

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 17 of 2007

**BETWEEN: AUSTRALIAN MEDIC-CARE COMPANY LTD
(A COMPANY INCORPORATED IN HONG KONG)
Applicant/First Cross-Respondent**

**AND: HAMILTON PHARMACEUTICAL PTY LTD
(ACN 008 204 635)
Respondent/Cross-Claimant**

**KENNETH KIN WAH KEUNG
Second Cross-Respondent**

JUDGE: BESANKO J

DATE OF ORDER: 15 DECEMBER 2010

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. The notice of motion dated 19 November 2010 be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

FEDERAL COURT OF AUSTRALIA

Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Ltd

[2010] FCA 1404

Citation: Australian Medic-Care Company Ltd v Hamilton
Pharmaceutical Pty Ltd [2010] FCA 1404

Parties: **AUSTRALIAN MEDIC-CARE COMPANY LTD (A
COMPANY INCORPORATED IN HONG KONG) v
HAMILTON PHARMACEUTICAL PTY LTD (ACN
008 204 635); KENNETH KIN WAH KEUNG**

File number: SAD 17 of 2007

Judge: **BESANKO J**

Date of judgment: 15 December 2010

Date of hearing: 9 December 2010

Place: Adelaide

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 9

Counsel for the Applicant/
First Cross-Respondent: With leave, the Applicant/First Cross-Respondent appeared
by Dr K. K. W. Keung

Counsel for the Respondent/
Cross-Claimant: Mr T Cox with Mr C Branson

Solicitor for the Respondent/
Cross-Claimant: Crawford Legal

Counsel for the Second
Cross-Respondent: The Second Cross-Respondent appeared in person

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 17 of 2007

BETWEEN: **AUSTRALIAN MEDIC-CARE COMPANY LTD
(A COMPANY INCORPORATED IN HONG KONG)
Applicant/First Cross-Respondent**

AND: **HAMILTON PHARMACEUTICAL PTY LTD
(ACN 008 204 635)
Respondent/Cross-Claimant**

**KENNETH KIN WAH KEUNG
Second Cross-Respondent**

JUDGE: **BESANKO J**

DATE: **15 DECEMBER 2010**

PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

1 On 11 November 2010, a taxing officer of this Court issued a certificate pursuant to O 62 r 46(3)(ca) of the *Federal Court Rules* to the effect that the costs of the respondent and cross-claimant, Hamilton Pharmaceutical Pty Ltd ("Hamilton") as between party and party, payable by the applicant and first cross-respondent, Australian Medic-Care Co Ltd ("Australian Medic-Care") were deemed to be \$356,322.60.

2 On 19 November 2010, Australian Medic-Care issued a notice of motion in which it sought the following orders:

1. The Certificate of Taxation dated 11th November 2010 issued in this action be set aside forthwith;
2. Leave be granted to the Applicant/First Cross-Respondent to file and serve a notice of objection to the estimate of the costs within 21 days from the date of the Order to be made herein; and
3. There be no order as to the costs of this application.

3 A director of Australian Medic-Care, Dr Kenneth Kin Wah Keung, sought leave to appear on behalf of the company. He told me that he is one of four directors of the company. He is the second cross-respondent in the proceeding. Dr Keung and Australian Medic-Care

had previously been represented by a firm of solicitors. However, on 19 February 2010 they filed a Notice of Appearance wherein they stated that they were acting for themselves (Dr Keung asserted that the company was appearing by him) and gave an address for service being an address in North Epping, New South Wales ("the address for service"). I granted Dr Keung leave to appear on behalf of the company. Hamilton did not object to a grant of leave.

4 The background to the notice of motion is as follows. On 29 July 2010, Hamilton lodged a bill of costs with the Court. The bill of costs was served on Australian Medic-Care. On 27 September 2010, the taxing officer sent to Dr Keung at the address for service and to the solicitors for Hamilton a letter advising them of the following:

1. that the estimate made of the approximate total for which, if the bill were to be taxed, the certificate of taxation would be likely to issue was \$356,322.60. That estimate was made under Order 62 paragraph 46(3)(a). Notification of the estimate was given under Order 62 paragraph 46(3)(b);
2. the provisions of Order 62 subrule 46(3);
3. that if a notice of objection was not filed and served the party filing the bill could, subject to proof of service, request the issue of a certificate of taxation; and
4. of the terms of the certificate of taxation which would issue in those circumstances.

5 A Notice of Objection was not filed and served by Australian Medic-Care and, on 1 November 2010, Hamilton wrote to the taxing officer requesting that a certificate of taxation be issued. As I have said, on 11 November 2010 that was done.

6 On 12 November 2010, Dr Keung wrote to the Registry of this Court claiming that the company did not receive the estimate "through mail or E-mail".

7 On 15 November 2010, Dr Keung wrote to the taxing officer claiming that the estimate did not come to his attention during the relevant period. He made the following points:

1. During the previous six months he had spent most of his time in Hong Kong.

2. He relied on his wife to collect letters for him. She had been in Hong Kong from 12 September 2010 to 23 October 2010. The letter was not received by Dr Keung.
3. Since February 2010, the Court has been in contact with Dr Keung and Australian Medic-Care and that contact has been by email first, followed by mail.
4. Australian Medic-Care would have objected to the estimate, and the solicitors for Hamilton were aware of this fact.
5. Hamilton will suffer no prejudice if the certificate of taxation is set aside.

8 In oral submissions before me, Dr Keung outlined a number of arguments he would put against various claims for costs made by Hamilton. Counsel for Hamilton said that he did not dispute that Dr Keung would have "something to say on the merits". His point was that Australian Medic-Care did not overcome the first hurdle in terms of the application for an order setting aside the certificate of taxation, namely, that it had not received the notice of the estimate (O 62 r 46(3)(cb)).

9 It is clear that Australian Medic-Care may only apply for the order it seeks if it had not received the notice of the estimate (O 62 r 46(3)(cb) and see *Cytel Pty Ltd v Peoplebank Recruitment Pty Ltd* [2008] FCA 518). It is also clear that it carries the onus of establishing that the notice was not received. There is no evidence that the notice of estimate was not received at Australian Medic-Care's address for service. In fact the probability is that it was. Service has been effected in accordance with the *Federal Court Rules* (see Order 7) and Australian Medic-Care has failed to establish that it did not receive the notice of estimate. Under the relevant rule I do not have a discretion to make the order which Australian Medic-Care seeks. In those circumstances, the notice of motion must be dismissed.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate: *R White*

Dated: 15 December 2010

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

No: **SADI7/2007**

**AUSTRALIAN MEDIC-CARE CO LTD
(A Company Incorporated in Hong Kong)
Applicant/First Cross-Respondent**

**HAMILTON PHARMACEUTICAL PTY LTD
ACN 008 204 635
Respondent/Cross-Claimant**

**KENNETH KIN WAH KEUNG
Second Cross-Respondent**

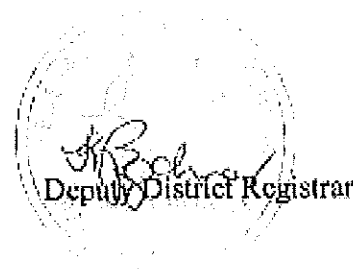
ORDER

JUDGE: Besanko J
DATE OF ORDER: 21 December 2010
WHERE MADE: Adelaide

THE COURT ORDERS THAT:

1. Further consideration of the orders sought by the respondent/cross-claimant adjourned to Thursday 23 December 2010 at 11.15 am.
2. The applicant/first-cross respondent and second cross respondent are to pay the costs of today of the respondent/cross-claimant.

Date that entry is stamped: 24 MARCH 2011



IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

No SAD 17 of 2007

BETWEEN:

Australian Medic-care Company Limited
(A Company incorporated in Hong Kong)
Applicant

Hamilton Pharmaceutical Pty Ltd
ACN 008 204 635
Respondent

ORDER

REGISTRAR: BOCHNER
WHERE MADE: ADELAIDE
DATE OF ORDER: 22 DECEMBER 2010

WHEREAS:

1. Pursuant to orders made by the Court on 14 December 2009 the applicant was ordered to pay the respondent's costs.
2. Pursuant to the *Federal Court Rules* an estimate was made of the approximate total for which if the Bill were taxed, a Certificate would issue. A Certificate of Taxation in the amount of \$356,322.60 was issued on 11 November 2010.
3. Service of the Certificate of Taxation was effected upon the solicitor for the applicant and after 14 days from the date of service the costs remain unpaid.

Pursuant to Order 62 sub-rule 45(3) of the *Federal Court Rules*, THE COURT HEREBY ORDERS THAT:

1. The applicant pay the respondent the sum of \$356,322.60.

Date that entry is stamped:

22 DEC 2010

DEPUTY DISTRICT REGISTRAR



TAKE NOTICE that pursuant to Order 35 rule 8 of the Federal Court Rules the amount herein bears interest at the rate of 9% from the date of the Certificate of Taxation. [Order 35 sub-rule 45(6)].

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)
SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION** **No: SAD17/2007**

NOTICE OF FILING AND HEARING

This application was filed electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/12/2010.

DETAILS OF FILING

Document Lodged:	Notice of motion: Federal Court Rules form 27
File Number:	SAD17/2007
File Title:	Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd
District Registry:	SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Warwick Soden

Dated: 23/12/2010

Registrar

NOTES

1. This Notice forms part of the application and contains information that might otherwise appear elsewhere in the application. The Notice must be included in the application served on each party to the proceeding.
2. The 'reason for listing' is descriptive and does not limit the issues that might be dealt with, or orders that might be made, at the hearing.

Listed for Mention Only on 23 December 2010 at 11.15am. Time for service has been abridged to 10am on 23 December 2010.



IN THE FEDERAL COURT OF AUSTRALIA)
SOUTH AUSTRALIA DISTRICT REGISTRY)
GENERAL DIVISION)

SAD No. 17 of 2007

BETWEEN:

AUSTRALIAN MEDIC-CARE COMPANY LTD
(A COMPANY INCORPORATED IN HONG
KONG)

Applicant/First Cross-Respondent

HAMILTON PHARMACEUTICAL PTY LTD
(ACN 008 204 635)

First Respondent/Cross-Claimant

KENNETH KIN WAH KEUNG

Second Cross-Respondent

NOTICE OF MOTION
(Form 27 - Order 19, rule 2)

The abovenamed Applicant and Cross Respondents will at _____ am/pm on
_____ 2010, at Level 5, Commonwealth Law Courts, 3 Angas
Street, Adelaide in the State of South Australia move the Court for orders:

1. That the Certificate of Taxation dated 11 November 2010 issued in this action be set aside.
2. The Applicant/First Cross-Respondent have leave to file and serve a notice of objection to the estimate of costs dated 27 September 2010 within 21 days.
3. In the alternative to orders 1 and 2 above:

Filed by the Applicant and Cross Respondents by their solicitors

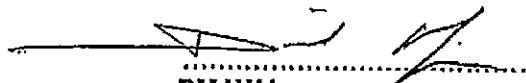
DMAW LAWYERS
Level 3
80 King William Street
ADELAIDE SA 5000

Tel: (08) 8210 2222
Fax: (08) 8210 2233
Solicitors for the Applicant and
Cross Respondents
Ref: [KD]149313



- 3.1 leave be granted to the Applicant/First Cross-Respondent to appeal against the judgment of Justice Besanko dated 15 December 2010;
- 3.2 an extension of time to 23 December 2010 within which the Applicant/Cross-Respondent be permitted to seek leave to appeal.
4. Such further or other orders as this Honourable Court deems appropriate.

Dated: 22 December 2010


.....
DMAW Lawyers
David Meegan
Solicitor for the Applicant and
Cross-Respondents

TO: HAMILTON PHARMACEUTICAL PTY LTD (ACN 008 204 635)
C/- Crawford Legal
PKF House, Level 1
139 Frome Street
Adelaide SA 5000

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

No SAD 17 of 2007

BETWEEN:

Australian Medic-care Company Limited
(A Company incorporated in Hong Kong)
Applicant

Hamilton Pharmaceutical Pty Ltd
ACN 008 204 635
Respondent

AMENDED ORDER

(pursuant to Order 35 rule 7 of the Federal Court Rules)

REGISTRAR: BOCHNER
WHERE MADE: ADELAIDE
DATE OF ORDER: 22 DECEMBER 2010

WHEREAS:

1. Pursuant to orders made by the Court on 14 December 2009 the applicant was ordered to pay the respondent's costs.
2. Pursuant to the *Federal Court Rules* an estimate was made of the approximate total for which if the Bill were taxed, a Certificate would issue. A Certificate of Taxation in the amount of \$356,322.60 was issued on 11 November 2010.
3. Service of the Certificate of Taxation was effected upon the applicant and after 14 days from the date of service the costs remain unpaid.

Pursuant to Order 62 sub-rule 45(3) of the *Federal Court Rules*, THE COURT HEREBY ORDERS THAT:

1. The applicant pay the respondent the sum of \$356,322.60.


DEPUTY DISTRICT REGISTRAR

Date that entry is stamped: 22 December 2010

TAKE NOTICE that pursuant to Order 35 rule 8 of the Federal Court Rules the amount herein bears interest at the rate of 9% from the date of the Certificate of Taxation. [Order 62 sub-rule 45(6)].



**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

No: **SAD17/2007**

**AUSTRALIAN MEDIC-CARE CO LTD
KENNETH KIN WAH KEUNG
Applicant**

**HAMILTON PHARMACEUTICAL PTY LTD ACN 008 204 635
Respondent**

ORDER

JUDGE: Besanko J
DATE OF ORDER: 23 December 2010
WHERE MADE: Adelaide

THE COURT ORDERS THAT:

1. The sum of \$200,000 of the monies standing in Court to the credit of the within Action, in an account titled 'Federal Court of Australia – Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Ltd' be paid out of Court to the respondent/cross-claimant forthwith on account of the costs payable in accordance with the order of the Court made on 22 December 2010.
2. The following orders be revoked:
 - 2.1 order 4 of the orders of Justice Mansfield of 6 July 2007;
 - 2.2 order 4 of the orders of Justice Finn of 7 July 2008; and
 - 2.3 order 4 of the orders of Justice Finn of 9 September 2008.
3. The interest in and which hereafter accrues in the account referred to in order 1 above be held as security for any costs order against the applicant for the benefit of the respondent.
4. Upon the undertaking of the applicant:
 - a. to submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any

person (whether or not a party) affected by the inability to use the remainder of the monies standing in the account referred to in order 1 above, from time to time;

- b. to pay the costs of the respondent/cross-claimant of and incidental to the applicant's Notice of Motion dated 22 December 2010 in any event;

the applicant's notice of motion be listed for hearing on Friday 18 February 2011 at 9.30 am on the condition that the applicant/cross-respondent provide, within 7 days of this order, further security for the costs of the respondent/cross-claimant in the sum of \$AUD15,000 to be paid into the account referred to in order 1 above.

5. The applicant pay the respondent/cross-claimant's costs of the hearing today in any event.
6. There be liberty to apply.

Date that entry is stamped: 24 December 2010.


District Registrar

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IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

No: SAD17/2007

AUSTRALIAN MEDIC-CARE CO LTD
Applicant/First Cross-Respondent

KENNETH KIN WAH KEUNG
Second Cross-Respondent

HAMILTON PHARMACEUTICAL PTY LTD ACN 008 204 635
Respondent/Cross-Claimant

AMENDED ORDER
(Pursuant to Order 35 rule 7
of the Federal Court Rules)

JUDGE: Besanko J

DATE OF ORDER: 7 February 2011

WHERE MADE: Adelaide

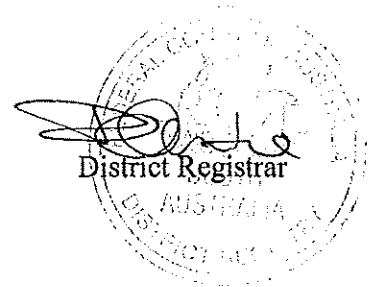
THE COURT ORDERS THAT:

1. The applicant and first cross-respondent's Notice of Motion dated 22 December 2010 be stayed until further order of the Court.
2. The balance of the money standing in the Court to the credit of the within action in an account titled 'Federal Court of Australia – Australian Medic-care Co Ltd v Hamilton Pharmaceutical Pty Ltd' be paid out of the Court to the respondent and cross-claimant on Monday 21 February 2011 or as soon thereafter as may be reasonably convenient on account of the costs payable in accordance with the order of the Court made on 22 December 2010.
3. The hearing of the applicant and first cross-respondent's Notice of Motion dated 22 December 2010 set down for 18 February 2011 be vacated.



4. The respondent and cross-claimant's Notice of Motion dated 25 January 2011 be listed for mention on 28 February 2011 at 9.30 am to consider dismissal of the applicant and first cross-respondent's Notice of Motion dated 22 December 2010.
5. The applicant and first cross-respondent pay the respondent and cross-claimant's costs of and incidental to today's hearing in any event.
6. The respondent and cross-claimant serve a copy of these orders on the applicant and first cross-respondent by e-mail sent to kkwkeung@netvigator.com on or before close of business on Wednesday 9 February 2011.
7. There be liberty to apply.

Date that entry is stamped: 11 February 2011



**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

No: **SAD17/2007**

AUSTRALIAN MEDIC-CARE CO LTD
Applicant/First Cross-Respondent

KENNETH KIN WAH KEUNG
Second Cross-Respondent

HAMILTON PHARMACEUTICAL PTY LTD
ACN 008 204 635
Respondent/Cross-Claimant

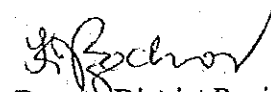
ORDER

JUDGE: Besanko J
DATE OF ORDER: 28 February 2011
WHERE MADE: Adelaide

THE COURT ORDERS THAT:

1. The Notice of Motion issued by the applicant and cross-respondents dated 22 December 2010 be dismissed.
2. 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.

Date that entry is stamped: 16 MARCH 2011


Deputy District Registrar