SUPREME COURT OF QUEENSLAND

CITATION:	*Mulvaney Holdings Pty Ltd v Thorne & Ors* [2012] QSC 247
PARTIES:	**MULVANEY HOLDINGS PTY LTD** **AS TRUSTEE FOR THE MULVANEY FAMILY TRUST** Plaintiff **V** **BRETT JOHN THORNE** Defendant And **GRAHAM DAVID LAIRD** Respondent **RICHARD JOHN WILLIAMSON** Respondent **RICK WILLIAMSON INVESTMENTS PTY LTD** Respondent
FILE NO/S:	S54/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	7 September 2012
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	27 August 2012
JUDGE:	McMeekin J
ORDER:	1. The orders made on 30 April 2012 and (to the extent they may subsist) 29 March 2012 be discharged. 2. The plaintiffs, within two days, pay Macrossan & Amiet the sum of $1,619.45 in respect of their invoice dated 4 May 2012. 3. The plaintiffs pay the reasonable costs, on the indemnity basis, of Graham David Laird (personally and as trustee of the Laird Family Trust), Richard John

Williamson and Rick Williamson Investments Pty Ltd of and incidental to the applications and orders made on 29 March 2012 and 30 April 2012 including their costs of and incidental to the hearing of 27 August 2012.

4. The applications made on 29 March 2012, 30 April 2012 and 27 August 2012 otherwise be dismissed.

CATCHWORDS: PROCEDURE – COSTS – whether persons who are affected by orders made in a proceeding but who are not parties to that proceeding should be protected as to the reasonable costs incurred as a result of the orders – where the applicant obtained ancillary orders affecting the interests of the respondents – where the respondents were not heard at the time the orders were made – where the applicant sought to maintain those orders and the respondents sought the orders be discharged – whether the applicant pay the costs incurred by the respondents on the indemnity basis

Corporate Affairs Commission v Austral Oil Estates Limited Unreported - BC8500624 - Supreme Court of New South Wales Equity Division - Eq 1407 of 1985 - 9 August 1985

Gold Ribbon Accountants Pty Ltd (in liq) v Sheers [2003] 1 Qd R 683

Heartwood Architectural Timber & Joinery Pty Ltd v Redchip Lawyers [2009] 2 Qd R 499

Mulvaney Holdings Pty Ltd as trustee for the Mulvaney Family Trust & Anor v Brett John Thorne & Ors [2012] QSC 127

Corporations Act 2001 s 601AD, 601AH(5)

Uniform Civil Procedure Rules 1999 rr 260B, 260D(4), 260D(5), 702, 703

COUNSEL: PO Land for the plaintiff

KA Barlow SC for the respondents

SOLICITORS: Kelly Legal for the plaintiff

Macrossan & Amiet for the respondents

[1] **McMeekin J:** The issue I have to resolve is whether persons who are affected by orders made in a proceeding, but who are not parties to that proceeding, should be protected as to the reasonable costs incurred as a result of the orders.

The Background

[2] On 29 March and 30 April of 2012 Mulvaney Holdings Pty Ltd ("the applicant") applied for and obtained certain orders pursuant to r260B and rr260D(4) and (5) of

the *Uniform Civil Procedure Rules* 1999 ("the rules"). Such orders are described in the rules as "ancillary orders" and are usually given as ancillary to freezing orders. Those orders affected the interests of Graham Laird, Richard Williamson and Rick Williamson Investments Pty Ltd ("the respondents"). The respondents were not heard at the time that the orders were made. The orders were made ex parte. That placed a heavy burden on the applicant to ensure that full disclosure was made and that the interests of those affected by the order were protected.[1]

[3] The ancillary orders were sought in support of a cause of action that the applicant and another company, Ozibar Pty Ltd ("Ozibar") as trustee for the Ozibar Unit Trust, brought against Brett John Thorne. The applicant was successful in its claim against Mr Thorne but Ozibar was not.[2] The respondents were not parties to those proceedings. In the instant case freezing orders were not made against Brett John Thorne ("the defendant") as he had filed for bankruptcy on his own petition subsequent to the hearing of the action against him and prior to the making of the orders. Effectively the bankruptcy legislation prevented the defendant from dealing with any assets and vested those assets in the trustee in bankruptcy. The orders made were directed only to third parties such as the respondents.

[4] The orders made on 30 April 2012 were to expire at 4pm on 27 August 2012. The parties came before me on that date. The applicant was interested in maintaining the orders in place. The respondents sought that the orders previously made on 29 March 2012 and 30 April 2012 be discharged. They also sought that the applicant pay certain costs that they had incurred which was the subject of an invoice forwarded in May of 2012 and further that the applicant pay the costs that they had incurred "of and incidental to the applications and orders made on 29 March 2012 and 30 April 2012, including the costs of and incidental to this days hearing" and that those costs be on the indemnity basis.

[5] Negotiations occurred and the parties resolved all but that last costs issue. It was agreed that upon the respondents providing certain undertakings the orders were discharged and the applicant agreed to pay the costs the subject of the invoice.

The Prima Facie Position

[6] Normally parties in the position of the respondents here are protected as to the costs reasonably incurred as a result of orders of this type. That is so because they have no interest in the suit, are considered to be in effect innocent bystanders, but may be adversely affected by the orders made. That outcome is reflected in the standard orders made.

[7] The making of freezing orders is governed by Practice Direction 1 of 2007. The practice direction provides:

(a) that a pro forma freezing order is set out in the appendix.[3] The pro forma order provides that the order is to be made on the undertakings set out in schedule A. Those undertakings include:

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1 *Heartwood Architectural Timber & Joinery Pty Ltd v Redchip Lawyers* [2009] 2 Qd R 499 where Applegarth J collected a number of the authorities at [30]-[32]; See also *Gold Ribbon Accountants Pty Ltd (in liq) v Sheers* [2003] 1 Qd R 683 at 694-695 per Holmes J

2 See *Mulvaney Holdings Pty Ltd as trustee for the Mulvaney Family Trust & Anor v Brett John Thorne & Ors* [2012] QSC 127

3 Para 2

(i) an undertaking that the applicant will "submit to such order (if any) as the court may consider just for the payment of compensation (to be assessed by the court or as it may direct) to any person (whether or not a party) affected by the operation of the order";[4]

(ii) that the applicant "will pay the reasonable costs of anyone other than the respondent which have been incurred as a result of this order".[5]

(b) that the applicant will bear the onus of satisfying the court that the order should be continued or renewed upon its return date;[6]

(c) that the court may make ancillary orders;[7]

(d) that a "respondent" can be either the person said to be "liable on a substantive cause of action" or some other person "who has possession, custody or control or even ownership" of assets that they may be ultimately liable to disgorge.[8]

[8] At the time of making the ancillary orders in the instant case undertakings were proffered by the applicant. They were not in terms of the pro forma order. The applicant undertook to pay "the reasonable costs of Graham David Laird and Richard John Williamson which had been incurred as a result of the operation of this order". The undertaking was thus more limited than the pro forma order provides in that it did not extend to "the reasonable costs of anyone other than the respondent which have been incurred as a result of this order". The applicant also undertook to pay compensation in accordance with the pro forma undertakings set out in schedule A to the practice direction but again limited to paying compensation to Graham David Laird and Richard John Williamson.

[9] There was no discussion or submission at the time of obtaining the orders concerning the form of the undertakings to be given in relation to costs and compensation.

[10] In the usual course the applicant for such orders cannot be certain as to the person who will be affected by the orders nor certain as to what those effects might be. Where a party comes to court seeking orders that interfere with the potential rights of third parties to a dispute then in the ordinary course it seems fundamental that those third parties will be protected by an order as to costs, unless the applicant can show that some other order is justified. The undertakings ought to have been in the form that the applicant would pay "the reasonable costs of anyone" who might be affected by the orders being made and not limited to Messrs Laird and Williamson. That undertaking must be offered except in the most extraordinary of circumstances. The prima-facie position is reflected in the pro forma undertakings set out in the schedule to the pro forma orders set out in the practice direction.

[11] As it happens here the interests of Rick Williamson Investments Pty Ltd have been affected in addition to those mentioned in the undertakings proffered. I do not know that there was any deliberate decision here to exclude Rick Williamson Investments Pty Ltd from the protection of the usual undertaking, nor any attempt to gain any

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4 Para 1 of the undertakings
5 Para 4 of the undertakings
6 Para 4
7 Para 8
8 Para 3

advantage. But no submission was made as to why it should not have been the subject of the undertakings.

[12] The undertaking regarding costs was given in respect of Messrs Laird and Williamson. So far as their costs are concerned the true issue is whether the applicant should be released from its undertaking. To put the matter in that way highlights what it is that must be shown and where the onus lies. Young J (as he then was) in *Corporate Affairs Commission v Austral Oil Estates Limited*[9] explained the principles in this way:

> "The law as to when a voluntary undertaking will be released is quite clear. The English Court of Appeal said in *Cutler v Wadsworth Stadium Ltd* [1945] 1 All ER 103 at 105 that the Court does not lightly vary an undertaking given by a litigant and it is far more difficult to obtain release from an undertaking than it is to be released from an interlocutory injunction. That case was applied by the High Court in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 178, but the High Court emphasised that the predominant consideration was the Court's continued control over its own proceedings, including interlocutory orders based on undertakings and that a further or different order will be appropriate whenever new facts come into existence or are discovered, which render its enforcement unjust, so the onus of proving changed circumstances is on the applicant who must establish them by evidence."

[13] So far as the costs of Rick Williamson Investments Pty Ltd are concerned I do not see that my power to make orders is limited by the terms of the undertaking offered by the applicant at the time of obtaining of the original orders. Rather my discretion in relation to the awarding of costs should be informed by the content of the usual undertakings expected.

The Applicant's Submissions

[14] The applicant submitted that the respondents should not be protected as to costs. Rather it was submitted that each party should bear their own costs. Mr Land, who appeared for the applicant, advanced the following reasons for that submission:

> (a) the respondents had by their actions in the interim displayed an attitude that effectively they would not be bound by the orders of the court and had breached the spirit of them if not the letter of them;
>
> (b) the respondents had offered an undertaking only two or three working days prior to the return date of the application but the undertakings given following negotiation on the day of the application were "broader and more extensive than those offered";
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> (c) the correspondence from the respondents' solicitors had suggested that the respondents' attitude was that they would not comply with the orders made on the 29th April at all and that in the circumstances it was essential for the applicant to return to court to seek further extension of the orders if no proper undertakings were offered.

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9 (1985) 10 ACLR 1; BC8500624

The Respondents' Dealings with the Defendant

[15] To understand these submissions it is necessary to say a little more about the facts.

[16] The claim that the respondents by their conduct had breached the spirit of the orders arises in this way. Prior to the making of the orders of 29 March the applicant had become aware that the defendant had sold or caused to be sold certain shares in a company, Transparent Enterprises Pty Ltd ("Transparent Enterprises") to Messrs Laird and Williamson or to entities that they controlled. The applicant believed that certain monies had been paid already in relation to that transaction and that further and substantial monies remained to be paid. The seller of the shares in Transparent Enterprises was a company, Thorne Developments Pty Ltd ("Thorne Developments") acting as trustee of one of the defendant's family trusts.

[17] The orders that were sought were designed to ensure that no further monies owing in respect of that transaction were paid to the defendant or to anyone else, but rather were paid into court. Hence the orders provided, inter alia, that Messrs Laird and Williamson "whether in their own right or whether as a director of … Rick Williamson Investments Pty Ltd …" were restrained from "purchasing or otherwise acquiring or acting in furtherance of any such purchase or acquisition, the shares or any of the shares in Transparent Enterprises Pty Ltd …"[10] Messrs Laird and Williamson were further restrained from paying any monies associated with the sale or purchase of such shares to the defendant or any entities connected to the defendant and were ordered to pay or caused to be paid into the Supreme Court of Queensland "any monies received or to be received by Thorne Developments Pty Ltd" or "any other form of payment whether received or to be received by Thorne Developments Pty Ltd for the purchase or other acquisition of such shares."[11]

[18] At the time that Thorne Developments entered into the agreement to sell the shares in Transparent Enterprises Thorne Developments was de-registered. That had occurred on 4 December 2011, some months before the share sale transaction had been entered into. Thorne Developments ceased to exist as at the date of its de-registration: s 601AD of the *Corporations Act* 2001.

[19] One half of the share capital of Transparent Enterprises was held by Thorne Developments in trust and hence vested in the Commonwealth upon the de-registration of Thorne Developments: s 601AD (1A) *Corporation Act 2001*.

[20] Hence at the date of the share sale agreement the seller of the shares had ceased to exist and did not own the shares the subject of the transaction. Those considerations obviously throw considerable doubt on the validity of the share sale agreement.

[21] To the date of the subject orders, and to the present time, the respondents have paid $395,000 dollars for the purchase of the shares in Transparent Enterprises. The balance of the purchase price ($1,476,775) was vendor financed with the parties entering into a loan agreement on the same date as the share sale agreement, the loans being secured by a mortgage given by Mr Laird as trustee of the Laird Family Trust over certain lands and further secured by guarantees by Mr Laird and Mr Williamson.

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10 Para 2(i)(a) of the Orders of 30 April

11 Para 2(ii) of the Orders of 30 April

[22] The mortgage that was provided was over Lots 2 and 4 on SP180674. At the time of entering into the loan agreement it was Mr Laird's intention to sell these two properties and utilize the sale proceeds to pay Thorne Developments for the purchase of the shares in Transparent Enterprises. [12]

[23] Mr Laird sold the two properties the subject of the mortgage on 20 June 2012. Prior to the settlement of transactions Mr Laird purported to obtain a release of the mortgage that had been granted to Thorne Developments. The mortgage was purportedly released by Thorne Developments under the hand of Craig Graham Thorne (the defendant's brother) who is described on the release as a "sole director". In fact Craig Graham Thorne was never the sole director of Thorne Developments and as mentioned Thorne Developments had ceased to exist on the date of its de-registration on 4 December 2011. What is more by the time he obtained the purported release Mr Laird was well aware that Thorne Developments had been de-registered. I was told from the Bar table by Mr Laird's counsel, Mr Barlow SC, that the respondents had appreciated that Thorne Developments had been de-registered in February 2012.

[24] Lots 2 and 4 on SP180674 were sold, according to the transfer documents, for $430,000.00 each.

The Alleged Breach of Court Orders

[25] The applicant submits that the sale of these properties was done "in furtherance" of the purchase or acquisition of the shares in Transparent Enterprises contrary to para 2(i)(a) of the orders of 29 April. The applicant points to the admission of Mr Laird that at the time of entering into the share sale agreement and the mortgage agreement these properties were to be sold in order to discharge the debt incurred in the transaction. The proceeds have not been used to discharge that debt. The obtaining of the purported "release" from the defendant's brother further ties the sale of these lots to the share sale agreement entered into with the defendant and raises further suspicions about the bona fides of the respondents.

[26] The applicant submits that the only reason that the respondents are not in breach of the court order is that the whole series of transactions involving the share sale agreement and the associated agreements were nullities because of the de-registration of Thorne Enterprises. It argues that the respondents were acting at least against the spirit of the orders if not the letter of them. If the defendant's brother had in fact had the authority to release the mortgage so as to clear the title to the two lots in question to enable the sales of those lots to proceed without any other enforceable arrangement by which the proceeds of sale were to be paid in discharge of the debt, then one end result, potentially, was that the respondents would obtain the shares in Transparent Enterprises without having to pay full value for them, effectively reducing the defendant's potential asset base and so defeating the defendant's creditors, the very reason for the orders being sought and obtained.

Discussion

[27] The release of the security is a very odd feature of the transactions. There is no good reason that I can see why anyone acting or purporting to act, in the shoes of the

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12 Para 20 of his affidavit of 24 August 2012

trustee of the family trust, assuming Mr Craig Thorne had any bona fides whatever, would release a valuable security without discharge of a very large outstanding debt. While the agreements provided for further payments to be made on 31 March and 31 August 2012 the payment due on 31 March was not met – a sum of $540,888. Hence the defendant's brother had purported to release the security which was intended to ensure that monies were paid to discharge some if not all of the amount outstanding of $1,476,775 at a time when the respondents were already $540,888 in arrears in their obligations.

[28] And why Mr Laird would seek a release from a person whom he must have known was in no position to give one remains entirely unexplained. At the time he was in receipt of expert legal advice from Messrs Macrossan & Amiet and he concedes that he knew of the de-registration of the company. He knew then that the defendant's brother was not the sole director of that company at the material time as he purported to be and as well that he could not have had any authority to give such release.

[29] The concerns about the respondents' motivations are heightened by the history of these transactions. They were entered into at a time when the defendant was being actively pursued by the applicant for a substantial sum of money. $395,000 was paid towards the share price of these shares before any documentation was drawn to evidence the transaction. That such a large sum would be paid without formal documentation seems odd to say the least. The share sale agreement and associated loan and mortgage agreements were executed on 28 February 2012, the day after the court entered interlocutory judgment against the defendant. This coincidence between the sudden divestment by the defendant of a substantial asset in which the respondents believed the defendant had an interest to parties potentially friendly to him on the day after he had judgment entered against him caused the applicant to have an understandable concern that the respondents were acting in league with the defendant.

[30] Nor have the respondents taken any steps to either recover the $395,000 paid to a non existent company for shares that the company did not own or otherwise have that transaction affirmed. These features of the dealings between the parties that I have highlighted since the orders were made hardly lessen the applicant's initial concerns.

[31] The respondents protest that they were not involved in any way with an attempt to transfer assets away from Mr Thorne in an effort to defeat his creditors. Rather they say that they had been engaged in discussions with him for some time prior to February 2012 with a view to acquiring these share interests and entered into an agreement by which they were bound to pay a very substantial amount of money for those share interests. Mr Laird swears that his learning of the fact that the defendant had become a bankrupt on about 26 March 2012, the apparent appointment of new trustees to replace Transparent Enterprises as trustee of a family trust associated with the defendant and the de-registration of Thorne Developments all caused him to become concerned about the validity and enforceability of the share sale agreement and the associated loan and mortgage agreements.

[32] The crucial issue is when Mr Laird became aware of these events and principally the de-registration of Thorne Developments. That is not sworn to.

[33] Mr Laird swears that because of the concerns that he and Mr Williamson had and have as to the validity and enforceability of these agreements, the further payment on 31 March was not made and they have no intention of making the payment due on 31 August until the status of these transactions is made clear to them.

[34] There are further complications. As I have mentioned, Thorne Developments held the shares, the subject of these transactions, on trust. That trust was a family trust associated with the defendant, but a discretionary trust. Thus the defendant's beneficial entitlement to the proceeds of sale of shares in Transparent Enterprises depends on a decision of the trustee of the family trust. There is a reference to those trustees now being the wife and brother of the defendant. They may choose not to distribute to the defendant. Thus, even if the share sale agreement remains enforceable, it is doubtful as to what impact that will have upon the assets available to the creditors of the defendant.

[35] This may explain why it is that no party has taken any step to enforce the share sale agreement. There is little point to the trustee in bankruptcy of the defendant seeking a re-instatement of Thorne Developments (which would have the effect that it is "taken to have continued in existence as if it had not been de-registered": s 601AH(5) *Corporations Act* 2001) or otherwise taking steps to enforce the agreement unless the defendant's asset position will be improved thereby. The respondents now have the shares in Transparent Enterprises registered in their name and presumably are exercising control over the assets of that company but without the inconvenience of having to pay full value for those shares. The only persons disadvantaged by the present state of affairs are the beneficiaries of the defendant's family trust. Their interests are presumably being represented by the present trustees of the family trust or the Commonwealth. I have no knowledge as to their intentions or interests in the matter.

[36] For present purposes the only finding that I can make is that I can well understand the applicant's concerns as to what was going on and as to whether the respondents were in fact endeavouring to avoid the spirit of the orders. However I am not in a position to make any findings as to the precise knowledge of the respondents at any particular time, nor as to their motivations. The obtaining of the release of the mortgages does not necessarily result in the conclusion that the respondents are endeavouring to avoid their obligations under the contracts nor can that release be seen as necessarily a furtherance of the purchase of the shares. Indeed if the share sale agreement is properly characterised as a nullity, as the applicant submitted, then the release of the mortgage was a necessary step in the unwinding of the transaction.

[37] Underlying the submissions made by the applicant are the notions that the respondents had not kept them informed as to what was going on, that the applicant had learnt only belatedly (on the 10th August 2012) of the sale of the two lots and that if the respondents were unclear as to their obligations under the orders because of any latent ambiguity then they had the right under the orders to come back to the court and have them varied.

[38] The difficulty with all these submissions it seems to me is that it is not for the respondents to take any step to further the interests of the applicant, nor to incur expense in order to advance those interests. The respondents were of course obliged to obey the orders of the court. But the sole issue, it seems to me, is whether they did or they did not comply with those orders. If there has been no breach of them,

either because of the failure of the orders to be wide enough to catch their actions or because of the originally unforseen circumstance that Thorne Developments had been de-registered and so the property vested in the Commonwealth, then that is a problem for the applicant not the respondents.

[39] At the heart of Mr Land's submission was the allegation that the release of the mortgages and the application of funds realised from the sale of the two lots were undertaken at the behest and direction of the defendant.[13] There is simply no evidence that is so. To the extent that funds realised have been paid out they have gone to discharge the first mortgage on the properties held by the Commonwealth Bank.[14]

[40] The question for me is whether, in this state of affairs, these issues should have any impact on what I consider to be the prima-facie position that the respondents, who are third parties to the dispute between the applicant and the defendant, should be protected as to their costs. I cannot see why. That the applicant had grounds for being concerned does not elevate those concerns to established breaches of the orders previously made. The obtaining of a release of mortgages in circumstances where the transactions underlying the grant of the securities might well be nullities is not a circumstance which in my view makes it unjust for the applicant to be held to its undertaking. In the absence of a breach of the orders there is no good reason to release the applicant from its undertakings and no reason why Rick Williamson Pty Ltd should not be protected.

The Failure to Provide Undertakings

[41] The remaining submissions of the applicant do not take the matter much further. The fact that undertakings were offered by the respondents a few days prior to the matter being returnable before the court does not in any way, in my view, impact on the applicant's obligation to protect the respondents for any costs that they incur as a result of the orders made against them. The onus always lies on the applicant to justify the continuation of the orders.

[42] It is common ground that the undertakings now provided, after extensive negotiation during the course of the day on which the orders were returnable, are wider than those offered a few days previously. But there is no suggestion that the applicant indicated before coming to court that it was willing to accept any undertakings from the respondents, nor were any draft undertakings advanced by the applicant as being appropriate. I was informed that the respondents learnt only at about 4:45pm on Friday 24 August that their undertakings would not be accepted and that the applicant proposed returning to the court on Monday 27 August to obtain a further extension of the orders already made.

[43] It might be said that the applicant's approach was reasonable in the sense that they have sought and obtained undertakings that protect their position. But it cannot be said that the respondent's attitude was unreasonable. They offered undertakings some days prior to the return date of the orders. After discussion and presumably appreciating what interests the applicant wanted protected they have agreed to wider undertakings. There is nothing unreasonable in that course.

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13 See para 26 of Mr Land's Outline

14 Para 21of Mr Laird's affidavit supplemented by a statement from the Bar table by Mr Barlow SC

[44] The simple fact is that if the applicant had wanted these orders extended then it was necessary that it negotiate with the respondents to see what their attitude might be. If it had wanted any extension of the orders, or undertakings that the respondents were not prepared to give, then it had to return to court and explain why that should happen. A continued requirement of any extension of the orders would have been that the respondents be protected as to costs. The respondents were plainly entitled to be heard on that application and again protected as to costs, unless, perhaps, it could be shown that their actions were unreasonable. While it might well have been worthwhile and reasonable for the applicant to have come to court and obtain the wider undertakings that is not the issue. Rather it is the reasonableness of the respondents' actions that are in question. The fact that there had been no prior requests by the applicant for the undertakings that are now proffered is strongly against the applicant's position.

[45] The respondents made further submissions concerning the appropriateness of the orders made on 29 March and 30 April. Because of the agreement reached by the parties these submissions were not explored extensively in argument. Given that, I will say no more than that the respondents had good reason to come to court to contest the continuation of the orders, that being the apparent position of the applicant at the close of business on the day before the hearing.

[46] The respondents, it seems to me, had no choice but to come to court to protect their interests. They certainly did not act unreasonably in doing so.

The Exchange of Correspondence

[47] Finally, a complaint was made about the attitudes engendered by the correspondence that passed between the solicitors.

[48] The applicant had formed the view that the respondents may not comply with the court orders at all given their interpretation of what passed between the solicitors. They may have formed that view but I cannot see that it was a reasonable view to take.

[49] Mr Telford, the solicitor for the respondents, swore that in a telephone conversation that he had with the solicitor for the applicant (Mr Kelly) on 10 August 2012 that he had made remarks to the effect "that if the transactions were not valid and contained no obligation for my clients to pay then how is it the case that my clients would ever be required to pay the monies into court." Mr Telford maintains that he advised Mr Kelly that he hadn't looked specifically at the point but that given the applicant's view that the respondents were in breach of the current orders it may be that his clients "should be looking more closely at this issue".

[50] Mr Land took me to Mr Kelly's file note of that same conversation which is exhibited to Mr Kelly's affidavit. The file note is not particularly legible but more significantly Mr Land did not highlight any particular part of the file note which he said contradicted Mr Telford's version of the conversation. The letter that Mr Kelly then wrote subsequent to the telephone conversation tends to confirm Mr Telford's recollection where Mr Kelly responds in the first numbered paragraph of the letter:

> "You say that once your clients are satisfied that there is no issue about the validity of their acquisition of the shares they will pay the share sale monies into court".

[51] There is no suggestion that the respondents have in fact paid any monies to the defendant or to any entity controlled by the defendant nor that the proceeds of sale from the two lots of land, if it be relevant, have gone to the defendant or any entity controlled by him. Rather part of the proceeds went to discharge the first mortgage on the lands (to the Commonwealth Bank of Australia who of course had priority) and the balance of the funds is still held by Mr Laird, according to his affidavit.

[52] A further difficulty for the applicant is that by their solicitor's letter of 10 August 2012 they demanded payment into court of the entire sum of $1,476,775 within seven days of the letter. Apart from the $540,888 already mentioned as due in March, those balance funds were not in fact due to be paid until 31 August 2012 under the terms of the share sale agreement.

[53] It is plain that the orders of 29 March and 30 April were predicated on the assumption that the respondents were under a legal obligation to make certain payments to Thorne Developments. It was never intended that in absence of such an obligation the respondents would be required to pay monies into court. Nor could the respondents have come under any obligation to make payments into court at an earlier date than they were obliged to make payments under their arrangements with Thorne Developments. The applicant's position was simply untenable. Plainly the applicant had no right to make the demand that it did.

[54] By the terms of that same letter of 10 August the solicitors wrote: "We hereby give notice of our client's intentions if that payment is not made our (*sic*) to pursue such orders against your clients as it sees fit including appropriate remedies for your clients' contempt of the earlier orders." Mr Barlow SC submitted that it was this demand which, more than any other factor, caused his clients to come to court. It was a demand that should not have been made.

The Indemnity Basis

[55] Mr Land opposed the order for costs being made on the indemnity basis.

[56] The pro forma order is silent, at least in terms, as to the basis upon which the costs of "anyone other than the respondent" should be assessed however the reference to the obligation on the applicant of paying "the reasonable costs" of such a person suggests that it is not to be limited by the restraints imposed on a costs assessor when assessing on the standard basis.

[57] This is exemplified by comparing the provisions of rr 702 and 703 of the rules. Rule 702 provides that "when assessing costs on a standard basis, a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed". Rule 703 applies to the indemnity basis of assessment and there a costs assessor "must allow all costs reasonably incurred and of a reasonable amount" having regard to certain matters. The reference in the pro forma order to "all reasonable costs" reflects the indemnity basis provided for in r 703 for an inter parties assessment of costs.

[58] In the usual course there seems to me to be good reason why third parties to a dispute should have their costs paid on the indemnity basis and if that is not to follow then the onus lies on the party in the position of the applicant to explain good grounds as to why it should not be so. Here I see no grounds of that type made out at all.

Conclusions

[59] In summary I conclude as follows:

(a) At the time that the orders of 29 March and 30 April were made the undertakings that should have been given in relation to costs should have protected not only Mr Laird and Mr Williamson but also any other entities potentially likely to be affected by the orders and that included Rick Williamson Investments Pty Ltd;

(b) The orders were in the form that they were in not by reason of any deliberate decision on my part nor as a result of any submission that related entities should not be protected as the pro forma orders required;

(c) The applicant has not discharged the onus on it of showing any new fact which would justify releasing it form its undertaking and specifically I am not able to make any finding that the respondents have breached the orders of the court;

(d) The respondents are third parties to the dispute between the applicant and the defendant and it is eminently fair that they be protected as to any costs that they have reasonably incurred as a result of the orders that were made affecting them;

(e) The respondents' appearance at the hearing on 27 August was both reasonable and necessary in the protection of their interests;

(f) I can see nothing in the conduct of the respondents that should result in their being deprived of the protection provided by the undertakings previously given and normally afforded to parties in their position.

The Orders

[60] The orders then, reflecting the agreement of the parties, will be as follows:

1. The orders made on 30 April 2012 and (to the extent they may subsist) 29 March 2012 be discharged.

2. The plaintiffs, within two days, pay Macrossan & Amiet the sum of $1,619.45 in respect of their invoice dated 4 May 2012.

3. The plaintiffs pay the reasonable costs, on the indemnity basis, of Graham David Laird (personally and as trustee of the Laird Family Trust), Richard John Williamson and Rick Williamson Investments Pty Ltd of and incidental to the applications and orders made on 29 March 2012 and 30 April 2012 including their costs of and incidental to the hearing of 27 August 2012.

4. The applications made on 29 March 2012, 30 April 2012 and 27 August 2012 otherwise be dismissed.