FEDERAL COURT OF AUSTRALIA

Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) (No 6) [2019] FCA 132

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| File number: | VID 632 of 2017 |
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| Judge: | **MOSHINSKY J** |
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| Date of judgment: | 18 February 2019 |
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| Catchwords: | **COSTS** – costs in relation to unsuccessful interlocutory application – whether indemnity costs appropriate – whether costs payable forthwith |
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| Legislation: | *Federal Court Rules 2011*, r 40.13 |
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| Cases cited: | *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225  *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV (No 5)* [2018] FCA 19 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 7 February 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 7 |
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| Counsel for the Applicant: | Mr LWL Armstrong QC with Mr AD Pound |
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| Counsel for the Respondents: | Mr IR Pike SC with Mr A Shearer |
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| Solicitor for the Respondents: | Clifford Chance |
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ORDERS

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|  | | VID 632 of 2017 |
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| BETWEEN: | SADIE VILLE PTY LTD (ACN 134 578 019) (AS TRUSTEE FOR THE SADIE VILLE SUPERANNUATION FUND)  Applicant | |
| AND: | DELOITTE TOUCHE TOHMATSU (A FIRM) (ABN 74 490 121 060)  First Respondent  DELOITTE CORPORATE FINANCE PTY LIMITED (ACN 003 833 127)  Second Respondent | |

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| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 18 FEBRUARY 2019 |

THE COURT ORDERS THAT:

1. The Uninvolved Partners of the first respondent pay the applicant’s costs of and incidental to their application for an order that they be excused from complying with the Production Order or that the Production Order be discharged, as agreed or assessed, such costs to be on a party and party basis.
2. There be no order as to costs in relation to the applicant’s application for orders as set out in the proposed amended interlocutory application attached to its submissions dated 5 November 2018.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

1. On 24 December 2018, I published reasons for judgment in relation to an application by certain partners of the first respondent for an order that they be excused from complying with an order for production of documents that had been made on 15 August 2018, or that the order be discharged: *Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) (No 5)* [2018] FCA 2066. I dismissed the application. I also dismissed an ancillary application by the applicant. These reasons deal with the costs of the two applications. These reasons should be read together with the reasons published on 24 December 2018. I will adopt the defined terms used in those reasons.
2. The positions of the parties are as follows:
3. Sadie Ville seeks an order that DTT pay Sadie Ville’s costs of and incidental to the application heard on 8 November 2018 (ie, the application by the Uninvolved Partners for an order that they be excused from complying with the Production Order or that the Production Order be discharged) on an indemnity basis and forthwith.
4. The Uninvolved Partners contend that costs ought to follow the event in respect of: (i) the Uninvolved Partners’ unsuccessful application to be excused from the Production Order or for the Production Oder to be discharged; and (ii) Sadie Ville’s unsuccessful application for *Sabre* orders.
5. Sadie Ville’s application for *Sabre* orders occupied very little time in oral and written submissions and was, in my view, largely responsive to the application brought by the Uninvolved Partners. Therefore, it is convenient to defer dealing with that application until later in these reasons. In relation to the Uninvolved Partners’ application, the main issues are:
6. whether costs should be awarded on an indemnity basis rather than the usual party and party basis; and
7. whether costs should be payable forthwith.
8. In relation to indemnity costs, the principles are set out in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233-234 per Sheppard J. Sadie Ville submits that the Uninvolved Partners’ application “was made on the basis of evidence that was so seriously deficient, and so lacking in candour, that the application ought never to have been brought”. Sadie Ville also submits that the Uninvolved Partners’ application “represents the latest step in a process of delay and obfuscation by DTT”. While I expressed the view at [54] of the 24 December 2018 reasons that the circumstances described in those reasons were extraordinary and troubling, those comments were directed to the underlying circumstances rather than to the conduct of the interlocutory application itself. I am not satisfied that, in circumstances where the relevant events had occurred, the situation was such that the application “ought never to have been brought”. I am also not persuaded that the other matters raised by Sadie Ville in its written submissions on costs justify an award of indemnity costs.
9. In relation to payment of costs forthwith, the position under r 40.13 of the *Federal Court Rules 2011* is that, if an order for costs is made on an interlocutory application, the party in whose favour the order is made must not tax those costs until the proceeding in which the order is made is finished. However, the Court has a discretion to order that costs of an interlocutory application be taxed immediately (as indicated in the note that follows the rule). The applicable principles in relation to the exercise of that discretion were summarised in *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV (No 5)* [2018] FCA 19 at [5]-[9] per Perram J. Sadie Ville submits that the Uninvolved Partners’ application was discrete from the underlying issues in this litigation and that a considerable period of time would otherwise elapse before the costs would be recovered. Sadie Ville also relies on the matters it raised in relation to indemnity costs. I am not satisfied that a departure from r 40.13 is justified in the circumstances of this case. The ordinary rule has the advantage of avoiding multiple taxations of costs. Further, in the event that the matter settles, it may not be necessary to have a taxation of costs. While the interlocutory application is discrete, and finalisation of the proceeding may be some time away, these matters do not in the circumstances of this case justify departure from the ordinary rule. Nor do the matters raised by Sadie Ville in connection with the indemnity costs issue.
10. Accordingly, in relation to the Uninvolved Partners’ application, I consider the appropriate order to be that the Uninvolved Partners pay Sadie Ville’s costs of and incidental to the application, on a party and party basis.
11. In relation to Sadie Ville’s application for *Sabre* orders, this occupied very little time and may be seen as responsive to the Uninvolved Partners’ application. In the circumstances, I consider it appropriate that there be no order as to costs in relation to that application.

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

Associate:

Dated: 18 February 2019