



## Equity Division Supreme Court New South Wales

Case Name:	Wigmans v AMP Ltd Fernbrook (Aust) Investments Pty Ltd v AMP Ltd Wileypark Pty Ltd v AMP Ltd Georgiou v AMP Ltd Komlotex Pty Ltd v AMP Ltd
Medium Neutral Citation:	[2019] NSWSC 814
Hearing Date(s):	On the papers
Date of Decision:	3 July 2019
Jurisdiction:	Equity – Commercial List
Before:	Ward CJ in Eq
Decision:	<ol style="list-style-type: none"><li>1. In relation to the multiplicity motions heard on 6-7 December 2018, costs of Komlotex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd and of the defendant (AMP Limited) be costs in the cause in the ongoing consolidated Komlotex/Fernbrook proceeding.</li><li>2. Save as provided in order Order 3 below, order that there be no order as to the costs of all other parties, with the intent that each of those parties bears its own costs.</li><li>3. Order that the costs of preparation of the Wileypark Pty Ltd proceeding (other than the costs of preparation for and attendance at the hearing of the multiplicity motions, which are to be borne by Wileypark Pty Ltd) be reserved for consideration at the conclusion of the final hearing or determination of the consolidated Komlotex/Fernbrook proceeding.</li></ol>
Catchwords:	REPRESENTATIVE PROCEEDING – CIVIL PROCEDURE – multiplicity of proceedings – costs orders
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 56
Cases Cited:	Impiombato v BHP Billiton Ltd (No 2) [2018] FCA 2045; (2018) 364 ALR 162

Perera v GetSwift Limited (No 2) [2018] FCA 909  
Wigmans v AMP Ltd; Fernbrook (Aust) Investments  
Pty Ltd v AMP Ltd; WileyPark Pty Ltd v AMP Ltd;  
Georgiou v AMP Ltd; Komlotex Pty Ltd v AMP Ltd  
[2019] NSWSC 603

Category:

Costs

Parties:

Marie Wigmans (Plaintiff in Wigmans proceeding)  
Fernbrook (Aust) Investments Pty Ltd (Plaintiff in  
Fernbrook proceeding)  
WileyPark Pty Ltd (Plaintiff in WileyPark proceeding)  
Andrew Georgiou (Plaintiff in Georgiou proceeding)  
Komlotex Pty Ltd (Plaintiff in Komlotex proceeding)  
AMP Limited (Defendant in all proceedings)

Representation:

Counsel:

R Lancaster SC with A Hochroth and P Meagher  
(Plaintiff in Wigmans proceeding)  
D Rappoport (Solicitor) (Plaintiff in Fernbrook  
proceeding)  
A Leopold SC with W Edwards and D Fahey (Plaintiff  
in WileyPark proceeding)  
I Pike SC with J Burnett (Plaintiff in Georgiou  
proceeding)  
C Moore SC with G Donnellan (Plaintiff in Komlotex  
proceeding)  
E Collins SC with I Ahmed and E Bathurst (Defendant  
in all proceedings)

Solicitors:

Quinn Emanuel Urquhart & Sullivan (Plaintiff in  
Wigmans proceeding)  
Slater & Gordon Limited (Plaintiff in Fernbrook  
proceeding)  
Phi Finney McDonald (Plaintiff in WileyPark  
proceeding)  
Shine Lawyers (Plaintiff in Georgiou proceeding)  
Maurice Blackburn (Plaintiff in Komlotex proceeding)  
Herbert Smith Freehills (Defendant in all proceedings)

File Number(s):

2018/00145792  
2018/00309329  
2018/00310082  
2018/00310103  
2018/00310118

Publication Restriction:

Nil

## JUDGMENT

- 1 **HER HONOUR:** On 23 May 2019, I published my reasons in relation to a number of interlocutory applications (the multiplicity motions) brought in five sets of proceedings that had been commenced as open class representative proceedings against the defendant, AMP Limited (AMP) arising out of disclosures made during evidence given by AMP executives at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 16 and 17 April 2018 (*Wigmans v AMP Ltd*; *Fernbrook (Aust) Investments Pty Ltd v AMP Ltd*; *Wileypark Pty Ltd v AMP Ltd*; *Georgiou v AMP Ltd*; *Komlotex Pty Ltd v AMP Ltd* [2019] NSWSC 603).
- 2 I concluded that the proceeding commenced by Komlotex Pty Ltd (Komlotex) (2018/310118) should be consolidated with that commenced by Fernbrook (Aust) Investments Pty Ltd (Fernbrook) (2018/309329), as had been proposed by those parties (and not opposed by AMP) and that the consolidated proceeding (to be known as *Komlotex Pty Ltd v AMP Limited*) should proceed as the only open class representative proceeding, with the remaining representative proceedings to be stayed. On 23 May 2019, I made orders accordingly for the consolidation of the Komlotex and Fernbrook proceedings and for the stay of the other representative proceedings (those orders being conditional on the payment into Court, on behalf of Komlotex and Fernbrook, of the sum of \$5 million as security for the defendant's costs, without prejudice to the ability of AMP to seek additional security as the matter progresses). I reserved the question of costs.
- 3 On 29 May 2019, I made consequential orders and on that occasion I directed that any party seeking a costs order in respect of the multiplicity motions file an application in respect of such orders, with directions as to the filing of any evidence in support and submissions together with evidence and submissions from any party resisting the costs orders sought, with a view to the costs of the multiplicity motions being determined on the papers.

- 4 Since the making of that order, I was informed that the parties had conferred and, other than WileyPark Pty Ltd (WileyPark) were agreed that the appropriate orders in respect of the costs of the multiplicity motions would be that: the costs of the successful plaintiffs (Komlotex and Fernbrook) and of the defendant (AMP) be costs in the cause in the ongoing consolidated proceeding; and that there be no order as to the costs of all other parties, with the intent that each of those parties bears its own costs. WileyPark, however, contended that its costs should continue to be reserved and provided admirably short submissions in that regard. None of the parties opposed the costs issue being dealt with on the papers (and without the need for any formal application or the filing of evidence). I will proceed accordingly.

### **WileyPark's submissions**

- 5 As noted, WileyPark seeks an order that the cost of the multiplicity motions, being the costs of and incidental to the hearing on 6 and 7 December 2018, be reserved. It notes that such an order mirrors the approach adopted by the Federal Court in the *GetSwift* proceedings (see *Perera v GetSwift Limited (No 2)* [2018] FCA 909 (*GetSwift (No 2)*), though acknowledging that a different course was adopted in *Impiombato v BHP Billiton Ltd (No 2)* [2018] FCA 2045; (2018) 364 ALR 162 (*Impiombato (No 2)*), where the Court ordered that there be no order as to the costs of the relevant proceeding including the costs of and incidental to the multiplicity question.
- 6 WileyPark submits that a final determination of the costs outcomes for WileyPark (and, it accepts, of the other unsuccessful plaintiffs) at this stage would occur “in the absence of the parties making submissions predicated upon, and the Court having the benefit of, the suite of complete information that exists only at the conclusion of a proceeding”. One might, of course, say this about any costs order made at an interlocutory stage of a proceeding. However, WileyPark argues that representative proceedings often give rise to novel and peculiar situations.

- 7 Wileypark maintains that there is uncertainty about the appropriate order that would be made at the conclusion of this proceeding and that, it is therefore appropriate that the Court make an order reserving costs so as best to preserve the Court's ability to consider all relevant circumstances that may arise throughout the conduct of the proceeding and make costs orders that best achieve justice between all parties and all relevant participants when complete information is known.
- 8 It is submitted that there are no relevant differences in the present case that would warrant this Court departing from the approach adopted in *GetSwift (No 2)* (Wileypark noting that there were no reasons provided for the adoption of a different course in *Impiombato (No 2)*). Wileypark submits that at all times it acted reasonably in advancing its claims as to carriage in a proceeding that it commenced legitimately.

### **Determination**

- 9 The position taken by Wileypark as to its costs of the proceeding must be understood in the context that it relied, in its submissions at the hearing of the multiplicity motions, on the costs it had incurred to date (its "sunk costs") as a factor to support the continuation of its proceeding (or at the very least that it not be permanently stayed). Its evidence was that, by 8 November 2018, approximately 1,350 professional fee hours had already been expended on the Wileypark proceeding by Phi Finney McDonald (Phi Finney), the solicitors acting for Wileypark, and that many hours had also been expended by counsel (see Mr Finney's affidavit affirmed 12 November 2018 at [42] and [46]; and Mr Finney's affidavit affirmed 28 November 2018 at [18]; where Mr Finney deposes to professional fee hours totalling some 1,345 hours). As noted at [206] of my reasons on the multiplicity motions, Wileypark submitted that these "sunk costs" should not lightly be "thrown away".
- 10 The so-called "sunk costs" factor of course applies equally to the other proceedings that I have stayed (the Wigmans and Georgiou proceedings), though no similar costs order was sought by the plaintiffs in those

proceedings. As I noted at [207] of my reasons, there was some criticism as to the expenditure of costs in the Wileypark proceeding – a criticism with which it is not appropriate here to do more than to note that there may well be scope for argument in due course as to whether particular costs of the conduct of the proceeding leading up to the hearing of the multiplicity motions were reasonably incurred.

- 11 The general discretion as to costs is broad, though it must be exercised judicially and having regard to the mandate provided in the *Civil Procedure Act 2005* (NSW) (in particular, under s 56 of that Act). It is not necessary to set out here the relevant principles applicable on the exercise of that general discretion; nor is it necessary to set out the principles applicable where proceedings are determined without a contested hearing on the merits as they are well known (see *Re Minister for Immigration & Ethnic Affairs: Ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6).
- 12 I consider that in the somewhat unusual (and hopefully not to be repeated) circumstances of the present case, with a multiplicity of proceedings covering broadly the same issues, arising out of the same factual circumstances, with overlapping class members and against the same defendant, commenced in different courts and within weeks of each other (indeed in the case of the Wileypark proceeding (2018/310082) on the very same day as the Wigmans proceeding (2018/145792)), and where the circumstances in which the costs of steps taken in one set of proceedings were incurred may be relevant to the ultimate decision as to costs, it is appropriate to reserve the question of the costs of preparation of the Wileypark proceeding leading up to the hearing of the multiplicity motions to be dealt with at the conclusion of the proceeding. However, I consider that there should be no order as to the costs of preparation for and hearing of the multiplicity motions themselves with the intent that Wileypark (and AMP) should each bear its own costs of those motions.
- 13 Having formed that view, there is logically no reason why that same result should not follow for the other proceedings that were stayed (the Wigmans

proceeding and the Georgiou proceeding (2018/310103)), though the plaintiffs in those parties did not seek such an order and have been prepared to accept an order that there be no costs ordered in respect of the respective proceedings. It may well be that this is a result of the costs arrangements in place in respect of those proceedings and it is not for me to second-guess the parties' decisions in that regard. Therefore, in the absence of any application to do so, I will limit the above costs orders specifically to the WileyPark proceeding.

14 Accordingly, I will make the following orders:

- (1) In relation to the multiplicity motions heard on 6-7 December 2018, costs of Komlotex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd and of the defendant (AMP Limited) be costs in the cause in the ongoing consolidated Komlotex/Fernbrook proceeding.
- (2) Save as provided in Order 3 below, order that there be no order as to the costs of all other parties, with the intent that each of those parties bears its own costs.
- (3) Order that the costs of preparation of the WileyPark Pty Ltd proceeding (other than the costs of preparation for and attendance at the hearing of the multiplicity motions, which are to be borne by WileyPark Pty Ltd) be reserved for consideration at the conclusion of the final hearing or determination of the consolidated proceeding.

\*\*\*\*\*