

SUPREME COURT OF QUEENSLAND

CITATION: *ABN Amro Morgans Ltd v Alders & Ors* [2008] QSC 160

PARTIES: **ABN AMRO MORGANS LTD ACN 010 669 726**
(Applicant)
v
**JOHN RONALD ALDERS AS TRUSTEE FOR THE
JOHN ALDERS SUPERANNUATION FUND**
**STARWINE INVESTMENTS PTY LTD ACN 087 876
739 AS TRUSTEE FOR THE JOHN RONALD ALDERS
SUPERANNUATION FUND**
**TABLELAND AIR SERVICE PTY LTD ACN 010 742
2002**
(First Respondent)
**ROBYN ANDERSON
TREVOR JOHN LAWRENCE**
(Second respondentS)
MARGARET MARY AZAR
(Third respondent)
**TREVOR RICHARD BALL AND KIM ELIZABETH
BALL**
(Fourth respondents)
**ATNONIO BARBAGALLO AND SUSAN RITA
BARBAGALLO**
(Fifth respondents)
**SALVATORE BARBAGALLO AND JACQUELYN
BARBAGLLO**
(Sixth respondents)
**TONY RICHARD BARBAGALLO AND ANNE MARIE
BARBAGALLO**
(Seventh respondents)
CYRIL TREVOR BOUGOURE
(Eighth respondents)
NORMAN BRAMICH AND PAMELA BRAMICH
(Ninth respondents)
**RUSSEL STEWART BRAMICH AND JAQUELLINE
BRAMICH**
(Tenth respondents)
**ROBERT LIONEL BRANDER AND JUDITH NANCY
BRANDER**
(Eleventh respondents)

**WOLFGANG LOTHAR BRETTSCHEIDER AND
RENATE FRIEDA WELHELMINE BRETTSCHEIDER
(Twelfth respondents)**

**PETER JOHN BURKE AND DENISE CONSTANCE
BURKE
(Thirteenth respondents)**

**KLAUS EMIL CAZZONELLI AND HELMA HELENA
CAZZONELLI
(Fourteenth respondents)**

**LESLEY DAVID COLEMAN AND HAZEL SALAN
COLEMAN
(Fifteenth respondents)**

**COLIN JAMES DALY AND SHELLY JOAN DALY
LACEVIEW PTY LTD ACN 011 059 788
(Sixteenth respondents)**

**KLAUS DIETER DORRICH AND WENDY DIANNE
WIGGINS
(Seventeenth respondents)**

**SALVATORE GIAMPAOLO AND MARIA
GIAMPAOLO
(Eighteenth respondents)**

**DONALD LYLE GRAHAM AND MARGARET
ELIZABETH GRAHAM
(Nineteenth respondents)**

**ROBERT ANTHONY GROENEWOUD
JOHN ROBERT ANTHONY GROENEWOUD AS
EXECUTOR OF THE ESTATE OF DANIELLE
MAUREEN GROENEWOUD
(Twentieth respondents)**

**HEATHER JOAN HORSEMAN
(Twenty-first respondent)**

**HEATHER JOAN HORSEMAN AND JAN CHRISTINE
MCCLANACHAN AS TRUSTEES OF THE WILL OF
DAVID RODNEY HORSEMAN, DECEASED
(Twenty-second respondents)**

**JAMES HORSEMAN AND DAWN OLIVE
HORSEMAN
(Twenty-third respondents)**

**MARK JOHN BRAMMEL JENKINSON AND
LYNETTE ELLEN JENKINSON
(Twenty-fourth respondents)**

**WILLIAM HENRY KIRWAN AND PAMELLA ELLEN
KIRWAN**

TRINITY CARE ASSOCIATION INC. IA 18259
(Twenty-fifth respondents)

ARTHUR LITSCHI AND MARGUERITE LITSCHI
(Twenty-sixth respondents)

JOHN HENRY LEWIS LLOYD
(Twenty-seventh respondent)

CATHERINE MCKENZIE
(Twenty-eighth respondent)

**NEIL WILLIAMS MCLAUGHLIN AND KAREN
ELIZABETH COOMBES**
(Twenty-ninth respondents)

GONDA MILLS
(Thirtieth respondent)

**JOHN ALEXANDERE MONTGOMERY AND ROBYN
RAE DESBOIS**
(Thirty-first respondents)

ROSEMARY JOY MOUNTNEY
(Thirty-second respondent)

**PETER STUART MOWAT
KATHLEEN HELEN MOWAT**
(Thirty-third respondents)

ZYGMUNT JOZEF PIETRZAK
(Thirty-fourth respondent)

JOHN POWELL
(Thirty-fifth respondent)

**MERVYN JOHN ROBSON AND SHERYL
MARGARET BRAUND**
(Thirty-sixth respondents)

ROSS SCRIVENER AND NARELLE SCRIVENER
(Thirty-seventh respondents)

**TERRY JOHN SKINER AND KERIN ELLEN
SKINNER**
(Thirty-eighth respondents)

**PAUL EDWIN SPICER
JANE SPICER
P.E SPICER PTY LTD ACN 010 669 080**
(Thirty-ninth respondents)

BRUCE PHILIP STAUN AND MARION JOAN STAUN
(Fortieth respondents)

**EGBERT JAAP VEURMAN
SANDRA JOY VEURMAN**

(Forty-first respondents)

BERNARD BRENT WESTON

(Forty-second respondents)

NORMAN JAMES WILKINS AND CARMEN MARIE WILKINS

(Forty-third respondents)

BRIAN JAMES WRIGHT AND ELAINE JOYCE WRIGHT

(Forty-fourth respondents)

KERRY DENYS WRIGHT AND OLIVE JENNIFER WRIGHT

(Forty-fifth respondents)

MARGARET HUBBARD AND WAYNE THOMAS HUBBAND

(Forty-sixth respondents)

ADRIAN PATRICK TELLES AND SHALINI SUSANNA TELLES

(Forty-seventh respondents)

DRURY MANAGEMENT PTY LTD (IN LIQUIDATION)

(Forty-eighth respondent)

NEWLINE CORPORATE NAME LTD AS DULY AUTHORISED REPRESENTATIVE FOR SYNDICATE 1218 AND LIMIT (NO 3) LTD AS DULY AUTHORISED REPRESENTATIVE OF SYNDICATE 683

(Forty-ninth respondents)

FILE NO/S: 557 of 2007
DIVISION: Trial
PROCEEDING: Application
ORIGINATING COURT: Supreme Court, Cairns
DELIVERED ON: 25 July 2008
DELIVERED AT: Cairns
HEARING DATE: 2 May 2008
JUDGE: Jones J
ORDER: **1. Grant leave to the second, fifth, sixth, ninth, twelfth, twenty-second, twenty-third, twenty-ninth, thirty-eighth, forty-first, forty-second, forty-fourth and forty-seventh respondents to discontinue their respective claims made against the applicant.**

- 2. Order that the said respondents shall not make any further application for relief of the same or similar kind based on the same or similar grounds to those relied upon in their respective proceedings consolidated within Cairns proceeding No 557 of 2007 other than their foreshadowed applications pursuant to the Rules of the Financial Industry Complaints Service Limited.**
- 3. Allow 14 days for parties to make submissions in writing on the issue of costs**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – Discontinuance – whether appropriate to grant leave to discontinue proceedings on terms that there be no fresh proceedings

Corporations Act 2001

Covell Matthews & Partners v French Wools Ltd [1977] 1 WLR 876

Financial Industry Complaints Service Ltd v Deacon

Financial Services Pty Ltd [2006] FCA 1805

Re Sailport Pty Ltd [1990] 2 QdR 395

Wickham v Bells Securities Pty Ltd [2006] QSC 167

COUNSEL: N O’Bryan SC for the applicants
P Dunning SC with D Morzone for respondents

SOLICITORS: McDonnells Law for the applicant
Clayton Utz for the respondents

- [1] By the Originating Application in these proceedings, ABN Amro Morgans Ltd (hereinafter “AAM”) sought orders that certain proceedings pending in both the District Court and the Magistrates court be removed into the Supreme Court and be heard together with proceedings already commenced there. Orders to this general effect were made on 7 December 2007 together with directions for the progression of the consolidated proceedings. This brought together 47 claimants with individual claims ranging between \$30,000 and \$314,000.
- [2] The plaintiff’s Statement of Claim on the consolidated proceedings has not yet been finalised to the point where AAM has been required to deliver a defence. However, all but 13 of the claimants have decided unconditionally to discontinue their proceedings and have filed Notices of Discontinuance. The remaining 13 have indicated that they intend to discontinue the proceedings for the purpose of seeking resolution of their claims under the Rules made by Financial Industry Complaints Service Limited (FICS). Being aware of this purpose AAM, by this application, seeks to impose a condition on any discontinuance by these claimants so as to preclude their lodging a claim before FICS. AAM is a member of FICS with an obligation to comply with the Rules.
- [3] This application is made pursuant to Rule 310 of the *Uniform Civil Procedure Rules* 1999. The general principle on which questions of this type are resolved was

expressed in *Covell Matthews & Partners v French Wools Ltd*¹ in the following terms:-

“...the court will, normally at any rate, allow a plaintiff to discontinue if he wants to, provided that no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained...”²

- [4] The claim by each of the claimants is virtually the same. Each of them was an investor in a managed investment scheme conducted by Drury Management Pty Ltd (in liquidation). The scheme was found to be illegal and was duly wound up. The claimants allege that they dealt with Mr Piet Walters who was the holder of a “proper authority” from AAM and was an “authorised representative” as those terms are defined for the purpose of the *Corporations Act 2001*. They allege that Walters whilst acting as representative for AAM provided securities advice to each of them resulting in their making investments in the scheme. By reason of the breach of his duty of care and fiduciary obligations they suffered financial loss. AAM contests these allegations and has joined Drury Management in the proceedings as the 48th respondent. AAM has also joined as the 49th respondent, a corporate representative of a syndicate of Lloyds members. This entity is AAM’s professional indemnity insurer. AAM seeks from it reimbursement for any claims successfully raised against AAM. AAM acknowledges that the issues thus joined will give rise to proceedings which by their very nature are quite complex.
- [5] The claimants share a concern that the risk of continuing the proceeding will involve them in costs of litigation which they cannot afford to carry. In the main, the claimants are small investors who have lost their invested funds. They do not have the financial capacity to engage in protracted legal proceedings against one of the largest financial institutions in the world. The singular advantage for the claimants is that the service offered by FICS is free. The process is a combination of reconciliation and, if necessary, arbitration.
- [6] The claimants acknowledge that in the circumstance it is appropriate for AAM to seek that such discontinuance be on the condition that the claimants be precluded from re-litigating their claims in a court. The imposition of such a condition is a well recognised approach. See *Re Sailport Pty Ltd*;³ *Wickham v Bells Securities Pty Ltd*.⁴ But AAM asserts that the condition should also preclude the claimants intended approach to FICS.
- [7] Thus, the question I have to determine is between those alternatives – discontinuance on terms which would include no entitlement to proceed in FICS and discontinuance on terms that would preclude court proceedings but not include a claim within FICS.
- [8] The claimants contend that their resort to a FICS hearing is a legitimate alternative proceeding and therefore not an abuse of process. Moreover, it reflects the public

¹ [1977] 1 WLR 876

² Ibid at p 879

³ [1990] 2 QdR 395

⁴ [2006] QSC 167

interest concerns by reducing the costs of civil litigation and encouraging alternative dispute resolution.

- [9] Counsel for AAM referred to the principles upon which stay orders and anti-suit injunctions are made on forum non conveniens arguments. I do not regard those considerations as being relevant in the circumstances here. The claimants are prepared to forego completely their rights to pursue their respective claims in any court. In electing to be bound by the arbitration of the FICS Panel there will be the same finality for all parties in a forum and by procedure which is entirely appropriate.
- [10] Counsel for AAM next raised the question of whether 11 of the 13 claimants with claims exceeding \$150,000 would be entitled to have their claims considered by FICS. He referred to the decision of *Financial Industry Complaints Service Ltd v Deacon Financial Services Pty Ltd*⁵. The rules applicable to future claims came into force on 1 July 2008⁶. These rules provide for a monetary limit by allowing FICS to determine a complaint “unless the Service is satisfied the amount of the claim for compensation exceeds \$150,000 at the date on which the complaint is made”. It is unnecessary to engage in any debate about the claimants’ entitlement to agitate their claims before the FICS Panel because, regardless of arguments raised, the claimants are prepared to accept whatever their fate may be before the Panel.⁷
- [11] AAM contends also that the discontinuance of court proceedings denies to it some juridical benefits which it could not raise before FICS.
- [12] Firstly, AAM seeks to mount a defence based upon the provisions of s 819 of the *Corporations Act* which it contends could not be determined before the Panel. In essence it argues that the representative, Mr Walters, was in the circumstances of the illegal scheme representing two or more persons with the effect that, by virtue of s 819(4), AAM would not have to indemnify the claimants for the actions of that representative. Mr O’Bryan of Senior Counsel for the claimants contended that it is unlikely that resort would be had to that particular section but if so, the Panel was obliged to apply the law as it existed at the time of the complaint. On the material before me it is not clear if this section will be relied upon or if so, how it is meant to apply in the circumstances. But I accept the position to be that the Panel must apply the law applicable at the relevant time. Thus, I find that no disadvantage has been shown to exist by AAM.
- [13] Secondly, AAM contends that in proceedings before the Panel it will not have the opportunity simultaneously to pursue its claims against the prospective third parties. That is undoubtedly the position but that does not deny AAM the opportunity to pursue its claims in separate proceedings. In fact, the issue between AAM and its insurer seems also to raise matters which would be of no interest to the claimants but which would seriously add to the length and thus the expense of the trial. On balance, whatever inconvenience is likely to be suffered by AAM in having to institute separate proceedings to claim indemnity is, in my view, outweighed by the cost and inconvenience likely to be incurred by the claimants remaining in the action where this issue is to be determined.

⁵ [2006] FCA 1805

⁶ Pursuant to Clause 29 of FICS Constitution

⁷ Transcript 38/35

- [14] As mentioned above, the consolidated proceedings have not advanced to the point where AAM has had to file a defence although it has instituted third party proceedings in relation to some claims. The nature of the proceeding has changed from a consolidated set of proceedings with 47 claimants to one of 13 claimants. The cost burden for each claimant, having regard to the defences projected to be raised by AAM, is disconcertingly high. The estimate of costs for the claimants proceedings range between \$50,000-\$100,000 per claimant. This estimate would increase if the intended third party proceedings were also to be involved. In the circumstances the claimants' legal representatives have acted properly in considering the alternative means of resolving this dispute.
- [15] In the circumstances I am satisfied that the defendant would not be deprived of any advantage in the litigation so far undertaken. In the exercise of my discretion I will give leave to the 13 applying respondents to discontinue his, her or its respective claim in proceeding No. 557 of 2007 on the basis that no respondent shall make any further application for relief of the same or similar kind based on the same or similar grounds to those relied upon in proceeding 557 of 2007 other than the foreshadowed application to FICS.
- [16] I will make the following orders:-
1. I grant leave to the second, fifth, sixth, ninth, twelfth, twenty-second, twenty-third, twenty-ninth, thirty-eighth, forty-first, forty-second, forty-fourth and forty-seventh respondents to discontinue their respective claims made against the applicant.
 2. I order that the said respondents shall not make any further application for relief of the same or similar kind based on the same or similar grounds to those relied upon in their respective proceedings consolidated within Cairns proceeding No 557 of 2007 other than their foreshadowed applications pursuant to the Rules of the Financial Industry Complaints Service Limited.
 3. I allow 14 days for parties to make submissions in writing on the issue of costs