FEDERAL COURT OF AUSTRALIA

The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 4) [2020] FCA 1573

File number:	NSD 215 of 2019
Judgment of:	**WIGNEY J**
Date of judgment:	30 October 2020
Catchwords:	**COSTS** – representative proceedings pursuant to Pt IVA *Federal Court of Australia Act 1976* (Cth) – interlocutory application seeking orders requiring group members to register and provide certain information and that only group members who registered and provided certain information would be eligible to receive any distribution from a settlement or judgment in the proceeding – whether either party was successful in the application – whether costs should follow the event
Cases cited:	*Gillion Pty Limited (Trustee) v Wet Fix Holdings Pty Limited (No 2)* [2016] FCA 1483 *Gloucester Shire Council v Fitch Ratings, Inc (No 3)* [2017] FCA 553 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Incorporated (No 2)* [2007] NSWCA 142 *Les Laboratoires Servier v Apotex Pty Ltd* (2016) 247 FCR 61 *Northern Territory v Sangare* (2019) 265 CLR 164 *O'Keefe Nominees Pty Ltd v BP Australia Ltd (No 2)* (1995) 55 FCR 591 *Oshlack v Richmond River Council* (1998) 193 CLR 72 *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 3)* [2020] FCA 748
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection

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ORDERS

NSD 215 of 2019

BETWEEN:	**THE OWNERS – STRATA PLAN NO 87231** Applicant
AND:	**3A COMPOSITES GMBH** First Respondent
	HALIFAX VOGEL GROUP PTY LIMITED ACN 104 808 853 Second Respondent

ORDER MADE BY:	**WIGNEY J**
DATE OF ORDER:	**30 OCTOBER 2020**

THE COURT ORDERS THAT:

1. The costs associated with the first respondent's interlocutory application dated 9 September 2019 be the applicant's costs of the cause as between it and the first respondent.

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

REASONS FOR JUDGMENT

WIGNEY J:

1 On 1 June 2020, I handed down a judgment in respect of an interlocutory application filed by the first respondent in this representative proceeding, **3A** Composites GmbH. The main relief sought by 3A in that interlocutory application was an order the effect of which was to require group members to register and provide certain information in respect of their claims. The proposed orders provided that any group member who did not register and provide the requested information within a specified period would be precluded from receiving any distribution from any settlement or judgment in the proceeding, but would nevertheless be bound by the terms of the settlement or judgment. 3A contended that this so-called "class closure" order was necessary to protect it from the prejudice it would otherwise suffer as a result of the expiry of statutory limitation periods for contribution claims it might have against third parties which it could not investigate without information about group members and their claims. In the alternative, 3A sought either an order the effect of which was to require the representative applicant, The **Owners** – Strata Plan No 87231, to narrow substantially the group member definition, or an order that the proceeding no longer proceed as a representative proceeding or an order the effect of which was that any group member who failed to register would be deemed to have opted out of the proceeding.

2 Perhaps not surprisingly, Owners opposed the making of the class closure order and any of the alternatives proposed by 3A. It ultimately acknowledged, however, that some form of registration regime, which also involved registering group members providing relevant information concerning their claims, may be appropriate in the circumstances. The interlocutory application was strongly contested and occupied three hearing days. Ultimately, I concluded that the Court did not have the power to make the proposed class closure orders and that, even if it did, it would not in any event have been appropriate to make the orders in all the circumstances: *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 3)* [2020] FCA 748. I also declined to make any of the alternative orders sought by 3A. I did, however, conclude that there was a proper basis for 3A's concern about the potential expiry of limitation periods in respect of possible contribution claims and that some form of voluntary group member registration regime involving the provision of information was warranted. I also addressed a number of ancillary issues.

3 One issue which I did not resolve was the costs of the interlocutory application. Nor could the parties agree on the appropriate costs order to be made. Owners submitted that 3A should pay its costs of the interlocutory application because the proposed class closure order was the main "battleground" and it won that battle. Owners contended that it had made it clear to 3A from a fairly early stage that Owners would not oppose some form of voluntary registration regime which involved group members providing some information in relation to their claims and that, but for the spectre of class closure, or the alternative orders proposed by 3A, there was unlikely to be any real contest between the parties.

4 For its part, 3A submitted that the parties should bear their own costs of the interlocutory application, which it rebranded as the "third party information application". In 3A's submission, there was no successful party; each party had a measure of success. It noted, in that regard, that while the Court declined to make a class closure order, or any of the proposed alternatives, it did accept that 3A's concerns about potentially expiring limitation periods were legitimate and that a voluntary regime involving group members registering and providing information about their claims was warranted. Perhaps more significantly, 3A contested Owners' claim that, but for the proposed class closure orders, there would have been no real contest. It contended that Owners had initially refused to provide any information about group member claims and had, both before and at the hearing, contested 3A's claim that it faced a risk related to the potential expiry of limitation periods in respect of contribution claims.

5 I do not intend to delve into the detail of the correspondence and dealings between the parties leading up to the filing of the interlocutory application. There is merit in 3A's submission that Owners was not as compliant and forthcoming in terms of the provision of information concerning group members and their claims as was suggested. There is also some merit in the submission that each of the parties had some measure of success.

6 There could, however, be little doubt that 3A would not, in any event, have been satisfied with a regime involving only voluntary group member registration. Its case was that a mandatory regime backed up by some form of class closure was necessary to protect it from the irremediable prejudice it would otherwise suffer as a result of expiring limitation periods. There could also be no doubt that it was the class closure aspect of the orders sought which was the most contentious and most intractable aspect of the interlocutory application. While it was likely that there would still have been some argument about ancillary issues, but for the class closure element, the issues could have been argued and resolved in a way that did not

involve the sort of trench warfare that ensued following 3A's filing of the interlocutory application.

7 In those circumstances, the preferable view is that, while it may be that each of the parties had some measure of success, the interlocutory application was primarily resolved in favour of Owners. The main and most contentious issues were essentially resolved in its favour. The issues that were resolved in 3A's favour were either ancillary issues, or issues that, but for 3A's push for some form of class closure, would have been considered and dealt with as a matter of ordinary case management as opposed to in the context of a fully contested interlocutory application.

8 What, then, is the appropriate costs order in the circumstances?

9 This is not the occasion for a treatise on the law of costs. It suffices to note that the Court's discretion in relation to costs is broad and largely unfettered. The "ordinary rule" or "usual order" is that, subject to some limited exceptions, a successful party is entitled to a costs order in its favour; the purpose of such a costs order being to compensate the successful party, not to punish the unsuccessful party: see *Les Laboratoires Servier v Apotex Pty Ltd* (2016) 247 FCR 61 at [303]; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67]; *Northern Territory v Sangare* (2019) 265 CLR 164 at [24]-[25].

10 As discussed in *Gloucester Shire Council v Fitch Ratings, Inc (No 3)* [2017] FCA 553 at [13], the general rule that costs follow the event does not necessarily apply to every interlocutory step in a proceeding, but rather is directed to a consideration of the litigation as a whole: see also *Gillion Pty Limited (Trustee) v Wet Fix Holdings Pty Limited (No 2)* [2016] FCA 1483 at [4]; ***O'Keefe Nominees*** *Pty Ltd v BP Australia Ltd (No 2)* (1995) 55 FCR 591 at 598B-C. It is not necessarily just that the costs of an interlocutory application should follow the result of that interlocutory application. Rather, at least in some cases, the costs of an interlocutory application should be determined by the result of the principal litigation of which the interlocutory application forms but a part: *O'Keefe Nominees* at 598G. A more appropriate costs order may be that the costs of the application be the applicant's or the respondent's costs in the cause, particularly where the interlocutory application occurs at a stage where the Court is not in a position to adjudicate on the ultimate outcome of the proceeding: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and*

New Zealand v The Macedonian Orthodox Community Church St Petka Incorporated (No 2) [2007] NSWCA 142 at [21].

11 In my view, the appropriate and just order is that the costs of and associated with the interlocutory application should be Owner's costs in the cause payable by 3A. The interlocutory application should be treated as part of the costs of the whole litigation as between Owners and 3A. If Owners is ultimately successful in the litigation as a whole, it should be able to recover its costs of and associated with the interlocutory application in question from 3A. That would be appropriate because the main and most contentious issues which arose in relation to the interlocutory application were resolved in its favour. The fact that some ancillary or relatively uncontentious issues that arose in the context of the interlocutory application were resolved in 3A's favour should not disentitle Owners from recovering its costs of the interlocutory application should it ultimately be successful in the overall litigation. Nor did 3A suggest that Owners' conduct of the interlocutory application, or any other consideration, operated to disentitle Owners from recovering its costs.

12 If, on the other hand, Owners is ultimately unsuccessful in the substantive proceeding, I do not consider that it, as essentially the successful party on the interlocutory application, should be obliged to pay 3A's costs in respect of the interlocutory application, even if it may otherwise be ordered to pay 3A's costs of the proceeding. As I have said, it is most unlikely that the interlocutory application would have been contested in the way that it was had 3A not pressed the Court to make the class closure orders. That is not to say that 3A acted unreasonably in applying for the orders. Rather, the important point is that 3A was the unsuccessful party in respect of what was the most contentious and critical aspect of the application.

13 As for the second respondent, Halifax Vogel Group Pty Limited, while it supported 3A's application, it did not play any significant role in the interlocutory application. Owners did not seek a costs order against it. It therefore should not be required to pay Owners' costs of the interlocutory application even if Owners succeeds in the substantive proceeding.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate:

Dated: 30 October 2020