



Equity Division Supreme Court New South Wales

Case Name: **Komlotex Pty Ltd v AMP Limited (No 4)**

Medium Neutral Citation: [2023] NSWSC 1378

Hearing Date(s): 14 November 2023

Date of Orders: 14 November 2023

Date of Decision: 14 November 2023

Jurisdiction: Equity

Before: Elkaim AJ

Decision: See paragraph 22

Catchwords: CIVIL PROCEDURE — Representative proceedings — Court approval – where group members were persons who had acquired shares in AMP – where group members alleged they suffered loss or damage by reason of conduct engaged in by AMP – where success by the plaintiffs was not guaranteed – whether the settlement was fair and reasonable.

Legislation Cited: *Civil Procedure Act 2005* (NSW), Pt 10, s 173, 179(a), 183
Court Suppression and Non-publication Orders Act 2010 (NSW), ss7(b), 8(1)(a)

Cases Cited: *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249; (2021) 150 ACSR 535
Oasis Fund Management Limited and Royal Bank of Scotland NV & Ors [2012] NSWSC 532
Williams v FAI Home Security Pty Ltd (No 4) [2000] FCA 1925

Category: Procedural rulings

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

David John Nichols (Interested Party 1)
Shirley Baxter (Interested Party 2)
Doris Reed (Interested Party 3)
Anthony Krensel (Interested Party 4)
Helen Judith Wong & Raymond Paul Wong
(Interested Party 5)
Peter James Barber (Interested Party 7)

Representation:

Counsel:

Mr C Moore SC (Plaintiffs)
Mr G Donnellan (Plaintiffs)
Mr J Ahmed SC (Defendants)

Solicitors:

Maurice Blackburn Lawyers (Plaintiffs)
Herbert Smith Freehills (Defendant)

File Number(s):

2018/310118

Publication Restriction:

JUDGMENT

- 1 These proceedings arise from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The final report was published on 4 February 2019. A relevant, as regards the defendant, Interim Report was published on 28 September 2018.
- 2 The proceedings were commenced on 5 June 2018. An amended statement of claim was filed on 7 December 2021. The case was set down for hearing on 21 August 2023, with an estimate of 15 days. The proceedings are representative proceedings brought pursuant to Pt 10 of the *Civil Procedure Act 2005* (NSW) (“the Act”).
- 3 The parties resolved their differences on the cusp of the hearing. In order to give effect to the resolution the approval of the court is necessary, pursuant to s 173 of the Act.
- 4 A notice of motion seeking approval was filed on 3 November 2023.
- 5 The settlement must be fair and reasonable. To expand a little on this general statement I refer to the decision of Stevenson J in *Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd; Mastoris v Allianz Australia Insurance Ltd* [2021] NSWSC 249; (2021) 150 ACSR 535, from [12]:

“12. The central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole. The Court’s role in relation to group members is supervisory and protective. The Court’s role is analogous to that which it assumes when approving settlements on behalf of persons with a disability.

13. When considering the reasonableness of the settlement *inter partes*, the Court is asked to determine whether the settlement is fair and reasonable considering the alternative, which is usually the risks and costs to which the plaintiff group members would be exposed were the matter to proceed to trial.

14. The question of whether the settlement is reasonable *per se* cannot be separated from ancillary questions concerning the approval of funding and legal costs. The evaluation of whether a settlement is fair and reasonable ‘must be carried out by reference to what all group members obtain in their hands following the resolution of their individual claims in the event that the settlement is approved.’” (citations omitted)

6 In *Oasis Fund Management Limited and Royal Bank of Scotland NV & Ors* [2012] NSWSC 532, Sackar J at [47] referred with approval to the test stated by Goldberg J in *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925, at [19]:

“Ordinarily the task of a court upon an application such as this, is to determine whether the proposed settlement or compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement. Ordinarily in such circumstances the Court will take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.”

7 The amended statement of claim sets out the allegations made by the plaintiffs. The plaintiffs are the named plaintiffs together with the group members. There are 18,702 group members. The group members are persons who had entered into a contract to acquire an interest in fully paid ordinary shares in AMP or American Depository Receipts representing AMP shares. They are also persons who alleged they suffered loss or damage by reason of AMP’s alleged conduct.

8 The relevant period for purposes of the action begins in May 2012 and ends on 16 April 2018.

9 The group members acquired their shares at different times during the relevant period and in different quantities. I was informed that AMP has a large number of small shareholders, perhaps derived from the demutualisation of AMP in 1998. These shareholders would have been offered opportunities to increase their shareholdings during the relevant period.

10 The primary allegations against the defendant are as follows:

(a) Customers of AMP had an advisor. From time to time the advisor would cease to act on behalf of the customer. AMP would then place such a customer in a pool. While in the pool, the customer,

not having an advisor, would naturally not receive any advice. Notwithstanding this fact, AMP continued to charge the customer fees for receiving advice.

- (b) The conduct described in the previous subparagraph was said to be a deliberate policy of the defendant.
- (c) During the period when this policy was in place (the relevant period), the plaintiffs and the group members purchased shares in AMP or American Depository Receipts representing AMP shares.
- (d) Because of the receipt of funds for services that had not been performed, the earnings of AMP were greater and, in turn, the value of the shares was accordingly inflated.

11 It was also alleged that the defendant misled ASIC in respect of the charges it was levying for services it was actually not providing. Another issue was whether the systems employed by the defendant were capable of preventing the “false” charging for phantom services.

12 I was informed that all of the above allegations were conscientiously denied by the defendant so that success by the plaintiffs was not assured. Further, there was a live “causation” issue arising from a debate as to the degree to which the share price was affected, if at all, by the defendant’s conduct and lack of disclosure. An additional quantum issue arose from an argument as to the impact (on share prices) of any reputational damage that would have been suffered by the defendant had it, as it should have, disclosed its charging policy.

13 I have no doubt that each of the arguments put against the plaintiff’s would have varied in strength. Nevertheless, I accept they were genuine arguments calling for an appropriate and measured compromise of the claim.

- 14 Having read the Confidential Advice of Counsel I am satisfied that the contested issues were real and capable of not only impeding the range of quantum but extended to success on liability.
- 15 The overall settlement sum is \$110 million. The two plaintiffs each contributed \$32,000 in pursuit of the claim. They are to be reimbursed this amount. The plaintiff's legal costs and disbursements amount to \$26,213,702.45. An amount of \$1,130,714 is also to be deducted as pre-approved administration costs. This leaves \$82,591,583.55 to be disbursed to the plaintiffs and group members.
- 16 There is of course not an equal division to be made of the above balance because of the difference in shareholdings, and when the shares were held, and for how long, by the different group members. The amount to be received by each group member is to be calculated according to a Settlement Distribution Scheme which has a pro rata distribution at its core.
- 17 As noted above, there are 18,702 members in the group. Only one of them has expressed an objection to the settlement. I was informed that the objection is based on a misunderstanding of the relevant figures involved. This level of objection is itself an endorsement of the settlement.
- 18 In relation to costs, almost a quarter of the settlement sum goes towards legal fees and disbursements. I have read the confidential advice of Ms Kerry-Ann Rosati the principal of a firm specialising "in the provision of legal costing services and advice to the legal profession". Ms Rosati conducted a detailed analysis of the cost structure, including examining all of the work, both in court and by way of preparation and concluded that all costs were "reasonably incurred" on a solicitor and client basis. As to the relationship between the amount of costs and the overall settlement, Ms Rosati said:

"In my opinion, the amount of costs incurred and estimated to be incurred is not disproportionate to the outcome of the proceeding in light of the issues involved and the work required to be performed as detailed above".

- 19 I have referred above to a confidential advice. I have also been provided with other confidential material and have been asked that this material remain confidential. The material includes an affidavit of the plaintiff's solicitor affirmed on 13 November 2023 together with the attached exhibit, the confidential opinion of counsel and the confidential opinion of Ms Rosati, again including an exhibit.
- 20 The Settlement Deed, to which my orders will give effect, is to remain confidential. On one level, settlement of this type, involving a public company and a large sum of money, should be explained. On the other hand, it is not unusual for commercial settlements to remain confidential. I note that a Settlement Notice disclosing the quantum of the settlement, together with the releases and covenants set out in the Deed has been provided to the registered class members.
- 21 I am satisfied that previously made orders regarding confidentiality should remain in place and that the confidentiality sought in respect of the solicitor's affidavit and the cost expert's affidavit should be granted.
- 22 In summary, I am satisfied that the settlement is fair and reasonable and accords with the principles for approval that I have set out above. Accordingly, I approve the settlement and make the following orders:

Settlement approval

- (1) Pursuant to section 173 of the *Civil Procedure Act 2005* (NSW), the settlement is approved upon the terms set out in:
 - (a) the Settlement Deed at Tab 1 of Confidential Exhibit VM-2 to the confidential affidavit of Ms Vavaa Mawuli affirmed on 13 November 2023;

- (b) the proposed Settlement Distribution Scheme at Tab 4 of Exhibit VM-1 to the affidavit of Ms Vavaa Mawuli affirmed on 10 November 2023 (Settlement Distribution Scheme); and
 - (c) the Loss Assessment Formula at Tab 2 of Confidential Exhibit VM-2 to the confidential affidavit of Ms Vavaa Mawuli affirmed on 13 November 2023.
- (2) Pursuant to s 183 of the Act or otherwise, the Court authorises the plaintiffs *nunc pro tunc* to enter into and give effect to the Settlement Deed on behalf of the persons identified in Part C paragraph 8 of the Further Amended Commercial List Statement filed 7 December 2021, other than such persons who have opted out of the proceeding (Group Members).
- (3) Pursuant to s 179(a) of the Act, the persons affected and bound by these orders are the plaintiffs, the Group Members and the defendant.
- (4) From the date on which the final distribution under the Settlement Distribution Scheme is confirmed to the Court by the person appointed by the Court as the Administrator of the scheme (as defined in that document) (Scheme Administrator):
 - (a) the claims in the proceeding as between the plaintiffs and defendant be dismissed;
 - (b) all outstanding costs orders in the proceeding be vacated (except for any costs order made by the Court in favour of the defendant against persons other than the plaintiffs in the proceeding).
- (5) There be no order as to costs.

Settlement Distribution Scheme

- (6) Pursuant to s 183 and/or s 173(2) of the Act, Maurice Blackburn is appointed as Scheme Administrator.
- (7) Pursuant to ss 173(2) and 183 of the Act, the following payments (as defined in the Settlement Distribution Scheme) are approved and to be paid in accordance with the Settlement Distribution Scheme:
 - (a) a Reimbursement Payment of \$32,000 to the First Plaintiff;
 - (b) a Reimbursement Payment of \$32,000 to the Second Plaintiff;
and
 - (c) the Plaintiffs' Legal Costs and Disbursements in the amount of \$26,213,702.45.
- (8) Pursuant to sections 173(2) and 183 of the Act, the amount of \$1,130,714.00 is approved as pre-approved Administration Costs to be paid to the Administrator in accordance with the terms of the Settlement Distribution Scheme.
- (9) Maurice Blackburn have liberty to apply in relation to any matter arising under the Settlement Distribution Scheme.

Confidentiality

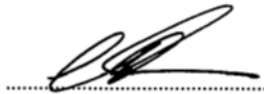
- (10) Pursuant to ss 7(b) and 8(1)(a) of the *Court Suppression and Non-publication Orders Act 2010* (NSW), on the ground that the order is necessary to prevent prejudice to the proper administration of justice, until further order, the material contained in:
 - (a) the confidential affidavit of Ms Vavaa Mawuli affirmed on 13 November 2023, including Exhibit VM-2;
 - (b) the confidential opinion of the plaintiffs' counsel; and

(c) the affidavit of the independent costs expert, including Exhibit KAR-1,

is not be published or disclosed without the prior leave of the Court to any person or entity other than the plaintiffs, the plaintiffs' legal advisers and the Court and is to be placed in a sealed envelope on the Court file and marked "Confidential, not to be opened without leave of the Court or a judge".

I certify that the preceding 22 paragraphs are a true copy of the reasons for the Judgment of Acting Justice Elkaim.

Dated: 14 November 2023.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a dotted line.

Associate