Equity Division
Supreme Court
New South Wales

Case Name:	Wigmans v AMP Ltd (No 3)
Medium Neutral Citation:	[2019] NSWSC 162
Hearing Date(s):	On the papers
Date of Decision:	26 February 2019
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	The Court has no power under s 181 of the Civil Procedure Act 2005 (NSW) to order that the Federal Court Applicants pay the costs of the Transfer Applications. Order that the litigation funders of the Federal Court Applicants pay the costs of the Transfer Applications.
Catchwords:	CIVIL PROCEDURE – representative proceedings – group members – costs orders – whether power to make costs order against group members COSTS – party/party – orders against non-parties – court's discretion – costs order against litigation funder
Legislation Cited:	Civil Procedure Act 2005 (NSW) Federal Court of Australia Act 1976 (Cth) Supreme Court Act 1986 (Vic)
Cases Cited:	Bray v F Hoffman-La Roche Ltd (2003) 130 FCR 317; [2003] FCAFC 153 Carter v Caason Investments Pty Ltd [2016] VSCA 236 De Jong v Carnival PLC [2016] NSWSC 347 Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807; [2004] UKPC 39 Excalibur Ventures LLC v Texas Keystone Inc [2017] 1 WLR 2221; [2016] EWCA Civ 1144 FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340 Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28

	Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59 Matthews v SPI Electricity Pty Ltd (No 9) [2013] VSC 671 Perera v GetSwift Ltd (No 2) [2018] FCA 909 PM Works Pty Ltd v Management Services Australia Pty Ltd [2018] NSWCA 168 Re the Minister for Immigration and Ethnic Affairs; ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6 TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 2) [2018] NSWSC 1149 Wigmans v AMP Ltd [2018] NSWSC 1045 Wileypark Pty Ltd v AMP Ltd [2018] FCAFC 143; (2018) 359 ALR 43 Yu v Cao (2015) 91 NSWLR 190; [2015] NSWCA 276
Texts Cited:	Second Reading Speech for the Courts and Crimes Legislation Further Amendment Bill 2010 (NSW) D C Pearce and R S Geddes, Statutory Interpretation in Australia (8th ed, 2014, LexisNexis Butterworths) P Herzfeld and T Prince, Statutory Interpretation Principles (2014, Thomson Reuters)
Category:	Costs
Parties:	Marion Antoinette Wigmans (Plaintiff/Applicant) AMP Limited (Defendant/Applicant) Wileypark Pty Ltd (Respondent) Fernbrook (Aust) Investment Pty Ltd (Respondent) Komlotex Pty Ltd (Respondent) Andrew Georgiou (Respondent) IMF Bentham Limited (for Wileypark Pty Ltd) (Respondent) Therium Litigation Finance (Australia) Limited (for Fernbrook (Aust) Investment Pty Ltd) (Respondent) International Litigation Funding Partners Pte Ltd (for Komolotex Pty Ltd) (Respondent) Augusta Ventures Limited (for Andrew Georgiou) (Respondent)
Representation:	Counsel: A Hochroth and P Meagher (Plaintiff/Applicant) I J M Ahmed and E Bathurst (Defendant/Applicant) A Leopold SC and W A D Edwards (Wileypark Pty Ltd) G Donnellan (Komlotex Pty Ltd) S Mirzabegian (Augusta Ventures Ltd) I R Pike SC with J Burnett (Andrew Georgiou)

	Solicitors: Quinn Emanuel Urquhart & Sullivan (Plaintiff/Applicant) Herbert Smith Freehills (Defendant/Applicant) Phi Finney McDonald (Wileypark Pty Ltd) Slater and Gordon (Fernbrook (Aust) Investment Pty Ltd and Therium Litigation Finance (Australia) Limited) Maurice Blackburn Lawyers (Komlotex Pty Ltd) Shine Lawyers (Andrew Georgiou)
File Number(s):	SC 2018/145792

JUDGMENT

1 Between 9 May and 7 June 2018, five open securities class actions were commenced against AMP Limited arising from conduct said to have been revealed on 16 and 17 April 2018 at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Those revelations are said to have led to a substantial fall in AMP's share price on 17 April 2018.

2 These proceedings, in which Ms Wigmans is the representative party, were the first commenced, albeit only by a matter of hours. The four remaining proceedings were commenced very shortly after in the Federal Court of Australia by Wileypark Pty Ltd, Fernbrook (Aust) Investments Pty Ltd, Komlotex Pty Ltd and Mr Andrew Georgiou (the "Federal Court Applicants").

3 On 6, 7 and 8 June 2018, AMP filed applications in the Federal Court seeking to transfer the four Federal Court proceedings to this Court.

4 On 8, 15 and 18 June 2018, each of the Federal Court Applicants filed notices of motion (which I will call the "Transfer Applications") in these proceedings seeking to have these proceedings transferred to the Federal Court.

5 I heard the Transfer Applications on 28 June 2018. On 9 July 2018 I refused them: *Wigmans v AMP Ltd* [2018] NSWSC 1045.

6 AMP's applications to have the four Federal Court proceedings transferred to this Court were heard by Allsop CJ, Middleton and Beach JJ on 14 August 2018. On 29 August 2018 their Honours granted those applications and ordered that the four Federal Court proceedings be transferred to this Court: *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143; (2018) 359 ALR 43.

7 The result is that all five proceedings are now in this Court and are being case managed by Ward CJ in Eq.

8 Now, both Ms Wigmans and AMP seek an order that either the Federal Court Applicants themselves, or their litigation funders, pay the costs of the Transfer Applications (save that Ms Wigmans has settled with Wileypark and its litigation funder, IMF Bentham Limited, and consents to her application against those parties being dismissed).

Decision

9 By reason of s 181 of *Civil Procedure Act 2005* (NSW) ("CPA"), I may not make a costs order against any of the Federal Court Applicants because none is a "representative party" in these proceedings and each is "a person on whose behalf [these] proceedings have been commenced".

10 However, I do have power to make a costs order against each of the Federal Court Applicants' litigation funders. I am satisfied that, in the circumstances of this exceptional case, the interests of justice require that I should make a costs order against the litigation funders.

No power to make an order against group members

11 Section 98(1) of the CPA provides that costs are in the discretion of the court and that the court has power to determine by whom, to whom and to what extent costs are to be paid.

12 Section 181 provides:

> "Despite section 98, in any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by sections 168 and 169."

13 It is common ground that ss 168 and 169 of the CPA are not engaged here.

14 It is also common ground that each of the Federal Court Applicants is a group member in these proceedings. Each is thus "a person on whose behalf the proceedings have been commenced" for the purpose of s 181.

15 The exception to the costs immunity in s 181 is expressed in terms of "a" representative party.

16 The term "representative party" is defined in s 155 of the CPA to mean "a person who commences representative proceedings".

17 An indistinguishable definition appears in s 33A of the *Federal Court of Australia Act 1976* (Cth) ("FCA Act"). Each of the Federal Court Applicants was, when the Transfer Applications were made, a "representative party" for the purposes of the four Federal Court proceedings.

18 The question is whether, notwithstanding the fact that the Federal Court Applicants are group members in these proceedings, they were also "a representative party" for the purpose of s 181 and thus not entitled to the immunity from an award of costs provided by s 181.

19 I understand there to be no authority on the question. In their comprehensive submissions no party drew my attention to any such authority. My own research has not revealed one.

20 In the corresponding provision in the FCA Act, s 43(1A), the position is made clear. That section reads:

> "In a representative proceeding commenced under Part IVA or a proceeding of a representative character commenced under any other Act that authorises the commencement of a proceeding of that character, the Court or Judge may not award costs against a person on whose behalf the proceeding has been

commenced (other than a party to the proceeding who is representing such a person) except as authorised by:

(a) in the case of a representative proceeding commenced under Part IVA — section 33Q or 33R; or

(b) in the case of a proceeding of a representative character commenced under another Act — any provision in that Act."

21 The use in s 43(1A) of the parenthetical words "other than a party to the proceeding who is representing such a person" makes it clear that only the representative party in the proceedings in question is exempt from the costs immunity provided by the section.

22 Thus, had Ms Wigmans made an application in the Federal Court proceedings, but failed, she would be immune from an adverse costs order because she is a "person on whose behalf the proceeding has been commenced" and is not "a party to the proceeding [i.e. the Federal Court proceeding] who is representing such a person".

23 The parenthetical words used in s 181 of the CPA ("other than a representative party") are not as clear as the words used in the FCA Act ("other than a party to the proceeding who is representing such a person").

24 The Explanatory Note to the Courts and Crimes Legislation Further Amendment Bill 2010, pursuant to which Pt 10 of the CPA was introduced, stated that "[a] *representative party* in representative proceedings is defined as any person who commences the proceedings" (underlining emphasis added).

25 That makes clear that Parliament intended the expression "representative party" to mean such a party in the proceedings to which the CPA applied; and not a representative party in proceedings otherwise commenced.

26 The use in s 181 of the indefinite article "a" rather than the definite article "the" can thus be seen to do no more than accommodate the possibility of multiple representative parties.

27 The legislative prohibition against awarding costs in s 181 is expressed to apply in "any representative proceedings". It is directed to the persons "on whose behalf the proceedings have been commenced". The exception to that immunity created by the parenthetical words ("other than a representative party") should therefore be read as being directed to those proceedings and thus to the representative party, or representative parties, to those proceedings.

28 Part 10 of the CPA was intended by Parliament to be modelled on the Federal and Victorian provisions which at the time were already in existence. In the Second Reading Speech for the Courts and Crimes Legislation Further Amendment Bill 2010 (NSW), the Attorney General said:

> "The new regime is substantially modelled on part IVA of the Commonwealth's Federal Court of Australia Act 1976, plus the inclusion of two new procedural rules to clarify the existing Federal regime.
>
> …
>
> The regime that is proposed by these amendments will provide a greater level of clarity for both litigants and the court, and will enhance the community's access to justice.
>
> …
>
> The bill's comprehensive set of rules for representative proceedings in New South Wales is modelled substantially on the Federal and Victorian regimes and includes provisions dealing with standing requirements, the nature of the group, substituting the representative party, settlement of proceedings, costs, and appeals.
>
> …
>
> The broad consistency between this bill and the existing Federal and Victorian regimes also will provide New South Wales litigants with a greater degree of certainty and clarity."

29 The "two new procedural rules" to which the Attorney General referred are not relevant to the construction of s 181. The Second Reading Speech thus bespeaks Parliament's intention that, subject to those two procedural matters, Pt 10 of the CPA operate consistently with the corresponding provisions in the Federal and Victorian regimes.

30 The equivalent provision regarding power to order costs in the Victorian jurisdiction is found in s 33ZD of the *Supreme Court Act 1986* (Vic). That section reads as follows:

> "In a group proceeding, the Court —
>
> (a) may order the plaintiff or the defendant to pay costs;
>
> (b) except as authorised by section 33Q or 33R, may not order a group member or a sub-group member to pay costs."

31 The definition of "plaintiff" in the Victorian statute is "a person who commences a group proceeding as a representative party or a person who is substituted under section 33T(1) or 33W(3)". The definition of "group member" is "a member of a group of persons on whose behalf a group proceeding has been commenced".

32 Like its Federal equivalent, Victoria's legislative regime prohibits the court from making an order for costs against a group member, with the exception of a plaintiff representative party: see *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317; [2003] FCAFC 153 at [140] to [142] for a Federal example; see *Matthews v SPI Electricity Pty Ltd (No 9)* [2013] VSC 671 at [63] to [65] and [84] for a Victorian example.

33 The construction of s 181 that I favour renders it congruent with its Federal and Victorian analogues, thus providing a further reason why it should be preferred.

34 The desirability that these statutes operate harmoniously is also consistent with the principle of *in pari materia*:

> "In the absence of any context indicating a contrary intention, where words in one statute are used in a subsequent statute in a similar connection (ie *in pari materia*) it is presumed that they have the same meaning in the latter as in the former." (P Herzfeld and T Prince, *Statutory Interpretation Principles* (2014, Thomson Reuters) at 227 [6.155].)

35 The principle extends to statutes in different jurisdictions and has been said to have particular force when the statutes have their genesis in the same source:

D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, 2014, LexisNexis Butterworths) at 128 [3.36].

36 I do not consider it relevant that the Federal Court Applicants stated in the notices of motion constituting the Transfer Applications that they were the applicant on the motion, being the "applicant" or the "lead applicant" in the relevant Federal Court proceeding. That was simply a recitation of the fact and of the Federal Court Applicants' interest in moving this Court for relief. It did not make them "a representative party" for the purposes of s 181.

37 Ms Wigmans and AMP pointed to consequences of this construction which were said to be anomalous.

38 First, AMP submitted that:

> "[T]he effect of this argument is that a costs order could not be made against a person who happened to be a group member, irrespective of the type of application that they brought, whether they were truly acting as a group member, or the reasonableness with which the application was pursued".

39 That is so. But, on any view of s 181, the same result would apply if a group member in representative proceedings in the Federal Court, who was not a representative party in those proceedings, made an unmeritorious or vexatious application in representative proceedings in this Court in which it was also a group member.

40 Second, Ms Wigmans submitted that:

> "[H]ad it been the case that some but not all of the Transfer Applicants were group members in the Wigmans proceedings, there would be no principled basis for making a costs order against only those Transfer Applicants who were not group members".

41 I agree that, on the construction of s 181 that I favour, had one of the Federal Court Applicants not been a group member in these proceedings, that Transfer Applicant would not be immune from a costs order. But that is what the legislation says.

42 For these reasons, my conclusion is that I have no power to make a costs order against any of the Federal Court Applicants. Each is "a person on whose behalf the proceedings have been commenced", and thus entitled to the immunity provided by s 181. And none is a "representative party" for the purposes of the exception to the immunity.

43 Section 183 of the CPA takes the matter no further. That section provides:

> "In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings."

44 The general words of s 183 cannot be used to overcome the specific prohibition in s 181: see *De Jong v Carnival PLC* [2016] NSWSC 347 at [58] (Beech-Jones J); *Perera v GetSwift Ltd (No 2)* [2018] FCA 909 at [27] (Lee J); and my discussion in *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 2)* [2018] NSWSC 1149 at [31] to [53].

45 So much was, ultimately, accepted by AMP. Thus, in reply submissions, AMP eschewed reliance on s 183 as an independent power to make a costs order against the Federal Court Applicants.

Should an order be made against the litigation funders?

46 There is no dispute that the Court has power to make a costs order against non-parties, such as the litigation funders.

47 The test is whether such an order is required by the interests of justice: *Knight v FP Special Assets Limited* (1992) 174 CLR 178; [1992] HCA 28 at 192-193; *Yu v Cao* (2015) 91 NSWLR 190; [2015] NSWCA 276 at [139] (McColl JA); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807; [2004] UKPC 39 at [25] (Lord Brown); *Carter v Caason Investments Pty Ltd* [2016] VSCA 236 at [49] (Weinberg, Ferguson and Kaye JJA).

48 In their submissions, Mr Hochroth and Mr Meagher for Ms Wigmans, summarised the applicable general principles as follows:

> "9. The general rule is that costs follow the event. A successful party 'is prima facie entitled to a costs order' [*Re the Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622 [[1997] HCA 6] at 624 (McHugh J)].
>
> 10. The object of a costs order is not to penalise the unsuccessful party; rather, 'the rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred' [*Latoudis v Casey* (1990) 170 CLR 534 [[1990] HCA 59] at 567 (McHugh J)].
>
> Thus, an award of costs may be made against a party or a non-party even where it has conducted itself reasonably (or put differently, unreasonableness is not a necessary condition to the exercise of the power to make a costs award) [*PM Works Pty Ltd v Management Services Australia Pty Ltd* [2018] NSWCA 168 at [57] (Leeming JA, McColl and Basten JJA agreeing)].
>
> 11. Factors relevant to the exercise of discretion in favour of making an award of costs against a non-party include:
>
> 11.1 whether the non-party is properly described as the "real party" to the litigation [*PM Works* at [29]];
>
> 11.2 whether the non-party is funding the litigation [*Carter v Caason Investments Pty* Ltd…at [13], [20]-[22], [38]…; *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 at [210] (Beazley, Giles and Basten JJA)];
>
> 11.3 whether the non-party has an interest in the litigation, such as an entitlement to the fruits of the litigation if a party succeeds [*Carter* at [38], [54]];
>
> 11.4 whether the non-party is involved in the litigation 'purely for commercial gain' [*Carter* at [38]];
>
> 11.5 whether the non-party has played an active part in the conduct of the litigation [*Carter* at [38], [54]];
>
> 11.6 the ability of the party in whose favour a costs order is to be made to recover from a party, including the impecuniosity of any such party [*Carter* at [42]-[43], [54]-[55]; *FPM* at [210]; *Knight v FP Special Assets Ltd*…at 192-193, 202 (Dawson J)].
>
> 12. Although the making of an award of costs against a non-party has been described in the authorities as 'exceptional', an award of costs against a non-party litigation funder is one such well-recognised 'exception' [*PM Works* at [35], [39], citing *Yu v Cao* (2015) 91 NSWLR 190 at [138]-[139] and fn 72, itself quoting *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*…at [25] (per Lord Brown); *Excalibur*

> *Ventures LLC v Texas Keystone Inc* [2017] 1 WLR 2221; [2016] EWCA Civ 1144 at [1] (Tomlinson LJ, Gloster and David Richards LJJ agreeing)]."

49 I would add that, although a non-party costs order is seen to be "exceptional":

> "…exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their expense…[t]he ultimate question [being] whether in all the circumstances it is just to make an order." (*Dymocks Franchise Systems* at [25].)

50 That passage has been cited by the Court of Appeal on a number of occasions, including in *Yu v Cao* at [139] and *PM Works* at [39].

51 These Transfer Applications were certainly "exceptional" in this sense. They represented a forum dispute between representative parties in five funded open class action proceedings of a kind that was, so far as I am aware, unprecedented.

52 The litigation funders had a substantial interest in the proceedings. Each stood to gain a substantial benefit if the proceeding funded was "selected as the appropriate litigation vehicle" (to adopt AMP's language). Each presumably saw it to be in its, as well as its group members', best interests to bring the Transfer Applications.

53 The fact that Ms Wigmans and AMP will not recover costs from the Federal Court Applicants themselves is also a relevant consideration.

54 It is not necessary that Ms Wigmans and AMP demonstrate that the litigation funders have behaved unreasonably in order to make out an entitlement to costs. I accept that it is likely that the litigation funders were motivated, at least in part, to achieve the obviously desirable result that all five proceedings end up being litigated in one court.

55 On the other hand, as AMP has pointed out, to a large extent "the reasons advanced by the [Federal Court] Applicants as to why they preferred the

Federal Court as a venue were abandoned": see also *Wigmans v AMP Ltd* at [21] to [22].

56 I do not find it relevant that one of the litigation funders, Augusta Ventures Limited, has an entitlement to contractual indemnity against the Federal Court Applicant it is funding, Mr Georgiou. That is a private contractual arrangement as to the allocation of risk of an adverse costs order that should not affect my exercise of discretion in this case.

57 Similarly, the fact that the funding agreement between Komlotex and their litigation funder, International Litigation Funding Partners Pte Ltd, has since been terminated does not persuade me to refuse to make a costs order against it.

58 Finally, it was submitted by Fernbrook that its litigation funder, Therium Litigation Finance (Australia) Limited, was not a "real party" to the proceedings because, amongst other things, Therium was "not entitled to control Fernbrook's proceeding or give instructions to its solicitors". In some circumstances, it may be that the mere fact that a non-party funds litigation is not a reason to make a costs order against them. Hypothetical examples in judicial commentary include circumstances where a family member provides funds out of affection (see *Dymocks Franchise Systems* at [34]) or a solicitor provides legal advice and services on a speculative basis (see the observations of Basten JA in *FPM Constructions* at [214]).

59 However, Therium's interest went beyond the mere recovery of the funds it provided. It stood to make a significant profit from the fruits of the litigation. The same can be said about each of the litigation funders in this case.

60 Overall, I am satisfied that the litigation funders should pay Ms Wigmans' and AMP's costs of the Transfer Applications. The Transfer Applications failed. They represented a discrete and now concluded foray in these proceedings. Costs should follow the event.

61 There is a suggestion in the submissions that I should order that costs be in the cause. Such an order could be made as between AMP and the Federal Court Applicants in the four former Federal Court proceedings that are now transferred to this Court. But no such order could be made in these proceedings as there is no cause between Ms Wigmans and the Federal Court Applicants or their litigation funders. The Federal Court Applicants and their funders will play no further role in these proceedings.

62 The appropriate order is simply that the litigation funders pay Ms Wigmans' and AMP's costs of the Transfer Applications.

63 Undoubtedly, some of the costs incurred by Ms Wigmans and AMP related to their application for the anti-suit injunction to which I referred at [44] to [55] of my judgment of 9 July 2018. That application was not pursued and the costs incurred by Ms Wigmans and AMP in that regard will not be included in the costs order I propose to make. As Ms Wigmans submitted, "any overlap as to the costs involved is a matter to be addressed in the assessment process if agreement cannot be reached between the parties".

Conclusion

64 The parties should bring in short minutes to give effect to these reasons. Those short minutes should give effect to the settlement between Ms Wigmans, Wileypark and IMF Bentham Ltd, and to the excision of Ms Wigmans' and AMP's costs of seeking the anti-suit injunction.

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