FEDERAL COURT OF AUSTRALIA

Ashby v Slipper (No 3) [2015] FCAFC 9

Citation:	Ashby v Slipper (No 3) [2015] FCAFC 9
Parties:	**JAMES HUNTER ASHBY v PETER SLIPPER**
File number:	NSD 22 of 2013
Judge:	**MANSFIELD, SIOPIS & GILMOUR JJ**
Date of judgment:	9 February 2015
Catchwords:	**COSTS** – whether respondent who settles a claim by an applicant against it is thereafter vulnerable to a costs order as a "non-party" where (it is asserted by the successful applicant) the remaining respondent is unable to meet the costs order **COSTS** – whether the successful applicant has established an entitlement to costs against a non-party – where the non-party is not shown to have directly or indirectly supported the respondent's conduct of the proceeding – where the non-party had settled the related claim against it including on the basis that there be no liability for costs – application for costs against non-party refused
Legislation:	*Members of Parliament (Staff) Act 1984* (Cth) *Fair Work Act 2009* (Cth) *Federal Court Rules 2011* (Cth) *Parliamentary Entitlements Regulations 1999* (Cth) *Financial Management and Accountability Act 1997* (Cth) *Federal Court of Australia Act 1976* (Cth)
Cases cited:	*Ashby v Commonwealth (No 4)* (2012) 209 FCR 65 *Ashby v Slipper* (2014) 219 FCR 322 *Ashby v Slipper (No 2)* [2014] FCAFC 67 *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 *United Group Resources Pty Ltd v Calabro (No 5)* (2011) 198 FCR 514 *Ashby v Slipper* [2014] FCA 973 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at [34] (*Knight*), and in *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50 *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 *Yirra Pty Ltd v Summerton* [2009] FCAFC 50

Date of hearing:	Heard on the papers
Date of last submissions:	19 September 2014
Place:	Adelaide (via video link to Sydney and Canberra)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	83
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 22 of 2013**

BETWEEN:	**JAMES HUNTER ASHBY** **Applicant**
AND:	**PETER SLIPPER** **Respondent**

JUDGES:	**MANSFIELD, SIOPIS & GILMOUR JJ**
DATE OF ORDER:	**9 FEBRUARY 2015**
WHERE MADE:	**ADELAIDE (VIA VIDEO LINK TO SYDNEY AND CANBERRA)**

THE COURT ORDERS THAT:

1. The application of James Hunter Ashby to amend the interlocutory application of 18 June 2014 is refused.
2. The interlocutory application of James Hunter Ashby of 18 June 2014 to vacate the orders as to costs made by the Full Court on 10 June 2014 is refused.
3. James Hunter Ashby pay to the Commonwealth of Australia its costs of the application of 18 June 2014 on an indemnity basis limited to costs reasonably incurred in resisting the proposed amendment of that application.
4. The interlocutory application of Peter Slipper of 15 September 2014 is refused.

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

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REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 This judgment concerns the costs awarded, or to be awarded, in a proceeding which has now been discontinued. It is a proceeding with a somewhat complex history.

2 On 20 April 2012, Ashby commenced a proceeding (NSD 580 of 2012) against the Commonwealth and Slipper. Ashby was at the time employed by Slipper on behalf of the Commonwealth under the *Members of Parliament (Staff) Act 1984* (Cth) (the MOPS Act) and Slipper was a Member of Parliament and Speaker of the House of Representatives.

3 The originating application alleged that Slipper had sexually harassed Ashby in the course of his employment by conduct between 4 January 2012 and 20 March 2012, so as to entitle him to damages under the *Fair Work Act 2009* (Cth) (the FW Act) and for breach of contract, and that Ashby had been forced on three occasions in effect to become involved in Slipper's misuse of Cabcharge vouchers. The allegations about the misuse of Cabcharge vouchers were not pursued when, some time later, a statement of claim was filed as settled by senior counsel.

4 The causes of action pleaded against the Commonwealth were contraventions of the general protections in the FW Act and breach of contract. Slipper was named as a respondent to that

aspect of the claim on the basis that he was a person "involved" in the Commonwealth's contraventions of the FW Act pursuant to s 550.

5 The relationship between the Commonwealth and Slipper arose because, as Speaker of the House of Representatives, he could "on behalf of the Commonwealth" employ staff pursuant to s 13 of the MOPS Act. Ashby was employed pursuant to that power.

6 The application as originally filed contained a wide range of material which was harmful to the reputation of Slipper and was argumentative. The application was filed without notice to either the Commonwealth or Slipper and it received immediate media attention.

7 Before the first directions hearing, Ashby filed a statement of claim in much more conventional form and with a narrower range of allegations.

8 On 8 and 13 June 2012, Slipper and the Commonwealth sequentially filed applications which, relevantly, sought summary judgment, or in the alternative, a permanent stay of the proceeding on the basis that it constituted an abuse of process.

9 The summary dismissal applications were heard together, commencing on 23 July 2012. The hearing was broken by the need to address some procedural issues. During one break, by 18 September 2012, Slipper commenced acting for himself. He had to that point been represented by solicitors and counsel. The hearing was to resume on 2 October 2012.

10 As a result of an offer of settlement made to Ashby by the Commonwealth by letter of 26 September 2012, and unconditionally accepted by Ashby on the following day, the claims against the Commonwealth were resolved. There was a need for some documentation to be completed to give effect to their agreement. It had not been completed by the resumed hearing. It was completed on 4 October 2012.

11 On that date, the summary dismissal for abuse of process application by the Commonwealth was discontinued by consent, and the proceeding by Ashby against the Commonwealth was also discontinued by consent. Ashby and the Commonwealth agreed as between themselves not to make any application for costs, and that there should be no order for costs on either the principal application or the summary judgment application of the Commonwealth in relation to it. There was a formal Deed of Settlement signed on that date (the Deed of Settlement).

12 Slipper remained as the sole respondent to the principal proceeding. His summary dismissal application proceeded. Ultimately it was successful, and the claim against Slipper was dismissed: *Ashby v Commonwealth (No 4)* (2012) 209 FCR 65.

13 Ashby sought leave to appeal from, and by leave appealed from, that decision. Slipper was of course the sole respondent. The Full Court by majority (Mansfield and Gilmour JJ, Siopis J dissenting) granted leave to appeal and allowed the appeal. The orders of the primary judge were set aside, including as to costs: *Ashby v Slipper* (2014) 219 FCR 322.

14 The Full Court initially ordered that Slipper pay the costs of the appeal and of the summary dismissal application of Slipper in the Court below. However, following an application by Slipper pursuant to r 39.04 of the *Federal Court Rules 2011* (Cth) (the Rules) to vary the order on the basis that the Full Court had not considered s 570 of the FW Act before making the costs orders, the Full Court on 10 June 2014 vacated its own costs orders (*Ashby v Slipper (No 2)* [2014] FCAFC 67) (the Costs Judgment).

15 At that point, Ashby's claim against Slipper remained to be heard and determined. On 23 June 2014, shortly before the hearing was to commence, Ashby sought and was granted leave to discontinue his claim against Slipper. That discontinuance was duly made. Consequently, the claims by Ashby against Slipper were also brought to an end, without any final judicial adjudication on their merits.

16 That discontinuance did not finally resolve the costs of the proceeding at first instance or on the appeal. That is because the Orders of the Full Court as to costs (both of the first instance summary dismissal application of Slipper and of the application for leave to appeal and the appeal itself) remained contentious.

MR ASHBY'S APPLICATION TO THE FULL COURT REGARDING COSTS

17 On 18 June 2014, shortly before he discontinued his claim against Slipper, Ashby applied under r 39.04 of the Rules to the Full Court to have the orders made on 10 June 2014 referred to at [14] above vacated. If successful, that would have the effect of restoring the orders as to costs first made by the Full Court, namely that Slipper should pay his costs both of his summary dismissal application in the first instance proceeding, and of the application for leave to appeal and of the appeal itself.

18 On 1 August 2014, Ashby applied for leave to amend that application so that, if the Full Court vacated its costs orders made on 10 June 2014, orders should be made that both Slipper

and the Commonwealth should pay his costs of the application for leave to appeal and the appeal, and that both Slipper and the Commonwealth should pay the costs of Slipper's summary dismissal application of the primary proceeding of 8 June 2012, together with the costs of his interlocutory application of 18 June 2014 itself.

19 This judgment addresses those claims.

20 The Court indicated that it would hear and determine those issues on written submissions, unless the Court considered it desirable to invite additional oral submissions. That included the application for leave to amend the interlocutory application, thereby exposing the Commonwealth to the costs orders sought, and if amended the question of whether the orders sought against the Commonwealth should be made. Directions were given for the material to be served on the Commonwealth.

21 That prompted Ashby to indicate that, if the interlocutory application were amended so as to allow him to seek costs from the Commonwealth, he proposed to seek leave to subpoena extensive documentary material from the Commonwealth.

22 The Court has the benefit of extensive written submissions on the issues from Ashby, Slipper and the Commonwealth. Ashby maintains the position that, if he is given leave to amend his interlocutory application to extend the costs orders he seeks against the Commonwealth, he should be given the opportunity to pursue by subpoena the documents he seeks from the Commonwealth before his application for costs from the Commonwealth is determined. The Court does not consider it necessary to invite oral submissions from the parties.

THE ORDERS

23 For the reasons set out below, we consider that:

(1) the application of Ashby to amend the interlocutory application of 18 June 2014 should be refused; and

(2) the application of Ashby to vacate the orders as to costs made by the Full Court on 10 June 2014 should be refused.

24 Orders will be made to that effect.

25 The consequence is that, strictly speaking, it is not necessary to consider the anticipatory request by Ashby for leave to issue a subpoena to the Commonwealth. We have, however, briefly adverted to that matter in these reasons for judgment.

26 We have considered, for the purpose of considering the application, so far as it concerns Slipper, the interlocutory application of Ashby of 15 September 2014 to re-open his case to adduce further evidence on the question of costs, namely that material referred to in the affidavit of Simon Berry of 15 September 2014. It is not necessary to consider that application further. It is also refused.

THE SUBMISSIONS

27 The Court has considered the submissions of Ashby of 8 August 2014 and its annexures, his responsive submissions of 5 September 2014 and its annexure (responding to the submissions of both Slipper and of the Commonwealth), and his supplementary responsive submissions of 19 September 2014 (addressing in particular the Commonwealth's submissions in the light of some documents provided to him by the Commonwealth, as noted below). Those submissions are in part based upon the affidavits of Michael Harmer of 18 June 2014 and 1 and 6 August 2014, the last of which annexes the form of the proposed subpoena.

28 It appears that the Commonwealth has voluntarily provided certain of the documents covered by the proposed subpoena, but that Ashby nevertheless wishes to pursue the request for leave to issue the proposed subpoena and/or a notice to produce documents to the Commonwealth, in the event that he is permitted to amend the costs variation application to seek orders against the Commonwealth.

29 The Court has also considered the submissions of Slipper of 20 August 2014 and of the Commonwealth of 29 August 2014 with its extensive attachments.

The application to vacate the costs orders

30 As a starting point, it is clear that both Ashby and Slipper, on the application for leave to appeal and on the appeal, indicated that they wished to be heard on the question of costs of both the appeal and the dismissal decision.

31 The costs orders made by the Costs Judgment were made by the Full Court having regard to the written submissions of both Ashby and Slipper.

32 Ashby now contends that the Full Court "refused to consider Ashby's submissions" made on the application to re-open the costs orders made on 27 February 2014 that the necessary "jurisdictional facts" existed to enliven the Court's power to award costs under s 570(2) of the FW Act. He complains that he was not given that opportunity. That is, in our view, a

little disingenuous. His written submission (through counsel) opposed the application and identified "independent and insurmountable difficulties" to Slipper's then application. They were: unexplained delay, the availability of an avenue of potential appeal and the decision not to pursue it, the "consent" to the orders through correspondence seeking a corrigendum, the fact that Slipper knew Ashby wanted costs of the appeal and had the opportunity to address that claim, and that there was no misapprehension of the facts or the law by the Full Court in making the original costs orders. Each of those topics is then addressed in a little detail.

33 Ashby's submissions on whether there was a misapprehension of facts or law by the Full Court included the submissions that the reasons for judgment "overwhelmingly" indicated that the requirements of s 570(2) were satisfied. Reference is made to cases addressing those requirements, and why in the circumstances those requirements were satisfied. There was no request to adduce further material.

34 The Full Court in the costs judgment addressed each of those matters in turn in the Costs Judgment.

35 Primarily, Ashby says now that he was not given the opportunity to be heard on whether the conditions specified in s 570(2) of the FW Act were satisfied so that the restriction on costs imposed by s 570(1) of the FW Act was incorrectly applied in the Costs Judgment. That contention, and the balance of his submissions, is considered when addressing his interlocutory application of 18 June 2014 and his proposed amendment to that interlocutory application.

The application concerning Slipper

36 Ashby's application of 18 June 2014 applies under r 39.04 of the Rules to vacate the orders made by the Court on 10 June 2014, and instead for an order that Slipper pay the costs of the application. At present, the effect of the orders made on 10 June 2014 is that, by reason of s 570 of the FW Act, there was no order for costs of the application for leave to appeal and of the appeal. The orders of the primary judge as to costs were also set aside.

37 The consequence would be that the orders 3 and 4.2 made by the Full Court on 27 February 2014 would stand, namely that Slipper pays Ashby's costs of the application for leave to appeal and of the appeal, and secondly that the costs orders made by the primary judge when dismissing the primary proceeding be set aside and that Slipper pay to Ashby costs of Slipper's application of 8 June 2012.

38 The Costs Judgment was given under rule 39.04 of the Rules. That power is still available to be exercised again, as the orders made on 27 February 204 and on 10 June 2014 have not yet been entered. The circumstances in which that power may be exercised are discussed in the Costs Judgment at [12]-[16]. It is not necessary to repeat them.

39 The primary focus for the exercise of the discretion to vary or set aside orders under r 39.04 is to cure injustice. Given that focus, whether that power should be exercised will depend on the circumstances of each particular case. It is important to bear in mind that the interests of justice require consideration not just of individual circumstances but the public interest in the finality of litigation: see *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24].

40 It is clear, as Ashby's submissions say, that in the written submissions on the appeal he indicated that he wished to be heard on the question of the appropriate costs order if given leave to appeal and if the appeal were allowed, including on the costs order which the primary judge made. He sought orders that the appeal be allowed with costs. When the appeal was allowed, as he sought, he obtained a costs order, and Slipper's interlocutory application of 8 June 2012 was refused with costs in Ashby's favour. He obtained the orders he sought, so he cannot complain of any injustice to him at that time.

41 As noted, Slipper then by interlocutory application sought to re-open the costs order under r 39.04 of the Rules, having regard to s 570 of the FW Act. On that application, both Slipper and Ashby were given the opportunity to be heard by written submissions. Their submissions were duly considered by the Full Court, leading to the Costs judgment.

42 The foundation for Ashby's current application is that his written submissions were not fully considered having regard to what was said by the Full Court in the Costs Judgment at [34]. It is contended that the Full Court at that point did not consider the arguments he advanced, because he had not advanced them earlier when the costs order of 27 February 2014 was made, and that it was wrong to refuse to entertain his contentions on the applicability or otherwise of s 570 as then in force on that basis because he had not been given an opportunity at that time to advance them.

43 It is not necessary to explore in detail the merits of that contention. For present purposes, the appropriate course – at least as a starting point – is to consider them now. He was not required to address them when the judgment on the appeal was given, including costs orders

in the terms he sought. In his submissions to the Full Court of 22 April 2014 and on this application he argued that s 570 should not in the circumstances operate to disentitle him from costs of the application for leave to appeal, or of the appeal or of Slipper's summary dismissal application. In addition, as we note later in these reasons, we do not consider his primary contention is made out.

44 The applicable terms of s 570 are set out in the Costs Judgment at [5].

45 As to the applicability of s 570(2), it should first be recognised that the primary judge at first instance was of the view that Ashby's claim against Slipper was an abuse of process and should be dismissed. Siopis J on appeal but in dissent would have upheld that ruling and dismissed the appeal. As a starting point, therefore, it is not routinely obvious that Slipper's summary dismissal application of 8 June 2012 was made vexatiously or without reasonable cause.

46 There is no doubt that Slipper's allegations in relation to Ashby's purposes for instituting the primary proceeding were serious. As it transpired, the Full Court by majority did not share the view of the primary judge that, on the material before the primary judge at that point – that is, the material relied on for the summary dismissal application – it was correct to have acceded to the summary dismissal application. That did not amount to the Full Court making positive findings in favour of Ashby about his reasons for bringing the primary proceeding. It did not invoke any specific findings of fact in his favour. It was based upon whether the qualitative assessment of the material then relied upon satisfied the task applicable for the summary dismissal of the proceeding. There had not then been a trial of all issues. The relevant evidence had not been given, and the reliability of the witnesses had not been exposed to testing by cross-examination. In the event, as noted above, that will not occur because Ashby has discontinued his proceeding.

47 It is neither appropriate nor possible to finally decide questions of fact, especially questions of such seriousness, on a costs application and without the benefit of a full factual hearing. But for the discontinuance of his claim, Ashby may well have been tested about why the primary proceeding was instituted in the terms it first appeared, and on a range of matters raised by Slipper arising in his summary dismissal application and in his defence of the claim.

48 We have considered each of the detailed factual propositions asserted by Ashby to support his claim that Slipper's summary dismissal application fell within the compass of s 570(2) so that

s 570(1) should not have been applied. We do not recite them seriatim. We do not consider that we can, or should, make those findings of fact, or any of them, on this application. Although, in the view of Mansfield and Gilmour JJ, Slipper's evidence did not "get him over the line", the Court (as we have noted) did not then make findings of fact in Ashby's favour and it remains the case that the Court is not prepared to do so on this application: cf *United Group Resources Pty Ltd v Calabro (No 5)* (2011) 198 FCR 514 at [71]-75]. The Court is not prepared to, or able to, make findings of act adversely to Slipper so as to activate s 570(2) on the material presently before it. As we have observed, such findings might have been made if the matter had proceeded to hearing. It did not. Making such serious findings as Ashby seeks against Slipper, on the basis of incomplete evidence, is not a step the Court is persuaded it should make.

49 In our view, after careful consideration of Ashby's contentions and the material he relies upon, he has not established to our satisfaction that Slipper's summary dismissal application was so obviously untenable that it could not succeed, or that it was manifestly groundless, or that it was vexatious or oppressive. We have reached that conclusion, having regard to the course of Slipper's summary dismissal application, including the fact that Ashby's evidence on it was not known to Slipper when he made that application, and the fact that Slipper's application was based in part on the course of Ashby's allegations (including the withdrawn allegation) and the extensive electronic communications between Ashby and others, uninformed by Ashby's response.

50 In our view, in an alternative way, the same outcome is reached when more detailed consideration is given to Ashby's claim that he signalled his desire to be heard on the question of costs in submissions to the Full Court before its judgment on the merits of the appeal was given. The Costs Judgment notes that contention at [26], and the absence of any detailed development of, or any explicit reference to, the proper application of s 570(2) at that time. The Costs Judgment, in that context, made the observations at [34] on which Ashby now bases his contention.

51 When so read, we do not agree that Ashby was deprived of the opportunity to be hard. He did not clearly signal at the appropriate time that he wished to raise s 570(2), or why he might wish to do so, in the event that leave to appeal were given and the appeal allowed. When he explicitly raised that issue, responding to Slipper's application leading to the Costs Judgment, it was duly considered.

52 Accordingly, we refuse to make the orders against Slipper sought by Ashby's interlocutory application of 18 June 2014.

The claim against the Commonwealth

53 In our view, no reason is shown why the agreement reflected in the Deed of Settlement does not apply in the present circumstances, or that that agreement should not be enforced.

54 The proposed amended interlocutory application dated 1 August 2014 seeks to vacate the orders of the Full Court of 10 June 2014, and so far as it concerns the Commonwealth seeks orders that the Commonwealth be jointly liable with Slipper for the costs of the application for leave to appeal, of the appeal, and of Slipper's summary dismissal application of 8 June 2012, and the costs of the amended interlocutory application itself.

55 Harmer's first affidavit of 18 June 2014 does not address the position of the Commonwealth. The second affidavit of 1 August 2014 does so at some length. After referring to the steps in the proceeding at first instance, he refers to the former solicitors for Slipper (who had ceased to act for him on 18 September 2012) in June 2013 commencing separate proceedings against Slipper to recover their legal fees; a default judgment was entered on 10 October 2013. He also refers to exchanges between the judge at first instance and senior counsel for the Commonwealth on 4 October 2012, following the agreement between Ashby and the Commonwealth.

56 Senior counsel for the Commonwealth made it clear he was not then appearing for Slipper, but offered to assist the Court (in a way that was not fully explored) as a friend of the Court. That offer was not accepted. The schedule of objections to Ashby's proposed evidence, apparently prepared by the Commonwealth before the claim against it was resolved by agreement, was handed to Slipper. The Commonwealth took no further part in the hearing at first instance. It was not a party to, and did not seek to participate, in the appeal.

57 The basis of Ashby's claim for costs against the Commonwealth appears from the affidavit of Harmer of 1 August 2014. In short, the Government addressed the extent of the indemnification it would provide to federal parliamentarians for public liability, workers' compensation and management liability, in part at least prompted by concerns about Slipper being left to pay his own costs of the proceeding against him (according to media reports). From 1 July 2013, the amendments to the *Parliamentary Entitlements Regulations 1997* (Cth) (Entitlements Regulations) extended indemnification in the circumstances there prescribed.

58 On 12 July 2013, the Government announced that it would cover Slipper's net legal costs of the proceeding at first instance and of the appeal, using an act of grace mechanism in the *Financial Management and Accountability Act 1997* (Cth).

59 When the principal proceeding was listed for hearing, as noted earlier in these reasons, Ashby indicated that he sought leave to discontinue the proceeding. He wished to keep open his entitlement to seek costs, both against Slipper and against the Commonwealth. On 23 June 2014, Flick J gave Ashby leave to discontinue the principal proceeding. That was duly done. Slipper applied by interlocutory application of that date to vacate the indemnity costs order made by a judge of the Court on 17 August 2012, when the summary dismissal order was made, so the entitlement to seek that order was preserved. As Flick J later observed, both Ashby and Slipper "took their chances" as to whether the indemnity costs order would be vacated: *Ashby v Slipper* [2014] FCA 973 at [5].

60 Flick J addressed that question in that later judgment, given on 14 September 2014. Flick J vacated the indemnity costs order: see at [8]. His Honour also addressed, and dismissed, an attempt to sustain the indemnity costs order on the basis of more recent information. His Honour also made no order for costs in relation to the interlocutory application of 23 June 2014 "[g]iven the terms of s 570" of the FW Act.

61 The further material in Harmer's affidavit of 1 August 2014 concerns separate proceedings by or against Slipper, including criminal charges for alleged dishonest use of travel entitlements, and about the extent of Slipper's assets.

62 Harmer's further affidavit of 6 August 2014 indicates that, as noted in broad terms above, the proposed subpoena against the Commonwealth seeks evidence about "the timing, nature and extent of the Commonwealth's arrangements with [Slipper] in relation to the conduct and funding" of the proceedings at first instance and on appeal. Quite extensive material has been provided by the Commonwealth. It has not given Ashby any key to alleging direct involvement by the Commonwealth in the conduct of the claim, or the appeal, by Slipper after 4 October 2012.

63 On that material, it is submitted in the lengthy written submissions that the Court should exercise its power under s 43 of the *Federal Court of Australia Act 1976* (Cth) to award costs against the Commonwealth as a non-party to the appeal. It is accepted that, in any event, the discretion under s 43 must be exercised subject to the provisions of s 570 of the FW Act, but

Ashby points out that s 570 relates to costs orders so far as they concern only a party to the proceedings.

64 It is not necessary to refer in detail to the authorities referred to by Ashby and by the Commonwealth as to the applicable principles. They are discussed in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at [34] (*Knight*), and in *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50 at [89]-[91].

65 For the reasons already given, we do not consider that, in any event, it is appropriate to set aside the orders made by the Court as to costs in the Costs Judgment of 10 June 2014.

66 In any event, in respect of the Commonwealth (and assuming that the conclusion referred to in [65] is not correct, we would not accede to Ashby's application for costs against the Commonwealth, either of the application for leave to appeal, and the appeal itself, or of Slipper's interlocutory application of 8 June 2012.

67 Indeed, it is our view that the prospects of Ashby securing such an order for costs from the Commonwealth was so slight that we would refuse leave to amend his interlocutory application of 18 June 2014 in the terms proposed in the proposed amended interlocutory application dated 1 August 2014.

68 These are our reasons for the conclusions expressed in the preceding two paragraphs.

69 In the first place, we consider that the terms of settlement are clear. It reflects an offer by the Commonwealth to settle Ashby's claims against it in the primary proceeding accepted unconditionally by Ashby, including that he would make no application for costs against the Commonwealth (as recorded in the exchange of letters between solicitors of 26 and 27 September 2012, and then in the Deed of Settlement). That was acknowledged by Ashby's counsel on 2 October 2012.

70 On its face, the proposed application is clearly in violation of that agreement. The agreement was reached in relation to the primary proceeding, but was clearly intended to cover any circumstance (such as an appeal) arising directly from the ongoing conduct of the primary proceeding by Ashby against Slipper, including of course Slipper's then outstanding summary dismissal application. There were, in essence, two possible outcomes to that application: it might succeed, or it might not. If it succeeded, the prospect of Ashby appealing (as he did) was clearly within the contemplation of Ashby and the Commonwealth.

If it did not, Slipper might have appealed or the primary proceeding might have progressed with the costs of that proceeding and of Slipper's interlocutory application being addressed by the primary judge at a later time. In any of those variations, both Ashby and the Commonwealth clearly intended that there would be no further issue as to costs between them, in particular by Ashby seeking costs against the Commonwealth.

71 Secondly, we do not accept that the Commonwealth is properly described (as Ashby now classifies it) as a "non-party" for the purposes of resolving this particular issue. The situation is different when we come to consider whether the Commonwealth is entitled to its costs of opposing Ashby's application to amend his interlocutory application of 18 June 2014. It was a party to the primary proceeding, including after Slipper's summary dismissal application, until it settled the claim by Ashby against it. The settlement was between two of the parties to the primary action in terms which finalised the liability of one to the other. It is illusory in our view now to categorise the Commonwealth, from a point immediately after the settlement, as a "non-party" whose conduct should be examined to see whether, as a non-party, a costs order should be made against it. That is demonstrated by the fact that the proposed amendment to Ashby's application of 18 June 2014 covers the costs of Slipper's interlocutory application of (and from) 8 June 2012. The Commonwealth was, and remained, a party to the primary proceeding until 4 October 2012.

72 Thirdly, even if the principles applicable to the making of a costs order against a non-party are applied, we do not consider that Ashby has shown that circumstances exist which would or reasonably could, make out such an entitlement on his part.

73 In expressing that view, we note first that the Commonwealth is not shown to have promoted Slipper's interlocutory application, or to have promoted the pursuance of it after 4 October 2012; nor is it shown to have promoted Slipper's participation as respondent in the conduct of the appeal. The Commonwealth was itself a party to the primary proceeding, having been so joined by Ashby, and resisted the claim against it until that claim was settled, so it is not a case where the Commonwealth was independently but privately supporting Slipper's defence of the claim by Ashby. The Commonwealth was directly involved by Ashby's claim.

74 We do not consider that the circumstances in which, ultimately, the Commonwealth came to indemnify Slipper for his costs in relation to the primary action or of the appeal can bring the case within the general principles discussed in *Knight*. The circumstances in which that indemnity came about are set out above. It was announced only after the appeal had been

heard. There is nothing to indicate that it was a factor moving Slipper's conduct of the primary proceeding or the appeal prior to that date: cf *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [114]. It follows that no conduct on the part of the Commonwealth, ultimately in indemnifying Slipper for his costs, steered or influenced the steering of Slipper's conduct of the primary proceeding or of the appeal in any arguably improper or unreasonable way.

75 Indeed, the material relied upon by Ashby simply does not support any suggestion that, from 4 October 2012, the Commonwealth played any real part in his ongoing application for summary dismissal of the claim against him or in his conduct of the appeal.

76 Nor is it shown that the Commonwealth at the time Slipper was pursuing his summary dismissal application or while he conducted the appeal, had the view, or a foundation for the view, that Slipper would be unable to meet any costs order made against him. It is not the case that the indemnity for costs, as ultimately given, had as its motivation Slipper's capacity to defend the primary proceeding (relevantly, having regard to the course of events, by presenting his summary dismissal application and by resisting the appeal).

77 It may also be observed that, in any event, to the extent that it is relevant that the party (who is alleged to have been supported by the non-party) is insolvent, and unable to meet any costs order, the evidence is somewhat equivocal. It is not clear that Slipper has no entitlement to a pension as a retired but long-standing parliamentary member. He is the sole shareholder in a company that owns 10 properties. It is apparent on the material that he has not paid (or had not paid) his former lawyers without the benefit of the costs indemnity, and that he was unrepresented in the latter part of the hearing of his summary dismissal application. So the material is somewhat equivocal, although it suggests at least that Slipper had short term cash or liquidity concerns. It is not an instance where Slipper was simply a "straw man" to pursue or protect the interests of the Commonwealth, but being funded in the conduct of the primary proceeding and/or the appeal by the Commonwealth.

78 Thus, addressing the main criteria which in the past have in the circumstances appeared to warrant a non-party costs order, in our view there is really no basis for treating the Commonwealth's position as coming within them or any of them.

79 Stepping back, to assess the justice of the case in the particular circumstances, in our view there is nothing shown which might expose the Commonwealth as a non-party but in the interests of justice to paying the costs of Ashby in the circumstances. His contention is

largely premised upon an asserted "vital and continuing interest" in the outcome of the primary proceeding, but such interest as the Commonwealth had, or may have had, cannot be shown to have amounted to any involvement at all in the primary proceeding or in the appeal, after 4 October 2012. It is clear that the exchanges between senior counsel for the Commonwealth and the primary judge in 2 October 2012 do not provide evidence of such an involvement after 4 October 2012.

The Costs of the Commonwealth

80 The Commonwealth accepts that s 570 of the FW Act might apply, so that it could be entitled to costs only in accordance with subs (2) of ss 569 or 569A of the FW Act, if it were a party to the proceeding. It does not apply to a non-party: *Yirra Pty Ltd v Summerton* [2009] FCAFC 50 in relation to the similarly worded predecessor of s 570.

81 In relation to the present interlocutory application of Ashby of 18 June 2014, Ashby asserts that the Commonwealth is at least from 4 October 2012 not a party to the primary proceeding or to the appeal.

82 In our view, therefore, the normal rules as to costs should apply. The Commonwealth is entitled to its costs of opposing the application to amend the interlocutory application of Ashby of 18 June 2014. Having regard to our reasons for refusing leave to amend that application, it is our view that the Commonwealth's request that it should recover costs on an indemnity basis should also be acceded to.

83 As indicated, we refuse Ashby leave to amend his interlocutory application of 18 June 2014 in the terms of his proposed amended interlocutory application dated 1 August 2014. We also order that Ashby pay to the Commonwealth its costs of resisting that application, on an indemnity basis but limited to such costs as were reasonably incurred in doing so.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield, Siopis & Gilmour.

Associate: 

Dated: 9 February 2015