# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *57 Moss Rd Pty Ltd v T&M Buckley Pty Ltd t/a Shailer Constructions & Anor; 57 Moss Rd Pty Ltd v T&M Buckley Pty Ltd* [2010] QSC 278 |
| PARTIES: | **57 MOSS RD PTY LTD**<br>**(ACN 125 428 444)**<br>(Applicant)<br>v<br>**T & M BUCKLEY PTY LTD**<br>**(ACN 010 052 043)**<br>**Trading as SHAILER CONSTRUCTIONS**<br>(First Respondent)<br>and<br>**SCOTT PETTERSSON (The Adjudicator)**<br>(Second Respondent)<br><br>**and**<br><br>**57 MOSS RD PTY LTD**<br>**ABN 41 125 428 444**<br>(Plaintiff)<br>v<br>**T & M BUCKLEY PTY LTD**<br>**Trading As SHAILER CONSTRUCTIONS**<br>**ABN 66 010 052 043**<br>(Defendant) |
| FILE NO/S: | 3037 of 2010 and<br>1737 of 2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Applications |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 15 July 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 1 July 2010 |
| JUDGE: | Ann Lyons J |
| **ORDER:** | |
| CATCHWORDS: | PROCEDURE – COSTS – SECURITY FOR COSTS – where the applicant and the first respondent entered into a |

construction contract in 2008 – where work ceased in 2009 and the contract was eventually terminated – where the first respondent made a claim against the applicant in respect of the building works – where the second respondent conducted an adjudication in respect of that claim – where the applicant brought an application (Proceeding No 3037 of 2010) to have that adjudication set aside – where the applicant brought a claim for liquidated damages against the first respondent (Proceeding No 1737 of 2010) – where this application is brought by the first respondent for security for costs in Proceeding No 3037 of 2010 – where orders also sought that Proceeding No 3037 of 2010 and 1737 of 2010 be stayed – whether those orders should be made.

*Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301
*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWSC 332
*Gentry Bros Pty Ltd v Wilson Brown and Associates Pty Ltd* (1992) 10 ACLC 1394
*Harpur v Ariadne Australia Limited* [1984] 2 Qd R 523
*Kirk v Industrial Relations Commission* [2010] HCA 1
*Rosenfield Nominees Pty Ltd v Bain & Co & Ors* (1988) 14 ACLR 467
*Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254
*Toms & Ors v Fuller* [2010] QCA 73

*Building and Construction Industry Payments Act* 2004 (Qld)
*Corporations Act* 2001 (Cth)
*Trade Practices Act* 1974 (Cth)
*Uniform Civil Procedure Rules* 1999 (Qld)

COUNSEL: Jacobs M QC with Pope M for 57 Moss Rd Pty Ltd
Whitten SB for T & M Buckley Pty Ltd

SOLICITORS: Derek Geddes Lawyers for 57 Moss Rd Pty Ltd
Mills Oakley Lawyers for T & M Buckley Pty Ltd

**A LYONS J**

**Background**

[1] On 22 May 2008, 57 Moss Rd Pty Ltd (Moss) and T & M Buckley Pty Ltd, trading as Shailer Constructions, (Buckley) entered into a contract whereby Buckley undertook to construct the "Seaforth at Manly" project at Wakerley in Queensland for several million dollars. The works ceased in or about March 2009 when the superintendent suspended the works. The local authority had issued a cease work notice which was subsequently lifted in April 2009. In October 2009, the financier took over possession of the project and gave notice it intended to complete with another builder. The building contract was terminated in November 2009.

[2] Buckley applied in February 2010 for adjudication of a claim as against Moss in respect of the building works. The second respondent, Pettersson, conducted the adjudication under the *Building and Construction Industry Payments Act* 2004 (Qld). An adjudication certificate in the sum of $2,321,453.56 was obtained. That is the sum of a judgment now obtained by Buckley against Moss. No stay of that judgment has been obtained.

[3] Proceeding number 3037 of 2010 filed on 25 March 2010 is an application by Moss against Buckley and the adjudicator Pettersson, for an order that the adjudication claim be set aside and declared void. Moss is submitting essentially that an adjudicator's decision can be challenged in the Supreme Court, relying on the recent High Court decision in *Kirk v Industrial Relations Commission*[1] to argue that State legislation cannot oust the exercise of judicial review by a State Supreme Court because the Australian Constitution has an entrenched minimum provision of judicial review. That issue is currently before the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[2] and is listed for hearing on 2 August 2010. Moss anticipates that the decision in proceeding number 3037 of 2010 may involve an appeal to the Queensland Court of Appeal.

[4] Moss has also commenced proceedings against Buckley in proceeding number 1737 of 2010, which is a claim by Moss for liquidated damages pursuant to the building contract dated 22 May 2008. A critical issue is whether the suspension by the superintendent was unlawful.

[5] On 20 April in proceeding number 2795 of 2010 Christopher John Garlick (Garlick), a director of Moss made an application for an order to set aside the enforcement summons which required Garlick to produce a statement of financial circumstances. This was resisted by Garlick on the basis that the form given to assist him was non-conforming and because a receiver had taken control of Moss.

[6] On 12 May 2010, the appointment of a receiver of Moss was made at the instance of Trust Company Fiduciary Services.

[7] On 24 May 2010, in proceeding number 5356 of 2010, Buckley sought the winding up of Moss on the basis of its status as a creditor. On 9 June 2010, Buckley's application for an order winding up Moss was to be heard. The court was unable to hear full argument on the matter in the time available. On that date, Atkinson J ordered that the winding up application be heard at the same time as the adjudication claim on 26 and 27 July 2010. On 9 June 2010, further orders were also made by Atkinson J in relation to the conduct of the three proceedings numbered 3037 of 2010, 5356 of 2010 and 2795 of 2010. Those orders required that each party file and serve any other applications in those proceedings by 17 June 2010; that Moss file and serve any further affidavits and outlines of submissions by 21 June 2010; and that Buckley file and serve any further affidavits and outlines of submissions by 12 July 2010. Moss was then required to file and serve outlines of submissions in reply by 16 July 2010.

---

1 [2010] HCA 1.

2 [2010] NSWSC 332.

**This application**

[8] By an application filed on 17 June 2010, the first respondent seeks orders that in relation to proceeding number 3037 of 2010 the applicant furnish security for the first respondent's costs of and incidental to the proceeding to the conclusion of the first day of hearing in an amount of $85,503. A further amount of $54,120 is also sought as security for the proceeding number 1737 of 2010. That application was foreshadowed in the application of 12 May 2010. Orders are also sought that pending the provision of such security, both proceedings be stayed.

[9] Buckley argues that the reasons for the applications at this stage are:

(a) The evidence of the precarious finances of Moss came to light in the affidavit of the sole director and shareholder Garlick in his affidavit of 23 April 2010;

(b) There have now been numerous submissions by senior and junior counsel for Moss. The outline of submissions filed has gone from a four page outline to a 67 page document which involves complex issues of law and fact. It is clear that the matter now requires a two day trial. There are allegations of fraud and now there is a need to also engage both senior and junior counsel;

(c) The appointment of a receiver on 12 May 2010 cast doubts over the capacity of Moss to pay an adverse costs order;

(d) The lack of any evidence of a capacity as requested any letter on 10 May 2010;

(e) The lack of evidence of value of any security offered by Garlick;

(f) Moss is a $1 company but has two fixed and floating charges over its assets;

(g) Concern that in proceeding 1737 of 2010 amendments increasing the claim by $2 million and a later amendment deleting the amendment raised concerns about the increasing costs in that action.

[10] Those applications were listed for hearing in Applications on 1 July 2010. On that date extensive oral and written submissions were made by both counsel, with oral submissions occupying almost five hours of argument. Counsel for Moss also relied on the 67 page outline of submissions already filed in relation to the matters listed for hearing on 26 and 27 July 2010. Further submissions continued to be submitted by email from counsel for Moss up until 8 July 2010.

[11] The extensive nature of all of that material precluded a determination of the applications prior to the 12 July 2010 deadline for the filing of further submissions by Buckley. At 2.28 pm on 12 July 2010, solicitors for Buckley by email to my associate, with a copy to the solicitors for Moss requested an extension of the 12 July 2010 date for the submission of outlines on the basis that the outlines would not be required if the applications were successful and a stay of the proceedings was granted. All parties were advised by my associate by email at 5.00 pm on 12 July 2010 that a decision in relation to the applications was expected within the week and that in the circumstances the existing directions should be stayed and that the timetable in relation to the delivery of outlines by Buckley and reply by Moss would be revisited once the judgment was delivered. Counsel for Moss objects to that course and argues a breach of the rules of natural justice.

**The relevant rules of court in relation to an application for security for costs**

[12] Rule 671 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR):

"**671 Prerequisite for security for costs**

The court may order a plaintiff to give security for costs only if the court is satisfied--

(a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or

...

(h) the justice of the case requires the making of the order."

[13] Rule 672:

"**672 Discretionary factors for security for costs**

In deciding whether to make an order, the court may have regard to any of the following matters—

(a) the means of those standing behind the proceeding;

(b) the prospects of success or merits of the proceeding;

(c) the genuineness of the proceeding;

(d) for rule 671(a)—the impecuniosity of a corporation;

(e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;

(f) whether the plaintiff is effectively in the position of a defendant;

(g) whether an order for security for costs would be oppressive;

(h) whether an order for security for costs would stifle the proceeding;

(i) whether the proceeding involves a matter of public importance;

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding."

**Should an order for security for costs be made? Submissions by Buckley**

[14] Rule 671(a) of the UCPR and s 1335 of the *Corporations Act* 2001 (Cth) permit an order for security for costs where the plaintiff is a corporation and there is reason to believe that it will be unable to pay an adverse costs order. Moss has one single share of $1 issued to Garlick and he is also the only director. There are encumbrances against its only asset. A receiver was appointed on 12 May 2010. The underlying default triggering the appointment has not been remedied and Moss has advised that it cannot pay the judgment into court.

[15] On 12 May 2010, an offer was made in a letter from Derek Geddes, the solicitor for Moss, which was to "offer the personal signature of Mr C J Garlick as security for your client's costs in respect of the 12th to 14th May 2010".

[16] Buckley states that the undertaking offered is inadequate for a number of reasons:

1. It is not an undertaking as commonly expressed;
2. It was clear that that offer was given contingent upon Buckley not seeking an adjournment of the hearing of 14 May of the adjudication claim;
3. It was limited to the days mentioned and not any others going forward up to the date of the application it had not been repeated or revised;
4. There was no evidence of capacity to pay by Garlick.

[17] Buckley also submits that it was clear that Moss was not going to be wound up before the adjudication hearing and it was therefore necessary for it to incur all the costs associated with the several hearings in July, including both counsel. It was also clear that Garlick was not going to give a statement of financial circumstances of Moss. In his affidavit of 21 June 2010, Garlick deposes that he has no financial records of Moss, he did not complete financial statements for the 2009 and 2010 financial years and "it would be impossible to extrapolate the financial position of 57 Moss Rd" from the vast volumes of documents.

[18] Counsel for Buckley also referred to the affidavit of David Shaw sworn on 30 July 2010, which deposes that on 9 June 2010, immediately prior to the hearing of Buckley's Originating Application seeking the winding up of Moss, Moss filed and served an amended statement of claim which increased the amount claimed by $2 million. On 17 June 2010, Buckley filed and served the application which sought security for costs and to strike out certain paragraphs of the amended statement of claim. On 24 June 2010, Moss filed a further amended statement of claim which reduced the amount claimed by $2 million to $764, 534.78.

**The arguments by Moss**

[19] It is not disputed that an order for security for costs against the company itself would frustrate the trial.

[20] Moss argues that security may not be ordered where the plaintiff's impecuniosity results from the acts of the defendant.[3] The difficulty, of course, is that it is difficult to determine this issue at an interlocutory stage.

[21] Moss also relies on the principle that an order for security for costs will not be made where the result of such an order would be to stultify the proceedings and argues that on the authority of *Buckley v Bennell Design & Constructions Pty Ltd*[4], the principle which is to be applied is that it is important to achieve a balance between ensuring that there is adequate protection provided to the other party and avoiding injustice to impecunious companies by unnecessarily shutting them out or prejudicing them in the conduct of litigation. It is also clear that the prospect of stultifying proceedings can operate as a factor in favour of the court exercising its discretion in the plaintiff's favour.

[22] Moss argues that there has been delay in seeking security for costs in proceeding number 3037 of 2010, as it was made for the first time on 12 May 2010 and without prior demand, after consent orders were made by Daubney J on 14 April 2010

---

3 *Rosenfeld Nominees Pty Ltd v Bain & Co* (1988) 14 ACLR 467.

4 (1974) 1 ACLR 301 at 304.

listing the matter for trial and after $140,000 had already been spent. It is submitted that the application is made late and that the consent orders constitute a waiver of any right to employ any procedural steps to frustrate the trial. It is also argued that if any order for security for costs is made, it should be calculated prospectively and not retrospectively.

[23] Moss argues that no security should be ordered because it alleges Buckley is guilty of unconscionable conduct or conduct in breach of the *Trade Practices Act* 1974 (Cth), as it is alleged that a number of the items in the adjudication determination in favour of Buckley were obtained without disclosing that those items were not on site at the time of the decision. Counsel argues that "Prima facie it is fraud for Buckley to have had a substantial amount of these items in its possession, and capable of disposing of them, without disclosing this to the Adjudicator".[5]

[24] It is also submitted that Buckley's conduct has materially contributed to Moss's lack of liquidity.

[25] Counsel for Moss also relies on the Queensland Court of Appeal decisions in *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd*[6] and *Toms & Ors v Fuller*.[7]

[26] Counsel also submits that the application was made in the face of Mr Geddes' letter of 12 May 2010, promising that Mr Garlick would bind himself personally to Buckley's costs in respect of the application to have the adjudication determination declared void if Buckley wins. Counsel submits that the details of Mr Garlick's financial position and the financial position of Moss are set out in Mr Garlick's affidavit sworn on 30 June 2010 and that a similar offer has been made in regard to the proceedings in case number 1737 of 2010. It is argued that the offers made by Mr Garlick satisfy the requisite criteria discussed in those cases and, as a consequence, it is a further ground for dismissing the application for security of costs with costs.

**The exercise of the discretion**

[27] The court has an unfettered discretion on the question of ordering security for costs which is to be exercised after taking into account all the circumstances of the case. As has been stated on many previous occasions, the court is required to take into account the matters advanced by each side and appropriately weigh them. Given the volume of material which has been forwarded to me, I have endeavoured to do so, conscious however, that a decision needs to be made expeditiously given the allocated hearing dates of 26 and 27 July 2010 and the need to file outlines of submissions in a timely fashion prior to trial.

[28] Despite the voluminous material provided by Moss in this application, it is difficult at this point to make an accurate assessment of its prospects of success in the two proceedings. It is sufficient to say that there would appear to be an arguable case, particularly given that in proceedings number 3037 of 2010 a similar argument is shortly to be advanced in the New South Wales Court of Appeal. Counsel for Buckley concedes that there is an arguable case in those proceedings. In relation to

---

5 Submissions at 5.9.
6 [2009] QCA 254.
7 [2010] QCA 73.

the liquidated damages claim of approximately $700,000, the issue is essentially whether the suspension of Buckley was lawful and that issue cannot be determined as it is clearly premature in the proceedings to do so.

[29] Neither am I able to conclude whether Buckley's conduct has materially contributed to Moss's lack of liquidity, nor whether Garlick's lack of liquidity has been materially contributed to by Buckley given the question is whether the conduct has "materially" contributed to the lack of liquidity, not merely whether the conduct has contributed to any extent. It would seem clear, however, that Moss has already expended significant funds on the litigation to date.

[30] In relation to the issue of fraud and unconscionable conduct, the issue seems to be that the payment claim and adjudication allowed for funds for the re-usable material, and yet it remains in Buckley's possession. Buckley argues that on these facts there is no basis to draw any of the inferences sought, because there is no evidence that Buckley has been paid for the material (on the contrary, the evidence from Shaw is that it has not). Buckley submits that whilst the material remains unpaid for, it is an amount Buckley remains out of pocket for (whilst storing the material) and is entitled to claim it. Furthermore, Buckley submits that no authority is cited for the proposition that failing to respond to its letter raises the inference claimed. Buckley submits that Mr Shaw has been forced to defend his good name by his affidavit in response and that the court should not place any weight at all on the allegations of misconduct in the absence of sufficient facts. Whilst some concessions in relation to the allegations of fraud were made by counsel for Moss during the hearing, the allegations of fraud and unconscionable conduct can only really be appropriately explored at trial.

[31] It is clear that a factor which needs to be considered in light of the undertakings offered by Garlick is the question of the impecuniosity of the person who stands behind the corporate plaintiff. It is also clear that this factor is not necessarily a determining factor but a factor which, nonetheless, must be weighed up with all the other factors I am required to consider. The principles involved in a consideration of this issue were set out in *Harpur & Ors v Ariadne Australia Limited*[8] where it was said in relation to an equivalent provision (s533(1)):

> "The mischief at which the provision is aimed is obvious. An individual who conducts his business affairs by medium of a corporation without assets would otherwise be in a position to expose his opponent to a massive bill of costs without hazarding his own assets. The purpose of an order fro security is to require him, if not to come out from behind the skirts of the company, at least to bring his own assets into play. If however he is available for whatever he is worth, the object of the legislation is satisfied."

[32] Cooper J in the Federal Court decision of *Gentry Bros Pty Ltd v Wilson Brown and Associates Pty Ltd*[9] stated the principle in the following terms:

> "In the instant case once the shareholders of the applicant have agreed to accept personal liability for any judgement for costs against the applicant the statutory purpose of s 1335...is satisfied....

---

8 [1984] 2 QD R 523 at 532.

9 (1992) 10 ACLC 1394.

> Once the shareholders have been exposed to personal liability for the applicant's costs, the weight to be given to the statutory provisions is gone. Those who stand behind the applicant once they accept personal liability for the applicant's costs are in no worse position than they would be as litigants in person in the Court...."

[33] It is clear, however, that subsequent cases[10] have indicated that the fact those who stand behind an impecunious corporation are prepared to expose themselves financially is simply one of the relevant factors when exercising the discretion and not the determining factor. In *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* Muir JA stated:

> "[39] I respectfully agree with the observations of Beazley J in *KP Cable Investments* that the decisions in *Mantray* and *Gentry* do not purport to propound a principle that where the shareholders or other persons interested in the outcome of the litigation offer to be personally liable for the plaintiff's company's costs, an order fro security should not be made and the other circumstances need not be considered."

[34] Turning then to a consideration of that issue of Garlick's undertakings in the context of all the other factors which have been argued.

**The financial circumstances of Christopher Garlick**

[35] Christopher Garlick, who is a barrister, is the sole director and shareholder of Moss. He sets out his financial circumstances in some detail in his affidavit sworn 30 June 2010, the day before the hearing.

[36] Garlick states that there are two fixed and floating charges over Moss and that one of those charges was assigned to him on 2 June 2010. He also outlines the other securities which were also assigned to him on the same day. He deposes that he had lodged the various securities to be transferred to the Garlick Family Trust with ASIC and DNR and that he is required to lodge further documents before the mortgage will be registered in his name. He states he has concluded a business transaction whereby 70 per cent of the securities including the mortgage would be held by the trust and 30 per cent shall be held by "the Lee Trust by United Mortgage Fund Pty Ltd (ACN) 1448296603 as trustee, of which I am the sole director. I will give an undertaking not to transfer any of the Garlick Family Trust entitlement to the securities until the litigation is concluded and any costs order against 57 Moss Rd, are satisfied."

[37] Garlick also deposes that he and his wife have granted a mortgage over their matrimonial home for $300,000 to his solicitors, ranking behind a first mortgage of $2 million to La Trobe Financial Services and a second mortgage of $95,000 to Stevryle Finance. He exhibits a valuation dated 24 November 2009 of the matrimonial home, which indicates a market value of $3 million. He argues, therefore, that there is considerable equity in the family home. Buckley argues, however, that the valuation relied is specifically for "mortgage security reasons" and the author specifically disclaims reliance for any other reason. Buckley submits it is unsafe to rely upon this valuation because no reason has been offered why another valuation could not have been obtained since 10 May 2010, when the issue

---

[10] *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254.

was first raised. It is argued that a further valuation could have been obtained in the time which has elapsed since the matter was listed on 17 June 2010, which was a period of some two weeks.

[38] Garlick also deposes that the fixed and floating charge held by Trilogy Funds Management is not valid basically because the documents were not signed on the date alleged and which appears on the documents. Garlick also deposes that the loan balance for the amount allegedly owing by Moss is inconsistent with other documents, particularly the loan statement of September 2009.

[39] Garlick outlines that the development project consists of 72 residential dwellings of which 44 are duplex style properties and 28 are free standing. He states that they are of superior quality and closely located to Moreton Bay. He deposes that the value of the completed project as set out in a valuation dated 16 February 2009 from Landmark White was $35,742,500 and that the upper amount of the mortgage is $26,970,000.

[40] Buckley disputes the value of the asset at 16 February 2009 as $35 million and argues that it is not known whether the Landmark valuation (performed before completion of the project) would be realised on a forced sale. Buckley submits that the likelihood is that on a receiver's sale the property would not realise the valuation. Buckley also queries the amount of the mortgage debt.

[41] Buckley also submits that Garlick in his affidavit of 30 June 2010 asserts for the first time that he and his wife own a house worth $3 million, and seeks to tender loan statements from the first two mortgagees (said to be combined debt of $2,095,000) "in confidence", not having previously given it to Buckley (despite request for evidence on 10 May 2010) because of "animosity" between the two companies. Added to those debts is a mortgage to Moss' solicitors, Derek Geddes, for $300,000, making a total of $2,395,000 in debt which leaves a balance of $605,000.

[42] Buckley is also critical of the "undertakings" Garlick is willing to undertake to "subordinate" namely:

(i) Any claim he has (as trustee) over the securities (which is basically a second mortgage, for an unknown amount, other than a debt of $37,756.72 lent to him by his parents which presumably they will have first call on before he does) referred to at 2.3 of his affidavit (although there is no evidence that Moss can realise the security);

(ii) Any claim he has in respect of unpaid wages Moss owes him (although there is no evidence the debt is able to be recovered from Moss).

[43] Buckley submits that the undertakings do not take into account the fact that Garlick only owns a one half interest in the property, and there is no mention as to whether there are any unsecured debtors having an equitable interest that would result in no equity being available to satisfy an adverse costs order.

[44] At the end of the hearing of the applications, counsel for Moss stated that the undertakings given by Garlick were unconditional. It was made clear that the undertakings were not limited to the proceedings of 12-14 May 2010 and were not limited in value.

[45] In my view, given the extent of the material supplied by Garlick I consider that those undertakings indicate that Garlick has come out from behind the skirts of the company and that he has exposed his own assets. In my view, that fact has meant that in weighing up the respective argument of both parties I am ultimately persuaded that if the undertakings offered are given, an order for security for costs in both applications is not required.

[46] I consider, therefore, that there should be orders that the application for security for costs be adjourned for a further seven days, to permit the lodgement with the Registrar of the Court of an irrevocable undertaking by Christopher John Garlick in a form acceptable to the Registrar in favour of the defendant/respondent, whereby Mr Garlick undertakes to pay any costs order made against the plaintiff in proceedings numbers 3037 of 2010 and 1737 of 2010. Upon lodgement of the said guarantee, the application for security for costs will stand dismissed. The parties will have liberty to apply and cost be reserved.

[47] I will hear from counsel, however, as to the form of the order and as to costs.

[48] I will also hear from counsel as to the appropriate orders which should be made in relation to the trial scheduled for 26 and 27 July 2010 and particularly whether there should be a stay of proceeding numbers 3037 of 2010 and 1737 of 2010.