

# SHAREHOLDERS GET NO JOY IN APPLICATION FOR INSPECTION OF INSURANCE DOCUMENTS IN DREAMWORLD CLASS ACTION

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The Federal Court dismissed an application by shareholders in a class action under s 247A of the *Corporations Act* for inspection of insurance documents and insurance related correspondence, for the purpose of ascertaining the commercial viability of the action and to enhance their prospects of settling it on favourable terms. In doing so the Court considered the 'vitally important' obligations of confidentiality between insurers and insureds and the factors relevant to applications for inspection of insurance policies.

## IN ISSUE

- Whether shareholders in a class action are entitled to inspect copies of insurance policies and documents to advance their position
- Factors relevant to Court's discretion to order inspection of insurance policies under s 247A of the *Corporations Act*.

## THE BACKGROUND

The lead applicants in a shareholder class action against Ardent Leisure Ltd and its subsidiaries sought orders pursuant to s 247A of the *Corporations Act* to inspect insurance documents and insurance related correspondence. The action related to the incident that occurred at the Dreamworld amusement park in October 2016 during the operation of the Thunder River Rapids Ride, resulting in the death of 4 people. Following the incident, the price of shares in the Ardent Leisure Group fell significantly. A class action was subsequently commenced on 18 June 2020.

## THE ISSUES ON THE APPLICATION

- Whether the applicants were entitled to inspect insurance documents (including applicable policies and notification correspondence) under s 247A of the *Corporations Act*, in order to ascertain the commercial viability of the class action and to enhance their prospects of settling on favourable terms.
- Factors relevant to the exercise of the Court's discretion under s 247A (specifically when inspection of insurance documents was sought).

## THE DECISION AT TRIAL

The Court (Derrington J) dismissed the application on the basis that the purpose for seeking inspection of the documents was not a proper one under s 247A and not referable to the applicants' capacity as shareholders.

The Court also held that, even if the purpose was proper, it would have not exercised its discretion in favour of inspection due to the specific nature of insurance documents.

Section 247A of the *Corporations Act* permits inspection of books of a company pursuant to an application by a shareholder if an application is made and the Court is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. The power to order inspection is discretionary.

The existence of insurance, including directors and officers insurance, held by the Ardent Group that was likely to respond to the applicants' claim was not in dispute. However, the applicants remained unaware of the applicable policy limits. Further, the funding agreement between the litigation funder and applicants was conditional upon the applicants obtaining copies of all relevant insurance policies

The 'unabashed' objective of the applicants in seeking to inspect Ardent's policy documents and notification correspondence was to advance their position in the action, specifically to ascertain its commercial viability and to enhance its prospects of settling on favourable terms. Significantly, the purpose of the application was not to enforce or vindicate the applicants' rights accrued in the capacity as shareholders. The Court confirmed that the proper purpose under s 247A must be connected to the applicant's rights as a shareholder.

The crux of the applicants' claims was that, before becoming shareholders, the Ardent companies engaged in misleading and deceptive conduct contravening continuous disclosure obligations and that this caused the applicants damage when they decided to purchase shares. The Court held that the alleged wrongs were done to them in their capacity as potential investors in the companies and not in their capacity as shareholders. Although the damage suffered arose after they became shareholders and because they were shareholders, that was not due to the infringement of any of their rights or entitlements as shareholders. This was significant, as the power in s 247A does not authorise inspection to assist applicants to advance claims which arose from wrongs allegedly done to them in other capacities. Accordingly, the applicants' purpose in seeking the documents was not 'proper' within the meaning of s 247A.

The Court also determined that, even if there was a proper purpose triggering s 247A, it would not exercise its discretion to order inspection. Regard was had to various matters identified by Beach J in *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473, which the Court considered relevant to the exercise of the power under s 247A. These matters include that insurance documents are generally commercially confidential between insurer and insured; an insurance policy will ordinarily only be discoverable when it is directly relevant to the pleaded issues; and that disclosure of an insurance policy would confer on the applicants a significant commercial advantage in settlement negotiations.

As to the requested inspection of notification correspondence, the Court referred to the 'special importance' of communications with insurers which are required to be made in good faith and pursuant to a duty to make full disclosure. The Court held that there are very good reasons why such documents ought not to be inspected by shareholders, due to the potential

for the insurer/insured relationship to be 'severely and detrimentally affected.' The Court noted that a 'somewhat exceptional' case might have to be advanced before the discretion might be exercised to permit the inspection of correspondence between an insured and insurer, even where a proper purpose under s 247A is established.

Finally, the Court also noted that the claim in the action was unlikely to exceed the respondents' net assets. Although there was a lack of evidence as to the value of the claim, which the Court accepted may be considerable, the Ardent Group had substantial assets from which any judgment might be satisfied. Its net asset position for the 2020 financial year remained significant (albeit diminished) at around \$290M. There was no risk of impending insolvency.

## IMPLICATIONS FOR YOU

- Insurers can take some comfort from the Court's approach to denying inspection of insurance policies and correspondence in shareholder class actions where material non-disclosures are alleged affecting decisions to invest.
- This approach will not apply, however, where actions are based upon alleged duties owed to applicants in their capacity as shareholders and are made for a proper purpose under s 247A.
- Even where a proper purpose for inspection is established under s 247A, a Court will consider the special importance of insurance documents in exercising its discretion to make any inspection order, providing a further 'safety net' for insurers in such applications.

*Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited* [2020] FCA 1302

## GET IN TOUCH



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