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TRANSCRIPT OF PROCEEDINGS

O/N 158420

FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA REGISTRY

BESANKO J

No. SAD 17 of 2007

AUSTRALIAN MEDIC-CARE CO LTD

and

HAMILTON PHARMACEUTICAL PTY LTD

ADELAIDE

9.29 AM, MONDAY, 28 FEBRUARY 2011

MR K. KEUNG appears for the applicant

MR T. COX appears with MR C BRANSON for the respondent

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MR T. COX: May it please the court, Cox, with MR BRANSON for the respondent, Hamilton.

HIS HONOUR: Yes. Thank you, Mr Cox.

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DR K. KEUNG: I am Dr Keung, representing AMC. Australian Medic-Care Company Limited.

10 HIS HONOUR: You are seeking leave to appear, in effect, for the company, are you?

DR KEUNG: Yes.

HIS HONOUR: There's no objection, is there, Mr Cox?

15

MR COX: No.

HIS HONOUR: All right. I will give you that leave, yes. Yes, Mr Cox.

20 MR COX: Your Honour, this is the respondent's notice of motion for the applicant's and first cross-respondent's notice of motion, filed last year, to be dismissed on the grounds of failure to provide the security that was ordered to be provided. An order made by consent. There has been an unexplained failure on the part of the applicant to lodge the security, and it's well overdue. And the applicant
25 was notified, after the orders made on the previous occasion, that dismissal would be sought today. It was sought on the previous occasion, but notified at least, by order served in accordance with the court orders, within 48 hours after the previous hearing, that dismissal would be sought and, again, there has been no affidavit evidence filed on the part of the applicant to explain the failure to lodge the security.
30 So the respondent seeks an order that the applicant's notice of motion be dismissed. We do so under the relevant provision of the Federal Court Act, section 56.

HIS HONOUR: Section?

35 MR COX: 56. It's the general provision that concerns the ordering of security for costs. Subsection (1) provides that the court may order an applicant to give security for the payment of costs. That may be awarded against the applicant. The amount - subsection (2) - is in the discretion of the court, and the timing of the payment of security. And then subsection (4) relevantly provides that if security is not given in
40 accordance with an order under this section, the court or a judge may order that the proceeding be dismissed.

HIS HONOUR: Yes.

45 MR COX: So that's the subsection that we specifically rely on today, and we rely upon the further considerations that are already outlined. It is by consent that this order for security was made, and the failure to lodge security has been unexplained,

other than a couple of references in correspondence that Dr Keung, on behalf of the applicant, said it was not necessary to provide security. I can take your Honour to one example of that, if I can take your Honour to the affidavit of Ms Visintin of 25 January 2011.

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HIS HONOUR: But the order has been made.

MR COX: Yes, the order has been made.

10 HIS HONOUR: So what's the point that you're making now? That it's now said the order shouldn't have been made?

MR COX: Essentially. Dr Keung has written correspondence saying it is not necessary to provide the security. So he is going back on the consent that he gave to
15 the order, essentially. So it's just a further consideration pointing to dismissal.

HIS HONOUR: I see.

MR COX: Perhaps it's not necessary to take your Honour to the comments in
20 correspondence.

HIS HONOUR: Well, perhaps give me a reference to it, Mr Cox.

MR COX: The relevant paragraphs in Ms Visintin's affidavit, in paragraph 6 and 8
25 where the applicant sought to – and that's a reference to correspondence that's attached, dated, relevantly, 10 January 2011 and 18 January 2011.

HIS HONOUR: Yes.

30 MR COX: And - - -

HIS HONOUR: Just give me the reference, is it paragraphs?

MR COX: 6 and 8.
35

HIS HONOUR: 6 and 8. Thank you.

MR COX: Thank you, your Honour. Those are my submissions.

40 HIS HONOUR: Yes. Yes, Dr Keung. Do you want to be heard on this?

DR KEUNG: I have some submissions for the Court, your Honour. I need about 10 minutes to speak out our submissions. In defence, as comments about your Honour's order issued on 7 February. Also, I have recalculated the money in the security for costs, and the money that Hamilton owes our company, and then I will discuss all
45 this. Why – I will, about our security for costs. We still have some money owed by Hamilton, for the breach of confidence issue. I think they need to return to us about

100,000 to 150,000. That should be enough security. Anyway, if your Honour asks me to present my submissions here, I will read it out now.

5 HIS HONOUR: Well, I will give you opportunity to make submissions, but you have to make it clear what submission you are making. Because I made an order when your lawyers - - -

DR KEUNG: You can – your Honour, you - - -

10 HIS HONOUR: Just listen to me, please. I made an order about security, and the security hasn't been provided. So I'm asked to strike out, or dismiss, your notice of motion.

DR KEUNG: Actually - - -

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HIS HONOUR: So your submissions need to be directed to what is before me. If there is another matter you wish to raise then you need to flag that, so that I know what the submission is relevant to. Do you understand that?

20 DR KEUNG: Actually, your Honour, if you ask me to explain, sometimes - for example the last time on 23 December, they suddenly gave us a notice of motion about the security for costs. Actually, at that time, because of my ear, I asked my lawyer to hear. It is too striking. There is no time for me to think about how to respond, you know. They just bring the 23 October notice of motion. Immediately,
25 it was heard. I have no time to prepare. Actually, you see, all the documents is in Hong Kong, and some are in my computer. And if the other side just bring some urgent notice of motion, I have no time to go through the things. Just like the 23 December motion. They said they asked for security for costs.

30 Actually we have enough money in the security for costs to pay out. For example, they haven't paid us the - for example, they asked us to pay the supposed – I agree, for the time being - the 356,000. But within that, according to Finn J, they have to pay Hamilton, pay Kenneth Keung the part - they sue wrongly. And also, I have to write down the part of our costs, on Dr Keung, spent on the breach of confidence on
35 AMCs part. We still haven't charged. That amounts to 100,000 to 150,000. If it's calculated according to the rate that they calculate their own bill of costs, the breach of confidence, again, may be 89,000. And then I am entitled to claim about 60,000 from the costs of suing me wrongly.

40 HIS HONOUR: What order is that, Mr Keung?

DR KEUNG: I haven't make up any order, but - - -

45 HIS HONOUR: What is the order that you're relying on?

DR KEUNG: This is not the order. I haven't calculated. Because it depends on - - -

HIS HONOUR: No, no. Don't worry about whether you calculate it or not, what order? When was it made?

DR KEUNG: Just 14 December. Made by Finn J. 14 December.

5

HIS HONOUR: Which year?

DR KEUNG: 2009. 3.7 and 3.8.

10 HIS HONOUR: Right. So, all right, there is an order there that Hamilton pay your costs on the cross-claim. And there is also an order there that Australian Medic pay Hamilton's costs on the cross-claim, insofar as they relate to establishing the Australian Medic's liability for breach of confidence.

15 DR KEUNG: Yes. Yes, there are two sources.

HIS HONOUR: All right. Well, what point do you make about that?

DR KEUNG: That can also be the security. That's why – we owed Hamilton, we can also take that into account. Because the amount of money will depend upon how much the figure in the certificate of taxation for Hamilton is. We can still get back about one fifth, or one sixth, of that amount for the breach of confidence. Therefore, the money in the security for costs still have 112,000 to 150,000 left if you take that into account.

25

HIS HONOUR: Take what into account?

DR KEUNG: Take the – we can get back about 120 to 150 thousand.

30 HIS HONOUR: Who is "we"?

DR KEUNG: AMC.

HIS HONOUR: Can get what?

35

DR KEUNG: Can get back from 120 to 150 thousand from the orders of Finn J.

HIS HONOUR: Which order?

40 DR KEUNG: 3.7 and 3.8.

HIS HONOUR: No, 3.7 deals with your costs. You personally. 3.8 requires AMC to pay costs.

45 DR KEUNG: Yes. AMC paid – the amount that AMC paid, a part should be deducted for Dr Keung. Because Dr Keung was not involved in the case.

HIS HONOUR: Well, your first hurdle is to show me why I should effectively ignore the order that I made that you provide security for costs. There is an order of the Court.

5 DR KEUNG: I'm sorry, your Honour. I didn't ignore your order. You see, your Honour, I make more submissions on the 6th to your Honour.

HIS HONOUR: I thought you were in court the day that your solicitors consented to the order. Were you not in court that day?

10

DR KEUNG: I am in court that day. But I can't clear to - - -

HIS HONOUR: You were in court that day, weren't you?

15 DR KEUNG: Yes. I am in court that day. But the matters are too urgent, and I am not very sensitive in my ear. And, actually, the defendant – the respondent has got enough money from our account. Now have taken all the money, I don't know why.

HIS HONOUR: Yes, I'm - - -

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DR KEUNG: Yes, actually, according to the advice of doctors, actually I should not attend here, pending a cardiac investigation. However, for the sake of justice – not just the 356,000, I attended this court to speak of the injustice and prejudice imposed on AMC. Before I start, I would like to tell your Honour that the fear of death -
25 fearing anginal pain - is very dreadful, especially in an aeroplane. That was the reason why I did not attend the court on 7 February. I am really sorry for this, your Honour. In the court order dated February 7, I do not know why the applicant needs to pay the cost of the hearing dated the same day. On 2 February, I told the court about the difficulties I encounter in attending the hearing in Adelaide.

30

One of which was my health. My coronary artery disease is affecting my life. Therefore, I sincerely ask for delay of the coming hearings. I got a documented advice, given by Queen Elizabeth Hospital, after an episode of stable angina on 6 February. My succession of conducting the hearing by email, or by phone, was
35 turned down. I need to know why the hearing had to be conducted in my absence, leading to deprivation of my chance to argue. That conflicted with the law governing human rights. I do not know whether the orders issued that day can be set aside according to order 35, rule 7(2a). In the order, AMC was asked to pay the remaining amount in the security for costs to the respondent.

40

I would like to know why AMC needs to pay a false bill of costs, dated 29 July. This is against my conscience, and justice, which all courts need to maintain. The defects of the bill of costs, including corrections made to change the nature of jobs, to cheat the taxing officer of the Court, have been submitted in the hearing on 9 December
45 last year. Although they were not mentioned in the reasons of judgment dated 15 December, the respondent was allowed to take 200,000, in the order dated 23 December, before the issue of setting aside the certificate of taxation has been

completely settled. In my absence, in the hearing dated 7 February, AMC was ordered to pay the remaining amount.

5 If the estimate has not been inflated, the actual amount should be at least a third lower, according to the report of Patterson Hartmann which I sent to Ms Katrina Bochner, the Deputy District Registrar, on 4 January. Therefore, AMC objects to any withdrawal of money from the security for costs, before clarification of the matter. Besides, there are costs related to breach of confidence that had to be returned to Kenneth Keung according to the court order dated 14 February 2009 by
10 Finn J. They amounted to about 100,000 to 150,000, which the respondent has never mentioned. It is surprising - somewhat surprising - that the court order all the security for costs deposited in the court be paid to the respondent/cross-claimant pending a hearing of the motion, dated 22 December, for setting aside the certificate of taxation.

15 And the orders were made upon knowledge that the amount in the certificate of taxation was greatly inflated by misleading, deception, and correction of certain bills in the bill of costs. They were documented in the hearing dated 9 December. I wonder if the taxing officer of the court did notice the numerous and obvious
20 mistakes in their drawing of the bill before issuing the inflated amount in the notice of the estimate. I have asked Ms Katrina Bochner twice about the obvious mistakes leading to the inflated figure; no reply about it has been received, except asking AMC to wait for the next hearings.

25 I have already given a chronology of the events to prove that 12 November was the date I first knew of the estimate, in my supporting affidavit dated 19 November. And the further on the non-receipt of the estimate in my submissions to the court dated 6 January, in case I left or something in the hearing due to my deafness in the left ear. If the court still insisted that delivery of a notice by surface mail means it is
30 definitely received by the applicant, a foreign company. Therefore, AMC must pay the bill of costs even though it is a fraud. My conscience cannot tolerate such a serious injustice, although, apparently, I need to obey the court orders. With regard to discovery as a whole, concerning the motion dated 22 December by the respondent, AMC just depends on the documents already supplied in order to save
35 costs and for my health reasons. I hope they can be enough for the court to grant discretion.

With regard to chronology, on 13 October last year, I told the lawyers of Hamilton that I needed to wait for the estimate before I decided how to pay the money owed
40 them. Reflecting that, at that time I had not received the estimate issued on 22 September. The lawyers of Hamilton did not tell me that it had been issued. Not send me any reply about the payment. That was clear evidence of my non-receipt of the letter of the estimate. 17 days after it had been issued. On 1 November, , Clover Legal – last year – Clover Legal applied for the certificate of taxation, without giving
45 any notice to AMC upon knowing that AMC did not know about the estimate. On 11 November the same year, I received letter from Clover Legal asking me to pay the amount of 356,000 in a certificate of taxation.

The following day, I asked Mr Aaron Cornish, my acquaintance in the legal profession, to ask the Federal Court of South Australia about the estimate. A copy of the estimate was sent to him from Ms Katrina Bochner on the same day. If I had got the estimate, why I have to phone up the lawyers to pay them a couple of hours? On
5 23 November, Patterson Hartmann, a legal costing company in Sydney, was asked to give advice on the bill of costs after the certificate of taxation had been issued. If the estimate had been known, they would have been giving to advice to me much earlier. I sent him the email, to ask him about the taxation on 23 November, after knowing the certificate of taxation only.

10

Up to the present moment, only the faxed copy from Mr Aaron Cornish was treated as the only notice of the estimate sent to me. I only know of the estimate on 12 November last year. This chronology of events clearly shows that I did not know the estimate until the District Deputy Registrar, Ms Katrina Bochner, sent the faxed copy
15 of it to Mr Aaron Cornish. Most of the material contained above, mentioned above, has been clearly set out in my affidavit. Therefore, I did not know the need of repeating them in the hearing dated 9 December. In view of my hearing defect and my inexperience in the court procedures - as I am not a counsel or lawyer - I hope the court can accept me to repeat the chronology of the non-receipt of the estimate today,
20 to supplement the material left out in the hearing dated 9 December.

20

Concerning further security for costs, for the hearings of December 10 2010, there should be enough amounts in the security for costs deposited at the Federal Court, if there were no inflated amounts in the bill of costs. If the bill of costs was roughly
25 calculated, for costs related to damages and breach of confidence issues, according to the ratio of trial dates, it was just about 100,000. Assuming the respondent/cross-claimant had used 1.5 million for the whole case - too far away from the 356,000 - why shouldn't AMC get the notice of the estimate by mail? Why couldn't it be sent by other means, as usually is done for other court matters?

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There are two judicial comments in certain cases, emphasising justice, the importance of justice, in similar cases. The first came from the concluding paragraph of the ACMA case. Notwithstanding that, and bearing in the mind that the certificate and the bill of costs pertain to a very significant sum from this perspective, in my
35 view the interests of justice dictate that there be an opportunity for Mr Mansfield to, at least, be informed of the breakdown of the disbursements in the bill of costs. I will not confine, in any way, his general opportunity to change the bill of costs. In another case, Autodesk Incorporation v Dyason, Brennan J said that:

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A court should not pronounce a judgment against a person on a ground which that person has not had an opportunity to argue, for to do so would be a denial of natural justice.

Anyway, as a foreign entity our company continues to respect and abide by the legal
45 system of Australia - after explanation, and within its capacity which, however, is limited, as the legal and judicial procedures are extremely costly and time consuming, and my health may not allow me to cope with them. In addition, AMC,

45

unlike the respondent, is never certain about the outcome. Based on misleading and deceptive misconduct in drawing the bill of costs dated 29 July, AMC applies for discretion to oppose the injustice. If the court thinks that this reason, and the chronology for the non-receipt of the notice of the estimate are not enough to grant
5 discretion, I do not want to proceed further in Adelaide, thereby endangering my health due to the long flight between Hong Kong and Australia, and the creation of financial difficulties for AMC as a result of the judicial procedures. AMC will just obey whatever orders are issued by the Federal Court here.

10 In conclusion, I would like to clarify that delivery of the notice of the estimate did not mean receive of it by a foreign company. There was no gain for AMC whatsoever for denial of the receipt, except increased risk to my health. However, the gain is tremendous for the respondent/cross-claimant as we can see now. Even the order dated 22 December can have the mistake of service upon the lawyer.
15 Could the notice of the - of the estimate be sent to my former lawyer? What AMC makes is just - is us - is just an opportunity to extend the time for post of bill. Actually, we immediately found out that mistake after receiving the certificate of taxation from Clover Legal on 11 November. On my other cases, they even opposed the orders a year later.

20 I hope the conclusion made by the judge in the ACMA case can be applied to the AMC one. There are two queries in my mind at present. One is, have human rights been considered during the issuance of the court orders on 7 February? Why AMC have to pay 356,000 while the matter of setting aside the certificate of taxation has
25 not been determined, pending the motion on 22 December last year? That is all I want to say to your Honour.

HIS HONOUR: Thank you. Mr Cox, is there anything you want to say in reply?

30 MR COX: There is only one matter, your Honour. Hamilton generally disputes nearly all of what Dr Keung said, but as to the order for the provision of security that was made on 23 December last year, not only was Dr Keung in court, he was represented by Mr Roberts as counsel, who was acting on instructions from a solicitor from DMAW Lawyers, and Dr Keung says he was not sensitive in the ear
35 on that occasion, but the parties spent the best part of an hour outside court, your Honour would recall, agreeing the form of orders that were made by consent. That's the only additional matter we want to put forward by way of reply. May it please the court.

40 HIS HONOUR: Now, the orders you're seeking are that the notice of motion, dated 22 December 2010, be dismissed?

MR COX: Yes.

45 HIS HONOUR: Any other orders?

MR COX: We seek an order for costs of and incidental to that notice of motion.

HIS HONOUR: Any other orders do you seek today?

MR COX: No, your Honour.

5 HIS HONOUR: Very well.

MR COX: Yes, your Honour, can I just clarify the costs order. It should be not only the costs of the applicant's notice of motion that was filed on 22 December last year, but also the costs of the respondent's notice of motion dated 25 January 2011, which sought a dismissal of that first notice of motion. So we seek an order that the applicant pay the respondent's costs of and incidental to both notices of motion.

HIS HONOUR: What was the date of your notice of motion?

15 MR COX: 25 January 2011.

HIS HONOUR: Yes. I note that the security for costs, referred to in order number 4, made on 23 December 2010, has not been provided. In the circumstances, and having regard to the material and submissions put to me, I think it's appropriate to make the orders sought by the first respondent and cross-claimant. I make an order dismissing the notice of motion issued by the applicant and cross-respondents, dated 22 December 2010. Is that adequate, Mr Cox, in terms of the form of the order?

MR COX: Yes, your Honour.

HIS HONOUR: Yes. Now, Dr Keung, do you want to be heard on the question of costs?

DR KEUNG: Actually, your Honour, actually, if you decide everything, we have to accept. But I don't think why the motion dated 22 December has to be dismissed. Actually - - -

HIS HONOUR: Well, I've made that order. Do you want to be heard on costs?

35 DR KEUNG: Yes. I don't know why it has to be dismissed, you know.

HIS HONOUR: Do you want to be heard on costs?

DR KEUNG: On the costs, yes.

HIS HONOUR: What do you want to say about that?

DR KEUNG: Because we have enough security for costs, and also, on 23 December, they filed the motion, I have no time to think, actually. Your Honour, you have to understand that I am a layman. Even I have to absorb some of the law material before I can decide something, and if the notice of motion was brought in on the 23rd and immediately heard – I have no documents to support, because all the

documents are in Hong Kong. That's why there are some difficulties. I hope your Honour can understand.

HIS HONOUR: Thank you.

5

DR KEUNG: In fact, even before any trial of the 22 December motion, it was not heard. We are already ordered to give up all of our money to their account. I don't know why.

10 HIS HONOUR: All right. Mr Cox, I am disposed to make an order for costs. Now, it would be, would it, that the applicant and first cross-respondent pay the first respondent and cross-claimants costs of the notice of motion, dated 22 December 2010 and the notice of motion dated 25 January 2011.

15 MR COX: Yes.

HIS HONOUR: Is that the order you seek? In that form?

MR COX: Costs of those notice – yes, that is sufficient. Thank you.

20

HIS HONOUR: All right. Well, I make an order that the applicant and first cross-respondent pay the first respondent and cross-claimant's costs of and incidental to the notice of motion dated 22 December 2010 and the notice of motion dated 25 January 2011. Now, they're the only notices of motion issued on that day.

25

MR COX: Yes.

HIS HONOUR: So I think that covers it. Is there anything else?

30 MR COX: No, there isn't, your Honour.

MATTER ADJOURNED at 10.04 am INDEFINITELY