JUDGMENT : **White J.** Equity Division. Supreme Court New South Wales. 29th March 2006.

1 These are applications for costs in various proceedings following the delivery of judgment by McDougall J in ***ISIS Projects Pty Ltd v Clarence Street Pty Ltd*** [2004] NSWSC 714. ISIS Projects Pty Ltd is a builder. It entered into a construction contract with Clarence Street Pty Limited. On 13 August 2004, McDougall J gave judgment in favour of ISIS on its claim pursuant to the *Building and Construction Industry Security of Payment Act* 1999 (NSW) to recover an unpaid portion of a progress claim. On 26 August 2004, judgment was entered for ISIS against Clarence in the sum of $910,847.92.

2 On the following day, ISIS issued a writ for the levy of property of Clarence to enforce the judgment. On the same day, ISIS lodged an application under s 105 of the *Real Property Act* 1900 (NSW) to record the writ on land at 50 Clarence St, Sydney. Clarence was the registered proprietor of strata lots in a high-rise building at that address.

Other Interests in 50 Clarence Street

3 Clarence held 50 Clarence Street on trust pursuant to the terms of a joint venture deed dated 6 September 2001. The joint venturers were Career Path Australia Pty Ltd, FBN Investments Pty Ltd and Koombari Pty Ltd. The deed of 6 September 2001 provided that Clarence would hold the property on behalf of the joint venturers as tenants in common in the proportion of their participating interests.

4 The directors of Clarence were Mr Nick Anastopoulos and Mr Christos Voukidis. They were also directors of Koombari. Koombari had a 40% interest in the joint venture. The shareholders of Koombari were C & O Voukidis Pty Ltd and Kleoni Pty Ltd, a company owned and controlled by Mr Anastopoulos or his relatives.

5 Mr Theodore Baker was the director and a shareholder of Career Path. The third joint venturer, FBN Investments Pty Ltd was placed under external administration.

6 On 14 June 2002, Clarence entered into a put and call option agreement with Old Bull Enterprises Pty Ltd. Old Bull had the option to acquire certain lots in what was then a proposed strata plan of subdivision of the property at 50 Clarence Street. The lots over which Old Bull had an option comprised level 9 of the property and accompanying car spaces. On 27 November 2003, Old Bull appointed Crotti Holdings as its nominee to exercise the call option.

7 On 23 September 2003, Clarence granted to Onetofour Holdings Pty Limited options to purchase lots on levels one to four of the property and accompanying car spaces. Onetofour is a company of which the directors and shareholders were Mr Baker and Mr John Crotti.

8 As at 31 August 2004, Clarence owed Koombari $1,083,860.09. It owed Career Path $776,900 and Crotti Holdings $709,058.44. These debts were unsecured. On 3 September 2004, Clarence entered into a loan agreement with Oxley Group Finance Pty Ltd. It gave Oxley a charge over all of its present and future assets to secure the loan. Oxley purportedly advanced $2,500,000 to Clarence by reducing the debts owed by Clarence to Koombari, Career Path and Crotti Holdings. The effect of the transaction was that instead of Clarence owing unsecured debts of $2,500,000 to Koombari, Career Path and Crotti Holdings, it owed that amount to Oxley, but the debt was secured over all of its assets. In turn, Oxley owed $2,500,000 to Koombari, Career Path and Crotti Holdings. Mr Voukidis, a director and shareholder of Koombari, was the director of Oxley. The shareholders of Koombari were also shareholders of Oxley. The other shareholders of Oxley were Crotti Holdings and a company called TTB Holdings Pty Ltd, whose sole director and shareholder was Mr Baker. In short, Oxley was controlled by those who controlled Koombari, Career Path and Crotti Holdings.

9 When ISIS obtained judgment there were two substantial hurdles in the way of its being able to execute the judgment. The first was that the Clarence Street property, against which it sought to issue a writ, was held on trust for the joint venturers. The second hurdle was that options had been given in respect of a number of the lots in favour of Onetofour and Old Bull.

10 The third hurdle to the execution of its judgment arose after judgment was entered, namely, the grant of the charge in favour of Oxley.

Notices of Motion in the Payment Claim Proceedings

11 Following the issue of the writ on 27 August 2004, various applications and proceedings were brought in this Court, all related, in one way or another, to ISIS' attempts to obtain satisfaction of its judgment. Judgment was entered against Clarence in proceedings 55032/03 ("the payment claim proceedings"). The parties to those proceedings were ISIS as plaintiff and Clarence as defendant.

12 On 8 September 2004, Watson Mangioni, who acted for Clarence, advised Turtons, who acted for ISIS, that Clarence held the property as trustee only. They contended that accordingly the properties could not be taken hold of, or sold, to satisfy the judgment debt.

13 On 6 October 2004, Clarence filed a notice of motion seeking, amongst other orders, an order that execution of the writ for levy of property be stayed, and orders to compel the removal of the writ from the titles. Clarence also sought, apparently in the alternative, an order that the execution of the writ for levy of property be stayed so as to permit the lots subject to the options to be sold, the proceeds used to discharge secured debts, which would include the debt owed to Oxley, and the balance to be paid to the Registrar to be held as security for the judgment debt. It also sought a stay of execution of the judgment.

14 In support of Clarence's notice of motion of 6 October 2004, Mr Voukidis swore an affidavit which provided details of the joint venture agreement and mortgages held by third parties. He also disclosed details of options granted between May 2002 and March 2004 and deposed that as a result of agreements between Clarence and the option holders, the options were yet to expire. He also referred to the Oxley charge. He deposed that the registration of the writ was an event of default both under a charge given to Permanent Trustee Co. Ltd and under the Oxley charge, entitling the chargees to appoint a receiver. He foreshadowed the commencement of proceedings against ISIS for damages for breach of contract and a final determination of amounts owing under the contract. He foreshadowed an appeal from McDougall J's judgment.

15 ISIS served a notice to produce documents relating to the charge and option agreements. On 14 October 2004, it filed a notice of motion in the payment claim proceedings. It sought, amongst other things, a declaration that Clarence was entitled to be indemnified out of the property for the amount of the judgment debt. It claimed a declaration that Clarence had an equitable charge over the property for that sum, and that Clarence also had a personal right to be indemnified by Koombari, Career Path and FBN Investments, being the beneficiaries of the trust on which the property was held. It sought a declaration that it was entitled to be subrogated to Clarence's rights, including the alleged rights which Clarence had under the equitable charge to which it said Clarence was entitled as trustee. It sought orders that trustees for sale be appointed to the property and sought a declaration as to the priorities of parties in respect of the property. After allowing for the position of registered mortgagees, it claimed to be entitled to priority over Oxley, Clarence, Koombari, Career Path and FBN Investments. It also sought declarations that Onetofour Holdings, Crotti Holdings, Tony Lapanaitis Group Pty Ltd and Angelo Anastasopoulos, (being option holders or persons asserting a right to exercise options), did not have an interest in the property. It was implicit in the relief claimed that ISIS claimed priority in respect of any interest which any optionee might have in the property. It named not only Clarence, but ten other parties as respondents to the notice of motion.

16 When the matter came before Bergin J on 22 October 2004, the second to fourth respondents to the notice of motion, being the beneficial owners of the properties, submitted that the claim should properly be brought by summons.

Commencement of Priorities Proceedings

17 On 12 November 2004, ISIS filed a summons against the same parties who were named as respondents to its notice of motion seeking the same relief as was sought in the notice of motion. Those were proceedings number 55084 of 2004, ("the priorities proceedings"). In those proceedings, Clarence, the beneficiaries (Koombari, Career Path and FBN Investments), the optionees (Onetofour Holdings and Crotti Holdings), and Oxley were separately represented. The beneficiaries filed a cross-claim for the removal of the writ from the titles to the property.

18 In its summons in the priorities proceedings, ISIS referred to Clarence's notice of motion in the payment claim proceedings in which Clarence contended that the writ should be cancelled because, inter alia, it alleged it held the real property on trust for the beneficiaries and further alleged that other parties, namely the option holders and Oxley, had an interest in the property. ISIS described the issues arising in its proceedings as being:

1. whether ISIS was entitled to enforce its judgment by way of a writ for levy of the property registered over the real property of Clarence;
2. whether Clarence had a right of indemnity against the beneficiaries in respect of the judgment debt and a corresponding equitable charge over the real property, and whether ISIS could exercise those rights such that orders be made for the statutory sale of the real property and against the beneficiaries;
3. whether any of the other defendants had an interest in any of the real property which had priority over ISIS; and
4. whether a receiver should be appointed to the whole or any part of the real property.

Clarence's Proceedings

19 In the meantime, on 15 October 2004, Clarence instituted its own proceedings against ISIS in which it sought to enforce what it claims to be its entitlements under the construction contract. These were proceedings 55075/04. No costs issue presently arises in those proceedings. The judgment ISIS obtained against Clarence Street pursuant to the *Building and Construction Industry Security of Payment Act* did not resolve the parties' contractual rights and obligations. (*Building and Construction Industry Security of Payment Act*, s 32).

Hearing of 22 November 2004

20 The priorities proceedings were listed for final hearing before McDougall J on 22 November 2004. Also fixed for hearing on that day were ISIS' notice of motion of 14 October 2004 in the payment claim proceedings and Clarence's notice of motion of 6 October 2004 in those proceedings. His Honour concluded that save for the question of whether the writ should be permitted to remain on the title to the land, the proceedings were not ready to be heard on a final basis. His Honour observed that the basis upon which ISIS attacked the deed of charge in favour of Oxley and the arguments that the options were not enforceable, was only clearly articulated on the previous Friday, although in saying that his Honour expressed no criticism of ISIS. Save in one respect, his Honour declined to hear the proceedings on a final basis. They were stood over to the next directions list before the Technology and Construction List Judge. His Honour reserved the costs of the hearing before him.

21 At the hearing before McDougall J, senior counsel then appearing for ISIS conceded that if his Honour followed certain statements of the majority of the High Court in ***Octavo Investments Pty Ltd v Knight*** (1979) 144 CLR 360,

then ISIS could not maintain its claim to registration of the writ. Counsel submitted that the propositions in *Octavo Investments* were obiter. His Honour said that he nonetheless regarded it as his duty to follow even obiter statements of the High Court and accordingly held that the registration of the writ could not be maintained. In *Octavo Investments Pty Ltd v Knight*, Stephen, Mason, Aickin and Wilson JJ said (at 367): *"The creditors of the trustee have limited rights with respect to the trust assets. The assets may not be taken in execution (**Savage v Union Bank of Australia Ltd** (1906) 3 CLR 1170 at 1186 ; **Re Morgan; Pillgrem v Pillgrem** (1881) 18 Ch D 93) …"*

22 His Honour ordered that the recording in the register maintained pursuant to the *Real Property Act* of the Writ for Levy of Property be cancelled. His Honour did not make that order on Clarence's notice of motion of 6 October 2004 in the payment claim proceedings, but on a cross-claim by the beneficiaries in the priorities proceedings. His Honour reserved the costs of the proceedings before him on that day. Clarence submits that as it obtained the relief which was the substance of the relief claimed in its notice of motion, it should have its costs of the motion.

Progress of Proceedings

23 On 26 November 2004, Bergin J made directions in three sets of proceedings. In the payment claim proceedings, her Honour ordered that ISIS' notice of motion of 14 October 2004 be dismissed save as to costs, and that its costs be reserved for decision with proceedings 55084/04 (the priorities proceedings). ISIS' notice of motion of 14 October 2004 had been superseded by the summons filed in the priorities proceedings. In the payment claim proceedings, Bergin J ordered that the notice to judgment debtor of intention to sell land and the notice of sale, issued by the Court on 14 and 15 September 2004 be set aside. These orders were consequential upon the orders for removal of the writ. In the priorities proceedings, her Honour made orders for the filing of an amended summons and for the filing of defences. Her Honour also made orders in proceedings 55075/04, in which Clarence was plaintiff, including orders for the filing of evidence in relation to an application by ISIS for security for costs.

24 In its notice of motion of 6 October 2004, Clarence had sought a stay of execution of the judgment. That application came before Bergin J on 10 and 14 December 2004. Clarence did not press its claim for a stay.

25 On 3 February 2005, ISIS filed an amended summons in the priorities proceedings. In the amended summons, ISIS claimed against Oxley that:
(a) as a matter of construction, the charge did not attach to the property;
(b) it did not secure a real debt; and
(c) that the charge was taken for the purpose of defrauding Clarence's creditors and should be set aside pursuant to s 37A of the *Conveyancing Act* 1919 (NSW).

26 ISIS also claimed that the options had lapsed, and in any event its entitlement as a holder, by way of subrogation, of Clarence's equitable charge over the property, had priority over the rights of the optionees.

27 On 4 February 2005, the defendants to the priority proceedings were ordered to file defences to the amended summons by 22 February 2005. On 4 March 2005, the time was extended to 6 April 2005. These orders were not complied with. Defences to the summons had been filed before its amendment.

Winding-Up Proceedings

28 Following the orders made on 22 November 2004 for the removal of the writ against the title of the property, the writ was returned unsatisfied. This gave rise to a presumption that Clarence was insolvent. (*Corporations Act* 2001 (Cth), s 459C(2)(b)). On 17 December 2004, ISIS filed an originating process for the winding-up of Clarence. In its notice of appearance of 2 February 2005, Clarence raised a number of grounds of opposition to winding-up. Clarence contended that there was no presumption of insolvency and it was not indebted to the plaintiff in the sum of $910,847.92 (plus interest and costs). As the plaintiff had a judgment for that sum which had not been set aside, and the writ for levy of property had been returned unsatisfied, these grounds of opposition were unlikely to succeed. Clarence also contended that it was solvent and that it had a genuine claim against ISIS by way of counter-claim set off or cross-demand equal to or exceeding the amount of the debt.

Proposals for Settlement

29 In the meantime, Clarence was seeking to sell units in the subdivision. On 21 October 2004, it proposed a regime whereby the writ for levy of property would be set aside and the judgment stayed for 120 days during which period Clarence would seek to sell as many of the units in the subdivision as were reasonably necessary to satisfy all debts secured against the property and realise sufficient moneys to satisfy the judgment debt, such amount to be provided either in cash or bank guarantee to the Registrar as security for the judgment debt. Clarence's solicitors advised that it had calculated that it could realise $15,510,000 from the sale of properties, including those the subject of the option agreements, and that after discharging secured creditors, including Oxley in the amount of $2,490,000, there would be $2,610,000 available for security for the judgment debt and to pay other unsecured creditors.

30 Not surprisingly this proposal was not acceptable to ISIS. The proposal did not provide for payment of the judgment sum. It gave Oxley priority over ISIS. ISIS indicated that it did not object in principle to a voluntary sale of the property to enable Clarence to satisfy the judgment debt. ISIS made a counter-proposal on 29 October 2004. It is not necessary to set out all the details of its counter-proposal. It proposed that Clarence sell the lots subject to the options only if ISIS was satisfied the contracts were at market value, or sufficient was raised to satisfy the judgment debt in full. ISIS proposed that after paying out Permanent Trustee and the costs of sale, the proceeds of sale should be paid to the trust account of Watson Mangioni, who were solicitors for Clarence. Then,

if there was sufficient money to pay out both Oxley and ISIS, the money should be paid. In other words, ISIS insisted, as it was entitled to, that it receive not security for its judgment debt, but payment of it. It did not accept that Oxley should have priority if the proceeds of sale were insufficient to discharge both its debt and the moneys owed to Oxley. It proposed that if the balance, after paying out Permanent Trustee, was insufficient to pay both ISIS and Oxley, its notice of motion should be listed to determine the priority as between those companies, and to determine any other outstanding issues. ISIS said that it would provide a signed form of cancellation of writ on the settlement of sale of each of the lots, but it did not agree to removing the writ from the register. As an incentive, ISIS offered to provide Clarence with a bank guarantee as security for the repayment of the judgment debt in the event that McDougall J's decision was overturned on appeal, or effectively reversed on the final determination of Clarence's own proceedings.

31 Clarence did not accept ISIS' counter-proposal. It said that the continued presence of the writ against the title put Clarence in breach of its contract with its financiers. On 4 November 2004, it modified its proposal that the proceeds of sale be held as security, to a proposal that moneys be paid to ISIS on the provision by ISIS of a bank guarantee for its return. However, its proposal was that moneys be paid after satisfaction of the Oxley debt. In later correspondence, it said that the continued presence of the writ on the title was counter-productive in its attempts to sell units in the subdivision as it created the impression in the market that Clarence Street was being forced to sell. Negotiations as to the mechanics by which the properties could be marketed and sold continued without agreement being reached.

32 On 3 December 2004, Watson Mangioni, on behalf of Clarence, made a revised offer as to the basis upon which units in the subdivision might be sold. The offer included paying 80% of the balance of the purchase price received after discharging amounts due to Permanent Trustee to Oxley, and the balance to a trust account for ultimate distribution to ISIS on the provision by ISIS of a bank guarantee to secure its repayment. The proposal was not acceptable to ISIS.

Final Resolution

33 In the first four months of 2005, the properties the subject of the option agreements were sold to the optionees.

34 On 22 February 2005, ISIS sought undertakings from Clarence that any proceeds of sale of parts of the property, after paying agents' and solicitors' fees in respect of the sale and moneys payable to Permanent Trustee as first mortgagee, should be paid into a trust account and not dealt with except in accordance with any orders of the Court. No such undertaking was proffered.

35 On 15 March 2005, ISIS filed a notice of motion in which it sought orders that Clarence be restrained from dealing with any of the proceeds of sale of the properties except by paying the real estate agents' and solicitors' fees reasonably incurred by it in respect of any sale, and by paying moneys payable to Permanent Trustee under the terms of its first registered mortgage. It sought orders that Clarence be required to pay the net proceeds of sale into its solicitor's trust account. It also sought orders that Oxley be restrained from dealing with any moneys paid to it by Clarence and that Oxley should not receive any payment from Clarence unless paid into the trust account of its solicitors.

36 On the same day, Clarence filed a notice of motion seeking orders that the proceedings and execution of the judgment debt in the payment claim proceedings be stayed. Clarence sought orders that upon ISIS giving the usual undertaking as to damages and providing security for it, Clarence should provide to the Registrar-General certificates of title in respect of certain lots of the subdivision with registrable discharges of mortgage, such certificates of title to be held by the Registrar as security for the judgment debt in the payment claim proceedings.

37 Both notices of motion were heard by Bergin J on 25 March 2005. Ultimately, her Honour made orders without opposition. However, that position was only reached after debate. Initially, Clarence's position was that its proceedings 55075/04 would establish whether Clarence was truly indebted to ISIS, and that if Clarence were successful in those proceedings, all of the other proceedings would fall away because they were based upon the existence of the judgment debt. Pending the determination of its proceedings, Clarence submitted there ought to be a preservation of the "status quo" which, it submitted, would work fairly, not only to ISIS but to all parties. It submitted that it should not be required to pay over the money. The status quo was that Clarence had not paid the judgment debt.

38 Ultimately, Bergin J did not make the orders sought against Oxley. There was no occasion to do so, as her Honour made orders to restrain Clarence from dealing with the net proceeds of sale of lots of the subdivision, except by discharging the debt owed to Permanent Trustee.

39 Upon ISIS giving the usual undertaking as to damages, her Honour ordered that by 13 April 2005, Clarence pay $1,050,000 into a controlled moneys account of ISIS' solicitors on trust for Clarence, with such moneys to remain in the account pending further order of the Court. Until that order was complied with, Clarence was restrained, subject to certain conditions, from dealing with lots in the strata plan. Her Honour ordered that the winding-up proceedings be transferred to the Technology & Construction List. All of the proceedings were listed for directions on 15 April 2005.

40 Neither Oxley nor Clarence was successful in maintaining the position it had adopted to that point. Oxley still contended that it was a secured creditor of Clarence. It did not suggest that its debt had already been discharged. Yet it did not receive payment of the net proceeds of sale. Clarence did not succeed on its claim that

it should only be required to provide security for ISIS' judgment debt, and not be required to pay it. ISIS proffered a bank guarantee as security for any obligation which it might have in the future to pay moneys to Clarence either in the event that the appeal from McDougall J was upheld, or, in the event that Clarence succeeded in its claims in proceedings 55075/04. That bank guarantee had been proffered in 2004.

41 On 14 April 2005, Clarence provided a bank cheque for $1,050,000 payable to Turtons Lawyers on trust for Clarence. On 18 April 2005, Watson Mangioni contended that the moneys in the trust account should be kept in an interest bearing account as security for the judgment debt. It contended that the winding-up proceedings should be dismissed and foreshadowed an application for indemnity costs if those proceedings were not dismissed at the next directions hearing. In response, ISIS' solicitors said that the deposit did not constitute payment of the judgment debt and that ISIS had been told nothing about the extent to which Clarence had discharged liabilities to third parties or had any other assets, other than moneys in the controlled moneys account, available to meet its liabilities.

42 On 21 April 2005, ISIS' solicitors proposed terms upon which the winding-up proceedings and the priorities proceedings could be resolved. Essentially the proposal was that the judgment debt and interest be paid to ISIS, and that ISIS would provide a bank guarantee in favour of Clarence if it were held, either on appeal from McDougall J's judgment or in the substantive proceedings instituted by Clarence, that ISIS should repay all or part of that sum. After further correspondence in relation to the precise orders which should be made and the terms of the guarantee, this proposal was accepted.

43 On 29 April 2005, orders were made by consent in the priorities proceedings, that:

"*1. Upon the plaintiff giving to the first defendant a bank guarantee in accordance with the agreement noted by this Court today in proceedings 55028/05, the solicitors for the plaintiff, Turtons Lawyers, may pay to the plaintiff the sum of $966,097.71 out of the moneys held in the controlled moneys account created pursuant to order 2 made 24 March 2005 and shall forthwith pay the balance of the funds held in the controlled moneys account to the first defendant.*

2. The summons be dismissed.

3. The cross-claim be dismissed.

4. The costs of the proceedings are reserved."

44 On the same day, orders were made dismissing the winding-up proceedings save as to costs. In the payment claim proceedings, the Court made orders by consent that any outstanding issues relating to costs be reserved.

Outstanding Costs Issues

45 Accordingly, in the payment claim proceedings, I have to determine what orders for costs should be made in relation to Clarence's notice of motion of 6 October 2004 and ISIS' notice of motion of 14 October 2004, both of which were listed for hearing before McDougall J on 22 November 2004. The parties to Clarence's notice of motion of 6 October 2004 were it and ISIS, but ISIS contended that the other parties, who were joined as respondents to its notice of motion of 14 October 2004, were proper parties to the issues raised by Clarence's notice of motion. ISIS' notice of motion of 14 October 2004 was overtaken by the proceedings 55084/04 (the priorities proceedings). The issues raised by those proceedings were not determined, and the costs of those proceedings remain to be decided. Finally, I have to consider the costs of the winding-up proceedings which were dismissed after ISIS received payment of its judgment debt.

46 Issues as to costs between ISIS and Tony Laponaitis Group Pty Ltd, Mr Angelo Anastasopoulos and Permanent Trustee were settled by agreement.

ISIS' Submissions

47 ISIS submits that all of the costs incurred from October 2004 to April 2005 in the three proceedings were incurred because Clarence failed and refused to pay the judgment debt, and created an artificial financial and security transaction through Oxley for the purpose of removing Clarence's assets out of the reach of ISIS. It also says that Clarence refused to give an undertaking that the proceeds of any sale by Clarence of its property would be frozen and not distributed to Oxley until after the enforcement proceedings had been determined. It described the orders made on 24 March 2005, the subsequent payment of the amount of the judgment debt into the controlled moneys account of ISIS' solicitor, and the subsequent release of those moneys to ISIS, as a capitulation by Clarence and Oxley. Ultimately, it received payment of the judgment and it was therefore unnecessary to pursue its claims for relief in the priority proceedings and the winding-up proceedings. ISIS claimed a practical success. It said that it was delayed in obtaining that success by defaults on the part of the defendants in complying with court orders and that the defendants acted unreasonably in opposing its claims. It also said that the policy behind the *Building and Construction Industry Security of Payments Act* was to protect a builder's cashflow through a summary procedure for assessing its contractual entitlements. It submitted that this policy would be frustrated if ISIS were not permitted to recover its costs of seeking to enforce its judgment, even though the only issue which was decided in its attempt to enforce the judgment, namely its right to maintain registration of the writ for levy of property, was decided against it.

Clarence's Submissions

48 Clarence submitted that it was successful in obtaining the principal relief sought in its notice of motion of 6 October 2004 and should therefore have its costs of that notice of motion. It submitted that ISIS' notice of motion of 14 October 2004, which sought to join additional parties was misconceived as ISIS later recognised by filing a

summons in new proceedings seeking the same relief. Clarence therefore submitted that it should receive its costs of ISIS' notice of motion of 14 October 2004. In relation to the priorities proceedings, Clarence contended that ISIS acted unreasonably in pressing for a final hearing of those proceedings before McDougall J on 22 November 2004. In any event, it says that the proceedings were misconceived and ISIS acted unreasonably in bringing the proceedings. It also submitted that ISIS acted unreasonably in not accepting its offers for the lifting of the writ and the setting aside of funds to provide security for the judgment.

49 Clarence says that the wrongful registration of the writ prevented it from selling the properties to enable it to meet its commitments to secured creditors and option holders and have sufficient moneys to pay ISIS' judgment. It says that that position was exacerbated by the filing of the winding-up proceedings. In relation to those proceedings, Clarence submitted that the proceedings were used as a debt-recovery process, and had little prospects of success. The proceedings were ultimately dismissed and costs should follow the event.

Joint Venturers' Submissions

50 The second to fourth defendants to the priorities proceedings, who were also respondents to ISIS' notice of motion of 14 October 2004 in the payment claim proceedings, were the joint venturers, Koombari, Career Path and FBN Investments. They sought orders that ISIS pay their costs of the notice of motion of 14 October 2004 up to 22 November 2004, and that ISIS pay their costs of the priorities proceedings up to 22 November 2004, (including the costs of effecting the order made by the Court that day that the writ of levy of property lodged by ISIS on the title of the property at 50 Clarence Street be removed). Otherwise, they contended that there should be no order as to costs between ISIS and them.

51 The reason the second to fourth defendants only sought costs up to 22 November 2004 is that they played no active role in the proceedings after that date except to respond to notices to produce, to request particulars of the amended summons, to attend directions hearings, and ultimately, consent to the dismissal of the proceedings.

52 They submitted that they had a powerful answer to the claims made by ISIS to be subrogated to Clarence's right to be indemnified out of the trust assets in respect of liabilities which it properly incurred. In their submissions prepared for the purposes of the hearing held on 22 November 2004, the second to fourth defendants said that if Clarence had asserted an indemnity arising from the judgment, the joint venturers could have resisted the claim until the final position between Clarence and ISIS was determined. Although the judgment in favour of ISIS was final, that did not mean that the judgment finally settled the balance owed between Clarence and ISIS. The ultimate balance would not be determined until the final determination of Clarence's claim in proceedings *55075/04* (*Building & Construction Industry Security of Payment Act*, s 32). They also submitted that at that stage it was not possible to deal with the question of whether or not the failure of Clarence to serve a payment schedule pursuant to s 14 of the Act would itself be a sufficient basis to deny Clarence a right of indemnity against the trust assets.

Optionees' Submissions

53 The fifth, sixth and eleventh defendants were also separately represented. They were Onetofour, Crotti Holdings, and Old Bull Enterprises. They were persons to whom options to purchase some lots in the development were granted, or who asserted a right to exercise such options. Onetofour and Crotti Holdings sought orders that ISIS pay their costs of ISIS' notice of motion of 14 October 2004 in the payment claim proceedings and their costs in the priorities proceedings. Old Bull was not joined as a defendant until the amended summons was filed on 3 February 2005. It submitted that it ought not to be exposed to an order for costs.

54 These defendants submitted that ISIS' notice of motion of 14 October 2004 was irregular, and that ISIS had accepted this to be the case by filing the summons instituting the priorities proceedings. They submitted that ISIS had demanded an urgent hearing of the priorities proceedings on 22 and 23 November 2004, but the hearing had to be vacated because the proceedings were not ready. Therefore, they submitted, ISIS should pay the costs thrown away by the vacation of the date.

55 They also submitted that there could be no substance to ISIS' claim to priority over the interests of the option holders. The registration of a writ on title to real property does not create an interest in land. Its operation is subjugated to any legal or equitable interest in the land. They submitted that insofar as ISIS asserted that the options had lapsed, that claim was bound to have failed. Insofar as ISIS claimed rights by way of subrogation to the trustee's right of indemnity, that right was subject to the rights of the holders of the options. Those options were created by Clarence, and hence as ISIS' claim to an interest in Clarence's assets arose by way of subrogation to its right of indemnity from those assets, it was necessarily subject to the options which Clarence had previously created. The trustees' right of indemnity or exoneration was not displaced by the options. On the exercise of the options, trust assets would be replaced by cash instead of land. They submitted that the notice of motion of 14 October 2004 and the subsequent priorities proceedings were an "unmeritorious frolic" and ISIS ought to pay their costs for being precipitously joined to expensive proceedings. ISIS did not succeed against them as the options were exercised. It was because the options were exercised and the properties sold that the judgment debt was paid.

56 ISIS settled its claims with the seventh, eighth and tenth defendants. The remaining defendant in respect of whom costs were in issue was the ninth defendant, Oxley. It was also separately represented.

Oxley's Submissions

57 Oxley sought its costs of the motion of 14 October 2004 in the payment claim proceedings and its costs of the priorities proceedings. It contends that the notice of motion of 14 October 2004 was an inappropriate vehicle for the relief which ISIS claimed. It submitted that the priorities proceedings were "presumptive, unnecessary and misconceived". It submitted that ISIS failed to achieve any relief against it and that the proceedings against it were ultimately dismissed. It submitted that costs should follow the event; the event being that ISIS failed in its claim against Oxley.

58 Oxley submitted that ISIS failed to achieve anything against it including interlocutory relief of any sort. That is not an accurate reflection of the substantive outcome of ISIS' notice of motion of 15 March 2005.

59 Oxley submitted that before it could be established that Clarence had any right of indemnity over the trust assets to which ISIS was subrogated, there would have to be a final accounting. It referred to *Jacobs' Law of Trusts in Australia*, 6 ed, pp 638-639, where the learned authors say: *"On a judgment at law against a trustee the creditor ordinarily could not levy execution against the trust property; this is so even though the debt was founded upon a debt incurred in the course of trading by the trustee, because the execution does not extend to equitable trust assets where the whole beneficial interest is not in the judgment debtor. Where on a final account between trustee and beneficiary the balance would be in favour of the trustee, the execution would reach the trust assets.*

…The subrogation is wholly derivative so that the creditor can be no better off than the trustee vis-à-vis the beneficiary, so that, for example, if the balance of account between trustee and beneficiary turns out to be not in favour of the trustee.

… A direct payment to the creditor out of the trust fund will be allowed where the fund is subject to administration by the court and where the trustee consents to such an order and other trust creditors are not thereby prejudiced. Where there is a plurality of trust creditors direct enforcement of the trustee's lien by one rather than another creditor may give him an advantage; again, direct access may be impossible without first settling the state of account between trustee and beneficiary because if the balance favours the beneficiary there will be no right of subrogation. …"

60 Oxley also contended that Clarence had an equitable set off against ISIS' judgment debt in Clarence's damages claim in the "substantive proceedings". It also submitted that ISIS was not entitled to be subrogated to Clarence's right of indemnity or exoneration from trust assets. Some of the reasons advanced in support of this latter contention were elusive, but showed the commonality of interest between Oxley and the joint venturers.

61 Oxley also contended that all creditors of Clarence were subrogated to Clarence's rights of indemnity and exoneration. Koombari, Career Path and Crotti Holdings were all creditors of Clarence prior to the giving of the Oxley charge, and prior to ISIS becoming a judgment creditor. Oxley submitted that as they were prior creditors, with a prior right of subrogation to any indemnities enjoyed by Clarence in respect of trust property, Koombari, Career Path and Crotti Holdings had prior ranking claims to those of ISIS. Oxley submitted that the creation and registration of the charge did no more than preserve the priority enjoyed by the creditors of the trust whose debts were paid out by Oxley. It did not explain why, if this were so, the charge was taken. Oxley submitted that the priority of earlier creditors showed that ISIS' claim to avoid the charge as a fraud on creditors was untenable. Hence it submitted that the claim against it was doomed to fail. It submitted that it should not have been "dragged into" the priorities proceedings. Instead, it submitted, ISIS should have abided the outcome of the substantive proceedings commenced by Clarence and ISIS should pay its costs.

62 Oxley, through its senior counsel, explained that the reason the charge was taken was that: *"It was simply a method used to arrange the financial circumstances of Clarence and the joint venture. It is no different than if, instead of going to Oxley, Clarence, bearing in mind the existence of a first registered mortgage to a financier, had gone to a second tier financier for short-term finance. All that happened is that three pre-existing creditors of the trust were paid out, and Oxley became the creditor in their place. … It was in the ordinary course of business, arranging the financial circumstances of Clarence."*

63 Although I am sceptical about that submission, its accuracy has not been determined.

Applicable Principles

64 There was no dispute as to the applicable principles. They are contained in judgments of Hill J in ***Australian Securities Commission v Aust-Home Investments Ltd*** (1993) 44 FCR 194 at 201, of McHugh J in ***Re Minister for Immigration & Ethnic Affairs; ex parte Li Qin*** (1997) 186 CLR 622 at 624-625, of Burchett J in ***One.Tel Ltd v Commissioner of Taxation*** (2000) 101 FCR 548 at 552-553, and of the Court of Appeal in ***Edwards Madigan Torzillo Briggs Pty Ltd v Gloria Stack & Ors*** [2003] NSWCA 302 at [5]. As a general rule, costs follow the event, such that prima facie the successful party is entitled to recover its costs from an unsuccessful party. As a corollary, prima facie, where a party discontinues an action, he is liable to each other party for their costs. However, the principle that costs follow the event is usually applicable following a hearing on the merits. Where a dispute has been resolved without a hearing on the merits, and there has been no capitulation, the court does not try an hypothetical action to determine who would have succeeded in order to decide how costs should be borne. In such a case, the general rule is that there should be no order as to costs. In some circumstances however, the court may be able to conclude that one of the parties has acted unreasonably in bringing or defending the proceedings. In rare cases, it may be possible for a judge to feel confident that even though both parties acted reasonably, one party was almost certain to have succeeded if the action had gone to a hearing. The reasonableness or unreasonableness of a party's institution or defence of proceedings, and the question whether one party had a near certainty of success, are matters which must be resolved, if they can be, on undisputed facts disclosed by the

pleadings, the affidavits, or documents tendered, or interlocutory relief granted. Where proceedings terminate after interlocutory relief has been granted, the court may take into account the fact that interlocutory relief has been granted in exercising its discretion as to costs, but ordinarily the grant of interlocutory relief carries no implication as to the ultimate merits of the case, beyond the fact that it raises a seriously arguable issue.

65 Although there was no dispute about the principles, there was vigorous dispute as to their application.

66 I agree with the defendants' submissions that it is not possible to decide the question of costs by treating all of the defendants as if they were one. It is also too simplistic to say that all of the proceedings were concerned with ISIS' attempts to enforce its judgment debt and as ISIS was ultimately successful in obtaining payment of its judgment debt, it obtained substantial success in the various proceedings. That approach may have merit so far as its claim against the judgment debtor, Clarence, is concerned. It does not have merit in relation to the claims against the other defendants, even though the other defendants were persons who, in one way or another, stood behind Clarence.

67 So far as the joint venturers are concerned, ISIS was unsuccessful in maintaining the registration of the writ for levy of property on the title. So far as the holders of options are concerned, ISIS did not establish that the options had lapsed or that it had priority over the interests of the optionees.

68 The position regarding Oxley is different. ISIS obtained orders for the payment of the net proceeds of sale of lots in the subdivision into a controlled moneys account from which the moneys were ultimately disbursed to it, without the moneys having to be paid to Oxley. ISIS' claim that Oxley's charge was ineffectual or should be avoided pursuant to s 37A of the *Conveyancing Act* was not determined, but that was because it obtained the relief it sought without having to have its claims against Oxley determined.

69 Also relevant to determining questions of costs as between the plaintiff and Clarence are the proposals each party put forward as to how matters could be resolved without litigation. The reasonableness of each party's proposals, and the extent to which the final outcome reflected what had earlier been proposed, is relevant to determining how the costs should be borne.

70 I will deal first with the two notices of motion in the payment claim proceedings.

Clarence's Notice of Motion of 6 October 2004 in the Payment Claim Proceedings

71 As noted in paragraph [48], Clarence claimed that it was successful in obtaining the principal relief sought in its notice of motion of 6 October 2004. Hence, it submitted that it was entitled to its costs of that notice of motion. However, McDougall J did not make his orders on Clarence's notice of motion. His orders for the removal of the writ were made upon the cross-claim of the second to fourth defendants in the priorities proceedings. It appears that his Honour was of the view that the proper applicants for this relief were the joint venturers, whose interests were directly affected by the writ.

72 It is surprising that the joint venturers should have had separate representation from Clarence, given that the directors of Koombari were also the directors of Clarence and that Mr Nick Anastopoulos, the shareholder of Clarence, controlled Kleoni, a shareholder of Koombari.

73 ISIS' claim that Clarence failed to join the necessary parties to Clarence's notice of motion of 6 October 2004 was not decided. That question became moot following ISIS' filing of its notice of motion of 14 October 2004 joining, amongst other people, Oxley, the joint venturers, and the optionees.

74 Nor did Clarence obtain all of the relief sought in its notice of motion. In particular it sought, but was never granted, a stay of execution of the judgment.

75 Although Clarence obtained part of the relief which it sought by the orders made on the joint venturers' cross-claim, there was no determination that it, as distinct from the joint venturers, was entitled to the relief sought on its notice of motion. That question has not been decided. Nor should it be decided on an application for costs. Given the commonality of interest between the joint venturers and Clarence, justice will be served by giving the joint venturers their costs in relation to that issue without ISIS being required to pay double costs. In my view there should be no order as to costs on Clarence's notice of motion of 6 October 2004.

ISIS's Notice of Motion of 14 October 2004 in the Payment Claim Proceedings

76 The respondents to ISIS' notice of motion of 14 October 2004 raised three grounds as to why they should have their costs of that notice of motion. The first is that the relief claimed in the notice of motion should have been sought in an originating process, rather than by notice of motion in the existing proceedings. That claim is well founded. As Oxley submitted, a notice of motion is an interlocutory application brought in principal proceedings for the purpose of better enabling the litigation of the claims made in the principal proceedings. The relief sought in the notice of motion was substantially declaratory relief in relation to the priorities between ISIS, the joint venturers, the optionees, and Oxley. Those claims were not properly commenced by notice of motion in the payment claim proceedings.

77 It follows that the respondents to that notice of motion are entitled to any additional costs which they incurred over and above the costs which would have been incurred had the proceedings been initially commenced by way of originating process. It does not follow that they are entitled to all of the costs which they incurred in dealing with ISIS' notice of motion up to the filing of the summons in the priorities proceedings. A substantial amount of

those costs would have been incurred even if the proceedings had been commenced by summons rather than notice of motion in the existing proceedings. Such costs would not be wasted.

78 A second ground upon which the respondents to the notice of motion claim their costs of that motion is that they contend that ISIS should not have attempted to bring the notice of motion on for urgent hearing before McDougall J on 22 and 23 November 2004. The ground advanced for having an expedited hearing was the pendency of the writ registered over the title to 50 Clarence Street and Clarence's application to remove the writ. At the hearing before McDougall J on 22 November 2004, ISIS all but conceded that the writ should be removed.

79 However, the concession made by ISIS did not detract from its claim for an expedited hearing of its notice of motion of 14 October 2004. Indeed, its claims to be subrogated to Clarence's rights to indemnity and exoneration, including its claim to be subrogated to Clarence's rights of indemnity from the joint venturers personally, and its claims that its rights derived by subrogation to Clarence's rights to be indemnified out of the trust property had priority over the claims of the optionees or Oxley, had greater urgency once it was conceded that it could not maintain the writ.

80 The respondents submitted that ISIS' pressing of its claims was premature. One of the reasons for this submission was that it was said that ISIS could not maintain a claim for relief based upon subrogation to the trustee's rights until the "true debt" between ISIS and the trustee was determined, or, until the taking of accounts. That contention raises a substantive issue of law which was not determined. It would not be appropriate to determine that issue in dealing with costs.

81 The other basis for the respondents contending that the notice of motion was premature was that they said it was brought on too quickly. It is true that McDougall J found that the application could not be heard on a final basis on 22 and 23 November 2004. One of the reasons for that was that it was not until Friday 19 November 2004 that ISIS served submissions which clearly articulated the basis upon which ISIS attacked the enforceability of the options and the deed of charge in favour of Oxley. However, his Honour expressed no criticism of ISIS in that respect. If an order for costs were to be sought arising from the vacation of the hearing dates of 22 and 23 November 2004 on the basis that ISIS should not have had the matter set down for hearing on those dates, I would expect that application to have been made before McDougall J on 22 November 2004 and determined by his Honour then. It does not appear that any application for costs was made on that ground. Rather, it appears that costs were reserved because the question of costs was thought to depend upon the determination of the issues raised by ISIS' notice of motion. All of the respondents to ISIS' notice of motion were associated with each other. They knew of the circumstances in relation to the joint venture agreement, the granting and extension of options, and the granting of a deed of charge. Prima facie, they were better positioned than was ISIS for an urgent hearing of ISIS' claims.

82 As McDougall J made no adverse finding against ISIS arising from the vacation of the dates of 22 and 23 November 2004, and as no application was made to McDougall J for costs incurred up to that date on the basis that ISIS ought not to have pressed for an urgent final hearing of its claims, and for the reasons in the preceding paragraph, I do not consider that the respondents to ISIS' notice of motion of 14 October 2004 are entitled to their costs of the notice of motion up to 22 November 2004 because the hearing fixed for that date had to be vacated.

83 The other bases upon which the respondents contend they should have their costs of the notice of motion of 14 October 2004 were the bases upon which they contended they should have the costs of the priorities proceedings.

84 For these reasons, the respondents to ISIS' notice of motion of 14 October 2004 are entitled to an order for payment of any additional costs incurred by them by reason of the claims being brought by notice of motion in the payment claims proceedings, rather than by originating process in new proceedings. Otherwise, the costs of ISIS' notice of motion of 14 October 2004 should be in accordance with the orders for costs to be made in the priorities proceedings.

Costs in the Priorities Proceedings: Second to Fourth Defendants

85 I will deal first with the costs of the second to fourth defendants, the joint venturers. Those defendants obtained the orders sought on their cross-claim for the removal of the writ. They are entitled to their costs of their cross-claim.

86 The joint venturers submit that they should also have their costs associated with their involvement in the hearing on 22 November 2004, but otherwise there should be no order as to costs between them and ISIS. Although they should have their costs of their cross-claim, upon which they were successful, it does not follow that they should have all of their costs in connection with the hearing of 22 November 2004. There has been no determination of the issues between them and ISIS. I could not determine whether it would be premature for the court to have dealt ISIS' claim to be subrogated to Clarence's rights prior to the determination of what debt was truly owing between ISIS and Clarence, unless I determined the substantive issue in those proceedings. The answer to that issue is not so obvious that I could determine that one or the other party was almost certain to have succeeded without conducting a full hearing on the issue. To do so would be inconsistent with the principles summarised in para [64]. Nor can I decide whether Clarence had lost its right of indemnity, or whether it was entitled to an indemnity from the joint venturers personally. The joint venturers appeared to acknowledge that it is not appropriate to decide

these questions by their acceptance that there should be no order as to costs between them and ISIS in the priorities proceedings except in relation to the hearing of 22 November 2004.

87 For the reasons above, I do not consider that I should make an order for costs on the basis that ISIS brought on the priorities proceedings prematurely, in the sense that it sought to have them heard before the parties could reasonably have been ready. Accordingly, the only costs to which the joint venturers are entitled in relation to the hearing of 22 November 2004 are their costs of the cross-claim on which they were successful. I will order that ISIS, being the first defendant to the first cross-claim, pay the costs of the cross-claimants of the cross-claim, but that otherwise there be no order as to costs as between the plaintiff and the second to fourth defendants.

Costs in the Priorities Proceedings: Fifth, Sixth and Eleventh Defendants

88 The position of the fifth, sixth and eleventh defendants is different. For the reasons given in relation to the costs of the second to fourth defendants, I do not think I should make an order for costs thrown away by reason of the vacation of the hearing on 22 and 23 November 2004. The question remains whether I should make any order for costs in the proceedings between those defendants and the plaintiff when the issues between them were not determined.

89 ISIS did not dispute that Clarence and Onetofour entered into a put and call option agreement on or about 23 January 2003. It pleaded that that agreement related to thirty-one of the lots in the strata plan. Nor did ISIS dispute that Clarence and Old Bull entered into a put and call option agreement in respect of eight lots in the strata plan.

90 By its amended summons, ISIS admitted that the period for the exercise by Onetofour of the call option for five of the lots was extended to 28 February 2005. In respect of those lots, it did not contend that the option had lapsed.

91 In respect of the remaining twenty-seven lots over which Onetofour had an option, ISIS contended that the options had lapsed before they were exercised. By a letter dated 30 January 2004 signed on behalf of Clarence and Onetofour, Onetofour's call option was extended to 31 July 2004, except for lots 5, 6, 7 and 79, where the period was extended to 28 February 2005. Another letter of the same day between Clarence and Onetofour extended the period for the exercise of the call option for the lots, other than lots 5, 6, 7 and 79, to 31 January 2005. ISIS contended that the second letter, produced by Mr Baker in an affidavit sworn by him was, "*another unsatisfactory feature of the conduct of the individuals standing behind Clarence and Oxley*". The question of whether the option in respect of the other lots which expired in July 2004 was extended to 31 January 2005 cannot be decided on a costs application. However, even if the options had expired, Clarence and Onetofour had agreed to extend them.

92 ISIS pleaded that Clarence and Old Bull entered into a put and call option agreement in relation to eight lots in the strata plan on or about 16 June 2002. The period in which the call option could be exercised was a period up to seven days after Clarence notified Old Bull in writing of the registration of the strata plan.

93 ISIS pleaded that prior to 7 November 2003, Old Bull was notified in writing of the registration of the strata plan. It pleaded that by a nomination form dated 27 November 2003, Old Bull purported to notify Clarence that it nominated Crotti Holdings as purchaser under the option agreement. It alleged that the nomination was ineffective because the call option period had lapsed. It pleaded that by reason of these matters neither Old Bull nor Crotti Holdings had any interest in the lots.

94 Old Bull and Crotti Holdings submitted that ISIS was unable to provide particulars of these allegations, although ISIS referred to a facsimile dated 7 January (a mistake for 7 November) 2003 from Gibsons Lawyers to Mr Voukidis. They submitted that that document did not constitute written notice of registration of the strata plan within the meaning of the option agreement and did not record any such notice having been given.

95 The question whether notice had or had not been given in terms of the option agreement is not one which can be decided on this application. Again, there was no issue between Clarence and Crotti Holdings about Crotti Holdings' right to exercise the option.

96 ISIS pleaded that to the extent any of Onetofour, Old Bull or Crotti Holdings had an interest in the lots the subject of the option agreement, ISIS' interest as holder, by way of subrogation, of Clarence's "equitable charge" over the property had priority over Onetofour's, Old Bull's, or Crotti Holdings' interest as option holder. ISIS also pleaded that to the extent Onetofour completed a purchase of any of the lots which was subject to the option agreement, then, by virtue of the principles of tracing, Onetofour took the lots subject to ISIS' interest in them as a holder by way of subrogation of Clarence's equitable charge over the lots. That claim was not made in respect of Old Bull's or Crotti Holdings' options.

97 ISIS did not act unreasonably in instituting proceedings against the option holders. Their rights were one of the matters raised by Mr Voukidis in his affidavit of 6 October 2004 as barriers in the way of ISIS enforcing its judgment against the land. However, it is practically certain that ISIS would have failed in its claim to have priority over the rights of the optionees, assuming the options were on foot. ISIS' submissions assumed that the issue was one of competing priorities, that is, of the priority of the optionees against the rights of an equitable chargee. However, the priority issue could only arise if ISIS was in the position of an equitable chargee taking its charge from Clarence. That was not its position. Its position was wholly derivative to that of Clarence. Although it was customary to describe the right of a trustee to indemnity out of trust assets as being in the nature of a charge

(***Octavo Investments Pty Ltd v Knight*** (1979) 144 CLR 360 at 367), the nature of that right was more fully explained by the High Court in ***Chief Commissioner of Stamp Duties for NSW v Buckle*** (1998) 192 CLR 226 at 246-247). Where a trustee is entitled to indemnity against personal liability incurred in the performance of a trust, and to have recourse to trust assets to satisfy his right of indemnity, he holds the trust property no longer solely in the interests of the beneficiaries. The High Court said (at 246-247): *"The term 'trust assets' may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation'. A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the 'trust assets which may be enforced in the same way as any other equitable charge. However, the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee. It is not a security interest or right which has been created, whether consensually or by operation of law, over the interests of the beneficiaries so as to encumber them in the sense required by s 66(1) of the* [Stamp Duties] Act."

98 It necessarily follows that ISIS, being subrogated to Clarence's rights of indemnity from the trust assets, would be subject to whatever interests Clarence had created in those assets. ISIS' right by way of subrogation to enforce a sale of the assets, (assuming that that right had already arisen), rose no higher than the right which Clarence itself had to sell property to satisfy its right to be exonerated out of the trust property.

99 Accordingly, at least insofar as the option agreements were on foot, the optionees were practically certain to have succeeded on their claims. It is practically certain that Onetofour would have succeeded in relation to its exercise of the options over lots 5, 6, 7 and 79.

100 It also follows from the derivative nature of ISIS' rights that it did not have priority over the rights of the optionees in respect of other lots which Clarence had contracted to sell to the optionees. That is so whether the contract was made pursuant to the option agreements, or independently of the option agreements.

101 It may be the case that ISIS would have been entitled to an injunction to restrain Clarence from making any such contracts. I express no opinion about this. ISIS did not seek such relief. Instead, the optionees acquired the lots over which options had been given and in due course the proceeds of sale of the lots formed part of the trust estate. Whether the options were validly extended or not, contracts were entered into with the optionees for the sale of the lots.

102 In my view, the proceedings against the fifth, sixth and eleventh defendants were unnecessary. Those defendants exercised the rights which they asserted they had. The result was the receipt of cash which was used, with other moneys, to pay off Permanent Trustee and to provide the funds from which the judgment debt was paid. I agree with the submissions of counsel for the fifth, sixth and eleventh defendants that the litigation against those defendants was unnecessary. I think it practically certain that if the proceedings against those defendants had been determined, ISIS would have failed in its claims against them. I will order that ISIS pay those defendants' costs of the priorities proceedings.

Costs in the Priorities Proceedings: Ninth Defendant

103 I have already explained why I reject Oxley's submission that ISIS failed to achieve anything against it, including interlocutory relief of any sort. To the contrary, ISIS was substantially successful against Oxley in obtaining interlocutory orders which restrained Clarence from paying the proceeds of sale until $1,050,000 had been paid into a controlled moneys account of ISIS' solicitors. Nor did Oxley insist on the receipt of those moneys. It consented to the order of 29 April 2005 for the payment of the judgment debt from the moneys in the account. It is not clear whether or not this was because Oxley had already been paid, or there were otherwise sufficient assets to pay Oxley's debt, or whether it was simply a capitulation by Oxley.

104 The claims between ISIS and Oxley were not determined. There were issues in relation to the construction of the charge and its validity. They are not matters which can be determined on this application.

105 It follows that there should be no order as to costs as between ISIS and Oxley.

106 The persons standing behind Oxley were in any event represented in the proceedings. There was a community of interests between Clarence, the joint venturers, the option holders and Oxley. Even if the defendants were otherwise entitled to their costs, it would not have been just to subject ISIS to the payment of four sets of costs. However, I do not need to consider this issue further, having regard to the orders I will make.

Costs in the Priorities Proceedings: First Defendant

107 The priorities proceedings were only necessary because Clarence did not immediately pay the judgment debt. Clarence relied upon the issues raised by the other defendants. A number of issues were not determined. These included whether Clarence had a right of indemnity from the trust assets for its incurring of the judgment debt, whether Oxley had a valid charge, and, if so, what it secured. Those issues should not be determined in this judgment. One issue was determined at the suit of the joint venturers, namely, whether ISIS could execute the judgment by way of the registration of a writ for levy of property over the land, but costs will be awarded in respect of that issue on the joint venturers' cross-claim. Another issue initially raised by the affidavit filed for Clarence in support of its notice of motion of 6 October 2004, namely, the position of the option holders, would have been decided in favour of the option holders.

108 However, the final outcome of the proceedings was that ISIS eventually received payment of its judgment debt. Ultimately, Clarence was unsuccessful in its claim that it should only be required to provide security for the judgment debt. It was also unsuccessful in its claim that that security should be provided only after the secured creditors, including Oxley, had been paid out.

109 ISIS submitted that its offer of 29 October 2004 ultimately reflected the terms upon which the judgment was paid. I do not agree. ISIS' offer of 29 October 2004 did not provide for the immediate removal of the writ, but only to ISIS providing a cancellation of the writ in respect of lots as and when the sales were settled. ISIS' offer was also subject to its being satisfied that the contracts for sale to the optionees were acceptable, or that they would otherwise result in sufficient moneys which would result in the judgment debt being paid.

110 I do not think that the proposals made by either party in October or November 2004 were reflected in the final outcome.

111 Clarence made a further proposal to resolve the dispute on 3 December 2004. However, its proposal required that eighty per cent of the proceeds of sale available after paying out Permanent Trustee should be paid to Oxley and twenty per cent to a trust account and thence to ISIS, upon ISIS' giving an undertaking to provide a bank guarantee. Nor did the final outcome reflect that proposal.

112 Clarence submitted that the registration of the writ compromised its ability to sell lots in the land to meet its obligations under the judgment. That may well have been so up to 22 November 2004, but not thereafter.

113 I do not consider that ISIS is entitled to any costs of the priorities proceedings against Clarence up to 26 November 2004, when Bergin J made the orders consequential upon orders for removal of the writ. ISIS was unsuccessful in the only issue determined by McDougall J on 22 November 2004. Its proposal to resolve the issues did not accord with the final outcome. On the other hand, for the reasons I gave in relation to its notice of motion of 6 October 2004, I do not consider that Clarence is entitled to an order for costs up to 26 November 2004. McDougall J did not determine that it, as distinct from the joint venturers, was entitled to the order for removal of the writ from the title to the trust property. A resolution of Clarence's entitlement to an order for removal of the writ would need to take into account what the High Court said in ***Chief Commissioner of Stamp Duties (NSW) v Buckle*** at 246 as to the nature of the trustee's and beneficiary's proprietary interests where a trustee is entitled to be recouped or exonerated out of trust property. That was not raised before McDougall J. It is not appropriate to decide that question in this judgment. Accordingly, there should be no order as to costs as between ISIS and Clarence up to 26 November 2004.

114 However, the position after that date is different. For the reasons I have given, I consider that the interlocutory relief that ISIS obtained on 25 March 2005 and the orders made by consent on 29 April 2005 represented a substantial victory for ISIS. Given that the proceedings were only necessary because Clarence failed to pay a judgment debt, I consider that justice would not be done if no order for costs was made in ISIS' favour against Clarence after 26 November 2005, because the claims it put forward in an endeavour to obtain satisfaction of its judgment were not determined.

115 In my view, Clarence should pay part of ISIS' costs of the priorities proceedings after 26 November 2004. Such costs would not include the costs payable by ISIS to the fifth, sixth and eleventh defendants. However, they are not to be confined to the costs incurred only in relation to the claims against Clarence, as distinct from the claims against the other defendants. Clarence was interested in all of the claims against the other defendants and it would not have been possible to prepare a case in such a way that costs were incurred in the case against the other defendants, without also being incurred in the case against Clarence.

116 However, ISIS should not recover all of such costs, as these would include the costs of the issues it raised against the fifth, sixth and eleventh defendants, where I consider its claims were untenable. Rather than ask a costs assessor to assess what costs were incurred in respect of what issues, it is better to make a percentage reduction of the costs payable by Clarence. I assess the percentage having regard to the numerous affidavits filed in the priorities proceedings, and the voluminous correspondence in the priorities proceedings, which were read or tendered on the hearing as to costs. I will order that Clarence pay seventy-five per cent of ISIS' costs of the priorities proceedings incurred after 26 November 2004. That will include the costs of the hearing before me.

Costs in Winding-Up Proceeding 55028/05

117 The winding-up proceedings were not determined. It is not appropriate to seek to resolve the competing contentions of the parties as to the merits of those proceedings. There will be no order as to costs of the winding-up proceedings.

Orders

118 In proceedings 55032/03:

(a) I make no order as to costs of the defendant's notice of motion of 6 October 2004;

(b) I order that the plaintiff pay the costs thrown away by the first, second, third, fourth, fifth, sixth and ninth respondents to the plaintiff's notice of motion of 14 October 2004, by reason of the plaintiff's application being brought by notice of motion rather than by originating process;

(c) otherwise, I order that the costs of the applicant, and the first, second, third, fourth, fifth, sixth and ninth respondents to the notice of motion of 14 October 2004 be costs in proceedings 55084/04.

119 In proceedings 55084/04, I order that:

(a) there be no order as to costs as between the plaintiff and the first defendant in respect of costs incurred up to and including 26 November 2004;
(b) the first defendant pay seventy-five percent of the plaintiff's costs incurred after 26 November 2004, such costs not to include the costs payable by the plaintiff to other parties;
(c) the first cross-defendant to the first cross-claim pay the cross-claimants' costs of the first cross-claim;
(d) otherwise there be no order as to costs as between the plaintiff and the second, third and fourth defendants;
(e) the plaintiff pay the costs of the fifth, sixth and eleventh defendants;
(f) there be no order as to costs as between the plaintiff and the ninth defendant;
(g) the costs of the hearing before me be treated as costs in proceedings 55084/04;

120 I make no order as to costs in proceedings 55028/05 (formerly 6818/04).

121 Where I have made no order as to costs, the order is made with the intent that each party bear its own costs of the application or the proceedings.

122 Exhibits may be returned after 28 days.

Plaintiff: M Elliott instructed by Turtons Lawyers
1st Defendant: M Cashion SC, M Southwick instructed by Watson Mangioni
2nd - 4th Defendants: J Stevenson SC, E Muston instructed by Aitken McLachlan Thorpe
5th, 6th & 11th Defendants: M J Dawson instructed by Gibsons Lawyers
9th Defendant: R Harper SC instructed by James R Knowles