



Australian Court Denies Costs Protection When Lead Plaintiffs Are Substituted in Class Actions

Key Points

- In representative proceedings, an issue arises regarding costs liability when a person is substituted for the lead plaintiff. This is because, although Australia generally requires a losing party to pay the successful party's legal costs, class action legislation provides group members with immunity against cost orders. Accordingly, a question arises as to whether former lead plaintiffs, who upon substitution became mere group members, can be held liable for pre-substitution costs. Similarly, a question arises in relation to the liability of new lead plaintiffs, who were formerly mere group members, in relation to costs incurred prior to their substitution as lead plaintiffs.
- In *Liesfield v Ausnet Electricity Services Pty Ltd and Ors* [2004] VSC 496, the Supreme Court of Victoria denied the request of the defendants to make a substitution order subject to conditions that both the former lead plaintiff and new lead plaintiff will be liable for any pre-substitution costs in the event a cost order is made in favour of the defendants.
- The Supreme Court of Victoria formed the view that the Court's discretion to award costs in that case should not be fettered by any conditions

imposed on an order for the substitution of a party. The Court expressed a view that both the former lead plaintiff and the new lead plaintiff could be held liable for pre-substitution costs. However, those comments are *obiter dictum*. As a consequence, it remains unclear whether the substitution of a lead plaintiff could leave defendants exposed in relation to pre-substitution costs.

Background

Mr Liesfield applied for orders substituting Dr Rowe for himself as lead plaintiff. The claims in the proceedings arose from the "Black Saturday" bushfires that occurred in February 2009.

The application was brought under rule 9.06 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), which provides the Court with a discretion to make a substitution order. Mr Liesfield gave no reason for seeking to withdraw as lead plaintiff. In support of the application, a solicitor's affidavit referred to the willingness of Dr Rowe, an existing group member, to be the lead plaintiff. Dr Rowe's husband was killed in the bushfire, and she claimed to have suffered psychiatric injury and property loss.

Whilst the defendants did not oppose the substitution of the lead plaintiff, they opposed the application being granted on an unconditional basis. They sought a condition that both Dr Rowe and Mr Liesfield would be liable for pre-substitution costs under any cost order made in favour of the defendants. In support of that request, it was argued that there is uncertainty as to whether Mr Liesfield or Dr Rowe could be liable for pre-substitution costs and submitted that a condition in the substitution orders is necessary to avoid the possibility that neither party will be liable under the Court rules.

Dr Rowe and Mr Liesfield did not consent to the making of these conditions. The defendants argued that achieving clarity as to pre-substitution costs liability was relevant to the Court's discretion to order the substitution.

The Costs Risks Contended by the Defendants

Section 33ZD of the *Supreme Court Act 1986* (Vic) provides that a court may not order a group member or sub-group member to pay costs (except as authorized by sections of the Act not relevant to the substitution of a lead party).¹ It was put that section 33ZD would preclude the court making a costs order against a former plaintiff who, upon substitution, became a group member. Similarly, a substituted plaintiff could argue that they have no liability for costs incurred up to the time they became the lead plaintiff.

The Decision

Dixon J was not persuaded that the defendants faced any risk from a substitution order regarding pre-substitution costs and held that the jurisdiction of the Court regarding costs should remain unfettered to be exercised at the proper time. Dixon J found that the imposition of the conditions was unnecessary and inappropriate for two reasons:

- The Court has a broad discretionary power under sections 24 and 33ZD of the *Supreme Court Act* to award costs against the plaintiff in a group proceeding; and
- The Court has a broad discretionary power under section 24 of the *Supreme Court Act* to award costs against persons other than parties to the proceedings (*applying Knight v FP Special Assets Ltd*²).

In relation to the position with Dr Rowe, Dixon J considered the decisions of *Revian*,³ *Auskay*⁴ and *Tongue*⁵ and stated that, although it was not necessary to determine the point in this case, his view was that a successful defendant would not be precluded from seeking an order that a substituted plaintiff should be liable for pre-substitution costs.

Dixon J also considered *Auskay* and *Tongue* in relation to the position of Mr Liesfield and stated that, although it was not necessary to construe section 33ZD for the purposes of the case, his view was that a group member's immunity under section 33ZD relates only to costs incurred when the group member was not a party to the proceeding. Dixon J's tentative view was that section 33ZD does not immunise a former plaintiff from adverse costs orders but rather casts liability on former plaintiffs that is limited to costs incurred by that person as a plaintiff.

Ramifications

A defendant is unlikely to get cost liability conditions imposed on an order for the substitution of a lead plaintiff and will need to wait until the conclusion of the proceedings to obtain certainty as to who will be liable for pre-substitution costs. In this case, Dixon J suggested that an exception to this may arise in circumstances where the impecuniosity of the proposed new lead plaintiff is in issue.

Alternatively, the usual procedure for dealing with impecunious plaintiffs is to seek a security for costs order. Security for costs are unlikely to be granted against plaintiffs that are natural persons (as opposed to corporations) only on the basis of their impecuniosity. However, in the class action context, at least in the Australian Federal Courts, it may be possible to obtain security for costs from the group members standing to benefit from the proceedings⁶

Lawyer Contacts

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Endnotes

- 1 The operative effect of section 33ZD is similar to that of section 43(1A) of the *Federal Court of Australia Act 1976* (Cth).
- 2 (1992) 174 CLR 178, 192-3.
- 3 *Revian v Dasford Holdings Pty Ltd* [2002] FCA 1119.
- 4 *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2010] FCA 1302.
- 5 *Tongue v Council of the City of Tamworth* (2004) 141 FCR 233.
- 6 *Madgwick v Kelly* (2013) 212 FCR 1.