FEDERAL COURT OF AUSTRALIA

Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited [2019] FCA 1547

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| File number: |  |
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| Judge: | **JAGOT J** |
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| Date of judgment: | 20 September 2019 |
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| Catchwords: | **COSTS** – costs orders – hearing vacated due to belated issue of subpoenas – indemnity costs – lump sum costs –costs where stay application not determined on its merits |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 37M  *Federal Court Rules 2011* (Cth) r 40.02(b) |
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| Cases cited: | *Cantor v Audi Australia Pty Limited (No 2)* [2017] FCA 1042  *Domino’s Pizza Enterprises Ltd v Precision Tracking Pty Ltd (No 5)* [2018] FCA 48  *Hamod v New South Wales* [2002] FCAFC 97; (2002) 188 ALR 659  *LFDB v SM (No 2)* [2017] FCAFC 207  *Perera v GetSwift Limited* [2018] FCAFC 202; (2018) 263 FCR 92  *Re Minister for Immigration and Ethnic Affairs (Cth); Ex Parte Lai Qin* [1997] HCA 6; (1997) 186 CLR 622  *Re Wilcox: Ex parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151  *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 |
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| Date of hearing: | Determined on the Papers |
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| Date of last submissions: | 20 June 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 21 |
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| Counsel for the Applicant: | Mr CA Moore SC with Mr P Strickland |
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| Solicitor for the Applicant: | Maurice Blackburn |
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| Counsel for the Respondent: | Mr J Stoljar SC with Mr BC Ryde |
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| Solicitor for the Respondent: | Allens |

ORDERS

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|  | | ACD 93 of 2016 |
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| BETWEEN: | INABU PTY LTD ACN 003 657 654 AS TRUSTEE FOR THE ALIDAS SUPERANNUATION FUND ABN 38 718 529 455  Applicant | |
| AND: | CIMIC GROUP LIMITED ACN 004 482 982  Respondent | |

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| JUDGE: | JAGOT J |
| DATE OF ORDER: | 20 september 2019 |

THE COURT ORDERS THAT:

1. The respondent pay the applicant’s costs of the interlocutory application dated 3 March 2017 as agreed or taxed.
2. The respondent pay the applicant’s costs thrown away by reason of the vacation of the March 2019 hearing dates on an indemnity basis.
3. The applicant’s interlocutory application dated 17 May 2019 otherwise be dismissed.
4. Each party pay its own costs of the interlocutory application dated 17 May 2019.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. These reasons for judgment concern the applicant’s application for costs orders dated 17 May 2019.

## 3 March 2017 interlocutory application

1. I will deal first with the application that the respondent pay the applicant’s costs of and incidental to the respondent’s interlocutory application dated 3 March 2017.
2. That application sought orders that the proceeding be stayed as an abuse of process because the applicant was a group member in a class action already commenced by another party in the Supreme Court of Victoria. The application was adjourned and ultimately dismissed without a hearing on its merits on 23 May 2019, following the dismissal of the proceeding in the Supreme Court of Victoria.
3. The applicant contended that it should be awarded its costs of the application. It submitted in support that the application was both misconceived and premature. It was misconceived because it is not an abuse of process for a bona fide competing class action to be commenced which overlaps with an existing class action: *Perera v* ***GetSwift*** *Limited* [2018] FCAFC 202; (2018) 263 FCR 92 at [145]-[157]; *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 at [17]-[18]. It was premature because the respondent had already filed an application for a permanent stay of the proceedings in the Supreme Court of Victoria. As the applicant put it, the respondent was relying on allegations of abuse of process to bring to an end all proceedings against it. The applicant noted that at the hearing on 3 April 2017, I raised at the outset that the application appeared to be premature because the other proceeding may itself be stayed or dismissed, leading to the adjournment of the interlocutory application. As noted, the other proceeding was ultimately dismissed on 19 February 2019 following an agreement to settle the proceeding having been reached on 23 July 2017.
4. The respondent contended that there should be no order as to costs of the application. It submitted that as there had been no hearing on the merits of the application, the usual consequence is that there will be no order as to costs: *Re Minister for Immigration and Ethnic Affairs (Cth); Ex Parte Lai* ***Qin*** [1997] HCA 6; (1997) 186 CLR 622 at 625. Further, at no time before the filing of the stay application had it been suggested by the applicant that the filing of the application would be premature. The issue of prematurity was first raised by me on the day the application was to be heard, before the parties had made submissions. The Court has the power to stay one or more competing class actions: *GetSwift* at [121]. It has been said that in some contexts a “wait and see” approach may be appropriate but in others “it may be desirable that clarity be injected sooner rather than later as to the proceedings to go forward and their constitution. This is likely to be in the interests of the respondent who should not be vexed or oppressed by duplicate classes prosecuting duplicate claims”: *GetSwift* at [66]. The respondent noted that in *Cantor v Audi Australia Pty Limited (No 2)* [2017] FCA 1042 at [76] a respondent was criticised for not bringing its application at an earlier time.
5. In *Qin* at 625 McHugh J explained that where there has been no hearing on the merits, a court is “necessarily deprived of the factor that usually determines whether or how it will make a costs order” (that is, the event of success by one or other party). However, there are circumstances in which it will be appropriate to make an order for costs despite the fact that there has been no decision on the merits. The Court may be satisfied that “one of the parties has acted so unreasonably that the other party should obtain the costs of the action” or it may be confident that “although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried”. McHugh J observed that the latter category of case is likely to be rare.
6. In the present case, there is a single determinative factor which has caused me to be confident that the applicant was almost certain to have succeeded in having the respondent’s application dismissed if the application had been fully tried. It is the fact that at all material times, including before the filing of the respondent’s application for a permanent stay of this proceeding, the respondent had already filed an application for a permanent stay of the competing proceeding and that application remained undetermined. In those circumstances, I consider that the respondent could never have succeeded in its application for the stay of this proceeding. Unless and until the outcome of the application in the other proceeding was known it could not have been concluded that the maintenance of this proceeding was an abuse of process requiring the grant of a permanent stay.
7. On this basis I am satisfied that, consistent with reasoning in *Qin*, this is one of the rare cases in which I can be confident in the particular circumstances that the respondent could never have successfully prosecuted its application. It had already filed an application to stay the competing proceeding, the outcome of which was unknown. Further, by July 2017 it knew it had agreed to settle the other proceeding. Accordingly, at no time could the respondent have succeeded in obtaining the order it sought for a permanent stay of this proceeding. Accordingly, the respondent should pay the applicant’s costs of the interlocutory application as agreed or taxed.

## The indemnity costs application

1. On 12 March 2019 Rares J ordered the respondent to pay the applicant’s costs of and occasioned by the respondent’s application to issue subpoenas to Mr King, Mr Stewart and Mr Wild (order 4), and to pay the applicant’s costs thrown away by the issue of the subpoenas and the vacation of the hearing fixed for 25 March 2019 (order 5). Justice Rares, in order 6, granted leave to the applicant to apply to me as the docket judge for an order for costs associated with order 4 to be paid on an indemnity basis. I granted leave to the applicant to also apply to me for an order for costs associated with order 5 to be paid on an indemnity basis.
2. In support of its application for indemnity costs, the applicant submitted:
3. The respondent first notified its intention to seek leave to issue the subpoenas on 5 February 2019, seven weeks before the hearing.
4. Before this the only indication of the witnesses to be called by the respondent was the filing of affidavits on 2 March 2018 pursuant to orders of the Court that the respondent was to file affidavits for all lay witnesses by 2 March 2018.
5. It was apparent that the purpose of the two affidavits filed was to avoid any adverse inference being drawn from the respondent not having called Mr King, Mr Stewart, and Mr Wild.
6. As such, the applicant reasonably assumed that the hearing would be documentary, a position reinforced on 3 October 2018 when the Court made an order that all evidence in chief of a lay witness was to be given by affidavit.
7. The respondent had information before October 2018 which should have permitted it to notify the applicant that it may want to issue subpoenas to give evidence to Mr King, Mr Stewart, and Mr Wild. In any event, it had all relevant information for that decision by October 2018, over four months before it first gave notice to the applicant.
8. It was unreasonable for the respondent not to have notified the applicant promptly after 1 October 2018 that it wished to subpoena Mr King, Mr Stewart and Mr Wild to give evidence. The respondent knew or ought to have known that if it delayed doing so until February this was likely to lead to the hearing being vacated with consequential prejudice and costs for the applicant. It was incumbent on the respondent to move quickly to avoid this consequence.
9. Even after the respondent gave notice of its intention to seek leave to subpoena the witnesses, it caused additional delay by failing to provide outlines of the evidence it intended to adduce from the witnesses until ordered to do so.
10. Accordingly, the respondent unreasonably delayed in its decision to seek leave to issue the subpoenas.
11. Where there is some “special or unusual feature in the case to justify the court in departing from the usual course” the Court may order indemnity costs: *Domino’s Pizza Enterprises Ltd v Precision Tracking Pty Ltd (No 5)* [2018] FCA 48 at [23] citing *Re Wilcox: Ex parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151 at 156-157. This may include a case where unreasonable conduct has caused costs to be incurred or where a party has failed to comply with the overarching purpose in s 37M of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**): *Hamod v New South Wales* [2002] FCAFC 97; (2002) 188 ALR 659 at [20]; *LFDB v SM (No 2)* [2017] FCAFC 207.
12. The circumstances of this case, involving unreasonable delay by the respondent in notifying its intention to seek leave to subpoena the witnesses, warrants the making of an indemnity costs order.
13. The respondent submitted:
14. The earliest time by which it could have been expected to decide to seek leave to subpoena the witnesses was December 2018 when it had received the ASIC transcripts (October 2018) and had received the applicant’s draft tender list which indicated for the first time the documents on which the applicant intended to rely (12 December 2018) and had time to digest them.
15. It could not have decided to issue subpoenas in March 2018 when its lay evidence was due. Mr Wild was not identified in the claim until August 2018 and the respondent did not receive the ASIC transcripts of Mr Wild and Mr Stewart until October 2018.
16. The forensic decision to subpoena a witness who has indicated they will not voluntarily give evidence is a vexed one.
17. In filing its lay evidence in March 2018, the respondent did not intend to indicate that it would not be issuing subpoenas to former executives.
18. The applicant was aware of the matters in relation to which it is expected the witnesses would give evidence because the applicant had the ASIC transcripts. It was also aware that the respondent intended to rely on these transcripts.
19. A cause of the hearing being vacated was the applicant’s incorrect assumption that the ASIC transcripts would not be admissible unless the respondent established that the relevant witness was unavailable. This is wrong at law. If by late 2018 the applicant had been preparing for the hearing on the basis that the ASIC transcripts would be admitted then the hearing may not needed to have been vacated.
20. I do not accept the respondent’s proposition at (6). The consistent position of the applicant was that it was prepared to deal with the ASIC transcripts in the March 2019 hearing if they were admitted over its objection. Further, the admission of transcripts (if they had been admitted) is not the same as the adducing of evidence from witnesses who are exposed to cross-examination. The two matters involve different forensic considerations for the applicant.
21. I accept the respondent’s proposition at (4) that it did not intend to induce in the applicant a belief that it would not be issuing subpoenas to the former executives. Nevertheless, I consider that such a belief was induced in the applicant by all of the circumstances to which the applicant has referred (as summarised above) and, in particular, the combination of the filing of the affidavits in March 2018 to deflect the drawing of any adverse inference from the fact that the former executives were not giving evidence and the absence of any notice from the respondent as to its intention to seek leave to issue the subpoenas before February 2019. I also consider that the applicant’s belief was reasonable in all of the circumstances.
22. I consider that in all of the circumstances it was reasonable of the respondent not to have sought leave to issue the subpoenas until it had the benefit of the ASIC transcripts in October 2018. I do not accept that the respondent needed to have the applicant’s documentary tender list in December 2018 in order to make its forensic decision. I agree with the applicant that in the face of the hearing fixed for March 2019, it was incumbent upon the respondent to move with the utmost speed in deciding whether or not to seek leave to issue the subpoenas because of the obvious threat to the hearing date if the respondent delayed. In my view, had the respondent done so in October 2018 then, despite the forensic decision being vexed, the vacation of the hearing date could have been avoided. I consider that to have received the ASIC transcripts in October 2018 and to have first given notice of intention to seek leave to issue the subpoenas in February 2019, given the March 2019 hearing, was unreasonable in all of the circumstances. This unreasonable conduct caused the applicant to incur costs which it otherwise could have avoided altogether. These unreasonably caused and avoidable costs are the applicant’s costs thrown away by the vacation of the hearing dates in March 2019. I consider that the applicant should be fully compensated for these costs given the circumstances in which they have been incurred. That is, the applicant should have the benefit of an indemnity costs order for its costs thrown away by the vacation of the hearing date.
23. I do not consider that the indemnity costs order should extend to the respondent’s application for leave to issue the subpoenas or to the issue of the subpoenas themselves. It is only the costs thrown away by the vacation of the hearing date which the respondent’s conduct unreasonably imposed on the applicant. Had the application for leave been made in October or November 2018 then it is likely that the hearing date would have been retained and the applicant would have incurred the costs of having to deal with the application and the issue of the subpoenas in any event. The applicant already has the benefit of the usual order for costs in its favour in respect of the application for leave and its costs thrown away by the issue of the subpoenas which I consider appropriate and sufficient in the circumstances to meet the interests of justice as served by the compensatory function of a costs order. I accept that the lateness of the application and the respondent’s dilatoriness in serving statements of the evidence it intended to adduce most likely increased the applicant’s costs in dealing with the subpoena application. In my view, however, the respondent’s conduct relating to the application was not so unreasonable in and of itself to justify the making of an indemnity costs order in this regard.

## Lump sum costs order

1. The applicant also seeks an order that such costs as incurred to date be awarded on a lump sum basis agreed between the parties or as determined by the Court pursuant to r 40.02(b) of the *Federal Court Rules 2011* (Cth).
2. The applicant submitted that there were two key reasons it should have the benefit of a lump sum costs order. First, it has incurred substantial costs in respect of both the application for leave to issue the subpoena and as a result of the vacation of the hearing date. Any taxation process would be detailed, protracted and expensive, and involve delay so that a lump sum costs order would be consistent with the overarching purpose in s 37M of the FCA. Second, if such an order is not made it can be expected that any costs recovery by the applicant would be delayed until after the hearing in March 2020. According to the applicant, the respondent has a propensity to delay any engagement on the issue of costs making such delay in respect of these costs likely.
3. The respondent submitted that a lump sum costs order was not appropriate and the applicant’s costs ought to be taxed at the conclusion of the proceeding in the ordinary course. According to the respondent, a lump sum costs order would not remove complexity and expense because, in addition to determining the lump sum, it would be necessary to exclude those costs from the overall costs of the proceeding at the end. Dealing with costs once, at the end of the proceeding, is the usual course and should be adopted in this case to avoid multiple taxations and consequential unfairness if the respondent is ultimately successful. Further, the costs cannot readily be determined at this stage. For example, the costs sought include the costs of re-reviewing documents already reviewed as a result of the former executives giving evidence at the hearing. This will include the costs of reviewing documents that should have been reviewed but were not because the applicant wrongly considered that the ASIC transcripts would not be admitted at the hearing. The costs deposed to as incurred to date are already significant. The fairest course, accordingly, is to require the costs to be taxed once at the conclusion of the proceeding.
4. I agree with the respondent’s submissions in this regard. Given the terms of the costs orders already made by Rares J and the indemnity costs order I will make for the applicant’s costs thrown away by the vacation of the hearing date, I do not consider it likely that it will be possible to determine costs in a lump sum on any basis which is logical, fair and reasonable. In particular, it will not be possible to assess the applicant’s costs thrown away by the vacation of the hearing date (or the issue of the subpoenas) until the completion of the hearing. Trying to assess the costs now will be difficult and will inevitably lead to multiple costs assessments when the better course would be for all issues of costs to be dealt with at the finalisation of the hearing.
5. I also do not consider it appropriate to specify in the costs order types of costs which will be recoverable. The necessary reading in time for any new solicitors or counsel is a possible cost thrown away but remains hypothetical at this stage. I also accept the respondent’s submission that the costs of re-reviewing documents required to be re-reviewed as a result of the former executives giving evidence may raise questions of fact best determined through the ordinary processes of taxation of a bill of costs.
6. As a result, I consider that the appropriate order is that the respondent be ordered to pay the applicant’s costs thrown away by reason of the vacation of the March 2019 hearing dates on an indemnity basis. As both parties have had a measure of success in relation to the applicant’s interlocutory application, I consider that each party should pay its own costs of that application.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot. |

Associate:

Dated: 20 September 2019