SUPREME COURT OF QUEENSLAND

CITATION:	*Mio Art Pty Ltd v Mango Boulevard Pty Ltd & Ors* [2018] QSC 31
PARTIES:	**MIO ART PTY LTD ACN 121 010 875 as trustee of the Spencer Family Trust** (plaintiff) **v** **MANGO BOULEVARD PTY LTD ACN 101 544 601** (first defendant) and **SILVANA PEROVICH** (second defendant) and **ROBERT WILLIAM WHITTON as trustee of the bankrupt estate of Silvana Perovich** (third defendant) and **BMD HOLDINGS PTY LTD ACN 010 093 348** (fourth defendant) and **TRADITIONAL VALUES MANAGEMENT LTD (IN LIQUIDATION) ACN 055 106 100 (IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE BLUE DIAMOND DEPOSITS TRUST NO 1 (ARSN 091 948 202)** (fifth defendant) and **EARNING PTY LTD ACN 118 746 599 (IN LIQUIDATION)** (sixth defendant) and **ROBERT WINNY** (seventh defendant) and **COMPENSATION FINANCE (AUSTRALIA) PTY LTD ACN 099 768 877** (eighth defendant) and **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** (ninth defendant) and

ACN 127 567 373 PTY LTD (IN LIQUIDATION)
(tenth defendant)
and
ACN 128 854 759 PTY LTD (IN LIQUIDATION)
(eleventh defendant)
and
ACN 128 854 768 PTY LTD (IN LIQUIDATION)
(twelfth defendant)
and
STANDARD BUILDERS PTY LTD ACN 121 087 312
(thirteenth defendant)

FILE NO:	1714 of 2011
DIVISION:	Trial Division
PROCEEDING:	Applications for Security for Costs
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	2 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 July 2017, 21 July 2017
	Further written submissions received
JUDGE:	Daubney J
ORDERS:	**1. On the application by the plaintiff against the fifth defendant, it is ordered:**

(a) that within 28 days the fifth defendant provide, in a form satisfactory to the Registrar, security in the sum of $70,000 for the plaintiff's costs of and incidental to defence of the fifth defendant's counterclaim up to the first day of the hearing;

(b) failing provision of such security within that time, the fifth defendant's counterclaim against the plaintiff be stayed;

(c) liberty to apply;

(d) the costs of and incidental to the application for security for costs be reserved.

2. On the application by the plaintiff against the sixth, tenth, eleventh and twelfth defendants, it is ordered:

(a) that within 28 days the sixth, tenth, eleventh and twelfth defendants collectively provide, in a form satisfactory to the Registrar, security in the sum of $70,000 for the plaintiff's costs of and incidental to defence of the sixth, tenth, eleventh and twelfth defendants' counterclaim up to the first day of the hearing;

(b) failing provision of such security within that time, the sixth, tenth, eleventh and twelfth defendants' counterclaim against the plaintiff be stayed;

(c) liberty to apply;

(d) the costs of and incidental to the application for security for costs be reserved.

3. On the application by the plaintiff against the thirteenth defendant, it is ordered:

(a) that within 28 days the thirteenth defendant provide, in a form satisfactory to the Registrar, security in the sum of $70,000 for the plaintiff's costs of and incidental to defence of the thirteenth defendant's counterclaim up to the first day of the hearing;

(b) failing provision of such security within that time, the thirteenth defendant's counterclaim against the plaintiff be stayed;

(c) liberty to apply;

(d) the costs of and incidental to the application for security for costs be reserved.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – where the Plaintiff has brought separate applications for security for costs in respect of counterclaims – whether discretionary factors favour the making of an order – whether a company in liquidation meets the threshold test for security for costs – whether costs of counterclaim are a priority under s 556 *Corporations Act* – whether security for costs required when strong counterclaim – whether security for costs can frustrate counterclaim

Corporations Act 2001 (Cth), s 1335(1), s 556(1)(a)
Uniform Civil Procedure Rules 1999 (Qld), r 670, r 671, r 672

Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114
Bell Wholesale Co Ltd v Gates Export Corporation (1984) 2 FCR 1
Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd (1997) 16 FCR 497
Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd [2009] 1 Qd R 116
Cherbourg Food Processing Company Pty Ltd v Enterprises (Qld) Pty Ltd [2012] QSC 162
Fiduciary Ltd v Morningstar Research Pty Ltd (2004) 208 ALR 564
Global Access Ltd v Educationdynamics LLC [2010] 1 Qd R 525
Harpur v Ariadne [1984] 2 Qd R 523
Hypec Electronics Pty (in liq) v Mead (2004) 61 NSWLR 169
In Re Lind [1915] 2 CH 345
Jalpalm Pty Ltd v Hamilton Island Enterprises Pty Ltd (1995) 16 ACSR 532
KP Cable Investments Pty Ltd v Meltglow Pty Ltd (1995) 56 FCR 189
Mango Boulevard Pty Ltd v Mio Art Pty Ltd (No 6) [2015] QSC 116
Mango Boulevard Pty Ltd v Mio Art Pty Ltd [2016] QCA 148
Norman v Federal Commissioner of Taxation (1962 – 1963) 109 CLR 9
Process Engineering Pty Ltd v Derby Meat Processing Co Ltd [1977] WAR 145
Sir Lindsay Parkinson & Co Ltd v Triplam Ltd [1973] QB 609
Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd [1985] 1 NSWLR 114

COUNSEL: FM Douglas QC with S Colditz for the plaintiff
M D Martin QC for the fifth defendant
S J Forrest for the sixth, tenth, eleventh and twelfth defendant
J R Green for the thirteenth defendant

SOLICITORS: Delta Law for the Plaintiff
Mills Oakley for the fifth defendant
Ashurst for the sixth, tenth, eleventh and twelfth defendant
Lillas & Loel Lawyers for the thirteenth defendant

[1] The plaintiff has brought separate applications for security for costs in respect of counterclaims in this proceeding by:

(a) the fifth defendant;

(b) the sixth, tenth, eleventh and twelfth defendants; and

(c) the thirteenth defendant.

[2] The fifth, sixth, tenth, eleventh and twelfth defendants are in liquidation.

[3] The thirteenth defendant is a company which was deregistered by the Australian Securities and Investments Commission ("ASIC") in 2011. It was reinstated on 10 January 2017. It is not in issue that the thirteenth defendant is insolvent and does not trade.

Background

[4] This proceeding has been before the courts on many occasions over the years, and other judges have comprehensively described the background. For present purposes, it is sufficient to recite the following brief overview.

[5] At its heart, the litigation is a dispute arising from a joint venture for the development of land at Mango Hill, north of Brisbane. The land is owned by Kinsella Heights Development Pty Ltd ("Kinsella"). As at July 2003, the issued capital of Kinsella was held as follows:

- 50 shares owned by Richard Spencer ("Spencer") (the former trustee of the trust of which the plaintiff is now trustee), and

- 50 shares owned by the second defendant, Silvana Perovich ("Perovich").

[6] In July 2003, Spencer (as trustee of the Spencer Family Trust) and Perovich entered into a Share Sale Agreement ("SSA") by which they each agreed to sell 25 shares to the first

defendant, Mango Boulevard Pty Ltd ("Mango Boulevard"). Mango Boulevard was, and is, a subsidiary of the fourth defendant, BMD Holdings Pty Ltd ("BMD"). BMD guaranteed Mango Boulevard's performance of the SSA.

[7] The SSA provided a mechanism for the timing of payments for the shares purchased under the SSA. Without descending into the detail which is ascertainable from other judgments, the assessment of the amount payable for the shares in Kinsella has been the subject of this extended litigation. Moreover, the SSA provided for a process of valuation, culminating in an arbitration to determine the value.

[8] In June 2005, Spencer (as trustee) and Perovich borrowed some $1.55 million from the fifth defendant. To secure that borrowing Spencer (as trustee) and Perovich assigned their entitlement to receive funds pursuant to the SSA to the fifth defendant.

[9] In April 2006, the fifth defendant obtained judgment against Spencer and Perovich for about $2.1 million.

[10] Following that, the fifth defendant then, in February 2007, made demand on the corporate guarantees which had been provided by BMD. BMD, by its then solicitors, denied liability to pay under the guarantee because there had been no default by Mango Boulevard in payment of moneys under the SSA. This was because on 6 February 2007 BMD had paid just over $1 million into Court, that being the balance then owing under the SSA.

[11] In any event, in August 2007 both Spencer and Perovich were declared bankrupt. Just prior to his bankruptcy, Spencer was replaced as trustee of the Spencer Family Trust by the plaintiff ("Mio Art").

[12] The arbitration provided for by the SSA has been conducted, and awards have been made by the arbitrator. In summary, the land was valued under that arbitration at about $50 million, and the plaintiff consequently asserts that it is entitled to be paid some $10 million by Mango Boulevard and BMD. The arbitral awards are now the subject of separate litigious challenge.

[13] The fifth – thirteenth defendants are all parties who, one way or another, claim an entitlement to share in the balance of the proceeds payable under the SSA. In October 2016, on unopposed applications by Mango Boulevard and BMD, the fifth – thirteenth defendants were joined to this proceeding so that all parties who claimed an entitlement to the balance of the proceeds payable under the SSA would be parties to this proceeding and bound by any decision in the proceeding. Their respective claims on the balance payable under the SSA are the subject of the counter-claims in respect of which the plaintiff now seeks the various orders for security for costs.

Security for costs – principles

[14] Section 1335(1) of the *Corporations Act* 2001 (Cth) provides:

> "Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

[15] Reference must also be had to Chapter 17 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*"), which relevantly provides:

> "**670 Security for costs**
>
> (1) On application by a defendant, the court may order the plaintiff to give the security the court considers appropriate for the defendant's costs of and incidental to the proceeding.
>
> (2) This rule applies subject to the provisions of these rules, particularly, rules 671 and 672.
>
> **671 Prerequisite for security for costs**
>
> The court may order a plaintiff to give security for costs only if the court is satisfied –
>
> (a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or
>
> (b) the plaintiff is suing for the benefit of another person, rather than for the plaintiff's own benefit, and there is reason to believe

the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or

…

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

672 Discretionary factors for security for costs

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

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

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

(c) the genuineness of the proceeding;

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

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

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

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

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

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

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

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

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

(m) the costs of the proceeding."

[16] Both under s 1335(1) and r 671(a), there is a relevant threshold test, namely that the applicant must satisfy the court that there is reason to believe that the respondent corporation will be unable to pay the applicant's costs of successfully defending the claim (in this case the counterclaim). If that threshold test is satisfied, then the Court has an unfettered discretion in deciding whether to order security for costs, having

regard to the circumstances of the case.[1] Whilst it is not possible to "ascertain or list all of the matters relevant to the exercise of the discretion because factors clearly vary from case to case and the weight to be given in any circumstances depends on the circumstances of each case",[2] reference is regularly made to the convenient summary of relevant considerations formulated by Beazley J (as she then was) in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*.[3] Without reciting the authorities underpinning the propositions, her Honour's list of "well established guidelines which the Court typically takes into account" on an application for security for costs[4] may be summarised as follows:

1. An application for security for costs should be brought promptly;

2. It is relevant to consider the strength and *bona fides* of the case in respect of which security is sought. "As a general rule, where a claim is prima facie regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide with a reasonable prospect of success."[5]

3. Whether the impecuniosity of the party against which security is sought was caused by conduct the subject of the claim by the applicant for security.

4. Whether the application for security for costs is oppressive in the sense that it is being used merely to deny an impecunious party a right to litigate.

5. Whether anyone is standing behind the impecunious company who is likely to benefit from the litigation and who is willing to provide the necessary security.

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1 *Sir Lindsay Parkinson & Co Ltd v Triplam Ltd* [1973] QB 609 per Lord Denning MR at 626; *Harpur v Ariadne* [1984] 2 Qd R 523, per Connelly J at 529.

2 *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 at [18].

3 (1995) 56 FCR 189.

4 Ibid at 197-198.

5 *Ibid* at 197.

6. Whether anyone standing behind an impecunious company has offered any personal undertaking to be liable for costs, and if so, the form of any such undertaking.

7. "Security will only ordinarily be ordered against a party who is in substance a plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate".[6]

Application against the fifth defendant

[17] By its counterclaim, the fifth defendant avers that it is owed some $6.6 million by Mio Art and Perovich and seeks a declaration that the payment of money pursuant to the SSA has been assigned to it and an order that Mango Boulevard and BMD pay such sum as is sufficient to discharge the indebtedness of Mio Art and Perovich.

[18] Despite the fact that it is in liquidation, the fifth defendant contends that the Court ought not be satisfied that the threshold test has been satisfied. It bases this submission on the fact that the fifth defendant has a credit balance in its bank account of some $1.36 million.

[19] The fifth defendant is the responsible entity of a registered managed investment scheme which operated a mortgage fund lending money on various forms of securities. The scheme was wound up pursuant to an order of the Supreme Court of New South Wales on 10 August 2010.

[20] The fifth defendant contends that any adverse costs order in respect of the counterclaim will be regarded as an expense of the liquidation, and will be afforded priority under s 556(1)(a) of the *Corporations Act* 2001 (Cth) because it is part of the fifth defendant's business (or that of the scheme for which it is the responsible entity) to recover money owing to it. On that basis, and with that asserted priority, the fifth defendant says that it presently holds sufficient cash reserves so as to preclude a conclusion that the fifth

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6 Ibid at 198.

defendant would not be able to meet an adverse costs order in respect of its counterclaim.

[21] It is neither possible, nor appropriate, on the present application to finally determine the question whether, if it is ordered to pay the costs of the counterclaim, such costs will be payable from the fifth defendant's assets. That will require close inquiry into whether the bringing of this particular counterclaim ought properly be characterised as part of the carrying on of the fifth defendant's business. In *Hypec Electronics Pty (in liq) v Mead,*[7] Campbell J said:[8]

> "[101] There is some room to doubt whether costs ordered to be paid by a company in liquidation which brings litigation and loses, will always be payable from such assets as the company has. The basic principle, expressed in section 553 *Corporations Act* 2001 (Cth), is that debts and claims the circumstances giving rise to which occurred before the date on which the winding up is taken to have begun, are admissible to proof. If a liquidator causes a company to bring litigation, and the company has costs ordered against it, the circumstances giving rise to the liability of the company to pay the costs order occur after the date on which the winding up is taken to have begun, so that liability is not admissible to proof under section 553. The listing in section 556 *Corporations Act* 2001 (Cth) of the order of priority of debts and claims allows, by implication, some exceptions to the principle set out in section 553. However, a debt or claim arising from circumstances occurring on or after the date when the winding up is take to have begun would be provable only if that debt or claim fell within one of the items listed in section 556.
>
> [102] The first item in section 556(1) is:
>
> > '(a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business;'
>
> Section 556(2) makes clear that a '*relevant authority*' includes a liquidator. *In Re MC Bacon Ltd* [1991] Ch 127 at 138 Millett J held that, *'... the expenses of realising or getting in the assets do not include the costs of an unsuccessful attempt to recover an*

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7 (2004) 61 NSWLR 169.

8 Ibid at [101] – [102].

> *asset'*. **Thus, costs ordered against the company, in litigation a liquidator causes it to bring, cannot be paid under section 556(1)(a), except when the bringing of the litigation can be characterised as part of carrying on the company's business.**" (emphasis added)

[22] But even if such an adverse costs order were recoverable from the fifth defendant's assets, it is far from certain that, by the time such an order is made, there will be sufficient cash left in the fifth defendant's account to meet the costs order.

[23] On 27 February 2017, the liquidators of the fifth defendant lodged with ASIC a Form 524 "Presentation of accounts and statement". Part 6 of that form detailed the "Expected Outcome" as involving payment of a dividend to creditors. The form then set out the liquidators' "Statement of financial position and estimated outcome of your appointment". This statement set out "high" and "low" estimates, and each estimate was premised on the $1.3 million cash held in the fifth defendant's account. The "high" estimate posited some future recoveries (including "potential legal recoveries" of $1 million) and estimated liquidators' and other costs of some $510,000, yielding an estimate of approximately $1.89 million as the amount available for dividends to creditors (and in which, the fifth defendant contends, an adverse costs order would enjoy priority). Under the "low" estimate, however, there was no allowance for any future recoveries, and the estimated liquidators' and other costs were estimated at just under $1 million, leaving the low estimate of the amount available as dividends for creditors at some $405,000.

[24] It is, however, not at all clear whether these estimates take account of the fifth defendant's pursuit of the present counterclaim, and the costs which will be incurred both by way of work by the liquidators and the legal fees, costs and outlays incurred by the liquidators in pursuit of the counterclaim. In that regard, I note that, subsequent to the filing of these estimates with ASIC, the liquidators issued a report to Unit Holders dated 2 May 2017 in which the liquidators referred to the current proceedings, stating that it was "necessary to participate in the proceedings to ensure the Company's interests in the SSA are protected" and then said:

> "I have sought legal advice with respect [to] the Company's position and whether further involvement in the proceedings could be funded by an

> external litigation funder in order to minimise further costs in the liquidation."

[25] In short, it appears to be the case on the material presently before me that, if an adverse costs order is made against the fifth defendant in respect of its counterclaim, then:

(a) it is possible that such a costs order might be recoverable out of the fifth defendant's assets; and

(b) it is possible that there might, at that time, be sufficient cash in the fifth defendant's account to satisfy the costs order.

[26] It is necessary to recall that these matters are raised because the fifth defendant, a company in liquidation, says that the Court ought not find that the threshold test for ordering security for costs is satisfied. In *Process Engineering Pty Ltd v Derby Meat Processing Co Ltd,*[9] Brinsden J observed, in relation to the threshold question, that winding up proceedings constitute *prima facie* evidence to satisfy that question.[10]

[27] Drawing on that proposition, Ann Lyons J (as she then was) in *Cherbourg Food Processing Company Pty Ltd v Enterprises (Qld) Pty Ltd*[11] said[12]:

> "The decision in *Process Engineering Pty Ltd v Derby Meat Processing Co Ltd* established that the fact that a company is in liquidation is sufficient evidence to satisfy this threshold test. It is not however determinative of the ultimate issue as to whether security should be ordered as it is simply one factor the Court should consider. There is no doubt that liquidation is a circumstance of some weight in the Court's discretion."

[28] The *prima facie* evidence constituted by the fact of liquidation may, of course, be displaced by other sufficient evidence which might lead to a conclusion that, notwithstanding the liquidation, the Court ought not be satisfied that there is reason to believe that a company will not be able to pay on an adverse costs order.

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9 [1977] WAR 145.

10 At 146, and citing Halsbury, 4th ed, Volume 7, para 779.

11 [2012] QSC 162.

12 Ibid at [22].

[29] It has been held that the threshold question must be decided "in relation to the time at which the potential liability for costs is first likely to accrue, the question being whether there is reason to believe that [the Company] will be unable to meet the liability as at that date".[13]

[30] In the present case, that time will not arise until after the hearing and determination of the counterclaim. By that time, of course, the fifth defendant will be liable for further liquidators' remuneration and the liquidators will have incurred significant legal costs and expenses in pursuit of the counterclaim.

[31] True it is that there are the possibilities that, in the event of a costs order against the fifth defendant on the counterclaim, those costs may be found to be able to be paid from the fifth defendant's assets and that there will be some remaining funds to satisfy the costs order. But, on balance, I do not consider that those possibilities outweigh the *prima facie* position with respect to the threshold question established by the fact of the fifth defendant's liquidation. My conclusion may well have been different if these were not mere possibilities but probabilities, and one could have had a settled degree of satisfaction that despite the liquidation, an adverse costs order would be met, and be able to be met, from the fifth defendant's assets. But that is not the state of the present case.

[32] Accordingly, I consider the threshold test to be satisfied, and my unfettered discretion for ordering security for costs against the fifth defendant in respect of the counterclaim is enlivened.

[33] In relation to the discretionary considerations, the fifth defendant argued that:

(a) there is no real issue that Mio Art has assigned its entitlement to receive funds under the SSA to the fifth defendant; and

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[13] *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* [1985] 1 NSWLR 114, per Waddel J at 117.

(b) as part of its defence to the counterclaim, Mio Art has advanced a case of there being a superior interest which would have priority over any entitlement of the fifth defendant.

[34] Under both of those scenarios, the fifth defendant contended that it was really placed in the position of defending positive claims brought by Mio Art, and this was a significant factor weighing against the making of an order for security for costs on the counterclaim.

[35] In its counterclaim,[14] the fifth defendant:

(a) adopts and effectively repeats certain allegations made in the defence of Mango Boulevard and BMD[15] in which it was pleaded, amongst other things, that:

(i) on 9 June 2005, Spencer, as trustee of the Spencer Family Trust, assigned to the fifth defendant his right to receive $3 million of the sale price payable under the SSA (plus certain other moneys) and that Spencer had given notice of this assignment to Mango Boulevard; and

(ii) on 9 June 2005, Spencer and the fifth defendant entered into a deed of cross-collateralisation in which it was recited that Spencer had assigned to the fifth defendant the right to receive payment of $3 million (plus certain other moneys) out of the share sale price; and

(iii) by a subsequent deed made between the fifth defendant and Spencer, the figure of $3 million was amended to $2 million.

(b) says further that on 9 June 2005, Spencer, Perovich and the fifth defendant entered into an Assignment of Benefit of Guarantees by which each of Spencer and Perovich assigned to the fifth defendant all of the right, title and interest under the guarantees issued by BMD, and notice of this assignment was given to BMD;

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[14] Court document 301.

[15] The relevant version being the twelfth further amended defence, Court document 306.

(c) pleads that Mio Art has replaced Spencer as the trustee of the Spencer Family Trust; and

(d) pleads that notice of the assignment to the fifth defendant of entitlement to receive money pursuant to the SSA was given in priority to any other notice provided by any other party to this proceeding.

[36] The defence to the fifth defendant's counterclaim raises issues as to the asserted entitlement of the fifth defendant to claim on moneys payable under the SSA as a consequence of the arbitration and as to the efficacy of the assignments by Spencer of his entitlements under the SSA and of the benefit of the BMD guarantees.

[37] So, in response to a plea in the counterclaim concerning Perovich being a party to the documents, it is said that because Perovich was not a party to the arbitration, the arbitral award is not binding on her. The consequence, so it is asserted, is that there is nothing payable by Mio Art to Perovich by reason of the arbitration, which in turn means that there is nothing payable by BMD to Perovich under the guarantee, and which then in turn means that there is no basis for the fifth defendant to make any claim against Mango Boulevard, BMD or Mio Art in reliance on the involvement of Perovich.

[38] Of more direct relevance is the defence to the fifth defendant's counterclaim which, amongst other things, asserts:

(a) On 12 April 2006, the fifth defendant obtained judgment against both Spencer and Perovich for some $2.05 million plus interest;

(b) By reason of that judgment, the underlying debt and any entitlement to an assignment of the proceeds of the SSA ceased and were merged into the judgment;

(c) Spencer and Perovich were declared bankrupt in August 2007;

(d) Any debt owed as at the date of bankruptcy became provable in, relevantly, Spencer's bankruptcy;

(e) On Spencer's subsequent discharge from bankruptcy, any debt he had owed was discharged by operation of s 153 of the *Bankruptcy Act* 1966 (Cth);

(f) Spencer does not have an entitlement for indemnity from the assets of the Spencer Family Trust in respect of the judgment debt;

(g) The assignment of entitlements under the SSA by Spencer, on a proper construction of the documents, was a partial and not an absolute assignment.

[39] Moreover, the defence to the counterclaim separately pleads a limited operation of the BMD guarantees and asserts that, on their proper construction, there was no assignment by Spencer of his rights under the guarantees to the fifth defendant, but rather it is the plaintiff, as trustee of the Spencer Family Trust, which is entitled to the benefit of the guarantees.

[40] It is clear enough that these matters raise defences to the claims pressed by the fifth defendant in its counterclaim. It may be, as counsel for the fifth defendant conceded in argument, that these matters may be determined in relatively short order at trial. But it is not enough for the fifth defendant simply to assert that it is seeking to vindicate its rights under the assignments made by Spencer without acknowledging that Mio Art seeks to vitiate the effect of those assignments.

[41] The fifth defendant says that, by Mio Art raising these matters in defence of the counterclaim, the fifth defendant is put in the position of defending itself against those assertions. As to that, there are two things to be said:

(a) The days in Queensland of a defendant being able to plead a bare defence are long gone. In *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd,*[16] I ventured to essay the contemporary pleading rules for defences under the *UCPR*.

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[16] [2009] 1 Qd R 116.

Amongst other things, I noted the requirement for a direct explanation for a denial, saying:[17]

> "It may be … that the nature of the direct explanation of the party's belief that an allegation is untrue necessarily compels the party to plead, in compliance with r 149, the material facts (not evidence) on which it will rely to controvert the allegation or other matters to prevent the opponent being taken by surprise. Thus, if the direct explanation given by a defendant is that the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue, the defendant should plead those matters by way of response, either as material facts under r 149(1)(b) or as matters required to be stated to prevent surprise under r 149(1)(c)."

That is precisely the situation here. The matters contained in the defence to the counterclaim to which I have referred above are pleaded by way of direct explanation for the plaintiff's denial of the counterclaim – and that is what is required by the UCPR. The raising of these matters in defence does not then put the fifth defendant substantially in the position "of a defendant" in respect of those matters.

(b) The relevant discretionary factor in r 672(f) is whether the fifth defendant "is effectively in the position of a defendant" with respect to the counterclaim. The approach for that purpose is to look at the substance of the dispute and to ask which party, in substance, is the attacker, and which party, in substance, is defending itself from attack. The authorities for that approach were conveniently assembled by Applegarth J in *Global Access Ltd v Educationdynamics LLC*.[18] The counterclaim in this proceeding cannot, in my view, be described as a "defensive manoeuvre". It is a free-standing claim by the fifth defendant, which seeks to vindicate its rights.

[42] Accordingly, the raising of these matters by Mio Art in defence of the counterclaim do not excite the discretionary factor referred to in r 672(f).

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[17] Ibid at [30].

[18] [2010] 1 Qd R 525 at [14] – [22].

[43] As a separate consideration under the same rubric, the fifth defendant pointed to the plea by Mio Art in its defence to the counterclaim of the possible existence of a lien which might effectively trump any claim by the fifth defendant. Mio Art has pleaded:

> "In further answer to the whole of [the fifth defendant's] counterclaim, the Plaintiff says that it and its solicitors have salvage and litigation liens over any moneys payable to the Plaintiff under the SSA and the DGI, [this is the BMD guarantee] an entitlement to be paid costs awarded in favour of the Plaintiff as a consequence of its efforts to ensure that the SSA and the DGI were duly performed by the First and Fourth Defendants, and 'just allowances' for its efforts as trustee, on behalf of the 'Spencer Family Trust', to recover the benefit of the performance of the SSA and the DGI by the First and Fourth Defendants, for the bankrupt estates of Mr Spencer and the Second Defendant and the Spencer Family Trust, in priority to any other party."

[44] There was some considerable discussion before me as to the precise nature of these asserted liens. Mr F M Douglas QC, who appeared for Mio Art, conceded in argument, for example, that the asserted solicitor's lien was not maintainable by any present party to the proceeding, but could only be sought to be enforced by a solicitor in due course. The balance of the matters characterised in the pleading as "salvage lien" were more properly characterised by Mr Douglas QC in the course of argument as "just entitlements", the fundamental underlying proposition being that those who have expended time and energy in pursuing the proper performance of the SSA and the BMD guarantees ought be compensated, or remunerated, for that time and effort in priority to any other party which might have a claim on moneys flowing from the SSA or as a consequence of the operation of the BMD guarantees. Whether Mio Art, or those standing behind Mio Art, are ultimately able to persuade the Court that there is such a "just entitlement" is a matter which must await trial.

[45] Relevant for present purposes, however, is whether the raising of this in the defence to the counterclaim has the effect of converting Mio Art from being the defender to the attacker. Once again, looking at the substance of the dispute as a whole, I do not think it does. The relevant principal claim is the pursuit by the fifth defendant of its claim for money flowing from the SSA or to which it says it is entitled pursuant to the operation of the BMD guarantees. This assertion of "just entitlements" is clearly defensive against that asserted principal claim by the fifth defendant.

[46] Accordingly, I do not consider that the raising of this matter in the defence to the counterclaim has the effect of putting the fifth defendant "effectively in the position of a defendant".

[47] Those were the only discretionary considerations argued by the fifth defendant in opposition to the making of an order for security for costs. It remains the case that the fifth defendant is a company in liquidation, and this of itself is a weighty factor. True it is, as I have already noted, that there is some prospect that an adverse costs order may be able to be recovered from assets which might be held by the fifth defendant. There are, however, no other discretionary considerations which would weigh against the making of an order for security for costs.

[48] In all the circumstances, I am satisfied that this is a case in which there ought to be an order for security for costs against the fifth defendant in respect of its counterclaim in this proceeding.

[49] The quantum of that security will be discussed separately below.

Application against the sixth, tenth, eleventh and twelfth defendants

[50] Each of the sixth, tenth, eleventh and twelfth defendants (collectively "the Earnings Defendants") is in liquidation. It was conceded that the threshold test is satisfied in respect of the application against them for security for costs on their counterclaim.

[51] The Earnings Defendants argued, however, that the discretion ought be exercised against the making of an order because:

(a) the merits of the Earnings Defendants' counterclaim is such that there is a high degree of probability that it will be successful;

(b) an order for security for costs would frustrate the counterclaim;

(c) it is not reasonable to expect those standing behind the Earnings Defendants to put up security; and

(d) the Earnings Defendants' want of means was brought about by Mio Art's default.

[52] The sixth defendant ("Earnings") is the trustee of a number of unregistered managed investment schemes, each of which was wound up by order of the Federal Court on 27 March 2008.

[53] These schemes operated as unit trusts and involved investors paying money into a pooled fund and subsequently being issued or transferred units. The liquidator of the Earnings Defendants has deposed[19] that there were 74 investors in the schemes, comprising 33 individuals (which he described as "primarily unsophisticated, elderly, mum and dad investors"), 31 superannuation funds, eight family trusts and two companies. He said that a number of the investors hold interests in their own names and also in their superannuation fund and/or family trust, and that he was aware of some 62 unique individuals or families who had invested in the schemes. The investments range in size from $4,000 to $418,000, with the average investment being $41,255.

[54] The only assets of these schemes are the loans secured by the entitlements on which the Earnings Defendants seek the relief claimed in their counterclaim. As such, the investors in the scheme stand to be primary beneficiaries of the counterclaim, if it is successful. Those claimed entitlements arise as follows:

(a) On 15 September 2005, salarypackaging.com.au Pty Ltd as trustee for a particular mortgage scheme (MMFS-CIT) lent $775,000 plus interest to Mango Capital Holdings Pty Ltd pursuant to a written loan agreement. By a Deed of Assignment dated 15 September 2005, Spencer (as trustee for the Spencer Family Trust) and Perovich assigned their right, title and interest under the SSA to receive the first $1 million of the amount payable under cl 5 of the SSA to salarypackaging.com.au Pty Ltd as trustee for the MMFS-CIT. MMFS-CIT's interests were subsequently assigned to one of the schemes of which Earnings is the trustee;

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[19] Affidavit of Adam Nikitins affirmed 7 July 2017.

(b) On 4 May 2006, Earnings as trustee for another scheme (MMFS-CIT-Moreton) lent $2.7 million plus interest to Alliance Credits Pty Ltd as nominee of Spencer (as trustee of the Spencer Family Trust) pursuant to a written Loan Agreement. That loan was secured by a Bill of Sale dated 4 May 2006, by which Alliance Credits Pty Ltd as nominee of Spencer (as trustee of the Spencer Family Trust) and Perovich agreed to assign to Earnings "absolutely sufficient of the balance share sale price pursuant to the Share Sale Agreement to discharge the debt under the loan facility agreement";

(c) On 12 May 2006, Earnings as trustee for MMFS-CIT-Moreton lent $2.2 million plus interest to Alliance Credits Pty Ltd as nominee of Spencer (as trustee of the Spencer Family Trust) pursuant to a written Loan Agreement. The amounts of $550,000 and $430,000 were subsequently drawn down. That loan was secured by a Bill of Sale dated 12 May 2006 under which Alliance Credits Pty Ltd as nominee of Spencer (in his capacity as trustee of the Spencer Family Trust) and Perovich agreed to assign to Earnings "absolutely sufficient of the balance share sale price pursuant to the Share Sale Agreement to discharge the debt under the loan facility agreement".

[55] In short, the Earnings Defendants, by their counterclaim, contend that Earnings is entitled to payment by Mango Boulevard and BMD, subject to the fifth defendant's priority, of an amount sufficient to discharge the indebtedness of Mio Art as trustee of the Spencer Family Trust.

[56] Argument before me on the merits of the Earnings Defendants' case focused particularly on the assertion that there was no real prospect of Mio Art succeeding in its defence that the debt owed to the Earnings Defendants had been discharged by Spencer's bankruptcy. *Norman v Federal Commissioner of Taxation*[20] was referred to for the proposition that the assignments of part of the debt owed to Spencer took effect as equitable assignments and gave rise to equitable charges in favour of Earnings. *In Re*

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[20] (1962 – 1963) 109 CLR 9, particularly per Windeyer J at 29-30.

Lind,[21] was invoked in support of the contention that an agreement to charge future property created an immediate equitable charge upon the property coming into existence, from which it was then argued that when this charged property comes into existence it is immediately seized, on the facts of this case, in the Spencer Family Trust, and did not form part of Spencer's bankrupt estate.

[57] Counsel for Mio Art, however, pointed to the distinction between assignments in respect of:

(a) presently enforceable rights,

(b) rights presently existing but enforceable only in the future, and

(c) rights which do not exist at all, but may do so in the future

and cited the proposition that the third category describes things that are not rights or choses at all, and cannot be the subject of a present assignment.[22]

[58] Mr Douglas QC argued that, on the facts of this case, there was no assignment of a presently enforceable right but merely a future right to have an arbitration to determine the value of property. There was, at the time of the assignment, no present right to enforce that entitlement, and that right to enforce did not arise until January 2007. Moreover, the highest that could be said of the Earnings position was that it had the partial assignment of a future entitlement to receive some money flowing from the operation of the SSA, and did not have the benefit of the assignment of the whole contract. It was submitted that the subject of the assignments on which the Earnings Defendants rely fell into Spencer's bankrupt estate, citing the following commentary:[23]

> "In an insolvency situation the position changes. Future rights cease to be automatically assignable. An assignment of rights which cannot be *earned*

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[21] [1915] 2 CH 345.

[22] Smith "The Law of Assignment" (2nd Ed) Oxford University Press at para 32.26.

[23] Ibid at 32.27 – 32.28, and omitting references and citations.

> by the assignor until after he has become bankrupt (in the case of an individual) … is ineffective against the trustee in bankruptcy …
>
> The reason for this rule is plain. If an assignment of unearned future receivables were valid, then the assignee would effectively be a secured creditor: the unearned receivables would be untouched by the insolvency, and would go straight to him."

[59] It is clear enough, I think, from the foregoing that the outcome in this case may not be as straightforward as posited by the Earnings Defendants' submissions. I emphasise the words "may not" because, amongst other things, the conclusion will require a close analysis of the assignment documents and examination of the nature of the rights assigned.

[60] It is equally clear, however, that this is not a task which is apt to be undertaken on an application such as the present. In that regard, I respectfully adopt the following observations and approach by Austin J in *Fiduciary Ltd v Morningstar Research Pty Ltd*:[24]

> "[37] For the purposes of the security for costs application, the Rich interests say that their claims against the Morningstar interests are bona fide and have reasonable prospects of success. The Morningstar interests do not assert otherwise, but they say that the merits of the underlying claims should be regarded as a neutral factor, and that the court should simply assume that the claims are bona fide and arguable and should not embark on a more detailed consideration of the merits: *Equity Access Ltd v Westpac Banking Corp* (1989) ATPR 40-972 at 50,636 per Hill J; *Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621 at 624 per Ormiston J.
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> [38] I agree with these submission. *Lynnebry Pty Ltd v Farquhar Enterprises Pty Ltd* (1977) 3 ACLR 133 was an appeal from a Master who had declined security after forming the conclusions that the plaintiff had a very strong case and the defences were prima facie implausible. Meares J agreed (at 136) with the Master's conclusions, on the limited evidence that was available, but he held that these conclusions were not a ground for refusing to grant security. However, he cited (at 135) authorities in support of the view that it is relevant to consider whether the plaintiff's claim is bona fide and has a reasonable prospect of success.

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[24] (2004) 208 ALR 564 at [37] – [39].

> [39] Here, looking at the ASC as a whole and not focusing on particular cause of action, I have no reason to doubt that the claims by the Rich interests are bona fide claims with a reasonable prospect of success. The claims are extensive and complicated, and they are vigorously contested by the Morningstar interests. It would therefore be highly imprudent, at the stage, to attempt to form any view as to the proportionate strength of the cases of the parties, even if the authorities permitted me to do so. In the present case, the merits of the Rich interests' case against the Morningstar interests are a neutral factor."

[61] Adapting his Honour's words to the present case, I have no reason to doubt that the Earnings Defendants' counterclaim is *bona fide* and has reasonable prospects of success. But beyond that, I do not consider it appropriate to weigh the proportionate strengths of the parties' positions, and accordingly proceed on the basis that the merits of the Earnings Defendants' counterclaim is a neutral factor in the discretionary evaluation.

[62] The second and third arguments advanced by the Earnings Defendants can conveniently be dealt with together. In relation to the proposition that an order for security would frustrate the counterclaim, it is appropriate again to refer to the judgment of Austin J in *Fiduciary Ltd v Morningstar Research Pty Ltd*, in which his Honour said:[25]

> "There is a well-recognised principle that the court will not make an order for the provision of security, even in the case of a corporate plaintiff, if the order would operate to frustrate or stultify the plaintiff's non-frivolous pursuit of its claims. It is thought to be oppressive to the plaintiff to do so, because the order would stifle a claim that may prove to be genuine …, and unjust, because the effect of the order would be that the defendants would achieve a 'victory' without any contest …"

[63] His Honour then went on to say[26] that this "stultification principle", whilst going to the exercise of the Court's discretion, does not automatically lead to refusal of an

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[25] At [72], and omitting citations.

[26] Ibid at [73].

application for security for costs. After referring to a number of cases which had considered the weight to be placed on this factor, Austin J said:[27]

> "I take these cases to mean, in the case of a corporate plaintiff, that although the court has a discretion to order security and may be influenced to do so by proof of the plaintiff's insolvency, it may be persuaded not to do so if the impecunious plaintiff proves that there is no real prospect of obtaining funds to meet the order from someone else … the mere fact that the corporate plaintiff is financially unable to provide security does not lead inevitably to the conclusion that the making of an order for security will stultify the plaintiff's claim. It may be that there is someone else who will satisfy the order on the plaintiff's behalf."

[64] His Honour then referred to a number of authorities which make clear that it is for the party seeking to resist the order for security for costs to satisfy the Court that neither the company nor those behind the company who stand to benefit from the litigation do not have the necessary means available to them, and continued:[28]

> "But it is not enough to identify a financially capable person who stands to benefit from the plaintiff's success in the litigation. It is also relevant to consider whether it is reasonable to expect that person to put up security. If, for example, the plaintiff company is in liquidation and it would be in the interests of its creditors for the plaintiff to succeed, it would not be reasonable, in 'practical common sense terms' to expect a financially capable creditor of the company to give security if the debt is small …"

[65] The Earnings Defendants argued simply that it is not reasonable to expect the investors, some of whom were described by the liquidator as being unsophisticated, elderly, "mum and dad" investors, to put up security in this case.

[66] Beyond those assertions, however, there was no evidence adduced on behalf of the Earnings Defendants with respect to either the means of the investors who stand to benefit from successful pursuit of the counterclaim, or any facts from which one might make a sensible conclusion as to the reasonableness or otherwise of expecting any of

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[27] Ibid at [74].

[28] Ibid at [79].

those investors to put up their own money to back the counterclaim. The liquidator of the Earnings Defendants, after describing the investors in the schemes, said this:[29]

> "17. I have instructed my solicitors … to file the counterclaim in this proceeding on behalf of the Earning Defendants and to otherwise take all available steps to seek repayment of the Loans. If the Earning Defendants are successful in these endeavours, the beneficiaries (after payment of my expenses pursuant to section 473 of the Act), will be the investors in the Schemes.
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> 18. As at the date of this affidavit, no distributions have been made to the Scheme investors. Given that the Loans are the only remaining assets of the Schemes, if the Loans are not repaid, the Scheme investors will not receive any distributions at all.
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> 19. During the course of the liquidation, I have had cause to correspond with the Scheme investors on occasion and have, at times, requested responses from investors. In these instances, the response rate has been patchy with many investors not responding at all and many not responding for months after my correspondence. For example, my most recent circular was issued to all investors on 22 March 2017 providing an update with respect to the liquidation of the Schemes and seeking confirmation of the investors' contact details by completing and returning a form attached to the circular. Since 22 March 2017, I have received completed forms from 36 of the 62 unique investors in the Schemes. I have not received completed forms from the remaining 26 of the 62 unique investors despite issuing a further circular on 20 April 2017 to investors who had not responded and contacting the investors by telephone and email (where those details were available and current)."

[67] What one can infer from this deposition by the liquidator is that about half of the investors are uninterested in the progress of the winding up of the Schemes. There may be many reasons for that. It may be a consequence of their lack of sophistication in commercial matters. It may simply be because the small amount they invested does not justify any further effort on their part. But beyond this, the information deposed to by the liquidator does not allow me to draw any inference with respect either to the means of the investors (particularly those who apparently remain interested in the progress of the winding up of the Schemes) or as to whether there are circumstances from which I should infer that it is not reasonable to expect those investors to back the counterclaim.

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[29] Affidavit of Nikitins affirmed 7 July 2017.

[68] Accordingly, the Earnings Defendants have not satisfied me that these matters influence the exercise of the discretion against the making of an order for security for costs.

[69] The final matter argued by the Earnings Defendants was, in truth, a repetition of the "stultification" argument, in that it was said that the only assets of the Schemes are the loans in respect of which recovery is sought under the counterclaim.

[70] The Earnings Defendants have not satisfied me that the discretion ought be exercised in their favour. Accordingly, there will be an order for security for costs in respect of the Earnings Defendants' counterclaim, the quantum of which will be discussed below.

Application against the thirteenth defendant

[71] The thirteenth defendant is a company which was deregistered by ASIC on 16 January 2011, at which time it was insolvent and had ceased to carry on business. The company was reinstated on 10 January 2017. Some issue was raised before me as to the regularity of that reinstatement, given that the thirteenth defendant was, and remains, undoubtedly insolvent. It is not necessary for me to examine that question further. Moreover, the sole director of the thirteenth defendant has deposed that neither the thirteenth defendant, nor he personally, has the means to meet an order for security for costs.

[72] On any view, the threshold test on the plaintiff's present application for security for costs in respect of the thirteenth defendant's counterclaim is satisfied.

[73] The counterclaim arises in the following way. In November 2007, the plaintiff and the thirteenth defendant entered into a transaction evidenced by a suite of documents by which the thirteenth defendant agreed to lend money to the plaintiff. Relevantly, the thirteenth defendant contends that under two of those documents, namely a Bill of Sale and a Deed of Assignment, the plaintiff assigned to the thirteenth defendant the plaintiff's right to receive up to $1 million of the proceeds of the SSA. Its counterclaim, therefore, is for a declaration that the plaintiff's entitlement to receive money pursuant to the SSA has been assigned to the thirteenth defendant and for an order that the

plaintiff and BMD pay the thirteenth defendant such an amount as is necessary to discharge the plaintiff's indebtedness.

[74] It seems that the purpose for which the thirteenth defendant agreed to lend close to $1 million to Mio Art was to assist in funding the pursuit of the principal proceeding by Mio Art against Mango Boulevard and BMD for recovery under the SSA. It was asserted on that basis alone that it is "not just" for Mio Art to seek to frustrate the thirteenth defendant's right of recovery. Why that should be the case was not explained.

[75] The thirteenth defendant's main argument against the ordering of security for costs focused on what it contended was the strength of its case on its counterclaim as opposed to the paucity of the defence put up by Mio Art.

[76] Mio Art has, however, expressly challenged the efficacy of the assignments on which the thirteenth defendant's counterclaim is premised. For its part, the thirteenth defendant pointed to another judgment which recorded Mio Art itself having argued to the effect that the Bill of Sale and the Deed of Assignment operated by way of an unconditional assignment of Mio Art's rights to receive money under the SSA sufficient to discharge the loan from the thirteenth defendant to Mio Art.[30] This, says the thirteenth defendant, is fundamentally inconsistent with the defence now raised by Mio Art.

[77] In fact, what was held in that tranche of litigation, both at first instance[31] and on appeal was that the documents, on their proper construction, did not evidence an absolute assignment but operated by way of charge only. The arguments now advanced by Mio Art in defence of the counterclaim seem to be consistent with those judgments.

[78] But in any event, Mio Art's defence to the counterclaim raises factual issues which go to the thirteenth defendant's claimed entitlement to recover, namely whether there was a repudiation of the agreements by the thirteenth defendant and whether, in any event,

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[30] See *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2016] QCA 148 at [34] – [38].

[31] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd (No 6)* [2015] QSC 116.

there had been unauthorised payments by the thirteenth defendant to third parties of moneys which are being claimed as having being lent to Mio Art.

[79] Again, it seems to me that there is enough in the defence to indicate that pursuit of the counterclaim is not as straightforward as the thirteenth defendant contends. My approach, consistent with that explained in the previous section of this judgment, is therefore to regard the thirteenth defendant's counterclaim as *bona fide* and having reasonable prospects of success, but to treat the merits of the counterclaim as a neutral factor in the exercise of the relevant discretion.

[80] There is, however, a significant consideration which weighs in favour of an order for security for costs.

[81] On 13 December 2010, judgment was entered in other proceedings in this Court by Macquarie Bank against the thirteenth defendant in the sum of nearly $14 million. That judgment in favour of the bank remains outstanding. Moreover, on 30 January 2012, First Mortgage Managed Investments Ltd recorded a security interest pursuant to the *Personal Properties Securities Act* 2009 against the thirteenth defendant as grantor for security interests including "all present and after-acquired property – no exceptions".

[82] In short, it seems that the only entities which could possibly benefit from successful pursuit of the thirteenth defendant's counterclaim are this secured creditor and the bank which is a judgment creditor in respect of a very significant judgment debt.

[83] In *Jalpalm Pty Ltd v Hamilton Island Enterprises Pty Ltd,*[32] Kiefel J (as she then was) had before her an application for security for costs against a corporate litigant which was undoubtedly insolvent. Receivers and managers had recently been appointed to that litigant by a bank, which was a secured creditor. There were other unsecured creditors, including the Australian Taxation Office. The sole directors and shareholders, who were also the beneficiaries of the trust of which the litigant was a trustee, offered undertakings to the Court to make their assets available to meet any order for costs.

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[32] (1995) 16 ACSR 532.

[84] Her Honour noted the oft-cited statement of principle in *Bell Wholesale Co Ltd v Gates Export Corporation*[33]:

> "In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the parties seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts."

[85] Her Honour then considered the case before her, and said:

> "Whilst I do not deny [the director] has a genuine interest in the litigation and no doubt has a strong sense of personal grievance, the only financial interest to be benefitted is that of the creditors and it is not suggested that they, and in particular the bank, are without means. I am therefore unable to conclude that an order for security would necessarily stifle the litigation. That is a matter within the creditors' power."

[86] In the present case, there is simply no evidence as to the thirteenth defendant's creditors, and their willingness to support or not support the pursuit of the counterclaim for their ultimate benefit. Not surprisingly, for example, there was no suggestion on behalf of the thirteenth defendant that the bank in question did not have the necessary means.

[87] In all of those circumstances, with the threshold test being satisfied, the thirteenth defendant has failed to satisfy me that the discretion in respect of ordering security for costs ought be exercised in its favour.

[88] I will now turn to consider the quantum of security for costs to be provided.

Quantum of security for costs

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[33] (1984) 2 FCR 1 at [4].

[89] It is accepted that, in assessing the quantum of security for costs to be provided, it is proper for the Court to adopt a "broad brush" rather than a strictly mathematical approach. This is consistent with the principles explained by French J (as he then was) in *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd*.[34]

[90] On each application, Mio Art sought security in an amount of approximately $180,000. It supported this figure by evidence from Mio Art's solicitor, which sought to quantify the costs which would be incurred in defending the counterclaims. Even a cursory review of those estimates, however, revealed them to be completely overblown, not least because they were being made on a full solicitor-own client basis.

[91] The solicitors for the respondents to the applications put on evidence of their own estimates of the likely costs of defending the counterclaims. Those estimates came in at approximately $76,000.

[92] In fairness, when confronted with those more conservative (and, dare I say, realistic) estimates, counsel for Mio Art, whilst not expressly conceding the point, did not advance any vigorous argument as to why I should not proceed in accordance with the lower estimates.

[93] Counsel for the Earnings Defendants submitted that there should also be some appropriate discounting to take account of the fact that there would inevitably be some overlap in terms of preparation for hearing in respect of each of the respective counterclaims. Having reviewed the material, I think it likely that there may well be some commonality in that regard, but am unable to be any more precise. Doing the best I can, therefore, I will allow a modest discount to reflect the prospect of "doubling up" in preparation.

[94] In respect of each of the applications, therefore, I will fix the quantum of security to be provided for the costs of the counterclaim at $70,000.

Conclusion

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[34] (1997) 16 FCR 497 at 515.

[95] Accordingly, there will be the following orders:

1. On the application by the plaintiff against the fifth defendant, it is ordered:

   (a) that within 28 days the fifth defendant provide, in a form satisfactory to the Registrar, security in the sum of $70,000 for the plaintiff's costs of and incidental to defence of the fifth defendant's counterclaim up to the first day of the hearing;

   (b) failing provision of such security within that time, the fifth defendant's counterclaim against the plaintiff be stayed;

   (c) liberty to apply; and

   (d) the costs of and incidental to the application for security for costs be reserved.

2. On the application by the plaintiff against the sixth, tenth, eleventh and twelfth defendants, it is ordered:

   (a) that within 28 days the sixth, tenth, eleventh and twelfth defendants collectively provide, in a form satisfactory to the Registrar, security in the sum of $70,000 for the plaintiff's costs of and incidental to defence of the sixth, tenth, eleventh and twelfth defendants' counterclaim up to the first day of the hearing;

   (b) failing provision of such security within that time, the sixth, tenth, eleventh and twelfth defendants' counterclaim against the plaintiff be stayed;

   (c) liberty to apply; and

   (d) the costs of and incidental to the application for security for costs be reserved.

3. On the application by the plaintiff against the thirteenth defendant, it is ordered:

(a) that within 28 days the thirteenth defendant provide, in a form satisfactory to the Registrar, security in the sum of $70,000 for the plaintiff's costs of and incidental to defence of the thirteenth defendant's counterclaim up to the first day of the hearing;

(b) failing provision of such security within that time, the thirteenth defendant's counterclaim against the plaintiff be stayed;

(c) liberty to apply; and

(d) the costs of and incidental to the application for security for costs be reserved.