



Equity Division Supreme Court New South Wales

Case Name: Wigmans v AMP Ltd (No 4)

Medium Neutral Citation: [2019] NSWSC 257

Hearing Date(s): On the papers

Date of Decision: 12 March 2019

Jurisdiction: Equity - Commercial List

Before: Stevenson J

Decision: Plaintiff to pay the costs of Mr Georgiou and Fernbrook (Aust) Investments Pty Ltd of her anti-suit injunction application

Catchwords: CIVIL PROCEDURE – representative proceedings – representative parties – costs order against representative party for unsuccessful anti-suit injunction application

COSTS – party/party – costs orders in interlocutory proceedings – plaintiff representative party applied for anti-suit injunction – application not pressed and ultimately dismissed by consent

Legislation Cited: Civil Procedure Act 2005 (NSW)

Cases Cited: CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345; [1997] HCA 33
Hilton v Guyot 159 US 113 (1895)
Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6
Santos Ltd v Helix Energy Services Pty Ltd (2009) 28 VR 595; [2009] VSC 282
Wigmans v AMP Ltd (No 3) [2019] NSWSC 162
Wigmans v AMP Ltd [2018] NSWSC 1045
Wigmans v AMP Ltd [2018] NSWSC 1118
Wileypark Pty Ltd v AMP Ltd [2018] FCA 1052
Wileypark Pty Ltd v AMP Ltd [2018] FCAFC 143; (2018) 359 ALR 43

Texts Cited: The Honourable T F Bathurst AC and the Honourable J L Allsop AO, “Protocol for Communication and Cooperation between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings” (November 2018)

Category: Costs

Parties: Marion Antoinette Wigmans (Plaintiff/Applicant)
AMP Limited (Defendant/Applicant)
Wileypark Pty Ltd (Respondent)
Fernbrook (Aust) Investments 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) Investments Pty Ltd) (Respondent)
International Litigation Funding Partners Pte Ltd (for Komlotex Pty Ltd) (Respondent)
Augusta Ventures Limited (for Andrew Georgiou) (Respondent)

Representation: Counsel:
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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) Investments 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 On 26 February 2019 I published reasons for making certain costs orders in these proceedings: see *Wigmans v AMP Ltd (No 3)* [2019] NSWSC 162.

- 2 I shall use the same abbreviations here.
- 3 A further matter requiring determination is the application made by two of the Federal Court Applicants, Mr Georgiou and Fernbrook (Aust) Investments Pty Ltd, for the costs of Ms Wigmans' application for an anti-suit injunction.
- 4 There is no dispute that the Court has power pursuant to ss 98 and 181 of the *Civil Procedure Act 2005* (NSW) to make an order for costs against Ms Wigmans. She is a representative party of the group members in these proceedings, and therefore not covered by the immunity in s 181.
- 5 Ms Wigmans filed her application for an anti-suit injunction on 14 June 2018.
- 6 At that time, one of the four Federal Court Applicants, Komlotex Pty Ltd, had filed its Transfer Application.
- 7 Ms Wigmans' application sought to enjoin all of the Federal Court Applicants from taking any step in the Federal Court other than discontinuing their proceedings or, alternatively, taking any step other than consenting to or making an application to transfer those proceedings to this Court.
- 8 In my judgment of 9 July 2018 I refused to make the first form of anti-suit injunction sought: see *Wigmans v AMP Ltd* [2018] NSWSC 1045 at [47]. As to the second form of anti-suit injunction sought, I adjourned the proceedings to 16 July 2018 and invited the Federal Court Applicants to consider whether they would agree that the four Federal Court proceedings be transferred to this Court. I said that if they did not, I would consider whether to grant the anti-suit injunction sought by Ms Wigmans.
- 9 That led one of the Federal Court Applicants, WileyPark, to approach Lee J in the Federal Court who, on 11 July 2018 in *WileyPark Pty Ltd v AMP Ltd* [2018] FCA 1052 at [19], ordered WileyPark to:

“Inform the [Federal] Court by 4.00 pm on 13 July 2018...as to whether any application is proposed to be made to preserve the status quo pending the current hearing of the Transfer Applications as ordered by Middleton J.”

- 10 His Honour’s reference to “any application” was a reference to the possibility that one or more of the Federal Court Applicants might bring an anti-anti suit injunction to restrain Ms Wigmans from pursuing her application in this Court for an anti-suit injunction.
- 11 That, in turn, led Ms Wigmans, on 12 July 2018 to apply to me for an anti-anti-anti-suit injunction, to restrain WileyPark from seeking to restrain from Ms Wigmans from seeking an anti-suit injunction.
- 12 At the direction of the Chief Justice I referred that matter to Ward CJ in Eq: see *Wigmans v AMP Ltd* [2018] NSWSC 1118. On that occasion her Honour said at [18] to [19]:

“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).

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).”

- 13 Her Honour noted that Ms Wigmans did not press for the anti-anti-anti suit injunction and instead undertook to seek deferral of further consideration of her anti-suit application until after determination of AMP’s application to transfer the four proceedings to this Court which was, at the time, pending in the Federal Court.

14 That application had been fixed for hearing before Middleton J on 14 August 2018 but was referred to the Full Court of the Federal Court. On 29 August 2018 the Court ordered that, on the expiry of 28 days, the four Federal Court proceedings be transferred to this Court: see *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143; (2018) 359 ALR 43.

15 Allsop CJ, with whom Middleton and Beach JJ agreed, expressed emphatically his agreement with Ward CJ in Eq's remarks and said at [13]:

“In *CSR Ltd v Cigna Insurance Australia Ltd* [(1997) 189 CLR 345; [1997] HCA 33], 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* [159 US 113 (1895) 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.”

16 Ultimately, Ms Wigman's application for an anti-suit injunction was, by consent, dismissed on 10 October 2018.

17 In November 2018 this Court and the Federal Court adopted a “Protocol for Communication and Cooperation between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings”. The Protocol records that the impetus for its development was these proceedings, and the four Federal Court proceedings, which, the Protocol records, led to:

“[C]onflicting applications for the transfer of proceedings in each court to the other and to the spectacle of anti-suit injunctions which had the capacity to affect the integrity of the processes of each of the respective courts and thus to undermine the administration of justice.”

- 18 I turn now to the costs orders sought.
- 19 On behalf of Ms Wigmans, it was submitted that Ms Wigmans' anti-suit application was not "unsuccessful" because the result sought to be achieved by it, that all proceedings be in this Court, is the result which has eventuated.
- 20 But that is not a result achieved by the commencement by Ms Wigmans of the application for an anti-suit injunction.
- 21 It was achieved by my decision to not transfer these proceedings to the Federal Court and the Federal Court's decision that, in light of my decision, and in all the circumstances, the appropriate course for it to follow was to transfer the four Federal Court proceedings here.
- 22 As was accepted on behalf of Ms Wigmans, "in the course of these proceedings, the Federal Court and this Court have suggested that this approach [the commencement by Ms Wigmans of an application for an anti-suit injunction] is inapposite". That understates matters somewhat. It would be more accurate to say that this Court and the Federal Court have deprecated the course that was adopted on behalf of Ms Wigmans.
- 23 It may be, as was submitted on behalf of Ms Wigmans, that "there was no reason for Ms Wigmans to think that at the time of commencing the Anti-Suit Application" particularly given the approach taken by Byrne J in *Santos Ltd v Helix Energy Services Pty Ltd* (2009) 28 VR 595; [2009] VSC 282 (to which I referred in my 9 July 2018 judgment at [52]).
- 24 However, both Fernbrook and Mr Georgiou were required to respond to Ms Wigmans' application and, to adopt the words used in Fernbrook's submissions, "to defend its right to continue its proceeding and its right to participate in the processes of the Federal Court already set in motion by AMP's transfer applications".

- 25 Whether or not it is fair to say that Ms Wigmans “abandoned” her application for an anti-suit injunction, the fact is that she did not press for it to be heard in circumstances where, as I see it, it was highly unlikely that Ms Wigmans would have succeeded.
- 26 As McHugh J observed in *Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6 at [8], where there has been no hearing on the merits, one circumstance where a Court may feel confident to make a costs order is where “one party was almost certain to have succeeded if the matter had been fully tried”.
- 27 As things have turned out, that is the case here. Further, Ms Wigmans actually failed in relation to the form of anti-suit injunction that I refused in my judgment of 9 July 2018.
- 28 In these circumstances, I am persuaded that I should order that Ms Wigmans pay Mr Georgiou’s and Fernbrook’s costs of Ms Wigmans’ application for an anti-suit injunction.
- 29 I now invite the parties to bring in short minutes to give effect to these reasons and to those of 26 February 2019.
