SUPREME COURT OF QUEENSLAND

CITATION:	*Milglade Pty Ltd & Anor v Harrison & Ors* [2008] QSC 359
PARTIES:	**MILGLADE PTY LTD AS TRUSTEE FOR THE CRANEFIELD TRUST (ACN 010 640 543)** (first applicant) and **DALRYMPLE HOLDINGS PTY LTD (ACN 010 043 428)** (second applicant) **v** **KENNETH OSCAR HARRISON** (first respondent) and **HARRISON GROUP INVESTMENT PTY LTD (ACN 100 361 948)** (second respondent) and **KEN HARRISON HOMES PTY LTD (ACN 060 363 966)** (third respondent) and **NAVYROSE PTY LTD (ACN 010 043 428)** (fourth respondent) and **KATHLEEN RAE HARRISON** (fifth respondent) and **GLENDRA MARGUERITA HARRISON** (sixth respondent)
FILE NO:	BS 3634 of 2004
DIVISION:	Trial Division
PROCEEDING:	Civil application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2008
JUDGE:	Chesterman J
ORDER:	**1. I will make an order in terms sought by Harrisons.** **2. The parties should submit a draft giving effect to the need to make future periodic payments to the banks and the solicitors and to provide the correct amount to make good the arrears owed to the banks.**

CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – GENERAL RULES – where application for variation of order – where order sought to be amended is due to changed financial circumstances of the applicant/respondent – whether the order was interlocutory in nature
COUNSEL:	Mr T Sullivan for the applicant/respondent Mr GI Thomson for the respondent/applicant
SOLICITORS:	Deacons for the applicant/respondent Hopgood Ganim for the respondent/applicant

[1] By an application filed on 7 March 2008 the applicants, the respondents to the action, whom I shall call 'Harrisons' seek to vary orders made by the Court on 13 July 2004 and 10 January 2005 in proceeding 6017 of 2004 to allow the applicants:

> 'To access and use funds held on trust in ANZ interest bearing deposit account no. 8370-35256 to pay their reasonable living, legal and business expenses ...'.

The respondents to the application, the applicants in the action, whom I shall call 'Milglade', oppose the variations.

[2] The first order was made by Atkinson J. It was in these terms:

> 'Upon (Milglade) ...
>
> (a) giving the usual undertakings for damages; and
>
> (b) undertaking ... by 4.00 pm on 13 July 2004 deliver ... duly executed withdrawals of caveats ... over Lot 2 on RP 198584 ... title reference 18666210 ...
>
> and upon (Harrisons) ... undertaking that:
>
> (a) by 4.00 pm on 13 July 2004 ... provide to (Milglade) a copy of the settlement statement relating to the completion of the sale of (the said land);
>
> (b) (Harrisons) will pay 50 per cent of the net proceeds of sale ... into an IBD account to be opened for that purpose jointly by the solicitors for the applicants and the respondents, such monies to be held in such account pending the hearing and determination ... of the proceedings commenced by Claim BS 11935 of 2003.
>
> By consent it is ordered:
>
> 1. The hearing of the originating application ... be adjourned ...
>
> 2. The costs be reserved.'

The land referred to in the order was for convenience described as 'Beaconsfield Street' during the argument of the application.

[3] The second order was made by a Registrar. It was in these terms:

> 'The Court orders, by consent, that:
>
> 1. That caveats ... lodged over Lot 20 on SP 145443 be removed.
>
> 2. By 4.00 pm on 13 January 2005 (Harrisons) ... provide to ... (Milglade) a copy of the settlement statement relating to the completion of the sale of Lot 20 ... .
>
> 3. (Harrisons) will pay, or cause to be paid, 50 per cent of the net proceeds of sale of Lot 20 ... into an IBD account opened for that purpose jointly by the solicitors for the first applicant and the first respondent, to be held in that account pending the determination or settlement of the proceedings commenced by Claim no. 3634/04.'

Lot 20 was described in argument as 'Aurora Place'.

[4] Harrisons have in the past carried on business as builders and property developers. For a time they, or some of them, carried on business in partnership with Milglade. Harrisons continued to carry on their business after the partnership was dissolved, though at a reduced level of activity and profitability. The reduction was said to be a consequence of a lack of capital. It has now ceased.

[5] The action is complicated but in essence Milglade seeks an account of the partnership dealings and declarations that Harrisons acted in breach of fiduciary duties to their partners. Milglade also seeks damages for fraud, or negligent misstatement of fact, equitable compensation and payment of any amount found due on the taking of the accounts. As well Milglade seeks to trace monies they allege were paid by them pursuant to and in reliance on misstatements made in breach of fiduciary duty into property subsequently acquired by Harrisons.

[6] It is this equitable claim to trace the alleged proceeds of breaches of fiduciary duty into Harrisons' properties which led to the lodging of the caveats and the compromise of the proceedings brought to remove the caveats.

[7] There were, in all, four agreements made between the parties pursuant to which Milglade removed caveats they had lodged over titles of properties owned by Harrisons who paid into a trust account established to give effect to the agreements half of the net proceeds of the sales. Two of those agreements were reflected in the consent orders I have described.

[8] The total amount paid into the trust account was $1,220,335.59. The balance of the monies presently in the account, including interest, is about $1,360,000.

[9] Harrisons seek a variation of those orders because of their changed financial circumstances. Put briefly Harrisons assert that when the agreements were made the monies to be paid into the trust account were not needed to discharge their debts, pay for their legal representation or to conduct their business and pay usual living

expenses. The years that have elapsed since the orders were made have wrought a change. The action has become far more complicated and the expense of preparing their defence to Milglade's case has increased substantially and they cannot now fund the litigation without recourse to the proceeds of the agreement. As well the Australian Tax Office has issued an assessment against one of the Harrison companies for $219,368 capital gains tax with respect to the capital gain made on the sale of Beaconsfield Street. Interest is accruing on that assessment at 14.15 per cent.

[10] Beaconsfield Street sold in July 2004 for $2,850,000. Pursuant to the undertakings and order of the Court $1,003,222 was paid into the trust account. The Aurora Place property sold in January 2005 for $900,000. One half of the net proceeds of sale $180,838 was paid into the account. The other two properties realised much smaller sums, about $36,000 paid into the trust account.

[11] The first point taken by the respondents is that the Court has no power to make the variation orders sought. The orders were made in proceedings separate from these (BS 3634/04) and were said to be final orders. The submission is that:

> 'The substantive right in issue in the proceedings was the respondents' statutory right to maintain caveats over the properties. That right was resolved by the consent orders once and for all. ... Despite the fact that the agreements were subsequently recorded in the orders, each was "a real contract between the parties". Where a consent order is a final order and expresses an agreement of the parties, it may be set aside by the Court only if there exist grounds upon which the underlying agreement can be set aside. ... There is no suggestion here that the applicants have any basis to vary or set aside the agreements which underlie the consent orders.'

[12] The authorities relied upon were *Harvey v Phillips* (1956) 95 CLR 235 and *General Creditors Ltd v Ebsworth* [1986] 2 Qd R 162. In *Harvey* the Court said (of a case involving the compromise of an action for damages) (243):

> 'But in the case of a compromise which is made within the actual as well as apparent authority of counsel a court does not appear to possess a discretion to rescind it or set it aside. The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact when disclosure is required, duress, mistake, undue influence, abuse of confidence or the like.'

[13] The authorities are undoubted but they apply to final orders. When an order is interlocutory in nature there is power to vary it. The clearest authority is *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Incorporated* (1981) 148 CLR 170 at 176-8:

> 'Considerable argument was directed to the question whether a court has power, otherwise than in the case of mistake operative at the time of giving it, to release a party from an undertaking, at least in the

> absence of the consent of the other party. But in our opinion a court undoubtedly has such a power. Just as an interlocutory injunction continues "until further order", so must an interlocutory order based on an undertaking. A court must remain in control of its interlocutory orders. A further order will be appropriate whenever, inter alia, new facts come into existence which render its enforcement unjust ...'

[14] The power of the Court to vary an interlocutory undertaking exists whether or not the undertaking was the result of an agreement between the parties, and the terms of the undertaking reflect that agreement. In *Alford v Ebbage* [2003] 1 Qd R 343 Fryberg J, with whom Wilson J agreed, said:

> 'In *Philip Morris*, the High Court held that a court has power to relieve against an interlocutory undertaking. There is no suggestion in the reasoning that the existence of this power is dependant upon or even affected by whether the undertaking was given pursuant to a contract. The nature and terms of any such contract may well affect how the discretion to grant relief is exercised, but they cannot control the existence of the power. Parties cannot deprive the Court of this jurisdiction by contract.'

[15] Wilson J said said (360):

> 'In my view the principles so expressed in *Adam P Brown* applies even where an undertaking records an antecedent agreement, or an aspect of it, as happened in this case. Insofar as *Fylis* may be authority for the contrary view, I respectfully disagree. The question whether to release the appellants from the interlocutory undertaking required the exercise of a judicial discretion.'

[16] Their Honours disagreed with the judgment of McPherson SPJ in *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593 which held that an undertaking, not expressly limited until further order, which followed the terms of an agreement between the parties could not be varied by the Court which had no power to discharge or vary the undertaking except in circumstances in which the agreement could be discharged or varied without the consent of the parties.

[17] Both Fryberg J and Wilson J expressed the opinion that the fact that the undertaking was the result of an agreement, and reflected its terms, would be of considerable weight when the Court came to exercise the power to vary an interlocutory undertaking.

[18] In my opinion the orders in question were interlocutory, and not final, in nature. They operated to secure the payment of monies into a trust account, the beneficiaries of which were the parties to the litigation 'pending the hearing and determination ... of proceedings commenced by Claim BS 11935 of 2003' in one case and 'pending the determination ... of the proceedings commenced by Claim 3634/04' in the other. To allow the payment to be made Milglade agreed to remove the caveats they had lodged so that the sales of the land could proceed.

[19] It is obvious that neither order determined the rights of any party to the monies paid into the trust account, nor whether Milglade in fact had a caveatable interest in the lands. Those issues were to be resolved by the proceedings referred to in the orders. The orders made interim arrangements for the preservation of money pending the determination of those proceedings.

[20] Senior counsel for the respondents relied in particular upon the judgment of Dunn J in *Kojak Constructions Pty Ltd* [1981] Qd R 339. In that case a summons was brought to remove a caveat lodged over a dealing with certain land. Dunn J held that an order made on such an application was final because it determined the question whether the caveator had the right to lodge a caveat. It was submitted that the orders in question here determined the substantive right of the parties to maintain caveats over the land. That right was the subject of a compromise, the terms of which were reflected in the consent orders. *Harvey* was said to apply in all its rigour.

[21] An order made on an application for the removal of caveats may be a final order in the sense that the question whether the caveats should remain or be removed is determined once and for all. The order cannot, in my opinion, be final with respect to the underlying dispute between the parties as to whether the caveator has an interest in the property. That dispute is never resolved by an application for the removal of the caveat. An order may be final in one respect and interlocutory in another. In their operation to preserve a fund, representing the disputed property, pending the resolution of the dispute, the orders were interlocutory.

[22] A caveat itself is usually regarded as a form of interim, statutory, injunction. See *Eng Mee Yong v Letchumanan* [1980] AC 331 in which Lord Diplock, speaking for the Privy Council (337):

> '... noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land ... . The Court's power to grant an interlocutory injunction ... is discretionary. It may be granted in all cases in which it appears ... to be just and convenient to do so. ... The guiding principle in granting an interlocutory injunction is the balance of convenience ...'.

[23] Proceedings for the removal of caveats have been conventionally dealt with by the application of principles applicable to the grant of interlocutory injunctions: the Court asks: (i) is there a serious question to be tried in the sense that the caveator has shown an arguable interest to be protected; (ii) does the balance of convenience favour allowing the caveat to remain or removing it? See *Re Burman's Caveat* [1994] 1 Qd R 123 in which the Court referred with approval to the 'entrenched authorities' which decided that the position of a caveator is equivalent to that of an applicant for an interlocutory injunction. The making of an order removing caveats or, dismissing an application for their removal, is indistinguishable from the grant or refusal of an interlocutory injunction. It is, in my opinion, clearly interlocutory in nature and does not give rise to a final order.

[24] It follows that the relevant authorities are *Philip Morris* and *Alford*. The Court has power to entertain the application.

[25] The action was commenced in December 2003 and has had something of a chequered history. On 26 August 2005 I made an order that it be placed on the commercial list and gave directions with respect to some outstanding interlocutory disputes, one about disclosure and another concerning the adequacy of the statement of claim. On 14 November 2005, having heard submissions, I made an order for security for costs in favour of Harrisons and gave Milglade leave to amend its statement of claim. By then the orders which Harrisons wish to vary had been made. On 6 February 2006 further directions were made to get the action ready for trial. On 16 May 2006 the plaintiff sought and was given leave to deliver its fifth amended statement of claim and a time was fixed for the delivery of an amended defence. Further orders were made by consent in February 2007, 22 March 2007 and 4 April 2007.

[26] On 13 April 2007 I listed the matter for trial for seven days commencing 13 August. In June or August, when the matter was called on, (the order sheet does not accord with my recollection) it was adjourned because I was told that Milglade wished to make further amendments to add further claims and particulars, the result of which would be that the trial would last an estimated four weeks. That length of time was not available and Harrisons were not in a position to meet the amended claims. Because of the anticipated length of the trial I made an order that it be removed from the commercial list and be transferred to the Supervised Case List. It does not seem to have got there.

[27] On 18 April 2008 the present application came before me, by chance, in the ordinary applications list. The submissions of counsel took more than half a day and could not be concluded on that day. The application was adjourned to a date to be fixed. I endeavoured to conclude the hearing on 20 May 2008 and 5 August 2008 but the dates were not suitable to one or both of the parties and the matter languished. I called it on again on 30 September 2008 to fix a date for the resumption of the hearing. 3 November 2008 was chosen.

[28] It became apparent during the argument on 18 April and 30 September 2008 that the trial should not last anything like as long as a month. It will turn on the contents of a small number of conversations between Mr Harrison and Mr Murphy on behalf of Milglade on occasions when loans were negotiated and monies advanced. Apart from this evidence the claim will depend upon an examination of transactions - the purchase, mortgaging and sale of real property by Harrisons in which the monies advanced by Milglade were engaged. This part of the case can be the subject of documentary proof which is really beyond controversy.

[29] Senior counsel for the parties agreed, on 30 September, that the trial should take no more than three to five days. Accordingly I have allocated trial dates in the second week in February 2009.

[30] Harrisons base their application on the principle that an order varying interlocutory undertakings should be made when new facts come into existence which render its enforcement unjust, relying upon *Adam P Brown* at 178. Two particular changes in circumstance are relied upon. They are the greatly increased complexity and scope of Milglade's claims and a marked deterioration in Harrisons' fortunes which means he can no longer fund his defence without access to the monies impounded by the undertakings.

[31] The action has certainly grown in complexity, if the lengthy statements of claim are the appropriate measure. There have been seven. The sixth amended statement of claim filed on 8 June 2007 runs to 172 pages. It contains 480 paragraphs. The prayer for relief extends to five pages.

[32] Given the recent realisation that the pertinent facts can be reduced to a manageable agreed narrative and that the balance of the factual dispute is concerned with only several conversations between two men the estimate of a month long trial which led to the adjournment in August last year was hasty, and the consequences, at least for Harrison, regrettable.

[33] Disclosure itself has been immense. By March 2008 more than 5,000 documents had been discovered. More recently another substantial bundle of papers has been given by Harrisons to Milglade. The former assert that the documents were not disclosable but to avoid further expensive disputation and to save time the documents were handed over. Milglade asserts that the documents were disclosable. I am in no position to resolve that difference of opinion but note that in April, before the documents were delivered, counsel for Milglade were moving to the position that an agreed narrative could be provided.

[34] One gets some idea of Milglade's claims by a review of the pleading with respect to Beaconsfield Street. The background to that particular claim is that there was a partnership between Dalrymple Holdings Pty Ltd ('Dalrymple') and Mr Harrison, the business of which was property development. Dalrymple was to provide monies to the partnership as working capital. Mr Murphy and Mr Harrison were to be the directors of Dalrymple. As a consequence of the partnership and directorship Mr Harrison came under fiduciary obligations to his partner and to the company. (It may be noted that the statement of claim takes 16 pages to get to this point).

[35] Milglade's claim with respect to the proceeds of sale of Beaconsfield Street is alleged to arise out of a request Mr Harrison made to Mr Murphy for a loan of $100,000 from Dalrymple to enable him to purchase the property. This was a purchase which stood outside the partnership's affairs. It was, and was known to be, by both Messrs Harrison and Murphy that Beaconsfield Street would be bought for the Harrisons' interests alone.

[36] Milglade's complaint is that the security given by Harrisons to secure the loan of $100,000 was not of the calibre or value which Mr Harrison represented. In essence the complaint is that the securities were of second registered mortgages, not first, and that two of the properties over which mortgages were executed had been sold by Harrisons prior to the transaction. One at least of the pleaded misrepresentations is said to arise by implication and not from anything allegedly said expressly by Mr Harrison. The failure by Mr Harrison to tell Mr Murphy of the existence of prior mortgages and of the sale of some lots is categorized as dishonest concealment. Perhaps surprisingly Milglade also relies upon alleged misrepresentation made by Mr Harrison to the National Australia Bank ('NAB') from which he borrowed most of the money to acquire Beaconsfield Street. The deceit of the bank is said to be deceit of Milglade for reasons which are not apparent on a first reading of the statement of claim.

[37] The purchase price of Beaconsfield Street was about $800,000. Only $100,000 of the price came from the loan from Dalrymple. The balance came from a loan from

NAB. Because the loan was obtained, it is alleged, by reason of Mr Harrison's misrepresentations and fraudulent concealments in breach of the fiduciary duty he owed Dalrymple as a director and Mr Murphy as a partner, Milglade claims half the value (as partner) of the property. The claim rests also on the fact that the NAB loan was secured on other property allegedly bought by Harrisons from monies borrowed in breach of duty from Dalrymple. It is common ground that the $100,000 loan was repaid on time and with agreed interest.

[38] One hesitates to criticise particularised pleadings, especially those in the realm of the *UCPR*, but this claim is pleaded over 56 paragraphs taking up 23 pages. The detail is, if necessary, close to overwhelming.

[39] There are other claims, each resting, as that one does, on alleged misrepresentations and concealments by Mr Harrison in breach of fiduciary duty, by which he obtained monies from Dalrymple. In each case though the money was obtained with Mr Murphy's agreement (induced by fraud it is said), and each advance has been repaid on time and with agreed interest, Milglade claims the properties and profits obtained by Harrisons indirectly from the advances.

[40] It should also be emphasised that Mr Harrison denies lying to Mr Murphy, or misstating the facts, or concealing relevant facts from him. The factual basis for the claims is assailed at its foundation. That dispute can only be resolved after trial at which the witnesses have testified and been cross-examined. It is impossible to make any assessment of the outcome of the trial. It is necessary and obvious to say only that Milglade has a claim, the worth of which cannot be assessed prior to trial. It is not a case of the type which one sometimes sees on interlocutory application in which there are *prima facie* indications of the justice of the plaintiff's claim.

[41] It is not self-evident that the fiduciary duties pleaded will be made out. There is no doubt that Mr Harrison was a director of Dalrymple but it is not so easy to see why he owed a fiduciary's duty as a partner to Mr Murphy, or Dalrymple, when the express basis for the loan was to enable Harrisons to engage in non-partnership activity.

[42] Counsel for Milglade relied upon *Paul A Davies (Australia) Pty Ltd v Davies* (1983) 1 NSWLR 440 and *Re O'Brien v Walker* (1981) 5 ACLR 564. These were cases in which directors of companies took the companies' money to buy properties for themselves and were held accountable for the monies taken and the property acquired with it at the suit of liquidators. The breach of fiduciary duty was obvious. It is not, I think, unarguable that in the pleaded circumstances Mr Harrison was not acting in his role of director of Dalrymple when he approached Mr Murphy to request a loan, and that the transaction was effected at arms length.

[43] The point cannot be resolved without a fuller legal argument than was available on the application and without a fuller examination of the facts. As it was the application was heard over two days, on each occasion for more than half a day.

[44] The second basis for the application is Harrisons' impecuniosity. On 14 March 2008 Mr Harrison filed an affidavit in support of the application heard in April in which he set out, *inter alia*, an account of assets, property dealings, income and financial position. He said:

> '16. When I agreed to the quarantine of 50 per cent of the proceeds of Beaconsfield Street only the original statement of claim had been filed and the allegations were ... narrow in scope. My costs to that point were approximately $25,000 and I was advised by my then lawyers that a cost to resolve the proceedings was approximately a further $60,000. I agreed to ... quarantine the other half of those proceeds of sale in the belief that I would not require those funds to fund my defence ... or to pay my day to day living and business expenses.
>
> 17. At that point in time my asset pool was sufficient to be able to meet those costs.
>
> 42. I am, by trade, a builder. I have, for the last four years during the currency of these proceedings, been largely unable to suitably conduct any business as a builder because each time either I or any entity controlled by me purchases a property to develop, the property is subject to the lodgement of a caveat by (Mildglade).
>
> 43. The effect of (Milglade's) conduct ... has been to grind my building business to a halt and leave me unable to carry on business. My companies and my family have been left without an adequate source of income.
>
> 44. Until now we have been able to survive on savings ... and through the conduct of a domestic tiles business that I ... ran until recently.
>
> 45. I now no longer have any means of income and have been living on savings. Other than the assets outlined in this affidavit I no longer have any savings to live on ...'.

[45] In cross-examination Mr Harrison conceded that the tiling business was conducted spasmodically and rather haphazardly.

[46] The matter was eventually listed for further hearing on 30 September 2008 but could not proceed on that day. In an affidavit filed in connection with the resumed hearing Mr Harrison deposed that he was without funds to pursue the litigation and that he had made a full and frank disclosure of his financial position in his earlier affidavit. He explained that he was required for cross-examination on short notice and that some of his evidence had been given without access to records. The point of that is that the focus of cross-examination was on the disposition of Mr Harrison's half share of the proceeds of the sale of the property. It will be recalled that only half was paid into the trust account pursuant to the undertakings. The premise under investigation by the cross-examiner was whether Mr Harrison had not retained a substantial portion of his share of the proceeds, about $1,000,000.

[47] The subsequent affidavit filed by Mr Harrison explained by reference to records that the money had been dissipated. The affidavit concludes:

> '86. I have sworn that I do not have access to funds to pay my lawyers for the continued defence of this action or the outstanding tax liability of Harrison Group Investments Pty Ltd to the ATO.
>
> 87. Since the filing of this application and giving evidence on 18 April 2008 I managed to sell land located on Russell Island for which I received approximately $58,000 cash in late May 2008. I have used those funds to live on and currently have approximately $20,000 of that left in my bank account.
>
> 88. As at the date of the swearing of this affidavit I have no other funds with which to pay legal, living or taxation expenses.
>
> 89. I also swear that I am not in a position in the foreseeable future, or at all, to receive funds which would enable me to pay those reasonable living, legal and taxation expenses.'

[48] A cash flow analysis which Mr Harrison prepared shows that between 4 October 2003 and 30 June 2008 the turnover of his businesses was of the order of $5,000,000 but that the 'net cash result', by which I understand him to mean the surplus of income over outgoings, was only $109,000.

[49] A fact about which there is no controversy is that Harrisons' solicitors have sworn that they have not been paid for an amount of over $200,000 for work they have performed pursuant to their retainer and will do no more to assist Harrisons with their defence unless put in funds. This is good evidence that Harrisons are without money to fund their defence. So is the fact that they have not paid monies due to two banks on mortgage accounts securing real property for the obligation to repay the loans. They are at risk of losing the properties to foreclosure or sale pursuant to the mortgagees' powers of sale.

[50] It was submitted on behalf of Milglade that Mr Harrison could conduct his former trade of house building by which to generate income. He has said that he cannot carry on the business of speculative house building as before by reason of a lack of funds. Milglade's suggestion is that he can build contract homes for homeowners. Mr Harrison deposes that he suffers such a degree of stress and anxiety from the litigation that he is unable to attend to such an occupation. I have no doubt the last few years have been very stressful for Mr Harrison. Whether or not he could build houses on contract, there is no suggestion in the evidence that he could generate sufficient income from that activity between now and early next year to pay the amounts required by his lawyers to represent him.

[51] Milglade does not accept Mr Harrison's account of his position. As I mentioned, Mr Harrison was required for cross-examination on his affidavit in April. The cross-examination went for the best part of the afternoon. Some discrepancies and inconsistencies were found between his oral testimony and that some detail of his affidavit.

[52] On 14 May 2008 Mr Harrison filed a further affidavit giving more detail of his financial position. Mr Murphy replied in an affidavit of 26 May 2008 which ran to 65 pages, 455 paragraphs and exhibited 280 pages of documents. It is, of course,

clear that Mr Murphy does not know more about Mr Harrison's financial affairs than Mr Harrison does. Mr Murphy's affidavit is argumentative, not factual, and seeks by tendention to discredit Mr Harrison's claim to a lack of funds. As I mentioned, Mr Harrison filed a further affidavit in September which sought to answer Mr Murphy's lengthy affidavit. Mr Murphy replied by filing two further affidavits again controverting Mr Harrison's testimony though without reference to any primary facts to indicate that Mr Harrison has lied about his financial position, does not need the money in the trust account, and can fund his action without it.

[53] Milglade's conduct on this application is extraordinary. One cannot of course criticise Milglade's examination, even searching examination, of the facts put forward by Harrisons to vary the undertakings and obtain money put away to abide the outcome of the litigation. The basis on which Milglade sued, I was told by its senior counsel, was that there was an assured fund of about $1.3 million from which it could recover in the event of success. If money were released from the account there would be the pursuit of an impecunious defendant, a very different prospect. Nevertheless the extent to which Mr Murphy takes issue with Mr Harrison's account of his affairs appears excessive. More to the point, no amount of investigation, cross-examination, property searches or enquiries with financial institutions (which no doubt were made or could have been made) has falsified Mr Harrison's sworn position that he is without money.

[54] In this regard it is relevant to recall some early correspondence between the parties. On 7 November 2003 Mr Porter, then Milglade's solicitor, wrote to Harrisons:

> 'We are instructed to inform Mr Harrison that if he should happen to think that our clients will be other than utterly relentless in their pursuit of him, he ought to think again. He is very well aware that they have pursued other defendants vigorously in the past until they obtained relief, even though it has sometimes taken years – in one case of fraud, 15 years.
>
> This is a case where your client has not only betrayed his trust as a business partner, cost our clients a presently inestimable amount of money in their late middle age and betrayed a friendship, but has blighted a dream.
>
> We are instructed to say that he can either co-operate and pay his dues or look forward to many years of unremitting expense and stress. Stress he alleges he endured in respect of our client's house will be as nothing to what he now faces should he continue to live in fairyland as was evidenced by his behaviour at the meeting on 7 October.'

[55] On 23 July 2004 Mr Murphy emailed Mr Harrison:

> 'I am a lawyer. While I would rather not be litigating, it doesn't stress me at all. Having entered the fight, I quite enjoy throwing the punches – it's my job.
>
> You have made another mistake I should mention.

> The senior partner of our solicitors, John Porter and ... I have been firm friends for about 30 years. Our barrister, ... QC, has been a close friend of both of us for over 40 years ... .
>
> Because of our long-standing friendship with our lawyers, we will be paying no legal costs until the end, when you will pay them anyway.
>
> In any case, the risks in this case are nowhere near equal. Our risks are only paying your costs. Your risks are paying your costs and our costs, plus everything you and your companies own; and I do mean everything.'

[56] The senior counsel named in the letter did initially appear for Milglade but has not done so for some time.

[57] Those communications are now some years old and the threats have not been repeated, at least so far as I was told. Nonetheless there is nothing to indicate that Mr Murphy's attitude has changed since that correspondence. Indeed the manner in which this application has been contested and the obsessive attempt to discredit Mr Harrison and his stated financial position make one suspect his attitude remains the same. The costs incurred on this application would have gone far towards paying for a four day trial.

[58] It is obvious that should its application fail then Harrisons will be unable to contest Milglade's claims and will lose half the proceeds of the sales of its properties. That point has not been lost upon Milglade: its counsel frankly admitted that its opposition to the application was a tactic to achieve that result.

[59] The applicable principle is usefully expressed in *United Mizrahi Bank Ltd v Doherty* [1998] 1 WLR 435 at 439:

> '... Sir Thomas Bingham MR gave a detailed judgment ... considering a first instance decision in which very careful consideration had been given to a number of questions, including ... whether a litigant should be driven from the judgment seat by not having legal representation on the one hand, or whether the funds should be expended on the other. He concluded that it was only in an exceptional case, where the merits could be gone into for the purpose of satisfying a court that the proprietary claim was so strong that it could be demonstrated that such proprietary claim was well-founded at an interlocutory stage, that a defendant should not be free to draw on enjoined funds to finance his defence. Absent the intervention of such considerations, the ordinary balancing act would apply ... in this way:
>
> > "Is there so great a risk of injustice to the defendant if he is not represented as to justify recourse to enjoined funds which may be shown to be the plaintiff's funds held by the defendant as trustee or constructive trustee?'

[60] In such cases 'a careful and anxious judgment has to be made ... as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the

possible injustice to the defendant ... if he is denied the opportunity of advancing what may ... turn out to be a successful defence.'

[61] Applying these principles, Harrisons have made out a case for a variation of the undertakings and release of funds to enable them to meet pressing commitments and to fund their defence. The relevant factors are:

(a) The strength of Milglade's case is impossible to assess. It depends upon the word of one witness against another.

(b) The monies paid into the trust account pursuant to the undertakings were, in law, Harrisons. It is only if the testimony of Mr Murphy is accepted that Milglade will have an arguable claim to a constructive trust over the funds. Even if his testimony is accepted it is not obvious that, as a matter of equitable principle, a constructive trust would be imposed.

(c) Harrisons cannot fund their defence without resort to the monies. As well they are at risk of losing their remaining properties because they have been unable to meet mortgage repayments.

(d) The conduct of the action has become far more complicated and far more expensive than it was when the undertakings were given and the funds placed under restrictions to await the outcome of the trial. This increase in complexity and cost has been due to the manner in which Milglade has conducted the action. I make no criticism of its solicitors or counsel and note that Milglade attributes some of the delays to Harrisons' failure to make prompt and proper disclosure. Nevertheless the most significant point is that this action could have been tried in August last year. It was adjourned because of a late substantial amendment giving rise to an estimate that the trial would occupy a month. It now appears as though it can be heard in less time that was allotted to it last year. Again I make no criticism of the lawyers who at the time made the assessment of the likely length of the trial but the delay and attendant additional expense is a result of Milglade's wrong assessment. It is not something which should add to the prejudice to Harrisons.

(e) There is at present more than $1.3 million in the trust account. The amount sought by Harrisons should not be much more than about $300,000, leaving a substantial fund to be fought over.

(f) There is a hint of vexation in Milglade's opposition to Harrisons' application for relief and an attempt by that tactic to deprive Harrisons of representation for a defence that may be a complete answer to Milglade's claims.

[62] Harrisons claim:

(1) An amount of $14,000.00 to bring an overdraft with NAB of $220,000 back to its limit. The debt is secured over some land owned by two

Harrisons' companies which may be sold or foreclosed upon if the account is not put back into order.

(2) $20,000.00 to bring another overdraft with the Bendigo Bank back to its limit. The facility was for $500,000 and secured over land at Redcliffe owned by Mr Harrison. It too is at risk of sale or foreclosure.

(3) $5,774.66 per month to enable the Harrisons to make monthly payments to the banks.

(4) $291,153.74 for legal costs incurred to date but unpaid, including counsel's fees.

(5) An arrangement for legal fees up to and including the trial.

[63] At the conclusion of the hearing I made an order that $21,000 be released to enable Harrisons to pay the sum to the ATO as a price for a moratorium on action by it to recover $239,726.17. That is the amount of assessment of capital gains tax on Harrison Group Investment Pty Ltd on the sale of land which Milglade claimed is held on a constructive trust, at least as to half, for it. Notwithstanding that it claims to be an equitable owner of the land in respect of which the assessment was raised Milglade adamantly refused to agree to the release of any monies to allow Harrisons to pay the assessment. When I raised the matter directly with senior counsel who appeared for Milglade in April it was said that, depending on which of the Milglade companies should be found to be the beneficial owner, the assessment may be less because of differing tax positions of companies in the group. No attempt seems to have been made to work out the minimum amount that might be payable by a Milglade company should it succeed in the action and become the owner of the land. In the meantime Mr Harrison effected a compromise with the ATO by which, for the payment of $21,000, it agreed to take no action to recover the full assessment until after the trial. Even then Milglade was reluctant to agree to a release of the modest sum required to pay the moratorium fee.

[64] Accordingly I will make an order in terms sought by Harrisons. The parties should submit a draft giving effect to the need to make future periodic payments to the banks and the solicitors and to provide the correct amount to make good the arrears owed to the banks.

[65] As the hearing of the application neared its end counsel for Milglade submitted that, in the event an order was made in favour of Harrisons, a similar provision from the fund should be paid to Milglade to assist it the prosecution of the claims. I do not understand why the submission was made. The application was made *instanter*, without notice to the Harrisons. No affidavit material had been filed in support of it. Nothing is known about Milglade's financial position or its ability to pay for its representation. The nature and timing of the application is suggestive of another tactic to diminish the chance that Harrisons will gain anything of substance from the action.

[66] The action has been set down for trial in the second week of February 2009. The parties should now devote their attention to ensuring it is ready so that their dispute can be resolved once and for all.