SUPREME COURT OF QUEENSLAND

CITATION:	*Heartwood Architectural Timber & Joinery Pty Ltd & Ors v Redchip Lawyers* [2009] QSC 195
PARTIES:	**HEARTWOOD ARCHITECTURAL TIMBER & JOINERY PTY LTD (ACN 125 503 5040)** (first applicant) and **BCA CODE CONSULTANTS PTY LTD (ACN 072 884 845)** (second applicant) and **DUNCAN SCOTT MAIR** (third applicant) **v** **REDCHIP LAWYERS (a firm)** (respondent)
FILE NO:	3887 of 2009
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 July 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 June 2009
JUDGE:	Applegarth J
ORDERS:	**1. The respondent pay the applicants' costs of and incidental to the application filed 4 November 2008 in Supreme Court Proceeding No 7272/08 to be assessed on an indemnity basis.** **2. The payment referred to in paragraph 1 hereof operate so as to discharge the liability of the applicants in Supreme Court Proceeding No 7272/08 to pay the costs referred to in paragraph 2 of the Order made by Applegarth J on 7 November 2008 in Supreme Court Proceeding No 7272/08.**
CATCHWORDS:	PROCEDURE – COSTS – JURISDICTION – PERSONS NOT PARTIES TO PROCEEDINGS – costs against solicitors personally for serious dereliction of duty to the Court – where an ex parte application was made for a freezing order – where the solicitor applying for the order deliberately omitted from the draft order the undertaking as to security contained in the pro forma freezing order contained

in Practice Direction 1 of 2007 – where the removal of the undertaking was not disclosed to the Court before the order was made and counsel for the applicants erroneously informed the Court that the draft order followed the form – where the order was later discharged because of the failure to disclose the removal of the undertaking – where costs order made against the applicants on an indemnity basis – where applicants are unlikely to be able to pay the costs order – whether the solicitor engaged in serious dereliction of duty – whether a costs order should be made against the solicitor's firm

PROCEDURE – where failure to comply with duty of disclosure to the Court on ex parte application for freezing order

PROCEDURE – power to make supplemental order – whether the order is a supplemental order – whether supplemental order is appropriate

Supreme Court of Queensland Act 1991 (Qld), s 118D
Uniform Civil Procedure Rules 1999 (Qld), r 260A, r 264, r 265

Akedian Co Ltd v Royal Insurance Australia Ltd [1999] 1 VR 80, applied
Bailey v Marinoff (1971) 125 CLR 529, cited
Brinks Mat Ltd v Elcombe [1988] 1 WLR 1350, cited
Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd (1993) 45 FCR 224, applied
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380, cited
De Sousa v Minister for Immigration (1993) 41 FCR 544, considered
Edwards v Edwards [1958] 2 All ER 179, applied
French v Chapple [2000] NSWSC 1240, cited
Harley v McDonald [2001] 2 AC 678, applied
Hayden v Teplitzky (1997) 74 FCR 7, cited
Ken Morgan Motors Pty Ltd v Toyota Motor Corp Australia Ltd Unreported, Supreme Court of Victoria, 23 November 1993, distinguished
Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269, cited
Levick v Commissioner of Taxation (2000) 102 FCR 155, considered
Manor Electronics Ltd v Dickson [1988] RPC 618, cited
Memory Corporation Plc v Sidhu (No 2) [2001] WLR 1443, applied
Milcap Publishing Group AB v Coranto Corp Pty Ltd (1995) 32 IPR 34, cited
Myers v Elman [1940] AC 282, applied
Orpen v Tarantello [2009] VSC 143, applied
Payabli v Armstel Shipping Corporations [1992] QB 907, cited

Port of Melbourne Authority v Anshun (1981) 147 CLR 589, distinguished
Preston Banking Co v William Allsup & Sons [1895] 1 Ch 141, cited
Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428, cited
Steindl Nominess Pty Ltd v Laghaifar [2003] 2 Qd R 683, cited
Third Chandris Shipping Corporation v Unimarine SA [1979] 1 QB 645, cited
Thomas A Edison Ltd v Bullock (1912) 15 CLR 679, cited
Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd (1988) 20 FCR 540, cited
UTSA Pty Ltd (in liq) & Ors v Ultra Tune Australia Pty Ltd & Ors (1998) 28 ACSR 444, applied
White Industries (Qld) Pty Ltd v Flower & Hart (1998) 156 ALR 169, applied

COUNSEL: P F Mylne
D R Cooper SC and L D Bowden

SOLICITORS: Griffiths Parry Lawyers
Redchip Lawyers

[1] On 30 July 2008 the respondent firm ("the firm") made an ex parte application to White J for a freezing order on behalf of their then clients Southern BN Pty Ltd, Brett Southern and Hotel Properties Ltd (who I shall refer to collectively as "Southern"). Orders were sought against the applicants in the present proceedings (who I shall refer to collectively as "Heartwood"). With a significant exception, the draft order given to White J essentially followed the form of the pro forma freezing order that is set out as an appendix to Practice Direction No 1 of 2007.[1] The pro forma freezing order includes in a Schedule undertakings that are given to the Court by an applicant. The first undertaking is:

> "The applicant undertakes to 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."

[2] The eighth undertaking contained in the pro forma freezing order is:

> "The applicant will:
>
> (a) on or before [*date*] cause an irrevocable undertaking to pay in the sum of $ to be issued by a bank with a place of business within Australia, in respect of any order the court may make pursuant to undertaking (1) above; and
>
> (b) immediately upon issue of the irrevocable undertaking, cause a copy of it to be served on the respondent."

The solicitor with the conduct of the matter on behalf of the firm deliberately omitted an undertaking in this form from the draft order that he prepared, and which were given

[1] Freezing Orders (also known as "Mareva Orders" or "Asset Preservation Orders").

to White J. The fact that it had been omitted was not brought to the attention of the Court. In fact, counsel appearing on behalf of Southern indicated that the draft orders followed the form. The solicitor who instructed him did not correct this statement. A freezing order that did not include an undertaking to provide security in respect of the undertaking to pay damages was made on 30 July 2008.

[3] On 6 August 2008 Chesterman J extended time for service of the order. The defendants were served on 14 August 2008. On 17 August 2008 Heartwood's solicitors raised in correspondence a concern about the lack of worth of the undertaking as to damages. On 18 August 2008 consent orders were made by Dutney J and the application for freezing orders was made returnable on 11 September 2008. On 11 September 2008 the Chief Justice made further orders by consent. Prior to that hearing, counsel for Heartwood raised with counsel for Southern the state of the undertakings. The applicants then gave an undertaking that Southern BN Pty Ltd would on or before 25 September 2008 cause an irrevocable undertaking to pay the sum of $150,000 to be issued by an Australian bank and that a copy of the undertaking be immediately served on the solicitors for Heartwood. The Chief Justice gave further directions about the future conduct of the matter including a direction that a statement of claim be delivered on or before 25 September 2008.

The application to discharge the freezing orders

[4] On 7 November 2008 I heard and determined in the Applications List an application by Heartwood to discharge the freezing orders that had been made. The grounds upon which the discharge was sought included:

(a) the failure to comply with Practice Direction No 1 of 2007 when the matter was before White J;

(b) the failure to comply with the order of the Chief Justice on 11 September 2008 to file and serve a statement of claim by 25 September 2008: as at 7 November 2008 a statement of claim still had not been filed and served;

(c) the failure to comply with the undertaking given to the court on 11 September 2007 in respect of the irrevocable undertaking to be issued by a bank by 25 September 2008: as at 7 November 2008 no such irrevocable undertaking had been obtained.

I granted the application on those grounds and found it unnecessary to decide the further ground argued by Heartwood concerning the alleged weakness of the case that it would remove or dissipate assets.

[5] As to ground (a), and in respect of the omission from the ex parte freezing orders obtained on 30 July 2007 of the form of undertaking that appears as paragraph 8 to Schedule A of the freezing order contained in Practice Direction No 1 of 2007 I stated:

> "The omission of that undertaking is significant. The omission was not due to oversight. The omission was deliberate because the applicant was simply not in a financial position to provide such an irrevocable authority and still has not done so.
>
> As has been pointed out by, amongst other authorities, *Cardile v LED Builders* (1999) 198 CLR 380 at 403-4, [51], a freezing order is a drastic remedy. In circumstances in which orders are sought on an ex parte basis there is an exacting duty of disclosure to the Court. That obligation requires disclosure of matters that are adverse to the

> applicant's interest and are relevant to the exercise of the Court's discretion.
>
> An obvious matter of importance to the Court is that there be orders in accordance with the usual draft orders, or there be some reason for a departure. It may be that there are good reasons why the usual undertakings are not to be given. But if a party seeking an ex parte freezing order wishes not to give the undertakings that appear in the Practice Direction, that should be brought to the attention of the Court. Unfortunately it was not and I accept that that was through no personal error on the part of counsel appearing before her Honour. However, it is unfortunate to say the least that such an important matter was not brought to the attention of the Court.
>
> A Court will discharge an order obtained ex parte where there has been relevant non-disclosure, even if that non-disclosure is inadvertent. In this case there was a deliberate decision made not to include an undertaking in terms of paragraph 8 of the usual undertakings that are required in such a case. Paragraphs 6 and 7 of the usual undertakings were not included either, but it was pointed out to her Honour that there was an intent to obtain orders in New Zealand, and in all the circumstances it is understandable that paragraphs 6 and 7 were not included even though there was not express mention before her Honour to their non-inclusion.
>
> The omission of the undertaking to provide an irrevocable authority was to the obvious financial advantage of the applicant and it provides one of a number of grounds that are asserted by the respondents in the principal proceedings as to why the orders should be set aside."

[6] As to ground (b), I noted that a substantial time had passed since 25 September 2008 and that when the matter was first before White J the delivery of a statement of claim was anticipated. I stated:

> "The reason why courts require the prompt delivery of a statement of claim is that freezing orders are not proceedings in their own right. They are called in aid of substantive proceedings and it is important that substantive proceedings are undertaken with dispatch."

[7] As to ground (c), namely the failure to cause an irrevocable undertaking to be given in accordance with the undertaking given on 11 September 2008 I stated:

> "It is not simply that the applicant failed to include that in the first order or that it still has not mustered such an irrevocable undertaking. The fact of the matter is that the applicants through their counsel gave an undertaking to provide it by the 25th of September 2008 and it's a serious thing for any party not to honour an undertaking.
>
> Due to the difficult financial circumstances in which the applicants find themselves, it was appropriate to seek an extension of time if one was to be sought before the 25th of September 2008. Instead they let matters drift. It's been said that nothing would have been gained by bringing the matter back into Court, but something was to

> be gained. That was compliance with an undertaking given to the Court."

[8] I ordered that the orders made by White J on 30 July 2008 and varied by the orders of Dutney J made on 18 August 2008 and the Chief Justice on 11 September 2008 be discharged. I declined an oral application by Southern to grant a further freezing order in circumstances in which there had not been a cross-application for their continuation, supported by material that would indicate that there was any real prospect that an irrevocable authority would be obtained. I said that I was not prepared to provide Southern with "one last chance to procure what seems to be a long-running pursuit of funds that are necessary to provide the irrevocable authority that has been sought".

[9] I concluded:

> "The relevant matter is that whatever view might be taken of the strength of the applicants' substantive claim as foreshadowed, there has been a disregard of existing Court orders for the delivery of the statement of claim, undertakings have not been met and this matter got off to a very unfortunate start when the Court's attention was not directed to the fact that an undertaking to provide an irrevocable authority was not included in the undertakings."

[10] In addition to granting an order discharging the freezing orders, I ordered Southern to pay Heartwood's costs of and incidental to the application filed 30 July, including reserved costs, to be assessed on an indemnity basis.

The present application

[11] By its amended originating application filed by leave on 15 June 2009 Heartwood seeks an order that the firm pay to it the amount of costs referred to in the costs order that I made on 7 November 2008. Heartwood seeks a further order that such payment "operate so as to discharge such liability of the applicants in proceeding 7272/08". It also seeks an order that the firm pay Heartwood's costs of and incidental to the present application to be assessed on an indemnity basis.

[12] The costs order that I made against Southern on 7 November 2008 in proceeding 7272/08 has not been satisfied and it is unlikely that it will be. Administrators were appointed to Southern BN Pty Ltd on 24 November 2008 and an order was made for it to be wound up on 23 December 2008. Communications from the liquidators of Southern BN Pty Ltd indicate that it is unlikely that any dividend will be paid to unsecured creditors. On 12 June 2009 the High Court in Auckland, New Zealand ordered that Hotel Properties Limited be liquidated. Title searches undertaken by the solicitors for Heartwood do not disclose that Mr Southern has any real property. The improbability that the costs order made by me on 7 November 2008 against Southern will be satisfied by Southern may explain the bringing of the present application.

[13] The present application seeks to invoke the Court's jurisdiction to award costs against solicitors representing parties in proceedings before it. The jurisdiction is based upon the ability of the Court to enforce duties owed by practitioners to the Court.[2] An object of the jurisdiction is to reimburse to a party to proceedings costs which that party has incurred because of the default of the practitioner. It has been said that it is a

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[2] *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169 at 229 following *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 234.

jurisdiction which is compensatory rather than punitive or disciplinary.[3] However, other judicial opinion is to the effect that the sanction imposed by a costs order is also punitive, and the Court designs its sanction for breach of a duty owed to the Court in a way that will compensate the disadvantaged litigant.[4] The jurisdiction is not to be exercised because of a "mere mistake or error of judgment".[5] It is a jurisdiction that may be exercised where there has been a serious dereliction of duty.[6]

[14] The conduct complained of is that the firm's employed solicitor:

(a) caused an ex parte application for freezing orders to be made before White J on 30 July 2008 whereby:

(i) he failed to inform or cause White J to be informed of changes made to the draft form relevant to the making of interim freezing orders ("the draft form") handed to Her Honour in the course of the application, in circumstances in which he knew that such changes had been made or caused to be made by him; and/or

(ii) he instructed counsel to inform White J that he, Mr Kake, had been through the usual undertakings in schedule A of the draft form with his client and that those usual undertakings were contained in the draft order handed to Her Honour, when the usual undertakings contained in schedule A to the draft form were not in the draft order handed to Her Honour.

(b) appeared ex parte before Chesterman J on 6 August 2008 and applied for the orders made by White J to be continued without informing His Honour of the changes which had been made to the draft form and handed to White J on 30 July 2008 as a proposed draft order in circumstances in which he knew that such changes had been made or caused to be made by him.

(c) upon instructing counsel on the return date before Dutney J on 18 August 2008, failed to inform His Honour or cause His Honour to be informed of the changes which had been made to the draft form handed to White J on 30 July 2008 in circumstances in which he knew that such changes had been made or caused to be made by him.[7]

These acts or omissions are alleged to have caused Heartwood to incur legal costs in proceeding 7272/08.

The issues

[15] The principal issues may be summarised as follows:

1. Does the firm's employed solicitor's conduct attract the jurisdiction of the Court to order costs against solicitors representing parties in proceedings before it?

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3 *White Industries (Qld) Pty Ltd v Flower & Hart* supra at 229.

4 *Harley v McDonald* [2001] 2 AC 678 at 703 [49].

5 *Myers v Elman* [1940] AC 282 at 319 per Lord Wright; see also *Re Bendeich (No 2)* (1994) 53 FCR 422 at 426–427.

6 *White Industries (Qld) Pty Ltd v Flower & Hart* (supra) at 230 and the cases cited therein. See also *Harley v McDonald* [2001] 2 AC 678 at 702–703 [48].

7 Exhibit 2: The particulars of the complaint against the firm.

2. If there is jurisdiction, should it be exercised as a matter of discretion?

3. In the circumstances of this case, can such an order be made by way of a "supplemental order"?[8]

The firm submits that the conduct complained of in this case does not attract the jurisdiction to impose costs upon the firm, and that it is now too late to seek such an order, since the order should have been sought before me on 7 November 2008.

[16] The firm advances a number of further submissions on issues of waiver, causation and quantum which I will address after considering the principal issues.

Relevant provisions

[17] Chapter 8 of the *Uniform Civil Procedure Rules* (*UCPR*) is titled "Preservation of rights and property." Part 2 of Chapter 8 contains provisions in relation to "Injunctions and similar orders". Division 2 of that Part is concerned with freezing orders. A freezing order may be made for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.[9]

[18] Rule 264 applies generally to the injunctions and similar orders governed by Chapter 8. It provides:

> **"264 Damages and undertaking as to damages**
>
> (1) Unless there is a good reason, the court must not grant a part 2 order until the trial or hearing or until a stated day without the usual undertaking as to damages having been given.
>
> (2) The usual undertaking as to damages for a part 2 order applies during an extension of the period of the order.
>
> (3) If the usual undertaking as to damages is contravened, the person in whose favour the undertaking is given may apply to the court for an order conditional on the assessment of damages.
>
> (4) If the court finds damages are sustained because of a part 2 order, the court may assess damages or give the directions it considers necessary for the assessment of damages.
>
> (5) In this rule or an order -
>
> ***usual undertaking as to damages***, for a part 2 order, means an undertaking to pay to a person (whether or not a party to the proceeding) who is affected by the order an amount the court decides should be paid for damages the person may sustain because of the order."

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[8] *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 117 ALR 253 at 253; *Akedian Co Ltd v Royal Insurance Australia Ltd* [1999] 1 VR 80 at 100; *UTSA Pty Ltd (in liq) & Ors v Ultra Tune Australia Pty Ltd & Ors* (1998) 28 ACSR 444 at 448.

[9] *Uniform Civil Procedure Rules* 1999 (Qld), r 260A.

Rule 265 provides:

> "**265 Other undertakings and security to perform undertaking**
>
> (1) The court may require an undertaking from a person approved by the court other than the applicant.
>
> (2) The court may require a person who gives an undertaking as to damages under rule 264 to make a payment into court or to give other security, including to the satisfaction of the registrar, for the performance of the undertaking.
>
> (3) In deciding whether to make a requirement under this rule, the court may consider the matters it could consider in deciding whether to order security for costs and whether it is otherwise reasonable in all the circumstances of the matter to impose the requirement."

[19] Section 118D of the *Supreme Court of Queensland Act* 1991 (Qld) provides for the making of practice directions by the Chief Justice of the Supreme Court, by the Chief Judge of the District Court and by the Chief Magistrate for their respective Courts. Section 118D(1) declares that a practice direction is not subordinate legislation. Practice Direction No 1 of 2007 relates to freezing orders and generally reflects the form of similar practice directions or practice notes in other courts. They are the product of the harmonisation of rules and practice notes amongst Australian courts.[10]

Facts

[20] On 3 June 2008 Southern BN Pty Ltd contracted to purchase a joinery business from Heartwood Architectural Timber & Joinery Pty Ltd. Part of the consideration was the transfer of two units in Auckland from Hotel Properties Ltd to BCA Code Consultants Pty Ltd ("BCA"). Mr Duncan Mair was and is a director of Heartwood Architectural Timber & Joinery Pty Ltd and BCA. The sale of the business of Southern BN Pty Ltd was on a "walk in-walk out basis". The sale settled on 24 June 2008. On 7 July 2008 Mr Brett Southern consulted a solicitor employed as a Senior Associate with the firm, Mr Kake, and gave him instructions which led Mr Kake to believe that Mr Southern or his company had a good cause of action against Mr Mair and his companies. On 7 July 2007 there was a discussion in general terms between Mr Kake and Mr Southern about a freezing order, and instructions were given to prepare an urgent brief to counsel with a view to commencing proceedings and obtaining a freezing order.

[21] Mr Kake was familiar with the contents of Practice Direction 1 of 2007 and the form of the pro forma freezing order that is set out as an appendix to it. He had some previous experience in obtaining freezing orders in Queensland prior to the introduction of Practice Direction 1 of 2007, including an application before Wylie DCJ. On that occasion no bank guarantee was provided in the matter by his client, who was the applicant for a freezing order. On another occasion in proceedings in the New South Wales Supreme Court Mr Kake instructed senior counsel and obtained a freezing order on behalf of a corporate entity that had assets apparently worth several millions of dollars. On that occasion no bank guarantee was provided by the applicant to support its undertaking as to damages. On the occasions that he obtained freezing orders (described in his affidavit as "Mareva injunctions") from courts in Queensland and

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[10] Biscoe *Freezing and Search Orders* 2nd ed, LexisNexis Butterworths, Sydney, 2008, para 1.29, 2.53.

New South Wales the court granting the orders did not require the giving of a bank guarantee to support an undertaking as to damages. Mr Kake's evidence is that on most of those occasions that he can recall, the applicant was an individual, save for one or two occasions where companies were involved. He states "In my mind this is akin to an application for security for costs where an individual is not normally required to give security".

[22] Mr Kake's understanding that an application for a freezing order and an application for security for costs are akin to each other in that way is misplaced. An application for a freezing order is not analogous to an application for security for costs against an individual. Freezing orders are governed by the principles discussed by the High Court in *Cardile v LED Builders Pty Ltd*.[11] They are in the nature of interlocutory relief and, in general, should be supported by an undertaking as to damages. The general principles which inform the exercise of the power to grant interlocutory relief inform the power to grant such orders. An applicant, including an individual applicant, may be required to support the undertaking as to damages by providing security.[12] This is why provision for such security is included in the pro forma freezing order set out in Practice Direction No 1 of 2007 and in similar example forms of order in other courts.[13]

[23] Mr Kake said that he did not regard all of the undertakings in the pro forma as "compulsory" as it is clear that the Practice Direction envisages that certain relevant paragraphs will be deleted in applicable circumstances.

[24] Mr Kake met with Mr Southern in face to face conferences prior to the hearing on 30 July. He discussed matters with him in conferences on 10, 23 and 30 July. He discussed with Mr Southern in a general way the undertakings which were required to be given by the applicants but did not obtain final confirmation of instructions until either 10 or 23 July 2008. He recalls an occasion when Mr Southern and he were in a conference room at the firm and Mr Southern said words to the following effect:

> "I am happy to give the undertaking concerning compensation but I do not want to get a bank guarantee because funds are tight at the moment and my financial situation is tight. I believe that the financial situation in my business will soon improve."

Mr Kake says that when he was taking instructions from Mr Southern, Mr Southern said words to the effect:

> "Do I have to be a party?"

to which he replied with words to the effect:

> "Yes you do because the court will want an undertaking from you as an individual and won't accept an undertaking from the companies only."

It was upon this basis that Mr Southern accepted that he had to personally become an applicant in the action.

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11 (1999) 198 CLR 380.

12 Biscoe *Freezing and Search Orders* 2nd ed, LexisNexis Butterworths, Sydney, 2008, para 6.111.

13 See, for example, Federal Court Practice Note (No 23), para 17, Appendix B undertaking (8) in Schedule A.

[25] A draft application and draft orders were prepared by Mr Kake and were amended from time to time up until 30 July 2008. Mr Kake emailed a copy of a draft application and a draft order to the Associate to White J. It has been said that it is unsatisfactory for an advocate to hand to the Court for the first time during the course of an urgent hearing a long and complex draft order which requires close reading and careful scrutiny by the Court, and that, save in the most exceptional circumstances, a draft order should be given to the judge to read before the oral hearing starts.[14] However, the volume of applications customarily dealt with by a judge in the Applications List of this Court does not often permit sufficient time for a judge to read material before an oral hearing starts. Such was the case here. The transcript of the hearing before White J on the afternoon of 30 July 2008 indicates that material was emailed to her Honour at 2.10 pm and her Honour stated at the outset of the hearing that she had not read anything other than the application. Counsel for the applicant addressed a number of matters. In due course, consideration was given to the form of order proposed. Mr Bowden of counsel informed her Honour:

> "Your Honour will note that there are the usual undertakings in Schedule A. My instructing solicitor has been through them with my client."

The reference to "the usual undertakings in Schedule A" is possibly ambiguous. It might be taken to refer to the undertakings that appear in Schedule A to the pro forma freezing order, and which are usually given in such cases. Alternatively, it might have referred to the undertakings in the draft order, which Mr Kake considered were in the form usually given. There is no evidence that Mr Bowden knew that the draft order that he handed to White J did not include paragraph 8 from the pro forma freezing order. Mr Kake does not recall having any detailed conversations with Mr Bowden on 30 July 2008. His recollection is that they discussed the matter over the telephone "in the broadest terms and the form of the order was not discussed in detail". He recalls that Mr Bowden asked words to the effect "Have the usual undertakings been given?" to which he replied "Yes". Mr Kake says that he gave that answer having regard to the matters that he refers to in his affidavit about what he regarded as the usual or standard undertakings in such a case.

[26] In his affidavit Mr Kake says that when Mr Bowden said to White J that Mr Kake had been through the undertakings in Schedule A with his client, that was correct because Mr Kake had been through those undertakings. Mr Kake was not cross-examined. In the circumstances I decline to find that Mr Kake understood Mr Bowden's reference to "the usual undertakings in Schedule A" as referring to the undertakings that appear in the pro forma freezing order.

[27] The words that I have earlier quoted that Mr Bowden said to White J were apt to convey the meaning that the undertakings appearing in the draft order were the same as those appearing in Schedule A to the pro forma freezing order. However, in circumstances in which he was not cross-examined on the point, I am not prepared to reject Mr Kake's evidence about the undertakings to which he understood Mr Bowden to be referring. He is entitled to the benefit of any doubt.[15] It is possible that Mr Kake understood Mr Bowden's reference to "the usual undertakings in Schedule A" as a reference to what he understood in practice were the usual undertakings, rather than the undertakings that are contained in Schedule A to the pro forma freezing order.

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14 *Memory Corporation Plc v Sidhu (No 2)* [2001] WLR 1443 at 1460.

15 *Steindl Nominess Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at 692.

[28] It is unfortunate that Mr Bowden was not alerted by Mr Kake to the deliberate omission of undertaking 8, and that Mr Bowden did not independently compare the undertakings being offered with those contained in the pro forma freezing order. In *Memory Corporation Plc v Sidhu (No 2)*[16] Mummery LJ stated:

> "Applications of this kind should never be treated by the advocate and those instructing him as involving routine pieces of paper work containing common form orders to be printed out from a computer and rubber stamped by the court. The urgency of the application and the absence of the other side necessarily mean that the court is even more reliant than it normally is on the scrupulous and meticulous assistance of the advocate in deciding whether or not to make extreme orders of this kind in the circumstances of the particular case."

[29] After Mr Bowden told White J that Mr Kake had been through "the usual undertakings in Schedule A" with his client, her Honour discussed unrelated matters concerning mortgagees and assets in New Zealand which were said to be unencumbered. The following exchange then occurred:

> "Her Honour: Alright, well, there is rather more than is needed in these draft orders but it follows the form.
>
> Mr Bowden: Yes, your Honour."

The draft orders did not follow the form. Mr Kake knew that they did not. In particular, he knew that paragraph 8 of the undertakings had been omitted. Mr Kake states in his affidavit:

> "Also I recall her Honour saying to Mr Bowden words to the effect that the draft orders 'follows the form'. Again I thought that that answer was correct. Had her Honour inquired of Mr Bowden whether or not the draft orders including the undertakings were exactly in accordance with the forms in the Practice Direction then I would have immediately instructed Mr Bowden to advise her Honour that that was not so."

It was not for her Honour to ask whether or not the draft orders including the undertakings were "exactly" in accordance with the forms in the Practice Direction. Her Honour effectively sought confirmation that the draft orders followed the form and was told by counsel that they did. The omission to include the undertaking in relation to security was not an inconsequential matter. It had not been included, on instructions, because Mr Southern said that he did not want to get a bank guarantee because his financial situation was tight. The omission of a provision in relation to security for the undertaking as to damages was a matter of potential significance, especially upon an ex parte application. Mr Kake permitted the Court to make the order that it did on the basis that the draft order followed the form in the Practice Direction, when it did not do so in a material respect. Mr Kake knew that it did not include the relevant undertaking and, by remaining silent, failed to inform White J of a matter relevant to the making of the freezing order.

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[16] Supra at 1460.

Duty of disclosure in obtaining ex parte orders

[30] An applicant for an ex parte order has a duty to make full disclosure of material facts which are known to it.[17] In *Thomas A Edison Ltd v Bullock*[18] Isaacs J stated that when:

> ...the Court is asked to disregard the usual requirement of hearing the other side, the party moving incurs a most serious responsibility... [I]t is the duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is of no excuse for him to say that he was not aware of their importance. *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail."

The duty of disclosure on an ex parte application has been the subject of consideration in numerous cases since Isaacs J made this important statement of principle. I adopt, with respect, the recent summary of relevant principles given by Beach J in *Orpen v Tarantello*:[19]

> "(a) First, the duty owed by a plaintiff seeking an ex parte order is to place before the court all material facts and matters.
>
> (b) Secondly, the duty is an absolute one, owed to the court.
>
> (c) Thirdly, the disclosure of all material facts must be both full and fair.
>
> (d) Fourthly, it is no excuse for a plaintiff to say he was not aware of the importance of a particular material fact.
>
> (e) Fifthly, a party fails in this obligation 'unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application'.
>
> (f) Sixthly, materiality is to be decided by the court, and not by the assessment of the plaintiff or his legal advisers.
>
> (g) Seventhly, a plaintiff must disclose any defence he has reason to anticipate may be advanced. A high standard of candour and responsibility is required of those who seek ex parte orders."

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17 In the present context it is unnecessary to consider the duty to disclose on an ex parte application material facts that would have been known if the applicant had made proper inquiries: *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356–1357; *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 at 1301 [180]; Biscoe *Freezing and Search Orders* 2nd ed, LexisNexis Butterworths, Sydney, 2008, para 6.127–6.139. In *Hayden v Teplitzky* (1997) 74 FCR 7 at 12 Lindgren J held that the obligation incumbent upon an applicant for ex parte relief does not extend to disclosure of material facts of which he or she had no knowledge.

18 (1912) 15 CLR 679 at 681–682.

19 [2009] VSC 143 at [27] (citations omitted).

[31] The gravity of a failure to observe the duty of disclosure is significant in the case of freezing orders. As Hobhouse J held in *Payabli v Armstel Shipping Corporations*:[20]

> "There is a duty of disclosure on all ex parte applications but the extent of the duty and gravity of any lack of frankness will depend in any given case on the character of the application. At one end of the scale there are... Mareva injunctions where the consequences of the order may be unpredictable and irremediable and very possibly most serious for the proposed defendant: there the very fullest disclosure must be made so as to ensure as far as possible that no injustice is done to the defendant."

The "high duty to make full, fair and accurate disclosure of material information" to the court and to draw that court's attention to significant factual, legal and procedural aspects of the case has been emphasised in later cases.[21] In *Hayden v Teplitzky*[22] Lindgren J ruled:

> "An applicant's obligation is to disclose that which, being known, is objectively material to the exercise of the discretion, whether materiality is known or not."

This is reflected in the principle that I have previously quoted that "materiality is to be decided by the Court, and not by the assessment of the plaintiff or his legal advisers".[23]

[32] A material fact does not have to be such as would have caused the application to be refused.[24] In *Siporex Trade SA v Comdel Commodities Ltd* Bingham J stated that an applicant must disclose:[25]

> "all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full inquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure."

An ex parte order that is obtained in breach of the duty of disclosure is liable to be discharged without a hearing on the merits. The respondent is prima facie entitled to its discharge.[26] An applicant can apply for a new order. In that regard, some courts have adopted a less severe approach than others.[27] The rationale for the necessity to discharge an order made in the absence of full disclosure was stated in *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd*:[28]

> "The rationale behind the principle is clear; it is of the utmost importance in the due administration of law that the Courts and the

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20 [1992] QB 907 at 918.

21 *Memory Corporation Plc v Sidhu (No 2)* supra at 1460.

22 Supra at 12.

23 This principle was expressed by Lawrence Collins J in *Konamaneni v Rolls Royce Industrial Power (India) Ltd* supra at 1301 [180].

24 *Milcap Publishing Group AB v Coranto Corp Pty Ltd* (1995) 32 IPR 34 at 36.

25 [1986] 2 Lloyd's Rep 428 at 437.

26 *Garrard v Email Furniture Ltd* (1993) 32 NSWLR 662 at 678.

27 See *Re South Downs Packers Pty Ltd* [1984] 2 Qd R 559 at 567; *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers* [2003] 1 Qd R 683 at 694–695; cf *Hayden v Teplitzky* (supra).

28 (1988) 20 FCR 540 at 543 (citations omitted).

> public are able to have confidence that an ex parte order has been made only after the party obtaining it has complied with its duty to disclose all relevant facts.
>
> The principle applies to an application to discharge or dissolve an ex parte interim injunction; the discharge of that injunction does not prevent a fresh application being heard and determined in the light of all relevant facts."

Accordingly, an aggrieved party which applies to discharge an ex parte injunction that was obtained without full disclosure is prima facie entitled to have the injunction discharged even if the Court takes the view that the order would probably have been made even if there had been full disclosure. The merits of the applicant's case for a freezing order may be relevant to the discretion to grant a new order.

Aspects of non-disclosure in the present case

[33] In this matter two related aspects require consideration. The first is the failure to disclose the fact that the applicants did not want to obtain a bank guarantee because Southern's financial position was "tight". The second is the omission to inform the Court that the form of order placed before it did not include an undertaking in the form of paragraph 8 of the pro forma freezing order and that, contrary to the statement made by Mr Bowden, the draft orders did not "follow the form". The focus of the application for a costs order against the firm is on the second aspect.[29] It might be said that the failure to disclose the fact that the draft orders did not "follow the form" and omitted an undertaking to provide security to support the undertaking as to damages was because such a disclosure would have prompted consideration by the Court about the reason why no undertaking to provide security was being offered. That, in turn, would have opened up the issue of Southern's financial capacity to meet the undertaking as to damages.

[34] Upon the hearing before me counsel for Heartwood submitted that Mr Kake made a conscious decision not to inform the Court of the deliberate excision of paragraph 8. He further submitted that there was a deliberate, conscious decision to not cause the Court to be informed of Southern's financial position. As to the first matter, I am prepared to find that Mr Kake made a conscious decision not to inform the Court that paragraph 8 of the undertakings had been deliberately omitted and that, as a consequence, the draft orders did not follow the form of the pro forma freezing order. Although an available inference is that he chose not to inform the Court of this matter because he did not wish the tight financial position of Southern to become an issue at the hearing, I am not prepared to make such a finding. The matter was not put to Mr Kake in cross-examination and I am not prepared to make such a serious finding in circumstances in which the matter was not put to him.

[35] There is no dispute that Mr Kake failed to inform White J, or cause White J to be informed, of the fact that the draft orders did not follow the form in the pro forma freezing orders and that he had made changes to the pro forma form by omitting the undertaking as to security contained in paragraph 8. The issue is whether his failure to disclose that the draft orders did not contain the undertakings contained in Schedule A to the pro forma freezing order constitutes a serious dereliction of duty. This requires consideration of why provision is included in the pro forma freezing order for an

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[29] See Exhibit 2: The particulars of the complaint against the firm.

undertaking as to security, and why, in the absence of such an undertaking, Southern's ability to meet its undertaking as to damages was a material matter.

[36] An applicant's ability to meet its undertaking as to damages is a material matter. A failure to disclose financial information which casts doubt on the applicant's ability to meet its undertaking as to damages is a material non-disclosure which will lead to the discharge of an ex parte order.[30] Such financial information is relevant to whether the Court should accept an undertaking as to damages in the absence of security.[31]

[37] Whilst there is a duty to disclose financial information which casts doubt on the applicant's ability to meet its undertaking as to damages, an applicant seeking an ex parte freezing order may not invariably be required to disclose information concerning its ability to honour an undertaking as to damages. In *French v Chapple* Hodgson CJ in Eq observed:[32]

> "There might, in my opinion, be cases where a plaintiff seeking ex parte relief, or even defended interlocutory relief, should as a matter of candour disclose problems about the plaintiff's ability to honour an undertaking as to damages. However, I do not believe that this is something that needs to be done generally, and I am not satisfied that this is a case where disclosure by this plaintiff of his financial position was required as a matter of candour. It is true that the plaintiff has very substantial liabilities, and it is true that there is not satisfactory evidence as to the value of the plaintiff's assets, but the material presently available suggests that those assets are substantial and are significantly in excess of liabilities."

In many cases, for instance those in which substantial public companies are applicants, no issue will arise concerning the worth of the applicant's undertaking as to damages, and in such cases the omission of an undertaking to provide security can easily be justified. If, however, information casts doubt on the applicant's ability to meet its undertaking as to damages then disclosure of that information would be required and a failure to disclose it would be a material non-disclosure.[33] In such a case a judge may conclude that the respondent should not have to bear the risk of not being compensated by the undertaking as to damages and that the applicant should provide security to support that undertaking.

[38] In some cases disclosure of financial information about the applicant's ability to meet its undertaking as to damages may generate potentially protracted disputes concerning the value of the undertaking. Against this background, the provision in paragraph 8 of Schedule A to the pro forma freezing order for an undertaking as to security might be seen as obviating inquiry into, and contests over, the applicant's financial capacity to meet its undertaking as to damages, or the financial capacity of those who may proffer a personal undertaking in addition to, or in lieu of, the applicant's undertaking as to damages.

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30 *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 623.

31 *Long v Specifier Publications Pty Ltd* (1988) 44 NSWLR 545 at 553; *Third Chandris Shipping Corporation v Unimarine SA* [1979] 1 QB 645 at 669; *Lock International Plc v Beswick* [1989] 1 WLR 1268 at 1278–1279; Biscoe *Freezing and Search Orders* 2nd ed, LexisNexis Butterworths, Sydney, 2008, para 6.153.

32 [2000] NSWSC 1240 at [4].

33 *Lock International Plc v Beswick* [1989] 1 WLR 1268 at 1279.

[39] Security is not required as a matter of course by the *Uniform Civil Procedure Rules*.[34] It is not required in express terms by the Practice Direction. However, the pro forma freezing order attached to the Practice Direction contemplates the giving of an undertaking to provide security to support the undertaking as to damages. The provision of such security cannot be regarded as inconsequential or not material to the decision of the Court to grant a freezing order.[35]

[40] It has been observed that security of the kind provided for in the form of an undertaking contained in the practice direction, which requires an irrevocable undertaking to pay a nominated amount to be issued by a bank with a place of business within Australia, reflects the earlier practice.[36]

[41] In summary, the worth of Southern's undertaking as to damages and the provision or absence of security in the form contemplated by the Practice Direction were material to the exercise of the Court's discretion to grant the orders sought by Southern. Neither the rules nor the Practice Direction made provision of such security compulsory. However, the provision or absence of such security was a material matter and the firm had a duty to draw to the Court's attention the deliberate omission from the form contained in the pro forma freezing order of an undertaking in relation to security. The non-disclosure of that deliberate omission was a matter which prima facie entitled Heartwood to an order discharging the freezing order.

[42] I accept that Mr Kake did not have a proper understanding of the importance of the undertaking as to security. This explains, but does not excuse, his failure to disclose to Mr Bowden prior to the hearing his deliberate omission of the undertaking from the draft orders. However, the matter did not end there. The first exchange between White J and Mr Bowden that I have quoted drew attention to the undertakings and it would have been appropriate at that point for Mr Kake to have Mr Bowden inform the Court that the undertakings in Schedule A which Mr Bowden told her Honour that Mr Kake had been through with his client did not include an undertaking as to security. Mr Kake's obligation to inform the Court of this matter was placed beyond doubt when Mr Bowden assured White J that the draft orders followed the form. They did not follow the form. Mr Kake knew that they did not. His failure to inform the Court of these matters is not excused by the fact that her Honour did not ask whether the draft order exactly followed the form. Mr Kake permitted the Court to proceed on the basis that the draft orders were not materially different from the pro forma freezing order. I consider that his failure to inform or cause White J to be informed of the changes that had been made to paragraph 8 of the pro forma freezing order in the draft orders provided to the Court amounted to a serious dereliction of duty.

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[34] See UCPR r 265 quoted above.

[35] The provision of security is addressed in the Federal Court Practice Note (No 23) at [17]:

> "If it is demonstrated that the applicant has or may have insufficient assets within the jurisdiction of the Court to provide substance for the usual undertaking as to damages, the applicant may be required to support the undertaking by providing security. There is provision for such security in the example form of freezing order."

Paragraph 19 of the same Federal Court Practice Note addresses the obligation of an applicant for an ex parte freezing order to make full and frank disclosure of information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages. It states:

> "An applicant for an ex parte freezing order is under a duty to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia."

[36] Biscoe *Freezing and Search Orders* 2nd ed, LexisNexis Butterworths, Sydney, 2008, para 6.112.

[43] The omission of the undertaking as to security was not the subject of disclosure to Chesterman J on 6 August 2008 when the matter came before the Court on an ex parte basis for an extension of time within which to serve the orders. Mr Kake's explanation for the non-disclosure before Chesterman J is that he believed that the freezing order made by White J had been properly made. In the absence of cross-examination I am prepared to accept this evidence. I find that Mr Kake's state of mind when the matter came before Chesterman J and before Dutney J was the same as when the matter was before White J. Mr Kake regarded it as acceptable, based upon his past experience, to include undertakings in the form contained in the draft order that omitted provision for security provided that Mr Southern personally gave an undertaking as to damages. This attitude was misconceived. Just as White J should have been told that there was no provision as to security and that the undertakings deliberately omitted undertaking 8 in the pro forma freezing order, the same disclosure should have been made to Chesterman J.

[44] I decline to find that Mr Kake engaged in "serious misconduct" in failing to inform Chesterman J of the omission of the undertaking as to security. Instead, I find that the omission should have been disclosed to Chesterman J for the same reason it should have been disclosed to White J and that the failure to do so constituted a serious dereliction in the duty imposed upon a legal representative applying for an ex parte order.

[45] Heartwood were represented by solicitors and counsel before Dutney J on 18 August 2008. In a letter dated 17 August to the firm, Heartwood's solicitors referred to the absence of evidence about the capacity of Southern to satisfy the undertaking as to damages, and the need for the Court to be satisfied that undertakings as to damages had substance. Heartwood's lawyers either failed to appreciate that the undertaking as to security had been omitted or did not raise specifically the absence of security at that stage. The matter was raised by Mr Mylne of counsel when he came into the matter prior to the hearing before the Chief Justice.

[46] The hearing before Dutney J was not ex parte and different considerations apply. The worth of the undertakings as to damages was a live issue prior to that hearing. Heartwood were served on or about 14 August 2008, and were not to know at that stage what, if anything, had been said to the Court on 30 July and 6 August 2008 about the worth of the undertaking as to damages or the provision of security in support of it. The apparent lack of worth of the undertaking as to damages was not raised by Heartwood's lawyers when the matter came before Dutney J on 18 August. Although the firm might have drawn the Court's attention to the omission of an undertaking as to security, in circumstances in which the worth of the undertaking as to damages was a live issue, and the parties consented to an order extending the freezing order to 11 September 2008, I do not find that Mr Kake engaged in misconduct or a serious dereliction of duty in failing to inform Dutney J of the omission of the undertaking as to security.

[47] In summary, I conclude that Mr Kake's failure to inform or cause White J to be informed of the changes that he had made to the pro forma freezing order by omitting the undertaking as to security was a serious dereliction of duty in circumstances in which the counsel who Mr Kake instructed told White J that the draft orders followed the form. They did not follow the form in a material respect. Mr Kake knew that they did not. His obligation of disclosure arose on an ex parte application. The applicant for such an ex parte order and their lawyers were required to supply "the place of the

absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application".[37] One material fact was the worth of the undertaking as to damages and the absence of security in support of it. I conclude that Mr Kake made a conscious decision not to inform White J of the deliberate omission of paragraph 8 in circumstances in which the Court was assured by Mr Bowden that the draft orders followed the form. Mr Kake's explanation for not making the appropriate disclosure at that stage of the proceedings is unsatisfactory. His failure to inform or cause White J to be informed of the deliberate omission of paragraph 8 was a serious dereliction of duty. Such conduct attracts the jurisdiction of the Court to order costs against the firm.

The discretion to exercise the jurisdiction

[48] In *Myers v Elman* Viscount Maugham stated that the jurisdiction to order a solicitor to pay the costs of court proceedings is enlivened when the solicitor engages in a "serious dereliction of their duty" to the Court.[38] In *Edwards v Edwards* Sachs J considered *Myers v Elman* and Viscount Maugham's observations and continued:[39]

> "Once a sufficient degree of dereliction of duty is established the exercise of the jurisdiction is, as counsel for the wife's solicitors submitted in the course of his most helpful address, a matter of discretion. I accept that view. I also agree with his submission that the jurisdiction is one to be exercised sparingly and that the court can to some extent bear in mind the repercussions of making an order. On the other hand, that cannot affect the duty of the court to protect litigants from being improperly damnified. Suffice it to say that any application made to the court in relation to this jurisdiction is naturally one which causes anxious scrutiny in all the circumstances."

The proposition that the exercise of the jurisdiction should be carefully considered has been followed in later cases.[40]

[49] The originating application filed on 14 April 2009 in the current proceedings sought an order that the firm pay the costs of and incidental to the originating application filed in Supreme Court Proceeding No 7272/08 insofar as those costs are attributable to the application for a freezing order, on an indemnity basis. On 7 November 2008 I ordered that the freezing orders granted by White J on 30 July 2008 and varied by the orders of Dutney J on 18 August 2008 and the Chief Justice on 11 September 2008 be discharged. I ordered that Southern pay Heartwood's costs of and incidental to the application filed 30 July 2008, including reserved costs, on an indemnity basis. The amended originating application seeks an order that the firm pay to Heartwood those costs. I do not consider that such an order is appropriate. Instead, I consider that an

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37 *Thomas A Edison Ltd v Bullock* supra at 682.

38 [1940] AC 282 at 292.

39 [1958] 2 All ER 179 at 186–187.

40 In *De Sousa v Minister for Immigration* (1993) 41 FCR 544 at 548, French J (as his Honour then was) applied the 'serious dereliction of duty' standard from *Edwards v Edwards*. The Full Court of the Federal Court held in *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166 [44] that there must be something akin to an abuse of process to grant costs against a non-party. In that case, costs were awarded where the solicitor's arguments had no prospect of success, and were submitted to the Court without urging from the client: *Levick* at 166 [44]. Costs in such cases were said to be given sparingly and with great caution: *Levick* at 167 [50]; see also *Re Bendeich (No. 2)* (1994) 53 FCR 422 at 426.

appropriate exercise of the jurisdiction which I have found exists in this case is for the firm to pay the costs of and incidental to the application to set aside the freezing orders.

[50] The costs order that I made on 7 November 2008 against Southern is likely to be empty. Substantial injustice would be caused to Heartwood in not being able to recover the costs which it incurred in setting aside freezing orders which were set aside by reason of non-disclosure in the circumstances that I have described. I set aside the freezing orders for additional reasons. However, the failure to disclose material facts to White J in itself justified an order discharging the freezing orders made by her Honour. Heartwood will be seriously prejudiced if it is unable to recover the costs that I ordered to be paid. As Sachs J stated in *Edwards v Edwards* it is the duty of the Court to protect litigants from being improperly damnified. Heartwood incurred the costs of applying to set aside the freezing orders because of the serious default of Mr Kake for which the firm is responsible. The proper exercise of the jurisdiction entitles it to be reimbursed these costs.

Is it now too late to seek such an order?

[51] The firm submits that it is now too late for Heartwood to make this application since the question of costs was before the Court on 7 November 2008, no application for costs against it was made at that stage and the matter is *res judicata*. It relies upon the principle of finality in litigation.

[52] Heartwood, in reliance upon the decision of the Full Court of the Federal Court in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd*, submits that the form of order sought is a "supplemental order" and that it does not vary or alter the existing order that I made on 7 November 2008. It submits that the principle of finality in litigation is not infringed because the issues involved in the present claim against the firm for costs have not been determined and remain to be resolved.[41] Further, and in the alternative, it submits that a supplemental order should be made because of circumstances that have arisen since 7 November 2008. It points to evidence that has emerged concerning the impecuniosity of Southern, and the evidence which has emerged concerning the conduct of Mr Kake including his instructions concerning the undertaking as to security.

[53] The circumstances in which a court may vary or alter an order are severely circumscribed.[42] In *Bailey v Marinoff* Menzies J stated:[43]

> "However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend the making of orders in litigation that has been brought regularly to an end."

Heartwood contends that it does not seek to vary or alter the costs order made by me on 7 November 2008, and that, instead, it seeks what has been described in the authorities as a "supplemental order". In the *Caboolture Park Shopping Centre* case the Full Court of the Federal Court stated in respect of the jurisdiction of the Court to make a supplemental order in an appropriate case:[44]

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41 *Caboolture Park Shopping Centre* supra at 235.

42 Heartwood notes that there is no power under the *UCPR* which permits the variation, setting aside or change to the order and that r 667 and r 668 do not apply in the present circumstances.

43 (1971) 125 CLR 529 at 531–532.

44 Supra at 235.

> "Critical to the jurisdiction of the court is first that the application need not be one in any way to vary or alter the initial order. The present application does not seek to do this. It is, in the sense used in the cases, a supplemental order."

In that case, White Industries sought a costs order against a firm of solicitors that the firm pay White Industries' costs on an indemnity basis and that payment by the firm of solicitors operate to discharge the liability of Caboolture. The Full Court of the Federal Court stated that the order, so framed, made it clear that the Court had no need in any way to vary or alter any order previously made by it.[45]

[54] The position is otherwise where the issue of costs against non-parties has already been determined, and this is the basis upon which Byrne J in *Akedian Co Ltd v Royal Insurance Australia Ltd*[46] distinguished the judgment of Hayne J in *Ken Morgan Motors Pty Ltd v Toyota Motor Corp Australia Ltd.*[47] Byrne J applied the *Caboolture Park Shopping Centre* case in proceedings in which final orders had been earlier made including an order requiring an insurance broker to pay the plaintiff's costs to the proceedings. His Honour held that there was jurisdiction to make a costs order against the professional indemnity insurer of the insurance broker because the orders sought were "truly supplemental" and did not affect the legal impact of the judgment previously pronounced. The same approach was adopted by Chernov J in *UTSA Pty Ltd (in liq) & Ors v Ultra Tune Australia Pty Ltd & Ors*.[48] Because Chernov J had not considered the question of whether costs should be ordered against non-parties there was to be no "re-agitation of issues" that the parties to a judgment had believed to be at an end, and the *Ken Morgan* case could be distinguished. The same point of distinction arises in the present case. I have not previously considered the question of whether costs should be ordered against non-parties.

[55] To the extent that there is a conflict between the views expressed in the *Ken Morgan* case and the *Caboolture Park Shopping Centre* case and the authorities that have followed it, the firm submits that I ought to prefer the views expressed in the *Ken Morgan* case. However, I respectfully prefer the views of the Full Court of the Federal Court and the views of Byrne J and Chernov J in the Supreme Court of Victoria. In the *Caboolture Park Shopping Centre* case the Full Court of the Federal Court stated:

> "The principle behind denying the right of a court to vary or alter a judgment regularly given and entered is the need for finality of litigation. The court has adjudicated upon the facts of the claim brought by a plaintiff against a defendant, found for one side and entered the relevant judgment. Neither the facts nor the law are to be agitated again, save on an appeal. But the issues involved where a claim is made against a solicitor for costs by a party to the litigation have not been determined by the judgment which has been entered. They remain yet to be resolved."[49]

In this matter no application is made to vary or alter the costs order made by me on 7 November 2008. The order sought in the present application is framed so that the payment of costs by the firm would operate so as to discharge the liability of the

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45 Ibid.
46 [1999] 1 VR 80 at 100.
47 Unreported, Supreme Court of Victoria, 23 November 1993.
48 Supra at 446.
49 Supra at 235–236.

applicants in proceeding 7272/08. I have not previously determined the question of whether any costs in proceeding no 7272/08 should be ordered against non-parties. Although the matter of non-disclosure to White J was considered by me on 7 November 2008 and was critical to my determination that the freezing orders should be discharged, an order for costs was sought only against Southern. The reasons for that non-disclosure, the instructions given by Southern to the firm, Mr Kake's understanding of the significance of the omission of the undertaking and his instructions to Mr Bowden were not in evidence or in issue, and my determination of issues on 7 November 2008 did not involve the determination of whether it was appropriate to make an order for costs against any party other than the applicants in proceeding 7272/08. I did not consider on 7 November 2008 whether costs should be ordered against the firm and, therefore, the present application does not involve a re-agitation of issues previously determined by me. Since the present application does not seek to re-agitate issues previously argued, or to vary or alter orders previously made in proceeding 7272/08, it does not affect the principle of finality in litigation.

[56] The firm further submits that the case falls within the principles enunciated in *Port of Melbourne Authority v Anshun*.[50] This written submission was not developed in argument. I do not consider that the present application attracts the principles discussed in that authority. It was reasonable in the circumstances for Heartwood to seek an order for costs *inter partes*, especially in circumstances in which it did not then know the content of communications between the firm and its clients. Had it earlier sought prior to 7 November 2008 an order for costs against the firm in addition to an order for costs against Southern the application would have been complicated and potentially protracted. Issues concerning legal professional privilege and the appropriateness of the firm continuing to act for Southern probably would have arisen. Practitioners should not readily seek a costs order against their opposing solicitors, since such a tactic has undesirable consequences for the conduct of litigation.[51] Heartwood might have sought on 7 November 2008 a costs order against the firm, but the matter of costs against the firm was not a simple matter that was apt for summary disposal by the court at the time.[52] The factual basis for the Court's determination of an application for costs against the firm did not depend on facts "within judicial knowledge because the relevant events took place in court or are facts that can be easily verified".[53] They extended to matters that occurred outside court, including the instructions given to the firm and the reasons for its conduct both inside and outside the courtroom. The question of whether costs should be ordered against the firm personally, against Southern or against both would have opened up issues of conflict between the firm and Southern.

[57] I conclude that it was reasonable in the circumstances for Heartwood to seek the order for costs that it sought on 7 November 2008 on that occasion in the hope that costs which it had incurred by reason of Southern's non-disclosure would be recovered by it.

[58] In summary, I conclude that it is not now too late for Heartwood to seek the orders that are sought in the present application. They are not precluded from doing so.

[59] In the *Caboolture Park Shopping Centre* case the Full Court of the Federal Court adopted a principle expressed by Lord Lindley in *Preston Banking Co v William Allsup*

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50 (1981) 147 CLR 589.

51 *Re Bendeich (No 2)* (1994) 53 FCR 422 at 427.

52 Cf *Harley v McDonald* [2001] 2 AC 678 at 702–704 [48]–[53].

53 Ibid at 703 [50].

& Sons.[54] Lord Lindley hypothesised a case in which an application proceeded on the theory that the original order "was right, and that circumstances had since occurred which had rendered a supplemental order necessary".[55] The Full Court of the Federal Court in the *Caboolture Park Shopping Centre* case did not state that the power to make a supplemental order is constrained by the requirement that the circumstances relied upon for its exercise must have arisen since the date of the original orders. The Full Court of the Federal Court in *Remington Products Australia Pty Ltd v Energiser Australia Pty Ltd*[56] found it unnecessary to determine that question. I adopt, with respect, the views expressed by the Full Court in the *Caboolture Park Shopping Centre* case that the exercise of the jurisdiction to make supplemental orders requires caution.[57] They are not, however, limited merely to the making of orders in aid of the enforcement and working out of original orders. I do not interpret the principles stated by the Full Court of the Federal Court in the *Caboolture Park Shopping Centre* case, including the adoption of the principle expressed by Lord Lindley, as confining the jurisdiction to make supplemental orders to cases in which circumstances have arisen since the date of the original orders. However, if the power to make a supplemental order is so constrained then circumstances have arisen since 7 November 2008. These are the circumstances in relation to the impecuniosity of Southern which make it improbable that the order for costs made by me on 7 November 2008 will be satisfied. The two companies have been placed in liquidation. Accordingly, if there is a requirement for circumstances to have arisen since the date of the original orders, then such circumstances have been established.

Waiver

[60] The firm further submits that the "irregularity" relating to the omission of the undertaking as to security was "fixed by consent by the order of the Chief Justice and each party carried on the action from that point of time as if there was no relevant mischief". The firm submits that it is now too late to complain about the deficiency in the order of White J. It contends that by their silence, or by their conduct in the hearing before the Chief Justice in September 2008, Heartwood intimated that they were prepared to proceed with the action and with the order "as corrected". The firm submits that there has been a waiver. I do not accept these contentions. In seeking the inclusion in the freezing orders made by the Chief Justice on 11 September 2008 of an undertaking in relation to security, Heartwood was seeking the inclusion of an undertaking which should have been proffered on 30 July 2008. At the very least, the absence of such an undertaking should have been justified before White J on 30 July 2008. To the extent that the orders made by consent before the Chief Justice on 11 September 2008 "corrected" the matter, Heartwood should not be taken to have waived its right to complain about the circumstances under which earlier orders were obtained.

[61] It was appropriate in the circumstances for orders to be made by consent on 11 September 2008 since the matter was made returnable on that date. Orders were made on that occasion for the future conduct of the action. Heartwood might have applied on that date for the earlier orders to be discharged. However, at that stage it did not have access to a transcript of the proceedings before White J and was not to

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54 [1895] 1 Ch 141.
55 Ibid at 144.
56 (2008) 246 ALR 113 at 117 [21].
57 Supra at 235.

know what, if anything, had been said on that occasion which justified the omission of an undertaking as to security.

[62] If an application had been made to the Chief Justice on 11 September 2008 to discharge or set aside the orders that had been made by White J on 30 July 2008 then the Court would still have retained the discretion to make new orders. I do not consider, in the circumstances, that the omission to seek an order discharging the earlier orders and the consent given to the orders made by the Chief Justice amounts to a waiver. The belated proffering of an undertaking to provide security and Heartwood's consent to this course did not preclude Heartwood from pursuing remedies in relation to the circumstances in which the original orders were obtained.

Causation

[63] The firm raises issues of causation in connection with the costs that Heartwood seeks an order that it pay. As previously noted, Heartwood's amended originating application seeks an order that the firm pay the costs that I ordered to be paid on 7 November 2008. These were Heartwood's costs of and incidental to the application for freezing orders filed 30 July 2008, including reserved costs, to be assessed on an indemnity basis. The firm submits that the costs caused by the conduct of Mr Kake that led to the order of White J being made could only be the costs of applying to set it aside.

[64] They further submit that by the time of the hearing before Dutney J, the solicitors for Heartwood knew or should have known of the absence of an undertaking as to security, had expressed concerns as to the worth of the undertaking as to damages, consented to orders and "voluntarily went ahead and engaged in a mediation thereby incurring further costs", followed by a subsequent hearing before the Chief Justice. The firm submits that those costs were expended with knowledge of the relevant irregularity and therefore cannot be said to have been caused by it.

[65] I consider that the order that should be made in the exercise of the jurisdiction to award costs against the firm is one in respect of the costs that were caused by the firm's breach of its duty to the Court. The costs of applying to set aside the freezing orders made by White J are of such a kind. Those freezing orders (as extended by further orders) were set aside on additional grounds. However, the breach of the duty of disclosure was the first ground relied upon, and itself justified an order setting aside the orders made by White J. Heartwood is entitled to an order that the firm pay the costs that it incurred in applying to set aside the freezing orders made by White J.

[66] I consider that other costs incurred by Heartwood in connection with Southern's application for freezing orders were not caused by the firm's breach of duty. Heartwood incurred costs in preparing affidavits to meet the merits of Southern's application for freezing orders. Whilst the matter came before Dutney J on the return date of 18 August 2008 as a result of the terms of White J's order of 30 July 2008, had no ex parte order been made on 30 July, it is likely that a hearing of the kind that occurred before Dutney J would have eventuated in August 2008, and it is likely that orders similar to the consent orders made by his Honour would have been made. The result would have been the making of freezing orders of a finite duration by consent and directions for a mediation. A further hearing of the kind that occurred before the Chief Justice would have been necessary.

[67] I should briefly address a further "causation" submission made by the firm, which contests Heartwood's contention that "White J. would not have made the ex parte freezing order on 30th July, 2008, had she been truthfully informed that no undertaking as to damages in the form prescribed by the draft order was able to be given".[58] If Mr Kake had caused White J to be informed of the deliberate omission of an undertaking as to security and the reason why such an undertaking had not been given, namely that Mr Southern's financial situation was "tight", then it is likely that an undertaking to provide security would have been required. The quantum of the security that would have been required would have depended on the duration of the freezing order and a provisional assessment of the possible damage that the freezing orders might cause to the respondents. When pressed to provide security prior to the hearing before the Chief Justice Mr Southern agreed to a bank guarantee of $150,000. I conclude that had disclosure been made, then White J would have required security to be given in a substantial amount in the absence of reliable of evidence of the worth of the undertakings as to damages. If Mr Southern had not been prepared to give the required undertaking to provide security, then an ex parte freezing order would not have been made. In this context, Mr Kake's conduct caused the ex parte freezing orders to be made in the form that they were made, and was a cause of the application to set them aside.

[68] In summary, I reject Heartwood's contention that "All costs incurred by the applicants in proceedings 7272/08 would not have been incurred but for [the conduct of Mr Kake in the points of complaint]".[59] However, the conduct of Mr Kake in not making disclosure before White J on 30 July 2008 caused the applicants to incur legal costs in Supreme Court proceedings 7272/08, namely the costs of applying to set aside the freezing orders made by White J. In order to protect Heartwood from being "improperly damnified" by the serious dereliction of duty that caused those costs, they should be assessed on an indemnity basis.

Measure of compensation

[69] The firm finally submits that as such an order is partly compensatory in nature, and there is no evidence of the quantum of such costs or that they have been assessed and demanded from Southern or that Southern cannot pay the costs, an order should not be made. As previously noted, Southern BN Pty Ltd is in liquidation and the evidence is that it is unlikely that any dividend will be paid to unsecured creditors. Hotel Properties Ltd has been liquidated. There is no evidence to suggest that it will be in a position to pay in whole or in part the costs order made by me against it on 7 November 2008. Searches undertaken by Heartwood's solicitors indicate that Mr Southern does not hold any real property in Queensland or New South Wales. Affidavit material filed in other proceedings indicated that Mr Southern was unable to provide working capital because he did not have any funds available for this purpose. The firm placed no evidence concerning the ability of Mr Southern to pay the costs which I ordered him to pay. The improbability that Heartwood will be paid the costs that I ordered on 7 November 2008 makes it appropriate to make a supplemental order. I do not accept the firm's submission that "there ought to be evidence that the current costs order is useless". It is sufficient that there is a high probability that it will not result in payment to Heartwood of the costs that it incurred in applying to discharge the freezing orders.

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[58] Exhibit 1: Letter, Griffiths Parry to Redchip Lawyers dated 10 June 2009.

[59] Ibid.

Mr Kake's position

[70] Finally, I should record that Mr Kake swears that it was not his intention to mislead the Court, and I accept his evidence, which was not the subject of cross-examination. However, as I have found, his conduct amounted to a serious dereliction of duty. Mr Kake has had the advantage of lengthy conferences with Senior Counsel, and now appreciates the need to direct the attention of Counsel and the Court to any departures from the form of freezing order set out in the Practice Direction.

Conclusion

[71] It was appropriate for Heartwood to seek orders discharging the freezing orders granted by White J on 30 July 2008 (as extended by further orders). Principally, this was because of the non-disclosure of the deliberate omission of paragraph 8 of the undertakings in the pro forma freezing orders in circumstances in which White J was given to understand that the draft orders followed that form. Mr Kake's failure to inform or cause White J to be informed of the deliberate omission was a serious dereliction of his and the firm's duty to the court.

[72] The proper exercise of the jurisdiction to order costs against practitioners to enforce duties owed by them to the Court entitles Heartwood to an order that the firm pay the costs that it incurred in applying to set aside the freezing orders made by White J.

[73] These costs were the subject of a costs order made by me against Southern on 7 November 2008, and the order sought in the present application is a supplemental order that does not vary or alter my previous order.

[74] The order that I propose to make is designed to sanction the firm for breach of duty "in a way that will enable it to provide compensation for the disadvantaged litigant".[60] Such an order is expressed in terms that are compensatory, but it is also punitive.[61] The objective of compensation is appropriate in circumstances in which it is highly improbable that the costs order that I made on 7 November 2008 will be met by Southern.

[75] Heartwood has established an entitlement to a supplemental order that the firm pay its costs of and incidental to the application to discharge the freezing orders made by White J, and that such payment operate so as to discharge the liability of the applicants in that proceeding.

[76] Heartwood seeks an order that it be paid the costs of and incidental to this application to be assessed on an indemnity basis. I will hear the parties' submissions as to costs.

Order

[77] I order:

1. The respondent pay the applicants' costs of and incidental to the application filed 4 November 2008 in Supreme Court Proceeding No 7272/08 to be assessed on an indemnity basis.
2. The payment referred to in paragraph 1 hereof operate so as to discharge the liability of the applicants in Supreme Court Proceeding No 7272/08 to pay the costs referred to in paragraph 2 of the Order made by Applegarth J on 7 November 2008 in Supreme Court Proceeding No 7272/08.

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60 *Harley v McDonald* supra at 703 [49].

61 Ibid.