FEDERAL COURT OF AUSTRALIA

Hurst, in the matter of Lloyds Curry Shop Pty Ltd (in liq) v Prasad (No 3) [2023] FCA 1174

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| File number: |  |
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| Judgment of: | **CHEESEMAN J** |
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| Date of judgment: | 4 October 2023 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – miscellany of interlocutory applications in relation to: amendment of pleading; continuation of freezing orders and further ancillary orders in relation thereto; review of a decision of a Registrar and indemnity costs application – Held: some interlocutory applications allowed in whole or in part, some interlocutory applications refused.  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 286, 588FA, 588G(1),(2),(3), 588GA, 588H, 588M*Federal Court of Australia Act 1976* (Cth) ss 35A(5),(6), 37M*Federal Court Rules 2011* (Cth) rr 3.11(1), 7.32, 7.33(1), 16.02(1)(a), 16.53, 25.01*Taxation Administration Act 1953* (Cth) s 8AAZC  |
|  |  |
| Cases cited: | *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd (No 2)* [2018] FCAFC 112*Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; 239 CLR 175*Attorney-General v Times Newspapers Ltd* (1974) AC 273*Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290*Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* [1986] HCA 46; 161 CLR 98*Blendell v Blendell* [2020] NSWCA 154*Caason**Investments Pty Ltd v Cao* [2015] FCAFC 94; 236 FCR 322*Calderbank v Calderbank* [1975] 3 All ER 333*Chamberlain Group Pty Ltd v Kids for Life Academy Pty Ltd* [2015] NSWCA 241*Commissioner of State Taxation (WA) v Pollock* (1993) 12 ACSR 217*Copeland in his capacity as liquidator of* *Skyworkers Pty Limited (in Liquidation) v Murace* [2023] FCA 14*Devine v Liu; Devine v Ho* [2018] NSWSC 1453; 338 FLR 208*Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118; 63 AILR 101-103*Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; 81 ALR 397*Huntsman Chemical Co Aust Ltd v International Pools Aust Pty Ltd* (1995) 36 NSWLR 242*Hurst, in the matter of Lloyds Curry Shop Pty Ltd (in liq) v Prasad* [2021] FCA 1562 *Hurst, in the matter of Lloyds Curry Shop Pty Ltd (in liq) v Prasad (No 2)* [2022] FCA 1133*In the Matter of Australasian Barrister Chambers Ltd (in liq)* [2017] NSWSC 693*Jones v Bradley (No 2)* [2003] NSWCA 258*LFDB v Ms S M (No 2)* [2018] FCA 2062*Nicols as trustee of the bankrupt estate of Manietta v Manietta, in the matter of Manietta* [2022] FCA 39*Owen as Liquidator of Davey SG Pty Ltd (in liq) v Davey, in the matter of Davey SG Pty Ltd (in liq)* [2021] FCA 200*Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; 269 FCR 349*Peterson Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699*Plaintiff P1/2003 v Ruddock* [2007] FCA 65; 157 FCR 18*Re Melbournehomes.com Pty Ltd (in liq)* [2020] VSC 854; 356 FLR 390*Sands & McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation* [1998] VSCA 76; (1999) 1 VR 489*Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 717; 144 ACSR 347*Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu* [2015] FCA 1098*Totev v Sfar* [2008] FCAFC 35; 167 FCR 193*Trevor, in the matter of* *Bell Group NV (in liq) (No 2)* [2017] FCA 927; 122 ACSR 418*Yeo, in the matter of Bradi Transport Pty Ltd (in liq) v Sklenovski* [2020] FCA 1540 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 135 |
|  |  |
| Date of last submissions: | 21 February 2023 |
|  |  |
| Date of hearing: | 19 April 2022, 17 August 2022 and on the papers thereafter  |
|  |  |
| Counsel for Applicants: | Mr B May  |
|  |  |
| Solicitor for Applicants: | Gavin Parsons and Associates  |
|  |  |
| Counsel for the First Respondent: | Mr C A Johnstone |
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| Solicitor for the First Respondent: | James Conomos Lawyers |
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| Counsel for the Second, Fourth and Sixth Respondents: | Mr D Allen |
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| Solicitor for the Second, Fourth and Sixth Respondents: | McEvoy Legal |
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| Counsel for the Third and Fifth Respondents: | Ms M Castle and Mr A Bailey |
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| Solicitor for the Third and Fifth Respondents: | Watson Webb |
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ORDERS

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|  | NSD 797 of 2021 |
|   |
| BETWEEN: | DAVID HURST IN HIS CAPACITY AS LIQUIDATOR OF LLOYDS CURRY SHOP PTY LTD (IN LIQUIDATION) (ACN 143787044)First ApplicantLLOYDS CURRY SHOP PTY LTD (IN LIQUIDATION) (ACN 143787044)Second Applicant |
| AND: | KAUSHIK PRASADFirst RespondentACCOLADE ADVISORY PTY LTD (ACN 604214100)Second RespondentSAM CASSANITI (and others named in the Schedule)Third Respondent |

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| --- | --- |
| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 4 October 2023 |

THE COURT ORDERS THAT:

**Amendment**

1. Subject to Orders 2 to 3, within 28 days of these orders, the applicants have leave to file and rely on an Amended Statement of Claim (**ASOC**) substantially in the form of the document sent by the applicants’ solicitors to my Associate by email copied to all parties dated Wednesday 31 August 2022 4:22PM (**RDASOC**), save that the document must be in a form that complies with the *Federal Court* ***Rules*** *2011* (Cth).

2. Leave to amend is refused in respect of the proposed particulars to RDASOC [110] with liberty to replead.

3. The liberty to replead is to be exercised at the time the ASOC is filed pursuant to Order 1.

4. Within 7 days of service of the ASOC, the second, fourth and sixth respondents (the **Accolade Parties)** are to request any particulars of the paragraphs in the ASOC that are the equivalent of paragraphs 62A, 62B, 70A-70C, 73B, 74A, 76A, 93A, 93B, 94, 94A-C, 96A, 96B, 97, 97A-C, 99, 100A-C, 102A (b), 102A (d), 102B, 102C, 102D-E of the RDASOC which are reasonably necessary to enable them to file and serve defences to the ASOC.

5. If a request for particulars is made in accordance with Order 4, the applicants are to respond within 14 days of receipt of the request for particulars.

6. The respondents are to file and serve their respective defences to the ASOC as follows, in the event that:

(a) particulars are not requested pursuant to Order 4, then within 21 days of service of the ASOC; or

(b) particulars are requested in accordance with Order 4, then within 21 days of the receipt of particulars pursuant to Order 5.

7. The parties submit by no later than 4pm, 18 October 2023, agreed short minutes of order, with any areas of disagreement to be indicated in mark up, which address:

(a) whether the references to the “Carmelo Transfer” in the Further Amended Originating Application stamped on 18 February 2022 (**FAOA**) are pressed;

(b) whether paragraph 1 of the FAOA is pressed in circumstances where MI Stores is not a party to this proceeding;

(c) whether the relief sought in paragraphs 4(a), 12(c) and 16C(a) of the FAOA is appropriately framed; and

(d) the filing of a Second Further Amended Originating Application that:

(i) addresses the issues in subparagraphs (a) to (c) of this Order; and

(ii) otherwise complies with the Rules, including in respect of applying numbering that is consistent with the requirements in relation to pleadings in the Rules.

8. The applicants pay the costs thrown away by reason of the filing of the ASOC, including the costs of the amendment application, such costs to be agreed, failing which the costs are to be assessed by a Registrar of the Court in a lump sum.

**Further Asset Disclosure**

9. The interlocutory application dated 20 April 2022 is dismissed with the applicants to pay the third and fifth respondents’ costs of the interlocutory application as agreed, or failing agreement, as assessed by a Registrar of the Court on a lump sum basis.

**Freezing Order Extension**

10. Within 7 days of the date of these orders the parties are to confer and submit proposed joint orders, with any areas of disagreement to be indicated in mark up, which give effect to my reasons in respect of prayer 8(c), (e) and (f) of the amended interlocutory application (**AIA**) filed on 18 February 2022.

11. The applicants pay the fifth respondent’s costs of the AIA as agreed, or failing agreement as assessed by a Registrar of the Court on a lump sum basis.

12. The third and sixth respondents pay the applicants’ costs of the AIA incurred in respect of their application against the third and sixth respondents, limited to the period following 23 September 2022.

13. The parties be granted leave to apply to vary Order(s) 11 and/or 12 by filing and serving submissions (of no more than 3 pages) in support of any variation they contend for within 5 business days of these orders.

14. In the event that a party applies to vary Order(s) 11 and/or 12 by filing and serving submissions under Order 13:

(a) the opposing party or parties is/are to file and serve any submissions in response (of no more than 3 pages) within 5 business days of service on them of the submissions under Order 13; and

(b) the party or parties served with submissions under paragraph (a) is/are to file and serve any submissions in reply (of no more than 2 pages) within 3 business days of service on them of the first mentioned submissions.

15. The submissions referred to in Orders 13 and 14 should be easily legible using a font size of at least 12 points and one and a half line spacing throughout, including in any footnotes and annexures.

**Review of Notice to Produce Decision**

16. The interlocutory application dated 27 June 2022 is dismissed with each party to bear their own costs of the application.

**Costs for Security for Costs**

17. The second, fourth and sixth respondents pay the applicants’ costs on an indemnity basis of the further amended interlocutory application filed on 11 April 2022 as agreed, or failing agreement as assessed, by a Registrar of the Court on a lump sum basis.

18. The second, fourth and sixth respondents pay the applicants’ costs of the interlocutory application dated 21 June 2022 as agreed, or failing agreement, as assessed by a Registrar of the Court on a lump sum basis.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

# INTRODUCTION

1 These reasons dispose of various interlocutory applications relating to procedural matters. Broadly, the relief sought by the various parties relates to: (1) leave to file and serve an amended statement of claim; (2) extending the operation of freezing orders against five of the respondents; (3) an attempt to compel two respondents to provide further asset disclosure affidavits; (4) a review of a decision of a Registrar of the Court to dismiss a separate interlocutory application seeking to set aside certain production notices; and (5) seeking an indemnity costs award in respect of a security for costs application that was dismissed. It is convenient to address the applications in respect of the extension of the freezing orders and the application for further asset disclosure affidavits together.

2 To date, nineteen interlocutory applications have been filed in this proceeding which was commenced on the day immediately before the expiration of the applicable limitation period. I have delivered two judgments in respect of interlocutory applications: *Hurst, in the matter of* ***Lloyds Curry*** *Shop Pty Ltd (in liq) v Prasad* [2021] FCA 1562 and *Hurst, in the matter of Lloyds Curry Shop Pty Ltd (in liq) v Prasad (No 2)* [2022] FCA 1133 (the ***Lloyds Curry (No 2)****).* Familiarity with *Lloyds Curry* and *Lloyds Curry (No 2)* is assumed for the purpose of these reasons. I will not repeat the background facts and procedural history set out in those decisions. I adopt the same nomenclature as used in those reasons. I again note that in referring to the first applicant as the liquidator I have adopted the shorthand used by the parties. In doing so, I do not overlook that in the substantive proceeding the validity of the liquidator’s appointment is in issue and that the liquidator confines his pleaded case, in the latest proposed amended version to the allegation of fact that he “conducted himself as a duly appointed liquidator of the Company” from 7 August 2015. I further note that part of the relief sought by the liquidator in the present proceeding is in aid of regularising the status of the liquidator.

3 In *Lloyds Curry*, I dismissed the applicants’ amended interlocutory application seeking to extend freezing orders made against the first respondent, Kaushik. In *Lloyds Curry (No 2)*, I granted the applicants’ application to adduce further evidence in respect of the liquidator’s applications to: (1) extend freezing orders against the second to sixth respondents, Accolade, Sam, Reliance, David and Carmelo respectively; and (2) compel further asset disclosure by the third and fifth respondents, Sam and David respectively.

4 I will address each application in turn.

# AMENDMENT APPLICATION

## Introduction

5 The statement of claim (**SOC**) was filed in September 2021. The respondents filed their respective defences in October 2021.

6 By amended interlocutory application, the applicants seek leave pursuant to r 16.53 of the *Federal Court* ***Rules*** *2011* (Cth) to file and serve an amended statement of claim in the form of annexure GD-37 to the affidavit of George Doueihi, solicitor, sworn 17 April 2022 (**DASOC)**. On the first occasion on which the amendment application was listed for hearing, the applicants sought to adjourn the application because following the exchange of written submissions, on the weekend, which was also a public holiday, before the first hearing, they served another iteration of the proposed DASOC, together with further written submissions. On the second occasion on which the amendment application was listed for hearing, after lengthy argument in which the necessity to further amend the then iteration of the DASOC was accepted by the applicants, I adjourned the application to enable the applicants to deliver a further revised draft of the amended statement of claim to the respondents. I will refer to this version of the pleading as the **RDASOC**.

7 Following circulation of the RDASOC, the area of dispute in relation to the proposed amendments narrowed somewhat. On the amendment application, the active respondents aligned amongst themselves as follows: (1) Kaushik; and (2) Accolade, Reliance and Carmelo (the **Accolade Parties**). The Court has not been informed of any opposition by Sam and David to leave being granted to file the RDASOC.

8 A paralegal on behalf of the applicants’ solicitors informed the Court in an email copied to all parties’ legal advisers that the paragraphs in respect of which leave is opposed (using the paragraph numbering in the RDASOC) are now as follows:

|  |  |
| --- | --- |
| **Leave to Amend opposed by:**  | **RDASOC Para No.** |
| The Accolade Parties | 62A, 62B, 70A-70C, 73B, 74A, 76A, 93A, 93B, 94, 94A-C, 96A, 96B, 97, 97A-C, 99, 100A-C, 102A (b), 102A (d), 102B, 102C, 102D-E |
| Kaushik | Amended particulars to 100 |

9 The parties did not seek to make further submissions in relation to the remaining paragraphs in dispute, which are substantially in the form in which the disputed paragraphs were at the time of the argument.

## Evidence

10 In support of their amendment application, the applicants rely on three affidavits of Mr Doueihi and an affidavit of the liquidator. Kaushik relies on two affidavits of Adrian Robins, solicitor. Accolade relies on an affidavit of Carmelo.

## Legal Principles

11 The principles in relation to the grant of leave to amend are well established and may be stated shortly. Pursuant to rule 16.53, leave to amend pleadings may be granted as a matter of discretion. The applicant seeking leave bears the onus of persuading the court that leave should be granted: *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118; 63 AILR 101-103 at [17] (the Court).

12 The factors to be taken into account in considering an application to amend include the effect of the delay in raising the proposed amendments, wasted costs, and the efficient conduct of legal proceedings: ***Caason*** *Investments Pty Ltd v Cao* [2015] FCAFC 94; 236 FCR 322 at [19] to [21] (Gilmour and Foster JJ); ***Aon*** *Risk Services Australia Ltd v Australian National University* [2009] HCA 27; 239 CLR 175; *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu* [2015] FCA 1098.

13 The Court’s power to grant leave to amend is broad and has the remedial objective of ensuring that any defect in the pleadings is cured and that the real questions in the controversy are properly agitated and to avoid a multiplicity of proceedings: *Aon* at [14]; *Caason* at [20].

14 Leave to amend will not be granted where the amendment would be futile: see *Caason* at [21]; *Plaintiff P1/2003 v Ruddock* [2007] FCA 65; 157 FCR 18 at [12] to [14] (in relation to previous iteration of the relevant rule).

15 Each case turns on its own facts.

16 I otherwise repeat the summary of the authorities in relation to the function of pleadings in civil proceedings included at [255] to [257] of *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290.

## Consideration

17 It is convenient to first address the amendment in respect of which Kaushik opposes leave.

18 The applicants’ solicitors’ communication identifies the relevant portion of the RDASOC as “the amended particulars proposed to be pleaded in paragraph 100”. Paragraph 100 of the RDASOC was previously cast as paragraph 110 of the SOC. To ascertain that, it is necessary to do a text comparison between the filed version of the SOC and the RDASOC because the applicants’ solicitors have not marked the amendments to the RDASOC using accurate strikethrough and underlining to delineate the amendments and have misnumbered the cross‑references to the SOC in the RDASOC. The RDASOC has been marked to indicate that RDASOC[100] was previously SOC[104]. That is not correct. Another difficulty with the way in which the applicants have crafted the RDASOC is that the numbering is not sequential in a way that is sensible and uses the same number for more than one paragraph. For example, paragraph [~~104~~ 100] is sequentially after paragraph [102E] but is followed by paragraph [101] and [102], and there are two different paragraphs numbered [99]. I note that this is contrary to r 16.02(1)(a) of the *Rules*.

19 The amendment in RDASOC[100] is to include what is described as “Particulars of the Insolvent Debts”. SOC[110] did not incorporate any particulars. RDASOC[100] is in the same form as DASOC[109] which was the first time that the applicants included the proposed particulars which purport to be “Particulars of the Insolvent Debts”. During the period in which the amendment application was adjourned, the applicants did not take the opportunity to revisit this paragraph of the pleading, notwithstanding the exchange of submissions and oral addresses highlighting the confusion engendered by the particulars incorporated into this paragraph.

20 The previous iteration of RDASOC[100], SOC[110], is the subject of a separate interlocutory application filed by Kaushik seeking an order that particulars be provided of that paragraph in accordance with requests previously made. That application for particulars has been deferred pending the amendment application.

21 No amendment is proposed in relation to the body of RDASOC[100]/SOC[110], which is as follows (errors in original):

Between 30 June 2014 and 7 August 2015 (**Relevant Period**) the Company incurred debts in the total sum of $1,228,628.23 (**Insolvent Debts**) to the following creditors (**Creditors**):

|  |  |  |  |
| --- | --- | --- | --- |
| **Creditor**  | **Total Creditor Liability as at 7 August 2015 ($)**  | **Debts incurred post 30 June 2014 ($)**  | **Debts incurred post 30 June 2014 ($)**  |
| ATO – Running Balance Account  | 681,951.46  | 682,031.87  | 682,031.87  |
| ATO – SGC Liability  | 676,706.52  | 266,457.45  | 266,457.45  |
| OSR Qld  | 687,586.44  | 280,138.91  | 280,138.91  |
| **TOTAL**  | **2,046,244.42**  | **1.228.628.23**  | **1.228.628.23**  |

22 Whereas previously no particulars were provided to the allegation in SOC[110], RDASOC[100] now incorporates three tables under the heading “Particulars of the Insolvent Debts”. Information is included in those tables under the following headings:

(1) **Table 1 - “ATO Running Balance Account”** with entries in columns marked “Effective date”, “Transaction description”, “Debit amount”, “Credit amount” and “Balance”. The transaction descriptions given include “carried forward balance”, “General Interest Charge (GIC)”, “Payment”, “Original Activity Statement for period …”, “PAYG Withholding”, “GST”, “Amended general interest charge (GIC)”, “Penalty for failure to lodge…”, and “Remission of penalty for failure to lodge …”;

(2) **Table–2 - “Superannuation Guarantee Charge”** with entries in columns marked “Date”, “Amount” and “Reason”. There are two rows with the Date entries for each row being “1 July 2014 to 30 September 2014” and “1 October 2014 to 31 December 2014” with Reason given in each row being “SGC”; and

(3) **Table 3 - “Office of State Revenue Queensland”** with entries in columns marked “Date”, “Amount” and “Remarks”. The remarks entries are “Periodic liability [Month year]” and “Final Liability 01/07/15 to 06/08/15”.

23 To be clear, the tables are not numbered in the RDASOC – I have numbered the tables to facilitate ease of reference.

24 The relevant issue on the present application is whether RDASOC[100], including the particulars incorporated in the proposed amendments, sufficiently exposes the case that Kaushik must meet. As the dispute has narrowed, the pleading issue was limited to the allegation directed to insolvent trading. In order to understand the way in which that allegation is exposed in the pleading, it is necessary to have regard to the earlier allegations made against Kaushik. I will summarise the main aspects of the pleading against Kaushik before turning to consider whether leave should be given in respect of the “particulars to RDASOC [100]”.

25 The relevant allegations against Kaushik are as follows:

(1) that he is a *de facto* (RDASOC [16(h)]) or shadow director of the Company (RDASOC [16(i)]);

(2) as such, he owes fiduciary duties to the Company including *inter alia* a duty to exercise his powers *bona fid*e in the interests of the company as a whole (RDASOC [17(c)]) and to take into account the interests of the Company’s creditors when the Company was insolvent, or approaching insolvency (RDASOC [17(d)]);

*Initial Transfers*

(3) that on 7 August 2015, he “and/or” Om Wati effected a series of transfers from the Company’s accounts to an account of MI Stores (the **Initial Transfers**) in circumstances where MI Stores had no legal entitlement to receive the amounts transferred: RDASOC [60] to [62];

(4) By effecting the Initial Transfers, he procured a breach of trust by the Company as the funds were trust funds held by the Company: RDASOC [62A];

(5) the Initial Transfers were a breach of his fiduciary duty; he was in a position of conflict between his duty to the Company and his own interests and “the interests of MI Stores” and the Initial Transfers had the effect of placing the funds beyond the reach of the Company’s creditors: RDASOC [62B];

(6) that the Initial Transfers were part of a dishonest and fraudulent design on the part of Kaushik to misappropriate trust property under the control of the Company and defeat its return to creditors: RDASOC [62C];

*Execution of Trust Deed*

(7) he breached his fiduciary duty in executing a trust deed allegedly dated 7 August 2015 but allegedly created on 10 August 2015 which purports to replace the Company as the trustee of the ND Stores Trust with ND Stores (NSW) and thereby placed trust assets of the ND Stores Trust under the control of ND Stores (NSW), without ND Stores (NSW) assuming any of the liabilities of the Company to its creditors: RDASOC [69] to [70B];

(8) the execution of the Trust Deed when he had earlier effected Initial Transfers was part of a dishonest and fraudulent design to misappropriate trust property under the control of the Company and defeat its return to creditors: RDASOC [70C];

*Accolade Transfer*

(9) On 18 August 2015, Kaushik effected a transfer from MI Stores Account in the sum of $747,038.55 to the Accolade (the **Accolade Transfer**): RDASOC [73];

(10) The Accolade Transfer was in breach of trust as the funds were the traceable product of trust property previously under the control of the Company in its capacity as trustee of the ND Stores Trust, at the time held on trust for the Company by MI Stores: RDASOC [73B], [74A(a)]; and

(11) the Accolade Transfer was a breach of his fiduciary duty owed to the Company and part of a dishonest and fraudulent design on the part of Kaushik to misappropriate trust property under the control of the Company and defeat its return to creditors for reasons which substantially mirror *mutatis mutandis* those alleged in respect of the earlier allegations: RDASOC [73A] to [74A].

26 The “equitable and accessorial claims” against Kaushik are then pleaded at RDASOC [98] as follows:

…. in making and/or procuring, and/or participating in:

(a) the Initial Transfers; and

(b) the Accolade Transfer,

and by executing the [trust deed], Kaushik:

(c) procured a breach of trust with respect to trust property of the Company; and/or

(d) breached the fiduciary duties he owed to the Company; and

…

(e) in committing each of these breaches, engaged in a dishonest and fraudulent design to misappropriate trust property under the control of the Company and defeat its return to creditors.

…

(mark up omitted)

27 For present purposes, the relevant allegations in relation to the claims for insolvent trading against Kaushik are as follows:

(1) Between 30 June 2014 and 7 August 2015 (**Relevant Period**) the Company incurred debts in the total sum of $1,228,628.23 (**Insolvent Debts**) to the Australian Taxation Office (**ATO**) and Office of State Revenue Qld creditors (**Creditors**): RDASOC [100];

(2) That he was a shadow and/or de facto director of the Company during the Relevant Period: RDASOC [101];

(3) Since 30 June 2014 and at all material times the Company was insolvent: RDASOC [102];

(4) The particulars to RDASOC [102] include:

…

*(b) Non-payment of an increasing ATO Running Balance Account debt;*

*(c) A failure to comply with an ATO debt repayment plan;*

*(d) Non-payment of SGC liabilities subsequent to 30 June 2014;*

*(e) Unreported and unpaid OSR Qld Payroll Taxes;*

…

(5) That he “was aware at all times during the Relevant Period that the Company was insolvent when the Insolvent Debts were incurred, or that the Company would become insolvent by incurring the Insolvent Debts”: RDASOC [103].

(6) The particulars to RDASOC [103]:

(a) repeat RDASOC [16(g) to (i)] which particulars are highly generalised and limited only by reference to “all material times” which is not specified or otherwise defined but if used consistently in the pleading would appear to commence at the time the Company was incorporated on 20 May 2010 whereas the allegation in respect of *de facto* or shadow director is for a lesser period; and

(b) allege that “Kaushik’s awareness of the Company’s financial position, and that it was insolvent when the Insolvent Debts were incurred, or that the Company would become insolvent by incurring the Insolvent Debts, can also be inferred in circumstances where Kaushik must have had access to the Company’s books and records that would have disclosed its financial position in order to be able to engage in the correspondence about the Company’s legal and financial affairs with consultants, accountants, and revenue authorities as pleaded at paragraph 16(g) above” notwithstanding that the first particular given in respect of insolvency is that the Company failed to maintain adequate books and records for the purposes of s 286 of the *Corporations* ***Act*** *2001* (Cth): RDASOC[102], particular (a).

(7) In the alternative to RDASOC [103], that a reasonable person in the position of Kaushik would be aware that there were grounds for suspecting that the Company was insolvent at the time the Insolvent Debts were incurred or that the Company would become insolvent by incurring the Insolvent Debts: RDASOC [104].

28 On this basis it is alleged that Kaushik has contravened s 588G(2) of the Act in relation to the incurring of the Insolvent Debts and that pursuant to s 588M of the Act, the liquidator may recover from Kaushik, as debts due to the Company, an amount equal to the Insolvent Debts.

29 Relevantly, s 588G applies where *at the time* when the company incurs a debt, the company is insolvent, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt, and *at that time* there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be: s 588G(1). A person contravenes s 588G by failing to prevent the company from incurring the debt in circumstances where the person is aware *at that time*, or a reasonable person in a like position in a company in the company's circumstances would be so aware: s 588(2).

30 Relevantly, the critical elements of the cause of action in respect of a director for insolvent trading under s 588M are that a debt has been incurred by the company; *at the time* the debt was incurred, the company was insolvent; the creditor has incurred loss or damage “in relation to” the incurring of the debt; and the director contravened s 588G(2) or s 588G(3).

31 The defences available in respect of a claim for insolvent trading also require consideration to be given to the specific circumstances at the time each debt arose: see ss 588H and s 588GA.

32 A company incurs a debt when, by act or omission, it is rendered liable for a debt, even one imposed by a statute, and a debt may include a contingent debt: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 717; 144 ACSR 347 at [137] and authorities cited therein.

33 When a debt is incurred for the purposes of s 588G will depend on the nature of the transaction involved. In the case of taxation liabilities, by analogy with s 588FA, a tax liability is a debt capable of being incurred within the meaning of s 588G: *Sands & McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation* [1998] VSCA 76; (1999) 1 VR 489, [36] (Charles JA, Brooking and Kenny JJA agreeing). The Full Court of the Supreme Court of Western Australia, as it then was, held that liability for payroll tax can potentially constitute a debt for the purpose of insolvent trading: *Commissioner of State Taxation (WA) v* ***Pollock*** (1993) 12 ACSR 217, at 222 (Pidgeon J), at 230 (Ipp J with Wallwork J agreeing). Justice Ipp considered that payroll tax only becomes a ‘debt’ upon the expiry of the month in which the payroll tax is being incurred, because it is only at this time that the amount of payroll tax to be paid can be ascertained: *Pollock* at 232. Justice Ipp further held in *Pollock* at 234 that a contingent debt is capable of being a debt within the meaning of the relevant insolvent trading provision, however, he his Honour expressly did not make a finding as to whether and when a *contingent debt* to pay payroll tax could be incurred as a debt: at 235. Justice Ipp’s finding was limited to a finding that it was reasonably arguably which was sufficient for reversing the strike out of the pleadings in that case. However, a company incurs a contingent liability for payroll tax upon employing an employee in any given month; by analogy, the liability for Superannuation Guarantee Charges would be incurred on each occasion that the company was obliged to remit the periodical payment: *Pollock* at 232. See also *Yeo, in the matter of Bradi Transport Pty Ltd (in liq) v Sklenovski* [2020] FCA 1540 [23] to [28].

34 Subsequent to the hearing of this application, the solicitors for Kaushik sent an email to my Chambers directing my attention to *Copeland in his capacity as liquidator of* ***Skyworkers*** *Pty Limited (in Liquidation) v Murace* [2023] FCA 14 at [19] to [26], which draws heavily on the analysis in ***Devine*** *v Liu; Devine v Ho* [2018] NSWSC 1453; 338 FLR 208; particularly at [37] to [38]. The solicitors for Kaushik had sought the applicants’ consent to the communication, which had not been forthcoming. Subsequent to Kaushik providing a copy of the decision in *Skyworkers*, the applicants’ solicitors forwarded to my chambers an email he had sent to Kaushik’s solicitors in which he sought to distinguish the decision in *Skyworkers*. I have treated that letter as a submission.

35 The applicants submit that *Skyworkers* can be distinguished on the basis that it was concerned with the particularisation of debts incurred to unsecured creditors and was not relevant to the particularisation of the statutory debts pleaded in paragraph [100] of the RDASOC. Further, that the applicants’ position in the present proceeding is distinguishable by the fact that the liquidator in this case relies on the “the ATO’s formal proof of debt”. They do not contend that *Skyworkers*, or *Devine* on which it is based, is wrongly decided.

36 I do not agree that *Skyworker* can be distinguished on the basis identified by the applicants.

37 The decision in *Skyworker* at [14] and [19] to [26]relevantly applies the analysis in *Devine* at [37] to [38]. The decision in *Devine* related *inter alia* to a claim from the Commissioner of Taxation for unpaid superannuation guarantee levy obligations in respect of which a proof of debt had been lodged by the Commissioner: [13]. The decision in *Skyworker* related *inter alia* to an unsecured debt to the Australian Tax Office. The principles articulated are based on an analysis of the relevant provisions and are not confined as submitted by the applicants.

38 The critical passage is as follows (*Devine*, [37] to [39]):

37. …the failure to plead when the debts were incurred is a fundamental flaw. The date on which the debt is incurred is an essential aspect of the claim. Unless that date is known, it is impossible to evaluate whether the Company was insolvent or whether the elements of contravention in s 588G are made out.

38. The question of when a debt is incurred may be a complex and contestable one. It is in my view essential that the Statement of Claim plead not only when it was that each debt was allegedly incurred but also how it was that the debt was incurred. The relevant contractual terms and the facts which give rise to the relevant debt should be pleaded so that they can be admitted or issue can be joined.

39 In respect of the application of the principle to the task of pleading, his Honour continued (at [39]):

39. It is not always necessary that this should be lengthy. In a case of goods sold and delivered or services supplied the debt will, in many cases, arise at the date of delivery: *Australian Securities & Investments Commission v Plymin* (2003) 175 FLR 124; [2003] VSC 123 at [517]. It should be possible to group claims of this type together and plead the incurring of the debts by reference to the dates the goods were delivered or the services were supplied, as the case may be, in tabular form. Where, as in this case, there are multiple claims for the employee claims may be more complicated, especially if the employees are contending that they have been underpaid for work actually done. But there seems no reason in principle why these too could not be pleaded in a tabular form.

40 Kaushik submits that the particulars proposed in the RDASOC should not be allowed for reasons which are predicated on an attempt to understand what is alleged in RDASOC[100] and is purported to be supported by the proposed incorporated particulars. I do not see any utility in reciting the attempt by Kaushik to follow through what RDASOC[100] as particularised is intended to convey. I will simply note that one of the functions which pleadings are intended to serve, supplemented by particulars, is procedural fairness by exposing the case which the respondent must meet. For reasons which will become apparent, I am satisfied that the inclusion of the particulars in RDASOC[100] does not adequately expose the case that Kaushik is required to meet in relation to the insolvent trading claims to discharge that function. Having reached that conclusion, it is not necessary for me to address whether the submissions made by counsel for Kaushik represent a real attempt to engage with the pleading, noting that the submissions rely on sections of the Act that are not directly relevant.

41 Kaushik’s submissions on this issue focussed on the component of the Insolvent Debts (as defined in RDASOC[100]) described as “Insolvent Trading Claim – Kaushik ($)” being owed to a Creditor described as “ATO – Running Balance Account” in the sum of $682,031.87 and purportedly, particularised by Table 1. That amount of $682,031.87 equates to what is described in the allegation in RDASOC[100] as the “Debts incurred post 30 June 2014 ($)”. The allegation in RDASOC[100] also includes reference to what is described as “Total Creditor Liability as at 7 August 2015 ($)” in the amount of “$681,951.46”.

42 The allegation in RDASOC[100] is, to put it neutrally, opaque. The particulars which are proposed are in the form of what appears to be a reproduction of a statement of the ATO’s running account balance (as provided for in s 8AAZC of the *Taxation Administration Act 1953* (Cth)).

43 The “Total Creditor Liability as at 7 August 2015 ($)” of $681,951.46 in respect of the “ATO – Running Balance Account” is particularised by reference to the final particularised running account balance as at 20 August 2015, being a date after the end of the “Relevant Period” as defined. There is no entry in Table 1 with an effective date of 7 August 2015. The most recent entry in Table 1 before the end of the Relevant Period is an entry for 25 July 2015 in the sum of $492,639.57. The next date after 25 July 2015 is an entry with an effective date of 25 August 2015. There are three entries for 25 August 2015. Two of these entries increase the amount included in the column headed “Balance”. The running account balance is increased to reflect a debit in respect of GST in the sum of $153,970 on 25 August 2025 and a further debit in respect of PAYG Withholding in the sum of $33,734, also on 25 August 2025. Following the entries for 25 August 2015, there is a debit entry in relation to GIC of $1,607.89 on 20 August 2025 with the result that the running account balance as at the effective date of 20 August 2015 is described as being $681,951.46.

44 The pleader alleges that the “Total creditor liability as at 7 August 2015” attributable to the “ATO – Running Balance Account” equates with the running account balance which includes “transactions” on that account which occurred on 20 and 25 August 2015. The rationale for this conclusion is not exposed and as a result the purported particularisation does not dispel the opacity of the pleading of the primary allegation.

45 The pleader alleges that the ATO - Running Balance Account debts incurred post 30 June 2014 amount to $682,031.87 and that this is the sum is a component of the “Insolvent Trading Claim – Kaushik ($)”. Kaushik is left to guess on the critical issue of the timing of the alleged debts being incurred and the dates on which he is alleged to have known that the Company was insolvent. That is an essential flaw in the way the insolvent trading claim against Kaushik is pleaded: see *Skyworkers* at [23] to [24]. Further the basis of the $682,031.87 sum alleged is not exposed in the particulars which are put forth to substantiate this pleading. That said, Kaushik is not required to plead to the particulars to RDASOC[100]. The adequacy of the particulars, or rather the lack thereof, may result in Kaushik being left in a position where he does not admit or deny the allegation in RDASOC[100] because he does not follow the allegation made against him. To allow an amendment with that likely consequence would not be consistent with the overarching purpose. In this regard, I note that Kaushik has not presently applied to strike out SOC [110] and has pleaded to this allegation by pleading a general non-admission.

46 Having regard to the extant application for particulars of the earlier iteration of this paragraph of the SOC in SOC [110], and given that Kaushik’s opposition to leave being granted is limited to the inclusion of the particulars to RDASOC[100], as a matter of case management and in order to avoid, to the extent possible within the Court’s power, further interlocutory procedural applications, I propose to resolve the disputes in relation to this paragraph, including the extant dispute about the request for particulars of the paragraph, as follows.

47 I refuse the applicants leave to amend by including the proposed particulars of RDASOC[100]. I grant the applicants liberty to replead to include as part of the substantive allegations of fact, the dates on which each of the debts alleged to comprise the “Insolvent Debts” were incurred and how each debt arose. That pleading should make clear whether the allegation in RDASOC[100] is as to three single debts arising under the respective statutes or as a series of individual debts arising under the respective statutes giving rise to the cumulative totals alleged in RDASOC[100]. The pleading should further make clear the basis upon which the applicants allege the debts arose, whether that be as contingent liabilities or as debts due under the relevant legislation. To the extent that the applicants rely on statutory presumptions in respect of the alleged “Insolvent Debts” then the material facts relied upon so as to engage those presumptions must be pleaded.

48 I have not overlooked the applicants’ submissions in which they relied on *Owen as Liquidator of* ***Davey SG*** *Pty Ltd (in liq) v Davey, in the matter of Davey SG Pty Ltd (in liq)* [2021] FCA 200 at [28] to [30] and ***Re Melbournehomes****.com Pty Ltd (in liq)* [2020] VSC 854; 356 FLR 390 at [42]. The submissions made in reliance on those authorities in the present context are superficial. I am not persuaded by them. *Davey SG* is a decision in respect of an application for judgment in default of an appearance. It is not apposite to the pleading issue before me. In the present circumstances, as I have already mentioned, the proposed pleading is opaque as to whether the “Insolvent Debt” is the series of singular debts or the aggregated total in respect of each discrete tax liability. The date(s) on and the manner in which the liability in respect of each debt is alleged to arise is not adequately exposed in the RDASOC. The observation in *Re Melbournehomes* at [42] upon which the applicants rely is context specific and it is principally concerned with matters of proof. It does not alter the conclusion I have reached in relation to the adequacy of the pleading of RDASOC [110] in satisfying the procedural fairness function.

49 If the applicants exercise the liberty to replead, then it is imperative that they pay close attention to observations made in *Devine* and *Skyworkers*. In this regard I also direct the applicants’ representatives to the observations of the Full Court in *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; 269 FCR 349 at [28] to [30] (the Court).

50 In the event that the applicants do not exercise the liberty to replead or replead in a way that is not adequate to expose the fundamental elements of the insolvent trading claim then the claim is at peril of being struck out on a future occasion.

51 I will make orders accordingly.

52 I now turn to the amendments in respect of which the Accolade Parties opposes leave.

53 Based on the FAOA the claim against Accolade, Reliance and Carmelo is one of “voluntary receipt” or knowing receipt of trust property being funds the subject of the Accolade Transfer, Reliance Transfer and Carmelo Transfer respectively. The paragraphs containing the allegations in relation to the Carmelo Transfer have been deleted in strikethrough from the RDASOC. The claim against Carmelo includes a further claim of knowing assistance in respect of the Accolade transfer and the Reliance Transfer.

54 The paragraphs to which objection is taken by the Accolade Parties were not revised in the RDASOC – these paragraphs are in the same form as in the DASOC that was current as at the date of the second hearing. Accordingly, I have considered the remaining disputed amendments, applying the principles identified above and having regard to the submissions made by the parties in relation to the DASOC.

55 The submissions advanced by the Accolade Parties, in writing and in oral argument, in respect of those paragraphs that were still in dispute after circulation of the RDASOC were directed to paragraphs 91 to 96, 97 to 99; 101 to 102; 100 to 100C and 103 to 103C.

56 It is not necessary to descend to the detailed critique of the pleading advanced by the Accolade Parties on this application at this stage. Many of those criticisms may well feature in any closing submissions made by the Accolade Parties, which is another way of observing that the submissions are a forceful attack on the merits of the claim pleaded against the Accolade Parties. This amendment application is not the occasion to be drawn into a detailed assessment of the strength of the applicants’ pleaded claim. Provided that I am satisfied that the claim is not manifestly futile, which I am, my focus must be on whether the RDASOC fulfils the function that pleadings are intended to serve, including in respect of procedural fairness, such that leave should be granted to file and rely on it.

57 Save for certain narrow exceptions, the way in which this application has developed demonstrates that the Accolade Parties are sufficiently apprised of the claim against them to prepare a defence to the amended pleading. I am not persuaded to accede to the Accolade Parties’ urging to refuse leave to amend and to deny the opportunity to replead. Nor am I persuaded to succumb to the hyperbolic entreaty to summarily dismiss the claim when the Accolade Parties have sought no such relief. The Accolade Parties have in fact filed defences to the existing SOC. Although, the manner in which the SOC has been drafted has given the Accolade Parties the opportunity to populate their defences with a blanket of non-admissions whereas a more focussed attempt at pleading would perhaps have resulted in the necessity for a more targeted defence, it is relatively clear that based on the RDASOC the Accolade Parties apprehend the claim made against them such that the dictates of procedural fairness have been met.

58 The applicants’ approach to the amendment of the pleading and prosecution of this interlocutory application left much to be desired. It did not facilitate the objectives of modern case management or satisfy the overarching obligations of practitioners in proceedings before this Court. However, in circumstances where I am satisfied that, save for limited exceptions, the Accolade Parties know the claim they must meet and having regard to the existing attempts by the applicants to plead their claims, I fear that to grant the applicants a further opportunity to re-plead the large tranches of the proposed pleading to which the Accolate Parties oppose leave is likely to be productive of delay, wasted costs and is unlikely to result in a meaningful refinement of the real issues in dispute. For these reasons, on the conditions that I will now identify, I have concluded that it is in all parties’ interests, and particularly in the interests of creditors of the Company, to grant leave to the applicants to file and rely on the RDASOC. I am also satisfied that to do so is consistent with the overarching purpose.

59 In allowing leave to file the RDASOC with the disputed amendments, I will afford the Accolade Parties the opportunity to request such particulars as are reasonably necessary to facilitate the filing of their defences. I will make that order in general terms. Without limiting the generality of that order, based on the submissions on this application, I would expect that particulars will be requested and supplied that expose the material facts relevant to allegations made in relation to the allegations about the Company divesting itself of property in the circumstances where it is alleged to have held the property as a trustee and where the relevant trust deed is alleged to have included an *ipso facto* clause and conferred a power on Kaushik as the sole unit holder to appoint a new trustee. I will make orders accordingly.

60 In making orders in relation to the provision of such particulars as the Accolade Parties reasonably require, I expect that the applicants through their representatives will engage in a meaningful way with any reasonable requests for particulars and not raise technicalities to avoid providing the particulars. In providing any particulars requested, the applicants must adhere to their obligation to clearly identify the legal elements of each claim and expose the allegations of fact required to establish each element. While it may not strictly be necessary to plead the legal conclusions that follow from the facts alleged, it is often convenient and consistent with the overarching purpose to do so.

61 There are three additional matters that were not canvassed by the relevant parties.

62 The first is that the Further Amended Originating Application (**FAOA)** includes a prayer for relief seeking a declaration that Carmelo holds property on trust on the basis of receiving the “Carmelo Transfer”. As mentioned, the pleadings in respect of the “Carmelo Transfer” in the RDASOC have been deleted in strikethrough. It is unclear whether the claims in respect of the Carmelo Transfer are pressed. If the claim is not pressed the references to the Carmelo Transfer in the FAOA must be deleted. I will order that the parties submit agreed short minutes to address this issue.

63 The second issue is that a declaration of an institutional constructive trust in respect of MI Stores is sought in circumstances where MI Stores is not a party. I will order the parties to submit agreed short minutes to address this issue and in particular, whether there is any reason why that part of the FAOA should not be struck out.

64 The third issue is that a declaration of constructive trust is sought against Accolade, Reliance and Carmelo over “any funds in [their respective] possession, custody or control” on the apparent basis they each have allegedly received trust property. These claims for relief appear to be cast more broadly than the pleaded claim for tracing. I will order the parties to submit agreed short minutes to address this issue and in particular, whether the FAOA is proposed to be amended.

## Determination

65 For these reasons, I will make orders as I have indicated above.

66 The only issue which remains is that of costs. I have previously ordered that the respondents should have the costs occasioned by adjournment of the amendment application to enable the applicants to rely for the purpose of the application on the RDASOC. There is no reason why the respondents should not have their costs occasioned by the leave granted to file the RDASOC, including in respect of the amendment application. I note that the time taken on this application was increased as a result of the manner in which the proposed amendments were put forward, including by the incoherent numbering of the successive iterations of the proposed pleading and the absence of reliable mark up of the amendments. I will order accordingly.

# FREEZING ORDER EXTENSION APPLICATION AND FURTHER DISCLOSURE APPLICATION

## Introduction

67 By amended interlocutory application, the applicants relevantly seekto extend the interim freezing orders made against Sam, David and Carmelo respectively, until the final resolution of the proceedings pursuant to rr 7.32 and 7.33 of the *Rules*. The application is in effect the *inter partes* return in respect of freezing orders which were made *ex parte* and continued by consent on a without admissions basis on multiple occasions.

68 The relevant freezing orders are to the following effect:

*The Cassanitis:*

(1) **Sam** – is prohibited from, in any way, disposing of, dealing with or diminishing the value of any of his assets in Australia up to the unencumbered value of $780,702.53;

(2) **David** – isprohibited from, in any way, disposing of, dealing with or diminishing the value of any of his assets in Australia up to the unencumbered value of $780,702.53; and

(3) **Carmelo** – is prohibited from in any way, disposing of, dealing with or diminishing the value of any of his assets in Australia up to the unencumbered value of $273,650.00.

69 Relatedly, by further interlocutory application, the applicants seek orders pursuant to r 7.33(1) of the *Rules* compelling Sam and David to swear further affidavits in compliance with the *ex parte* ancillary asset disclosure orders made on 9 August 2021. The relevant parties consented to the application being determined on the papers.

70 The relevant circumstances in which this application is brought are addressed in [9] to [14] of *Lloyds Curry (No 2)* and are not repeated here.

## Evidence

71 At the hearing of the freezing order extension application, the applicants relied on affidavits of Mr Hurst sworn 6 August 2021, 20 September 2021, 5 November 2021, 16 April 2022 and 19 April 2022; an affidavit of Nicarson Natkunarajah, a registered liquidator formerly working under the supervision of Mr Hurst, sworn 5 November 2021; two affidavits of Mr Doueihi sworn 21 February 2022 and 25 February 2022; and two affidavits of Gavin Parsons, solicitor for the applicants, sworn 1 February 2022 and 2 February 2022. Sam and David each relied on an affidavit sworn by Sam on 1 September 2021, and an affidavit sworn by David on 2 September 2021. Carmelo relied on two affidavits of Mr Hurst sworn 9 August 2021 and 21 September 2021. Carmelo also relied on an affidavit sworn by him on 18 October 2021, save for paragraphs [15] to [22] and an affidavit sworn by him on 16 March 2022 save for paragraphs [4] and [5]. There were also a number of documentary exhibits tendered on the application.

72 In *Lloyds Curry (No 2)*, I allowed the applicants to re-open and granted leave for them to rely on additional affidavits of Mr Hurst (multiple) and Mr Blanch, paralegal, in support of the Freezing Order Extension Application and the Further Disclosure Application. My reasons for doing so are at *Lloyds Curry (No 2)* at [20]. These affidavits relevantly contain evidence of current and historical land title searches and personal name extract searches for Sam and David.

## Legal Principles

73 Rule 7.32 of the Rules provides:

**Freezing order**

(1) The Court may make an order (a ***freezing order***), with or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the Court’s process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.

(2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

Note: ***Without notice*** is defined in the Dictionary.

74 Rule 7.33 of the Rules provides:

**Ancillary order**

(1) The Court may make an order (an ***ancillary order***) ancillary to a freezing order or prospective freezing order as the Court considers appropriate.

(2) Without limiting the generality of subrule (1), an ancillary order may be made for either or both of the following purposes:

(a) eliciting information relating to assets relevant to the freezing order or prospective freezing order;

(b) determining whether the freezing order should be made.

75 There was no debate on the applicable principles in relation to the continuance of the freezing orders which are summarised in *Lloyds Curry* at [22] to [28] and *Nicols as trustee of the bankrupt estate of Manietta v Manietta, in the matter of Manietta* [2022] FCA 39 at [47] to [52]. I apply those principles here.

76 As mentioned, the application is in effect the *inter partes* return in respect of *ex parte* freezing orders. As such, the applicants bear the onus.

77 In their belated application for additional asset disclosure orders, the applicants relevantly seek the orders in respect of each of Sam and David pursuant to r 7.33(1) of the *Rules*, that they each be ordered to swear a further affidavit in compliance with asset disclosure orders previously made. Despite undertaking to do so, the applicants did not identify any authority to support their application to in effect bootstrap the orders already made, instead of initiating a contempt proceeding.

## Consideration

### Application for further disclosure pursuant to existing asset disclosure orders

78 It is necessary to first address the application for further disclosure. The applicants seek an order against each of Sam and David that they each swear a further affidavit in compliance with the orders previously made on 9 August 2021. The relevant asset disclosure orders, previously made, against Sam and David were substantially in identical form as extracted below with order 7(a)(ii) being made against David only:

**PROVISION OF INFORMATION**

(7) Subject to paragraph 9, you must:

(a) at or before the further hearing on the Return Date (or within such further time as the Court may allow) to the best of your ability inform the applicants in writing of:

(i) all your assets in Australia, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets;

(ii) the current location of funds transferred to the Fourth Respondent, Reliance Financial Services Pty Ltd, on 18 August 2015 in the amount of $780,702.53, and if the current location of the funds is not known to you, details as to where and when those funds were paid or used, and for what purpose.

(b) Within 10 working days after being served with this order, swear and serve on the Applicants an affidavit setting out the above information.

(8) (a) This paragraph (8) also applies if you are a corporation and all of the persons who are able to comply with paragraphs 9 and 10 on your behalf and with whom you have been able to communicate, wish to object to your complying with paragraphs 9 and 10 on the grounds that some or all of the information required to be disclosed may tend to prove that they respectively:

(i) have committed an offence against or arising under an Australian law or a law of a foreign country; or

(ii) are liable to a civil penalty.

(b) You must:

(i) disclose so much of the information required to be disclosed to which no objection is taken; and

(ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and

(iii) file and serve on each other party a separate affidavit setting out the basis of the objection.

79 The form of the order appears to be drawn directly from Annexure A of GPN-FRZG which provides sample freezing orders.

80 The applicants submit, without reference to authority, that it is open for them to seek a further order for asset disclosure in circumstances where they did not persist in their application to cross-examine Sam and David on the affidavits given in response to the existing asset disclosure orders, and have not assumed the burden of bringing proceedings for contempt. In their submissions in reply, again without reference to authority, the applicants submit that the “question to be answered is whether, based on the evidence, it is in the interests of justice for further disclosure to be ordered” in respect of the orders already made.

81 Sam and David submit that the application for orders to have them file further affidavits is the continuation of a pattern of a lack of proportionate conduct of the proceeding and haphazard applications, which serve to increase the costs well beyond the amount in issue. Further, that the reason for seeking the further affidavits in the context of the *inter partes* freezing order application appears to be to try to establish that there has been a failure to disclose, but that even if that was established, that would not establish dissipation, or even a risk of dissipation.

82 In the present circumstances, unaided by the parties identifying any relevant authority, I see no purpose in making a further order to duplicative effect of the orders already made. I agree with the submission advanced on behalf of Sam and David that this is regrettably another application that continues the disorganised way in which the applicants have conducted the proceeding to date. That said, I do not accept that the additional evidence belatedly advanced by the applicants is irrelevant to the issue of risk of dissipation. That is an issue I will consider in the context of the application to extend the operation of the freezing orders.

83 Notwithstanding that the parties are legally represented, given the manner in which this proceeding is being conducted, it is relevant to note that where there is an allegation that there has been non-compliance with a Court order, the Court has an armoury of tools to manage what is *prima facie* contempt. First, the Court may refuse to hear a person further in the same litigation until they have purged their contempt (**Option 1**). Secondly, the Court may strike out their defence in the proceeding unless they purge their contempt within a specified time (**Option 2**). Finally, the Court may punish the contemnor following formal contempt proceeding which may result in the imposition of fines, sequestration of property and imprisonment (**Option 3**).

84 **Option 3** — *punishing the contemnor following formal contempt proceedings* — I do not consider punishment, including by way of imprisonment, which may be imposed following a finding of contempt in contempt proceedings after the contemnor has been afforded procedural fairness, to be appropriate where the aggrieved party has not assumed the burden of establishing that the respondent should be committed for contempt. Generally, no sufficient public interest is served by punishing the offender if the person for whose benefit the order was made chooses not to insist on its enforcement: *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* [1986] HCA 46; 161 CLR 98 at 107 citing *Attorney-General v Times Newspapers Ltd* (1974) AC 273 at 308 (Lord Diplock). Accordingly, I do not propose to proceed with Option 3. This does not mean that where the aggrieved party chooses not to initiate contempt proceedings the Court is without remedy, if it is established that there has been disobedience of its orders.

85 **Option 1** — *refusing to hear a person further in the same litigation until they have purged their contempt* — may be exercised even where formal contempt proceedings have not been brought. I must, however, be satisfied on the balance of probabilities of the existence of contempt, having regard to the seriousness of the application: see *In the Matter of Australasian Barrister Chambers Ltd (in liq)* [2017] NSWSC 693, [4] and the authorities cited therein. I note that there is debate over whether Option 1 operates as a mandatory rule or if there is discretion in exercising Option 1, with the weight of authority leaning towards it being a discretionary matter: *Blendell v Blendell* [2020] NSWCA 154, [84] (Leeming JA); *Chamberlain Group Pty Ltd v Kids for Life Academy Pty Ltd* [2015] NSWCA 241, [17] (Emmett JA, Leeming JA and Sackville AJA).

86 **Option 2** — *striking out the contemnor’s defence in the proceeding unless they purge their contempt within a specified time* — may be exercised as a sanction for disobedience to a freezing, ancillary or search order. Option 2 is usually framed as a self-executing guillotine order which encourages compliance with the first Court order, continued default of which results in the strikeout of the defaulting party’s defence.

87 The options outlined above are powerful tools which the Court may use in discharging its role in ensuring that cases are managed in a manner which is consistent with the overarching purpose as set out in s 37M of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

88 In the present application, the applicants have not advanced submissions based on the alternatives outlined above. It follows that the respondents have not been afforded an opportunity to respond on these issues.

89 As indicated, in the present application, I propose to take into account the evidence belatedly led in relation to the issue of dissipation of assets on the *inter partes* application in relation to the freezing orders against Sam and David.

90 On the basis of the scant information before me, the most appropriate relief if *prima facie* contempt is established would appear to be in terms of Option 2. That may or may not be correct. It is possible that the alleged non‑compliance may be remedied before it is necessary to consider this issue. If it proves to be the case that alleged non-compliance persists, then that is a matter which I expect the applicants will bring back promptly to the Court, on notice, in a manner that enables the Court to determine the alleged non-compliance with the existing orders on a considered basis.

91 By way of contrast, the applicants’ approach is to seek to make an ancillary order in the terms already made or an order for compliance with an order already made. I decline to make such an order. To do so would undermine the undermine the authority of the orders already made and derivatively undermine the administration of justice. If the applicants maintain that the existing asset disclosure orders have not been complied with, then there are clear avenues available to them to address that non-compliance.

92 The interlocutory application in relation to further disclosure on the existing asset disclosure orders is dismissed with costs.

### Freezing Order Extension application

93 I now turn to the substantive issue, which is whether the applicant has established that the freezing orders should be continued.

94 As mentioned above, the existing freezing orders have been extended by consent on a number of occasions on a without admissions basis as against the second to sixth respondents. Sam, David and Carmelo withdrew from that position and the applicants assumed the burden of establishing that the existing orders should be continued against them on an *inter partes* basis.

95 Accolade and Reliance initially indicated that they did not challenge the freezing orders against them, but sought to change their position at the hearing of the application. The applicants said they were not in a position to deal with the change in position and Accolade and Reliance did not press to be heard on the *inter partes* return of the freezing orders. When orders were made to permit additional submissions following determination of the application to re-open, those orders were relevantly limited to Carmelo and did not extend to Accolade and Reliance. The applicants take the point that no orders having been made for Accolade and Reliance to be heard on this application, they have not replied to the written submissions filed by Accolade and Reliance without leave. In the circumstances, it is only necessary for present purposes to consider the continuation of the freezing orders against Sam, David and Carmelo. The applicants bear the onus.

96 Applying the principles, identified above, I am satisfied that it is appropriate to extend the existing freezing orders against Sam and Carmelo. I am satisfied that the applicants have established a good arguable case and that the balance of convenience otherwise favours that outcome. The focal point of the submissions was on whether the applicants have established by evidence that there exists a real risk of dissipation in order to avoid a prospective judgment so as to warrant the extension of the freezing orders against Sam, David and Carmelo. That issue was hotly contested.

97 On balance, I have concluded that the applicants have established by evidence in relation to Sam and Carmelo that there is relevantly a real risk of dissipation such that the Court’s processes may be frustrated. In these circumstances, I am satisfied that it is appropriate to make freezing orders against Sam and Carmelo until further order on the undertaking as to damages proffered. I am not satisfied that the applicants have discharged their onus in relation to David and accordingly the freezing order against him will be discharged. My reasons are as follows.

98 I repeat the observations made as to the relevant principles at [56] to [57] of *Curry Shop*.

99 I am satisfied that in the present circumstances there is a good arguable case that each of the respondents engaged in serious wrongdoing against the Company. The applicants plead that each of Sam, David and Carmelo engaged in Kaushik’s breaches of fiduciary duty which amounted to dishonest and fraudulent misappropriation of trust property to defeat its return to creditors (at RDASOC [99], [101A-101B], [102A-102B]). The nature of the allegations at the heart of the applicants’ claim is relevant to the whether there is a reasonable apprehension of a risk of dissipation for the purpose of frustrating the action or execution.

100 In this case, I am further satisfied that there is a good arguable case in respect of the allegations made in respect of the manner in which the Company’s assets were rerouted *via* various corporate entities in close proximity in time and in circumstances which on the evidence as it stands on this application do not suggest a substantive legal or commercial explanation for the transactions being conducted in the way in which they were. That is relevant to the risk of dissipation because it demonstrates a capacity on the part of the respondents to deal with assets in a manner which may takes some time to unravel. In such circumstances, it may be unnecessary to adduce further evidence of the risk. Against that I must weigh the fact that the relevant enquiry is whether there is a current risk of dissipation of assets now held. Past events may be relevant, but only if they serve to demonstrate current risk.

101 In the circumstances of this application, having regard to the passage of time since the impugned transactions and the absence of evidence of actual unjustifiable dissipation in the lengthy intervening period, it is necessary for the applicants to establish by evidence that there is presently a reasonable apprehension of the relevant risk. In making that observation, I do not intend to suggest that the mere fact of delay in bringing the initial application establishes that there is no risk of dissipation. Where a respondent knows that he or she faces legal proceedings and a freezing order application for a substantial time, and does not take steps to dissipate its assets, that can be a powerful factor militating against a conclusion of a real risk of dissipation. The equally available alternative inference in the present circumstances is that the relevant respondents did not appreciate that they were at risk, and that the passage of time reinforced their confidence in that regard. Had there not been additional evidence, I would have regarded the issue of dissipation to be finely balanced, and as the applicants bear the onus I would have reached a similar conclusion as I did in relation the continuance of the freezing orders against Kaushik, and now, David.

102 In relation to Sam, the further evidence which in my view moves the needle, is that notwithstanding that he was compelled by Court order to disclose his assets and to solemnly attest to the truth of his respective disclosures, the evidence on this application demonstrates that he has not in his initial asset disclosure affidavits, disclosed all of his assets as he was required to do. Contrary to the submission advanced on his behalf, the issue of non-disclosure pursuant to an order that is made as an ancillary order to a freezing order is a matter that may, when taken in context of the whole of the evidence, demonstrate a reasonable apprehension of unjustifiable dissipation which may in turn frustrate the Court’s processes. That inference is readily drawn where assets are omitted from the affidavit which purports to be given in accordance with the order made and the omission is not adequately explained.

103 It is not necessary to trace through the arguments made in relation to each of the assets held by Sam that were not disclosed by him. The evidence demonstrates Sam did not disclose his shareholdings in multiple companies, including companies in respect of which he was the sole director and sole shareholder and which held real property. The shares in the companies are Sam’s assets. That is so regardless of whether the relevant companies act as corporate trustees. Sam did not disclose these assets until the liquidator led evidence which called his asset disclosure affidavit into question. I am satisfied that Sam’s failure to disclose these assets was a material omission which has not been adequately explained. It is evidence which in the whole of the circumstances establishes that there is a reasonable risk of dissipation that is sufficient to warrant the making of the freezing orders against Sam.

104 The evidence in relation to David was much narrower in compass. It demonstrated that he had not disclosed his asset comprised of the 100% of the shares in **Whistledixie** Pty Ltd, a company which is the sole proprietor of a property in Ruse, New South Wales. David identified Whistledixie as a former client of Cassaniti & Associates and that he had been employed by Cassaniti & Associates. He noted that his address on the ASIC records was an address he had not lived at for about 20 years. David has deposed that he did not know he was a shareholder of Whistledixie, had not ever received dividends from Whistledixie and that he had since instructed Accolade to update and rectify the ASIC register. His explanation as to how he may have come to be a shareholder of that company was not directly challenged although I was invited to reject it. I have considered this evidence. I am not satisfied that the applicants have established that there is presently a reasonable risk of dissipation by David based on this evidence.

105 In relation to Carmelo, I am satisfied that the applicants have established on the evidence the relevant risk of dissipation. In his asset disclosure affidavit of 5 October 2021, Carmelo disclosed fairly meagre assets of less than $15,000 consisting of: a joint bank account with a balance of $12,600, thirteen bank accounts, with a balance of $0.00 in twelve accounts and $500 in one account, shares in Accolade Advisory Pty Ltd valued at $100, “Crypto Currency” valued at $1,418, Carmelo’s remuneration received on a weekly basis, the figure of which is not disclosed and Carmelo’s personal clothing, toiletries and effects, the value of which is not disclosed. I note that disclosed monetary value of the assets held by Carmelo are well below the $273,650 in value of Australian assets that Carmelo is required to preserve pursuant to the freezing order made against him. In Carmelo’s affidavit of 6 October 2022, Carmelo discloses that about three weeks after he provided his asset disclosure affidavit, he, as purchaser, exchanged contracts for the purchase of a real property in Elizabeth Hills, NSW for the contract price of $1,420,000 and the settlement of the purchase was effected on 7 December 2021. Carmelo does not offer any explanation for how he sourced the funds to do so, given he had only weeks earlier deposed to having very low value assets. It then emerged that in mid‑2022, Carmelo offered the property for sale through a real estate agent, hoping to sell the property for $1,500,000. Between early July and mid-September 2022 he received offers in the range of about $1,250,000 to $1,380,000. He says that because he did not receive offers in his desired range, he withdrew the property from sale. Based on the evidence as it stands, and the absence of an explanation as to how he funded the acquisition of the property, I infer that, on the evidence before me, it appears that Carmelo may not have been frank in his asset disclosure affidavit. Coupled with the recent attempt to sell the property I am satisfied that there the applicants have established the requisite risk of dissipation necessary to extend the freezing orders against Carmelo.

106 For completeness, I note that it was submitted on behalf of Carmelo that another reason to discharge the freezing order against him was because on the *ex parte* application, counsel for the applicants had breached his duty of candour to the Court. It is alleged that the explanation proffered by the applicants for the delay in bringing the application against Carmelo was that an affidavit from Sam on behalf of Accolade and Reliance failed to disclose the explanation for the transfer of some $273,000 to Carmelo however, counsel for the applicants failed to draw the Court’s attention to the fact that Mr Hurst already knew, as early as 6 April 2021, an amount of $273,000 was paid from Reliance to Carmelo. I have reviewed the transcript of the *ex parte* application which Carmelo relies on in making this submission.

107 It is tolerably clear that counsel for the applicants in fact expressly stated that Mr Hurst had been aware of the transaction “a few months ago” however it was the failure of Sam in his affidavit to disclose why that transaction occurred which “spurred” Mr Hurst to join Carmelo. The respondents’ submission that counsel for the applicants breached their duty of candour on an *ex parte* application proceeds on a false premise and I reject it.

## Determination

108 For these reasons, I am satisfied that the freezing orders made against Sam and Carmelo should be continued until further order whereas the freezing order against David should be discharged. In the ordinary course, costs should follow the event. Accordingly, in the absence of any application for a different costs order, I will order that the applicants must pay David’s costs of this *inter partes* application and that Sam and Carmelo pay the applicants’ of this *inter partes* application as it relates to Sam and Carmelo. I will however afford the parties an opportunity to apply for a different costs order if they seek to do so. The parties are to confer and submit short minutes of order to give effect these orders.

# REVIEW APPLICATION

## Introduction

109 On or shortly after 26 April 2022, the applicants served notices to produce on each of Accolade and Reliance seeking production of the trust deeds for the “Accolade Trust” and “Reliance Discretionary Trust” and for documents for the financial years 2017 to 2021 related to those trusts. On 4 May 2022, Accolade and Reliance filed an interlocutory application seeking to set aside the notices to produce (**NTP Application**)which was referred to a Registrar of the Court for determination. The Registrar concluded that the NTP Application should be dismissed because, *inter alia*, the issue as to who controls each of the Accolade Trust and the Reliance Discretionary Trust is relevant to the substantive proceeding.

110 By interlocutory application pursuant to ss 35A(5) and (6) of the FCA Act and r 3.11(1) of the Rules, Accolade and Reliance seek a review of the Registrar’s decision and that the Registrar’s orders and the notices to produce be set aside. The review application is to be determined on the papers.

## Evidence

111 Accolade and Reliance did not file evidence in support of their application. The applicants rely on the evidence that was before the Registrar and in addition an affidavit of Mr Doueihi sworn 28 July 2022 and annexures GD‑39 and GD‑40 thereto.

## Legal Principles

112 A party may apply to the Court under s 35A(5) of the FCA Act and r 3.11 of the Rules for review of the exercise of a power of the Court by a Registrar. A review under s 35A(5) of the FCA Act is in the nature of a hearing *de novo*: *Totev v Sfar* [2008] FCAFC 35; 167 FCR 193 at [13] (Emmett J), at [58] (Bennett J agreeing), at [92] (Cowdroy J). A review application does not hinge on error being established in the decision the subject of the review.

113 In *Trevor, in the matter of* ***Bell Group NV*** *(in liq) (No 2)* [2017] FCA 927; 122 ACSR 418, Jagot J (when her Honour was on this Court) said relevantly (at [20]):

20. ...As explained by Kenny J in *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2013] FCA 623; (2013) 304 ALR 319 the right of review under s 35A(5) is “by way of a hearing de novo in the sense that the parties may adduce fresh evidence as of right”, “is a complete rehearing; and the judge is not fettered by the Registrar’s decision” (at [36]), so that the “court must determine the facts on the evidence that is adduced at the hearing before it, whether or not that evidence, and the facts to which they relate, were in existence at the time the Registrar made the decision under review” (at [38]).

## Consideration

114 Accolade and Reliance rely on two grounds:

(1) That the Registrar erred in refusing to set aside the notices to produce in circumstances tantamount to an abuse of process; and

(2) That the Registrar erred in holding that notices to produce may be relevant to the further disclosure application against Sam and David notwithstanding that the freezing orders may be discharged.

115 The submissions advanced by Accolade and Reliance proceed on the basis that the relevant state of affairs against which the review is to be considered is constrained to the position as it applied before the Registrar. That is not correct: *Bell Group NV* at [20]. The review application falls to be determined by reference to the subsequent determination of the Extension of the Freezing Order application and the Further Disclosure application.

116 In the application before me, it was established that at the relevant times, Reliance was operating as trustee of the Reliance Discretionary Trust, Sam was the Appointor of the Reliance Discretionary Trust and relevantly swore an affidavit on behalf of Reliance in response to the existing asset disclosure orders, and Sam is and was a general beneficiary of the Reliance Discretionary Trust. Attempts by the applicants to obtain information as to whether the affidavits filed pursuant to the existing asset disclosure orders addressed the issue of interests in trust property have not been answered. A query in relation to whether supplementary affidavits would be given similarly went unanswered. In these circumstances, I conclude, that the issue as to who has control over the two trusts, including with respect to distributions, is of relevance in the proceeding.

117 The extant application to continue the freezing orders on an *inter partes* basis was brought in respect of the freezing orders against Sam, David and Carmelo, not in respect of the freezing orders against Accolade and Reliance: see [95] above. The notices to produce are potentially relevant on the *inter partes* application to continue these freezing orders, if and when brought. As indicated above, this is an issue on which Accolade and Reliance have waxed and waned but their most recent position was that they intended to proceed at some point.

118 Although, I have dismissed the application for further disclosure on the existing asset disclosure orders, that is largely a product of the fact that the applicants did not prepare that application by reference to established legal principle with the result that the affected parties were not afforded an adequate opportunity to respond. In light of my conclusion at [90] and [91] above, I consider that the material sought by the notices to produce, is of continuing relevance to the issue of alleged non-compliance with the existing asset disclosure orders, which is an issue that if not addressed, is likely to be the subject of a further application.

119 I refer to the observations I made in respect of the application for leave to file further evidence in *Lloyds Curry (No 2)* at [20]. Observations to similar effect may be made in the present context. The notices to produce are targeted and the issues to which they are directed are significant in relation to the issue which is likely to be re-agitated as to compliance with the asset disclosure orders. I agree with the submissions advanced on behalf of Accolade and Reliance in relation to the dilatory manner in which the applicants have approached their investigations and preparation of evidence in respect of their interlocutory applications. Their approach has been consistently to put the cart before the horse. This application is regrettably no different. It is a matter than may appropriately be recognised by denying the applicants their costs on this application even though they will have successfully resisted the review application. Having regard to the overarching purpose, I am satisfied that it is appropriate to dismiss the present application in order to forestall the same, or substantially similar, notices to produce being issued with the result that there would be a new round of applications in respect of those notices that mirror the application determined by the Registrar and the present application and in respect of which the same arguments would likely be re-agitated.

## Determination

120 The review application should be dismissed with each party to bear their costs of the application.

# INDEMNITY COSTS APPLICATION

## Introduction

121 The Accolade Parties filed a further amended interlocutory application seeking security for their costs against the applicants (**Security Application**). That application was the subject of a report by a Registrar of the Court acting as a **Referee** which addressed the question of whether security for costs ought to be granted, and, if so, in what amount and on what terms. The Referee delivered a **Report** recommending that the application be dismissed and that an order be made that the Accolade Parties pay the applicants’ costs. By interlocutory application, the applicants sought that (1) the Court adopt the Report in whole; (2) the Security for Costs Application be dismissed; and (3) that the Accolade Parties pay the applicants’ costs of the Security for Costs Application on an indemnity basis. The Accolade Parties initially opposed this application but ultimately did not press their opposition. On 8 August 2022, I ordered that the Report be adopted in whole and dismissed the Security for Costs Application. The only live issue for determination is the application for indemnity costs. The Accolade Parties concede that they ought to pay the applicants costs of the Security for Costs Application, but submit that there is no basis for the Court to order that costs be paid on an indemnity basis. The concession as to costs was only made by the Accolade Parties when they filed their submissions.

## Evidence

122 The applicants rely on the affidavit of Kurtis Blanch, a paralegal employed by the applicants’ solicitors, affirmed on 23 August 2022 and annexures KB‑5, KB‑6 and KB‑7 thereto. The Accolade Parties did not file evidence in opposition to the application.

## Legal Principles

123 The applicable principles are well established. In the context of the matters in issue on this application it is sufficient to extract the observations of the Full Court in *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd (No 2)* [2018] FCAFC 112 (the Court):

5. Section 43 of the *Federal Court of Australia Act 1976* (Cth) confers a broad discretion on the Court to award costs in proceedings. In *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151, Black CJ at 152 stated the principles applicable to a claim for indemnity costs:

…it is well established that the starting point for any consideration of an application for indemnity costs is that in the ordinary case costs will follow the event and the Court will order the unsuccessful party to pay the costs of the successful party, on a party and party basis, a basis which will fall short of complete indemnity. Nevertheless, the Court has an absolute and unfettered jurisdiction in awarding costs, although the discretion must be exercised judicially. So indemnity costs may properly be awarded where there is some special or unusual feature in the case justifying the Court in exercising the discretion in that way.

6. A well-established circumstance justifying an award of indemnity costs is an imprudent refusal of an offer to compromise (*Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233 per Sheppard J). In such cases, a key question is whether the offeree’s refusal of the offer was “unreasonable” when viewed in light of the circumstances existing at the time the offer was rejected (*Black v Lipovac* (1998) 217 ALR 386 at 432 per Miles, Heerey and Madgwick JJ; *CGU Insurance Ltd v Corrections Corporation of Australia Staff Superannuation Ltd* [2008] FCAFC 173 at [75] per Moore, Finn and Jessup JJ).

7. The circumstances to be taken into account in determining whether rejection of an offer was “unreasonable” cannot be stated exhaustively but may include, for example:

(a) the stage of the proceeding at which the offer was received;

(b) the time allowed to the offeree to consider the offer;

(c) the extent of the compromise offered;

(d) the offeree’s prospects of success, assessed as at the date of the offer;

(e) the clarity with which the terms of the offer were expressed; and

(f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree rejecting it.

(*Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at [25] per Warren CJ, Maxwell P and Harper AJA; *Beling v Sixty International S.A. (No 2)* [2015] FCA 355 at [25] per Mortimer J).

8. An unsuccessful party is not liable to pay indemnity costs merely because it received an offer to settle on terms more favourable than it achieved at trial and rejected that offer (*CGU Insurance* at [75]; *Black* at [217]–[218]). As we observed in the Appeal Reasons, albeit in the context of r 25.14(2) of the FCRs, assessment of the “unreasonableness” of an offeree’s refusal of a settlement offer is a broad-ranging inquiry that is not restricted to consideration of the extent or quantum of the compromise offered.

124 The applicants submit that an order for indemnity costs may be made where a litigant “properly advised, should have known that he had no chance of success”: *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; 81 ALR 397 at 401. Further, that a due and timely warning of an intention to claim indemnity costs will make the awarding of indemnity costs more likely: *Huntsman Chemical Co Aust Ltd v International Pools Aust Pty Ltd* (1995) 36 NSWLR 242 at 249.

125 The Court’s costs practice note (GPN-COSTS) applies to all proceedings in this Court. It relevantly provides that the Court’s preference, wherever practicable and appropriate, is for the making of lump sum costs orders. However, the adoption of a lump sum costs procedure remains at the discretion of the judge: see *LFDB v Ms S M (No 2)* [2018] FCA 2062 at [6] to [8].

## Consideration

126 Prior to the hearing of the Security Application, on three occasions the Accolade Parties were informed that the applicants considered the application to be “manifestly hopeless and bound to fail” and on each occasion put on notice that the applicants would seek indemnity costs if the application was pressed but refused by the Court.

127 On 16 February 2022, the applicants provided the Accolade Parties with information concerning the financial position of the liquidator, and exposed by reference to authority why the applicants considered that the Accolade Parties’ reliance on the position of the Company, being a company in liquidation, was misplaced.

128 On 8 March 2022, the applicants provided evidence that the liquidator had obtained adverse costs insurance in the sum of $430,000 and offered to consent to the Accolade Parties withdrawing the application with no orders as to costs. That offer, made after business hours on 8 March 2022, was expressed to be open until 4pm, 9 March 2022.

129 On 10 March 2022, the applicants provided the Accolade Parties with a copy of the adverse costs insurance policy it had obtained (redacting for privilege and also in respect of the policy premium and payment details). At this time the applicants again offered to consent to the Accolade Parties withdrawing the application with no orders as to costs. That offer, made at about 4pm on 8 March 2022 was expressed to be open until 5pm, 11 March 2022.

130 The communications sent by the applicants clearly foreshadowed the making of an application for indemnity costs and exposed the basis for why the applicants maintained the application would fail. The reasons as to why the application would most likely fail highlighted by the applicants’ solicitors in their communications to the Accolade Parties’ solicitors, including the financial position of the liquidator, the existence of the adverse costs policy and the likelihood that any costs order, if made, would be made against both the liquidator and the Company on a joint and several basis, featured in the Decision as to why there was no reason to believe that the applicants would be unable to pay an adverse costs order if so ordered.

131 The offers made on 8 March 2022 and 10 March 2022 were not made pursuant to r 25.01 of the *Rules* nor were they expressed to be made in accordance with the principles in *Calderbank v Calderbank* [1975] 3 All ER 333. That does not mean the offers are not effective in an argument on costs: *Jones v Bradley (No 2)* [2003] NSWCA 258 (Meagher, Beazley and Santow JJA) at [15]. However, in the context where the applicants on a reasoned basis maintained that the application was doomed to fail, the offers to consent to the application being withdrawn with no order for costs represented a real compromise on the part of the applicants. The original Security Application had been filed four months’ before the offers were made. During that time, it can readily be inferred that costs had been incurred by the applicants on the application. The Accolade Parties’ submission that the offers did not represent a real compromise because they did not offer to provide security are not to the point.

132 The Accolade Parties submit that it was not unreasonable to reject the offers because the letters did not address the issues raised by Yates J in ***Peterson*** *Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 and general proposition that litigation insurance is not a panacea for an adverse costs order because the respondent is primarily dependent upon the applicant to make a claim and for the conduct of the applicant to not have adversely affected the liability of the insurer. The Accolade Parties submit that in *Peterson*, Yates J ordered security because the policy did not insure the respondents. Further that as in *Peterson* in this case, the policy insures the applicants and that the policy is of no or little security given the applicants may not claim and the claim may not be answerable if the applicants failed to honour the terms of the policy. I do not agree. In the present case, the adverse costs policy was not offered as the form of security for costs. The policy was but one of a number of factors relevant to the determination of whether there was reason to believe that the applicants would be unable to satisfy an adverse costs order.

133 Taking all of the above into account, I am satisfied that in the circumstances of this application, it is appropriate to depart from the usual order that costs be awarded to the successful party on a party/party basis and award the applicants their costs of the Security Application on an indemnity basis. The costs of this application (the adoption application) should also be paid by the Accolade Parties on the ordinary basis.

## Determination

134 For the above reasons, I will order that the Accolade Parties pay the applicants’ costs on the Security Application on an indemnity basis and on this adoption application on a party/party basis. In the event that costs are not agreed, they are to be assessed by a Registrar of the Court on a lump sum basis.

# CONCLUSION

135 For these reasons, I will make orders in relation to each of the interlocutory applications as indicated in these reasons.

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| I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 4 October 2023

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | RELIANCE FINANCIAL SERVICES PTY LTD ACN 146317919 |
| Fifth Respondent: | DAVID CASSANITI |
| Sixth Respondent: | CARMELO DUARDO |