



Supreme Court New South Wales

Case Name: Wigmans v AMP Limited

Medium Neutral Citation: [2018] NSWSC 1118

Hearing Date(s): 12 July 2018

Date of Orders: 12 July 2018

Date of Decision: 12 July 2018

Jurisdiction: Equity Division

Before: Ward CJ in Eq

Decision: 1. Make orders in accordance with the Consent Orders initialled and dated today and placed with the Court papers:

The Court notes that:

- (i) The plaintiff and each of the FCA Class Action Applicants have undertaken to each other and the Court that, until 7 days after the determination of the defendant's applications to transfer the Federal Court Proceedings to this Court, they will not make or move upon any application or other court process for anti-suit relief (whether an anti-suit injunction, anti-anti-suit injunction, or anti-anti-anti-suit injunction) with respect to the conduct of their respective proceedings against AMP Limited.
- (ii) The plaintiff will not make or move upon any application in this proceeding for a common fund order or orders for the distribution of an opt out notice without first providing 7 days' notice to each of the FCA Class Action Applicants.
- (iii) The undertaking in paragraph (i) does not prevent any FCA Class Action Applicant from seeking anti-suit relief to prevent the plaintiff from continuing to seek a common fund order or orders for the distribution of an opt out notice.

- (iv) The plaintiff will send an agreed communication to the Associate to Stevenson J to the effect that the plaintiff does not seek that its anti-suit application filed on 14 June 2018 be determined until after the expiry of seven days from the determination of the defendant's applications to transfer the Federal Court Proceedings to this Court.
2. The Court orders that the plaintiff's notice of motion filed on 12 July 2018 is dismissed with no order as to costs.

Catchwords: EQUITY – Equitable remedies – Injunctions – Application for injunction restraining the applicants in certain Federal Court proceedings from making an application in those proceedings in relation to the conduct of these Supreme Court proceedings and from taking any further step in relation to the conduct of the Federal Court proceedings – Notice of motion dismissed by consent with no order as to costs

Legislation Cited: Corporations Act 2001 (Cth), s 1337H

Cases Cited: Commandate Marine Corporation v Pan Australia Shipping Pty Limited (2006) 157 FCR 45; [2006] FCAFC 192
CSR Limited v Cigna Insurance Australia Limited (1997) 189 CLR 345; [1997] HCA 33
Santos Limited v Helix Energy Services Pty Limited (2009) 28 VR 595; [2009] VSC 282
Wigmans v AMP Limited [2018] NSWSC 1045

Category: Procedural and other rulings

Parties: Marion Antoinette Wigmans (Plaintiff)
AMP Limited (Defendant)
Komlotex Pty Ltd (Interested Party)
Andrew Georgiou (Interested Party)
Wileypark Pty Ltd (Interested Party)

Representation: Counsel:
A Hochroth and P Meagher (Plaintiff)
E Bathurst (Defendant)
B Slade (solicitor) (Komlotex Pty Ltd)

Solicitors:
Quinn Emanuel Urquhart & Sullivan (Plaintiff)
Herbert Smith Freehills (Defendant)
Maurice Blackburn (Komlotex Pty Ltd)

Shine Lawyers (Andrew Georgiou)
Phi Finney McDonald (Wileypark Pty Ltd)

File Number(s): 2018/145792

Publication Restriction: Nil

EX TEMPORE JUDGMENT

- 1 **HER HONOUR:** Referred to me this morning by Stevenson J, at the direction of the Chief Justice, is an application by notice of motion filed in court on 12 July 2018 by the plaintiff (Ms Wigmans) for orders relevantly in the nature of what is described as an anti-anti-anti-suit injunction. The background to that particular application, as I was informed and as is disclosed in the affidavit affirmed 12 July 2018 by Ashleigh Lauren Whittaker (the solicitor with the care and conduct of representative proceedings commenced in this court by the plaintiff), is as follows. (I should note that aspects of this background are also set out in the reasons for judgment delivered by Stevenson J in these proceedings on 9 July 2018.)
- 2 A number of open class securities class actions have been commenced against AMP Limited. 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 and 7 June 2018. The Federal Court applicants are Komlotex Pty Limited, Mr Andrew Georgiou, WileyPark Pty Limited and Fernbrook (Aust) Investments Pty Limited.
- 3 Ms Wigmans, the plaintiff in the proceedings commenced in this Court, is not a party to any of the Federal Court proceedings, though I am informed she is a group member in one or more of those proceedings. In the Federal Court proceedings, an application has been made by AMP Limited to transfer those proceedings to this court. Directions have been made for that application to be heard in the Federal Court by Middleton J on 14 August 2018.
- 4 After that occurred, the Federal Court applicants filed notices of motion in these proceedings to transfer the Supreme Court proceedings to the Federal Court. Those applications were heard by Stevenson J on 28 June 2018 and, after further written submissions were received by his Honour, his Honour published reasons on 9 July 2018 refusing the application to transfer the

proceedings in this court to the Federal Court of Australia (*Wigmans v AMP Limited* [2018] NSWSC 1045).

- 5 In his Honour's reasons, his Honour noted (at [8]) that everyone had agreed that all five proceedings should be heard and managed by one judge in the one court; that vital case management decisions would have to be made concerning the progress of the various proceedings; and that those decisions could not and should not be made until a forum was determined. His Honour was not persuaded that it was more appropriate in the interests of justice to transfer these proceedings to the Federal Court. Hence, his Honour refused that application.

- 6 There was, however, also before his Honour an application by the plaintiff for two forms of anti-suit injunction, the first being an order restraining the Federal Court applicants from taking any further steps in the proceedings in the Federal Court other than discontinuing those proceedings, and the second being an order restraining the Federal Court applicants from taking any further steps in the Federal Court other than consenting to or applying for an order under s 1337H of the *Corporations Act 2001* (Cth) to transfer the Federal Court proceedings to this court.

- 7 His Honour saw no justification for granting an anti-suit injunction in terms of the first alternative, which his Honour noted would effectively cause the Federal Court proceedings to be brought to an end. As to whether an anti-suit injunction in the form of the second alternative should be granted, his Honour noted that the court had power to grant anti-suit relief by reason of its inherent power to protect the integrity of its processes once set in motion, and also had 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 were, according to the principles in equity, vexatious or oppressive, or where the bringing of those proceedings involved unconscionable conduct or the unconscientious exercise of legal rights (there referring to *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 at 392; [1997] HCA 33).

- 8 His Honour made reference to the decision of Byrne J in *Santos Limited v Helix Energy Services Pty Limited* (2009) 28 VR 595; [2009] VSC 282 (*Santos*), where proceedings were pending both in the Supreme Court of Victoria and the Supreme Court of South Australia between the same parties arising from the same circumstances.
- 9 Stevenson J indicated that he proposed to adopt a similar course to that which had been adopted by Byrne J in *Santos*, and invited the Federal Court applicants to consider whether they would now agree that the four Federal Court proceedings be transferred to this Court. His Honour directed that the parties inform him of their decision by 5pm on 16 July 2018. His Honour said (at [54]) that if they did not his Honour would consider whether to grant an anti-suit injunction in terms of the second alternative sought by Ms Wigmans. His Honour noted what was said by Byrne J in *Santos* (at [31]):

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.

- 10 His Honour expressed the opinion (at [56]), with which there can be little dispute, that common sense should prevail. (Whether it has or not, I might add, is another matter.)
- 11 The matter has come back today on an application for an anti-anti-anti-suit injunction in circumstances where, when the matter was listed in the Federal Court before Lee J yesterday (at, I understand, the court's own motion) there was suggestion made as to the possibility of an anti-anti-suit injunction being sought in the Federal Court. Counsel there appearing for one of the Federal Court applicants (Komlotex Pty Ltd), Mr Donnellan, indicated that an application had recently been drafted on which Komlotex would seek to move that day. Komlotex's stated position was that it was "very much still of the view that it would prefer to have its matter heard in [the Federal] Court".

- 12 The culmination of the directions hearing before Lee J was that his Honour ordered the applicant to inform the court by 4pm tomorrow (13 July 2018) as to whether any application was proposed to be made “to preserve the status quo pending the current hearing of the transfer applications as ordered by Middleton J”.
- 13 In *CSR Limited v Cigna Insurance Australia Limited*, to which I have already referred, the plurality (comprised of Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) said (at 395-396):

... [A]lthough [an anti-suit injunction] ... operates in personam, it nevertheless interferes with the processes of the foreign court and may well be perceived as a breach of comity by that court. [Citation omitted.] Comity, relevantly, was explained by the Supreme Court of the United States in *Hilton v Guyot* [(1895) 159 US 113 at 163-164] in the following terms:

“Comity”, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

- 14 The plurality went on to say (at 396):

For this reason, the cases also emphasise that the power to grant injunctions in restraint of foreign proceedings should be exercised with caution. And that is so whether the injunction is sought in the exercise of the inherent or equitable jurisdiction.

- 15 It has been recognised in a number of cases, including by Allsop J (as the Chief Justice then was) (with whom Finn and Finkelstein JJ agreed) in *Commandate Marine Corporation v Pan Australia Shipping Pty Limited* (2006) 157 FCR 45; [2006] FCAFC 192 (at [252]) that the grant of an anti-suit injunction or an anti-anti-suit injunction involves a potentially complex exercise of discretion in which comity is a real consideration.
- 16 There is no doubt that there is power in this Court, in its inherent jurisdiction and/or in the equitable jurisdiction, to grant an anti-anti-anti-suit injunction of the kind which was sought by the plaintiff today, and it was impressed upon

me by counsel for the plaintiff that it was sought in aid of preserving the integrity of the processes of this Court. Concern as to the importance of steps which might affect or undermine the integrity of the court and its processes was a matter also referred to by Lee J when the matter came before his Honour in the Federal Court yesterday.

- 17 The cases in general that have dealt with anti-suit injunctions or anti-anti-suit injunctions or the like have tended to be cases involving matters where proceedings were commenced in the court of the forum as well as in international courts. This is a relatively unique case where there are present proceedings in the Supreme Court and, at the same time, proceedings in the Federal Court.
- 18 I am of the firm view that, as a matter of policy, this Court should not take steps that may interfere with or undermine the processes of the Federal Court; just as I would expect that judges of the Federal Court would be concerned, as a matter of comity, not to take steps which would interfere or cause interference in the integrity or processes of this Court. In my view, there would need to be powerful reasons given for an anti-anti-anti-suit injunction of the kind that was sought in the notice of motion filed today to be made (just as there would need to be, I would hope, recognised a need for powerful reasons before any anti-anti-suit injunction might be granted in the Federal Court if to do so would affect or undermine the integrity of the processes of this Court).
- 19 In the circumstances, I am encouraged by the common sense that appears to have broken out between the parties in the proceedings before me today, in so far as a consent position has been able to be achieved. It would not, in my view, be consistent with the administration of justice, and indeed would tend to bring the integrity of both the Supreme Court and the Federal Court's processes into disrepute, were there to be a continuation of the unseemly debacle that appears to have taken place to date (in relation to the competing anti-suit injunctions or threat thereof).

20 I note the undertakings that have been given. Those will be formally noted in consent orders to be forwarded to my associate during the course of today. I again commend the parties on reaching at least a position that preserves the status quo pending the determination of the application for the transfer of the proceedings in the Federal Court to this Court. I make no comment whatsoever on the merits or otherwise of that application, which will be for the Federal Court to deal with.
