**Equity Division**
**Supreme Court**
**New South Wales**

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| Case Name: | Wigmans v AMP Ltd |
| Medium Neutral Citation: | [2018] NSWSC 1045 |
| Hearing Date(s): | 28 June 2018; further written submissions received 2, 3 & 4 July 2018 |
| Date of Decision: | 9 July 2018 |
| Jurisdiction: | Equity - Commercial List |
| Before: | Stevenson J |
| Decision: | Application to transfer these proceedings to the Federal Court of Australia is refused |
| Catchwords: | CIVIL PROCEDURE – jurisdiction – transfers to and from other courts – s 1337H Corporations Act 2001 (Cth) – multiple class actions – where four class actions arising from same facts pending in Federal Court – whether these proceedings should be transferred to the Federal Court – whether court to make an anti-suit injunction |
| Legislation Cited: | Civil Procedure Act 2005 (NSW)<br>Corporations Act 2001 (Cth)<br>Federal Court of Australia Act 1976 (Cth)<br>Judiciary Act 1903 (Cth)<br>Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)<br>Uniform Civil Procedure Rules 2005 (NSW) |
| Cases Cited: | Commonwealth of Australia v Mewett (1995) 59 FCR 391<br>CSR Ltd v Cigna Insurance Australia Ltd [1997] HCA 33; (1997) 189 CLR 345<br>Santos Ltd v Helix Energy Services Pty Ltd [2009] VSC 282; (2009) 28 VR 595<br>Smith v Australian Executor Trustees Ltd [2016] NSWSC 17 |
| Category: | Procedural and other rulings |
| Parties: | Marion Antoinette Wigmans (Plaintiff) |

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| | AMP Limited (Defendant)<br>Komlotex Pty Ltd (Applicant)<br>Andrew Georgiou (Applicant)<br>Wileypark Pty Ltd (Applicant)<br>Fernbrook (Aust) Investment Pty Ltd (Applicant) |
| Representation: | Counsel:<br>J C Sheahan QC with A Hochroth and P Meagher (Plaintiff)<br>S G Finch SC with I J M Ahmed and E Bathurst (Defendant)<br>C Moore SC with G Donnellan (Komlotex Pty Ltd Applicant)<br>I R Pike SC with J Burnett (Andrew Georgiou Applicant)<br>W A D Edwards with D J Fahey (Wileypark Pty Ltd Applicant)<br>R J Weber SC with R Howe (Fernbrook (Aust) Investment Pty Ltd Applicant)<br><br>Solicitors:<br>Quinn Emanuel Urquhart & Sullivan (Plaintiff)<br>Herbert Smith Freehills (Defendant)<br>Maurice Blackburn (Komlotex Pty Ltd Applicant)<br>Shine Lawyers (Andrew Georgiou Applicant)<br>Phi Finney McDonald (Wileypark Pty Ltd Applicant)<br>Slater Gordon (Fernbrook (Aust) Investment Pty Ltd Applicant) |
| File Number(s): | SC 2018/145792 |

## JUDGMENT

1 Five open class securities class actions have been commenced against AMP Limited.

2 The proceedings in this Court were commenced on 9 May 2018 by Ms Marion Wigmans. The four remaining proceedings were commenced in the Federal Court of Australia between 9 May 2018 (hours after these proceedings) and 7 June 2018. The Federal Court applicants are Komlotex Pty Ltd, Mr Andrew Georgiou, Wileypark Pty Ltd and Fernbrook (Aust) Investments Pty Ltd.

3 Each plaintiff/applicant seeks compensation for loss said to arise from misleading or deceptive conduct of AMP. That conduct is said to have been

revealed at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 16 and 17 April 2018 and to have led to a substantial fall in AMP's share price on 17 April 2018.

4 The applicants contend that they, and the members of the classes they represent, have suffered loss by reason of purchasing shares in AMP in a specified date range. The date range in Ms Wigmans' proceedings in this Court is the widest; thus all group members in the four Federal Court proceedings will be group members in these proceedings.

5 The claims made in each of the proceedings arise out of the same facts and are essentially the same.

6 In each proceeding, AMP is alleged to have:

(a) charged fees to clients without providing the service for which the fees were charged;

(b) made false or misleading statements to the Australian Securities and Investments Commission in relation to the charging of those fees;

(c) failed to comply with its continuous disclosure obligations under the *Corporations Act 2001* (Cth) and the ASX Listing Rules; and

(d) engaged in misleading or deceptive conduct in relation to those matters.

7 The provisions in Pt 10 of the *Civil Procedure Act 2005* (NSW) and Pt IVA of the *Federal Court of Australia Act 1976* (Cth) permit multiple representatives to commence proceedings of this kind.

8 Everyone agrees that all five proceedings should be heard and managed by one judge in one court. Vital case management decisions will have to be

made concerning the progress of the various proceedings and those decisions cannot and should not be made until the forum is determined.

9 To that end, AMP has filed an application in the Federal Court (to be heard by Middleton J on 14 August 2018) for an order to transfer the four Federal Court proceedings to this Court.

10 On 28 June 2018 I heard a corresponding application by the four Federal Court applicants for an order to transfer these proceedings to the Federal Court. At the same time, I heard an application by Ms Wigmans for an anti-suit injunction.

**Decision**

11 I refuse to transfer these proceedings to the Federal Court.

12 I invite the Federal Court applicants to indicate, by 5.00 pm on 16 July 2018 whether they will now consent to the transfer of the Federal Court proceedings to this Court.

13 If they do not, I will decide whether to make an anti-suit injunction.

**The transfer application - is it "more appropriate" for these proceedings to be heard in the Federal Court?**

14 As this is a "civil matter arising under the Corporations legislation" it must be determined under Pt 9.6A of the *Corporations Act*.

15 Section 1337H(2) of that Act provides that "the transferor court" may transfer proceedings to "another court that has jurisdiction in the matters for determination" if it is "more appropriate" that the proceedings be determined there, having regard to the "interests of justice" (s 1337H(4)).

16 In considering an application under s 1337H, the transferor court "must" have regard to the matters in s 1337L, namely: the principal place of business of any body corporate concerned in the proceedings; the place or places where

the events the subject of the proceedings took place, and the other courts that have jurisdiction.

17 It is common ground that:

(a) AMP's registered office and principal place of business is NSW;

(b) the overwhelming majority of persons named in the various Statements of Claim are located in NSW;

(c) almost all the documents likely to be relevant to resolution of the issues in the proceedings are located in NSW;

(d) NSW is therefore the natural venue for resolution of all five matters; and

(e) accordingly, the proceedings should be heard in NSW, whether in this Court or in the Sydney registry of the Federal Court.

18 At a preliminary hearing on 8 June 2018 Middleton J indicated that if it were necessary, the Federal Court could hear the proceedings before it in Sydney. His Honour has not yet committed himself to that course. However, I proceed upon the basis that it is probable that his Honour would be persuaded that, were the proceedings to stay in the Federal Court, the final hearing should take place in Sydney. It is less clear where the numerous interlocutory applications that the parties anticipate will arise would take place.

19 Each of the solicitors for the Federal Court applicants has sworn affidavits to explain their decision to commence proceedings in the Federal Court despite the subsistence of these proceedings in this Court.

20 The solicitor for Mr Georgiou said that her decision was based on her view that the Federal Court:

(a) is the "natural forum" for securities class actions;

(b) has "significantly developed procedures for managing class actions";

(c) has developed a "body of jurisprudence surrounding the making of common fund orders which has not been developed" in this Court; and

(d) has "the greater experience and jurisprudence" in this area than this Court.

21 The solicitor for Fernbrook has expressed a similar opinion, stating that in his view shareholder class actions are more appropriately dealt with by the Federal Court "because of the experience possessed by, and jurisprudence developed by" the Federal Court "in representative proceedings broadly and shareholder class actions in particular".

22 However in submissions before me, all counsel eschewed reliance on such assertions.

23 Subject to one matter, it was common ground, as is obviously the fact, that there is no juridical or procedural advantage or disadvantage to any of the group members, the Federal Court applicants, or to AMP, in hearing the proceedings in one court as opposed to the other.

24 That one matter arises from s 182 of the *Civil Procedure Act*. That section provides that on the commencement of any representative proceedings the running of the limitation period for group members is suspended and does not begin to run unless either the group member opts out or the proceedings are finally determined without finally disposing of that group member's claim. There is a corresponding provision in s 33ZE of the *Federal Court of Australia Act*.

25 In oral submissions, counsel for Wileypark submitted that there was an issue as to whether s 182 could operate to suspend limitation periods in federal

legislation, such as in ss 1041I(2) and 1317K of the *Corporations Act*. However, that matter was not pressed as being relevant to the question of transfer. In written submissions received after argument concluded on 28 June 2018, Wileypark's counsel confirmed that he did not submit that any inefficacy of s 182 to suspend federal limitation periods tells in favour of transferring these proceedings to the Federal Court.

26 However, in written submissions received after argument concluded, Fernbrook submitted, for the first time, that it was uncertain whether s 182 could suspend federal limitation periods and that this factor "ought to weigh considerably in favour of acceding to the transfer applications". Fernbrook had said nothing about this at the hearing. Fernbrook's argument is based on what it submits is uncertainty as to whether ss 1041I(2) and 1317K of the *Corporations Act* "otherwise provide" for the purposes of s 79 of the *Judiciary Act 1903* (Cth) and thereby prevent s 79 from operating to make s 182 binding on this Court when exercising federal jurisdiction.

27 It is highly unsatisfactory that such an argument, which has potentially wide ranging consequences, was raised at the heel of the hunt.

28 As it turns out, I find it irrelevant to the task at hand.

29 That is because AMP has stated, in written submissions, that it "does not propose to contend that the Wigmans proceedings, or any of the Federal Court Proceedings, are time barred". I take that to be an assurance by AMP to the Court that it will not do so. A limitation defence is one that must be specifically pleaded: Uniform Civil Procedure Rules 2005 (NSW) r 14.14(3). "Unless and until that happens the limitation has no effect… A court will not, of its own motion, refuse a remedy although the 'lateness' of the commencement of proceeding is apparent": *Commonwealth of Australia v Mewett* (1995) 59 FCR 391 at 919 (Lindgren J) (citations omitted). That is particularly so where, as here, the relevant provisions of limitation bar the plaintiff's remedy, rather than extinguish the plaintiff's right.

30 As AMP has assured the Court it will not plead a limitation defence, I find the s 182 question (whatever may be its correct answer) to be not merely neutral on the question of transfer, but irrelevant.

31 It is common ground that this Court is a natural forum for resolution of Ms Wigmans' claims and the claims of the class she represents. That must be so. The defendant, AMP, is here. AMP wishes to have Ms Wigmans' claims against it resolved in this Court. The events took place here. The persons criticised in the pleadings are here. The doubtless voluminous documents that will need to be considered are here.

32 Further, these proceedings are at a more advanced stage than those in the Federal Court.

33 At the first directions hearing in this Court on 1 June 2018, the parties agreed to orders for Ms Wigmans to provide $5 million for security for costs, for the provision of particulars and for the filing by AMP of a Commercial List Response. Preparation of Ms Wigmans' expert evidence is said to be underway. It is anticipated that a preliminary expert report will be served by 3 August 2018.

34 In the Federal Court, there has been the preliminary case management hearing to which I have referred and the allocation of 14 August 2018 for the hearing of AMP's transfer application.

35 Ultimately, the Federal Court applicants' submissions as to why it is "more appropriate" that these proceedings be determined in the Federal Court, rather than here, came down to two propositions.

36 The first is that there are four proceedings commenced in the Federal Court, and only one proceeding in this Court. But, at least in the case of two of the Federal Court applicants, that appears to be largely because their solicitors hold the opinions I have referred to at [20] and [21]; agreed by counsel not to be relevant to my consideration of the matter.

37 The second is the contention that the "only way" this Court can, by its own orders, ensure that all five proceedings are heard in the one court (as everyone agrees must happen) is to grant the transfer applications.

38 But the weight of the latter submission only arises because the Federal Court applicants' transfer applications have been brought on for hearing before this Court some five weeks before the hearing of AMP's corresponding application in the Federal Court.

39 Had Middleton J heard AMP's transfer application prior to the transfer application before me, that submission could have been made to his Honour.

40 In any event, acceding to the Federal Court applicants' transfer application is not the only means by which I could ensure all five matters are heard in the one court. There is always the possibility of an anti-suit injunction. I will return to this.

41 It is true that Mr Georgiou lives in Melbourne and that each of Komlotex, Fernbrook and Wileypark have their registered offices in Victoria. It may be that many of the group members reside or are incorporated outside NSW. But I see these factors as being of little, if any, weight. Those parties will, no doubt, simply give unchallenged evidence of their purchase of shares in AMP.

42 The matter that I regard as being determinative is that Ms Wigmans has commenced her proceedings in a court which, everyone agrees, is a natural forum for resolution of the issues in those proceedings.

43 In circumstances where:

(a) it is now agreed that there is no relevant juridical or procedural advantage or disadvantage to any party by reason of Ms Wigmans commencing and maintaining proceedings in this Court;

(b) AMP, the defendant/respondent in all five proceedings is the party most affected by the question of choice of venue; and

(c) AMP wishes to litigate against Ms Wigmans in this Court (and not in the Federal Court);

I am not persuaded that it is "more appropriate" in the interests of justice to transfer these proceedings to the Federal Court.

**Anti-suit injunction?**

44 Ms Wigmans sought, in the alternative, two forms of anti-suit injunction.

45 The first is an order restraining the Federal Court applicants from taking any further steps in the proceedings in the Federal Court other than discontinuing those proceedings.

46 The second is an order restraining the Federal Court applicants from taking any further steps in the Federal Court other than consenting to applying for an order under s 1337H to transfer the Federal Court proceedings to this Court.

47 I see no justification for granting an anti-suit injunction in terms of the first alternative. That would effectively cause the Federal Court proceedings to be brought to an end. Senior counsel for Ms Wigmans did not press this alternative with any enthusiasm.

48 The issue is whether an anti-suit injunction in the second alternative should be granted.

49 This Court has power to grant anti-suit relief by reason of its inherent power to protect the integrity of its processes once set in motion. It also has power, by virtue of its equitable jurisdiction, to enjoin a party from commencing or continuing proceedings in another court where the proceedings in the other court "are, according to the principles of equity, vexatious or oppressive" or where the bringing of those proceedings involves "unconscionable conduct or

the unconscientious exercise of legal rights" (*CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; (1997) 189 CLR 345 at 392).

50 The Federal Court applicants were entitled to commence proceedings in the Federal Court. There is no suggestion that this Court's jurisdiction to issue a anti-suit injunction arises merely by virtue of the fact that those proceedings were commenced: for example *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17 at [22] (Ball J).

51 But the position may be different if the Federal Court applicants maintain their determination to prosecute their proceedings in the Federal Court in the face of my refusal to accede to their application that these proceedings be transferred to that Court.

52 Byrne J considered such a circumstance in *Santos Ltd v Helix Energy Services Pty Ltd* [2009] VSC 282; (2009) 28 VR 595. In that case proceedings were pending in the Supreme Courts of Victoria and South Australia between the same parties arising from the same circumstances. Byrne J refused an application under s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) for an order transferring the Victorian proceedings to the Supreme Court of South Australia.

53 His Honour said:

> "Accordingly, in a case where there are two competing proceedings in two jurisdictions within the cross-vesting regime and a judge in one jurisdiction refuses to transfer the local proceeding because, in the interests of justice, the local court is seen as more appropriate, it would not be unreasonable for the judge to make inquiry of the parties seeking an assurance or an undertaking that they would agree to a stay or at least to take no further step in the other proceeding. If there was any risk that this course would not be taken, it would be but a consequence of the decision not to transfer, that there be granted an anti-suit injunction in order to ensure that this decision was given effect to."

54 I propose to adopt a similar course and invite the Federal Court applicants to consider whether they will now agree that the four Federal Court proceedings be transferred to this Court and to inform me, and the other parties, of their

decision by 5.00 pm on 16 July 2018. If they do not, I will consider whether to grant an anti-suit injunction in the terms of the second alternative sought by Ms Wigmans.

55 In those circumstances, the parties should bear in mind the following observation of Byrne J in *Santos*:

> "The granting of an anti-suit injunction should then be seen, not as an intrusion upon the processes of the other court, nor as a reflection upon the competence of the other court, nor as any criticism of the other court for accepting the other proceeding or for progressing it. Rather, it is but a practical order made in aid of the underlying decision made under the cross-vesting legislation as to which court is more appropriate."

56 Common sense should prevail.

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