated as an Opt Out Notice received by the Court at the time when it was received by the solicitors.

11. The solicitors for the Plaintiffs and the Defendant be granted leave to inspect the Court file and to copy any opt out notices filed by group members.

Claim Registration

12. Subject to order 14 below, pursuant to section 183 of the Act, any Group Member who wishes to register their claim in this proceeding at this stage, should by the Class Deadline:

- a. submit a completed registration form in a form set out in Schedule D to this Order (Registration Form) through the 'AMP Shareholder Class Action Claims Registration' webpage established on the website of the Plaintiffs' solicitors; or
- b. complete a hard-copy Registration Form and return it to the Plaintiffs' solicitors at Level 8, 179 North Quay Brisbane Qld 4000,

(New Registered Group Members).

13. In completing the Group Member Registration Form, and in order to register for the purpose of Order 12 above, each Group Member will be required to submit:

- a. the Group Member's name and address and/or email address;
- b. any relevant Holder Identification Number (HIN) or Security Reference Number (SRN), if available;
- c. the number of AMP securities held by each Group Member immediately prior to the commencement of trade on 10 May 2012;
- d. for each acquisition:
 - i. transactional information consisting of the date of acquisition, the quantity of securities acquired, the price per security paid and the brokerage paid, regarding AMP securities acquired from 10 May 2012 to 13 April 2018 (inclusive); and

- ii. total amount paid (net of brokerage) in respect of the acquisition, if available;
- e. for each sale:
 - i. transactional information consisting of the date of sale, the quantity of securities sold, the price per security and the brokerage paid regarding AMP securities sold from 10 May 2012 to 13 April 2018 (inclusive); and
 - ii. total amount received (net of brokerage) in respect of the acquisition, if available.

14. A Group Member will be deemed to have complied with Order 12 above if, by the Class Deadline:

- a. that Group Member has retained Maurice Blackburn in writing to act for that Group Member in connection with this proceeding (Existing Registered Group Members); and
- b. to the extent they have not already done so, that Group Member provides to Maurice Blackburn the same information as New Registered Group Members are required to submit pursuant to Order 13 above.

15. By 4:00pm AEDT on 18 December 2020, the Plaintiffs must deliver to the solicitors for the Defendant (in electronic form), a de-identified version of the information referred to in Order 13 in respect of each of the Existing Registered Group Members and New Registered Group Members.

16. The Notice to Group Members, the Abridged Notice, the Opt Out Notice and the Registration Form approved pursuant to Orders 5, 6 and 12 above, may be amended by the Plaintiffs before they are emailed, posted, displayed or published in order to correct any website or email address or telephone number or other non- substantive error.

Mediation

17. Mediation in this matter is to be conducted no later than 23 April 2021. In the absence of agreement by the parties as to a mediator, the mediation shall be conducted by a person to be appointed by the Court.

Other Orders

18. The proceedings be listed for further directions on 3 May 2021 at 9.30am.
19. The parties have liberty to apply on 48 hours' written notice.

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