Federal Court of Australia

Lewis, in the matter of Gallop International Group Pty Ltd (In Liq) (No 2) [2021] FCA 7

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| File number: | SAD 235 of 2018 |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: |  18 January 2021 |
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| Catchwords: | **COSTS** — application for costs of an Interlocutory application — where Interlocutory application seeks orders for production of evidence relied on to obtain ex parte orders and setting aside of orders made under s 597(9) of the *Corporations Act 2001* (Cth) for production of insurance documents — application for production of evidence relied on dealt with first and applicant successful — affidavit produced by respondent — applicant elects not to pursue further orders and application otherwise dismissed — appropriate order as to costs is that there be no order as to costs |
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| Legislation: | *Corporations Act 2001* (Cth) s 597 |
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| Cases cited: | *Gerah Imports Pty Ltd v Duke Group Ltd (in liq)* (1993) 61 SASR 557*Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301*Lewis, in the matter of Gallop International Group Pty Ltd (in Liq)* [2020] FCA 1315  |
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| Registry: | South Australia |
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| Division: | General Division |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 7 |
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| Date of last submissions: | 9 October 2020 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicants: | Mr T Marskell |
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| Solicitor for the Applicants: | Roser Lawyers |
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| Counsel for the Respondent: | Mr M Hoffmann QC |
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| Solicitor for the Respondent: | Johnson Winter & Slattery Lawyers |

ORDERS

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|  | SAD 235 of 2018 |
| IN THE MATTER OF GALLOP INTERNATIONAL GROUP PTY LTD (IN LIQUIDATION) (ACN 147 664 551) |
|  | MARTIN DAVID LEWIS AS LIQUIDATOR OF GALLOP INTERNATIONAL GROUP PTY LTD (IN LIQUIDATION)Plaintiff |
| IN THE INTERLOCUTORY APPLICATION: |
| BETWEEN: | SOPHIE GRACE PTY LIMITED ACN 122 434 584First ApplicantSOPHIE GRACE LEGAL PTY LIMITED ACN 151 901 665Second Applicant |
| and: | MARTIN DAVID LEWIS AS LIQUIDATOR OF GALLOP INTERNATIONAL GROUP PTY LTD (IN LIQUIDATION) (ACN 147 664 551)Respondent |

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| order made by: | BESANKO J |
| DATE OF ORDER: | 18 January 2021 |

THE COURT ORDERS THAT:

1. There be no order as to costs with respect to the Interlocutory application dated 23 July 2020.

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

REASONS FOR JUDGMENT

BESANKO J:

1. This is an application for costs in relation to an Interlocutory application filed on 23 July 2020. The relief sought by the applicants in the Interlocutory application was as follows:

1. To the extent necessary, an order that time be extended for the Applicant to bring this application pursuant to rule 1.39 of the *Federal Court Rules 2011* (Cth).

2. An order that pursuant to section 596C(2) of the *Corporations Act 2001* (Cth), all affidavits filed in support of the Originating Process, including the documents referred to therein, be made available for inspection by the Applicant.

3. Further or in the alternative, an order that all evidence relied on by the Respondent on 25 June 2020 be made available for inspection by the Applicant.

4. An order that the decision of Registrar Parkyn made on 25 June 2020 be reviewed pursuant to section 35A(5) of the *Federal Court Act 1976* (Cth) and that the following Orders made on 25 June 2020 be discharged:

a. 4(b); and

b. 4(c).

5. The Orders to produce directed to the Applicant and issued pursuant to the orders made on 25 June 2020 be stayed pending the determination of this application.

1. The Interlocutory application was dealt with by the parties and the Court by first addressing the orders sought in paragraphs 1, 2 and 3 and, in particular, the applicants’ request that it be provided with all the evidence relied on by the respondent on 25 June 2020.
2. The applicants were successful at the first stage and on 16 September 2020 the Court made the following orders:

…

4. The applicants be granted an extension of time to 23 July 2020 within which to bring the Interlocutory application filed on 23 July 2020.

5. The respondent produce the affidavit of Benjamin Renfrey sworn on 22 June 2020 to the applicants within seven days.

6. The applicants’ Interlocutory application filed on 23 July 2020 be listed at 9:00 am (Adelaide time) on Thursday, 1 October 2020.

7. The question of costs be reserved.

8. The parties have liberty to apply on two days’ notice.

(*Lewis, in the matter of Gallop International Group Pty Ltd (in Liq)* [2020] FCA 1315.)

1. The applicants, having received Mr Renfrey’s affidavit in accordance with the order in paragraph 5, decided not to pursue the Interlocutory application any further and, in particular, did not press for the order sought in paragraph 4 of the application namely, that the relevant orders made by Registrar Parkyn on 25 June 2020 be discharged. On 30 September 2020, the following orders were made by consent:

1. The Interlocutory application filed on 23 July 2020 be otherwise dismissed.

2. By 5:00 pm (ACDT) on 9 October 2020, the parties file and exchange written submissions of not more than three pages (and annexing any relevant correspondence) on the issue of costs.

3. The Court determine the issue of costs on the papers.

4. The case management hearing listed at 9:00 am (Adelaide time) on Thursday, 1 October 2020 be vacated.

1. The applicants seek the costs of the Interlocutory application. Those costs will largely relate to the contested issues to this point. They submit that costs should follow the event and that they have been successful on the contested issues. The affidavit of Mr Renfrey should have been produced by the respondent without argument. The applicants’ basic point is that the bulk of the costs relate to the contested hearing on 27 August 2020 and that need not have taken place and, indeed, the Interlocutory application itself may not need to have been issued had:
2. the application by the respondent under s 597(9) of the *Corporations Act 2001* (Cth) been inter partes as the applicants contend it should have been and not ex parte as it was;
3. Mr Renfrey’s affidavit been provided in response to a request from the applicants’ solicitors dated 26 June 2020; and
4. Mr Renfrey’s affidavit been provided in response to a request from the applicants’ solicitors dated 30 June 2020.
5. The respondent submits that the proper order is that there be no order as to costs because “any costs to which the Applicants may be entitled by reason of their success on their intermediate application to inspect the affidavit is more than set off by the costs to which the Liquidator is entitled by reason of their abandonment of their application”. He further submits that an application for documents recording details of professional indemnity insurance policies and claims thereunder is uncontroversial as the authorities make clear (*Gerah Imports Pty Ltd v Duke Group Ltd (in liq)* (1993) 61 SASR 557; *Grosvenor Hill (Qld) Pty Ltd v Barber* (1994) 48 FCR 301).
6. In my opinion, the respondent’s submissions are correct and there should be no orders as to costs. The Interlocutory application should be viewed as one application, not as a series of applications and furthermore, the respondent is correct that it is well-established that the insurance cover that might be applicable in respect of a chose in action falls within the examinable affairs of a company being wound up in insolvency.

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| I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated:  18 January 2021