SUPREME COURT OF QUEENSLAND

CITATION: *Faamate & Ors v Congregational Christian Church in Samoa-Australia (Ipswich Congregation) ABN 90 103 392 182 & Ors (No 2)* [2020] QSC 12

PARTIES:
TAUA MEAULI FAAMATE
(first applicant)
and
LAGILAGIA FAAMATE
(second applicant)
and
VAEA LOLE NOUATA
(third applicant)
and
SEGIA NOUATA
(fourth applicant)
and
MAIAVA PERETISO MULIAGA
(fifth applicant)
and
NAUMATI MULIAGA
(sixth applicant)
and
TUITEA MAFUTAGA FOE
(seventh applicant)
and
LEITU FOE
(eighth applicant)
and
TAGO AVE IATIGA
(ninth applicant)
and
SEUAANA TAOFIA MULIAGA
(tenth applicant)
and
LINE MULIAGA
(eleventh applicant)
and
FAALAA TUSI FANOLUA
(twelfth applicant)
and
ALA FANOLUA
(thirteenth applicant)
and
LUATUA ASOSILI SETEFANO
(fourteenth applicant)
and

TALALELEI SETEFANO
(fifteenth applicant)
and
FALEAUTO TALUVALE FA
(sixteenth applicant)
and
JUNIOR PAPUA
(seventeenth applicant)
and
SENIA PATO
(eighteenth applicant)
and
ASO AUKUSO
(nineteenth applicant)
and
TIANA AFAESE
(twentieth applicant)
and
LEAVEA JONES
(twenty-first applicant)
v
CONGREGATIONAL CHRISTIAN CHURCH IN SAMOA-AUSTRALIA (IPSWICH CONGREGATION)
ABN 90 103 392 182
(first respondent)
and
KERITA REUPENA
(second respondent)
and
TIPI TISEMA
(third respondent)
and
LOLINI SAKAIO
(fourth respondent)

FILE NO:	SC No 12831 of 2016
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	14 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Submissions received 10 October 2019 (applicants), 17 October 2019 (respondents), 18 October 2019 (applicants in reply) Further submissions requested and received 4 November 2019 (applicants) and 8 November 2019 (respondents)
JUDGE:	Wilson J

ORDERS: **The order of the Court is:**

1. **The respondents pay the applicants 65% of their costs on the standard basis, to be assessed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – where the applicants sought an order winding up an incorporated Association on the just and equitable ground – where the applicants were unsuccessful, however, were largely successful in respect of declaratory relief sought – where the respondents made an open offer on the eve of the trial – where the open offer did not include the declaratory relief – whether the respondents should pay the applicants' costs of the proceeding, and if so, in what apportionment – whether the costs order should be joint

Uniform Civil Procedure Rules 1999 (Qld) rr 681, 684

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor [2013] QSC 216, cited
Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors (No. 2) [2019] QSC 249, cited
BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, cited
Bucknell v Robins [2004] QCA 474, cited
Faamate & Ors v Congregational Christian Church in Samoa-Australia (Ipswich Congregation) ABN 90 103 392 182 & Ors [2019] QSC 194
Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2) [2013] QSC 170, cited
Monie v Commonwealth of Australia (No 2) [2008] NSWCA 15, cited
NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd [1999] QSC 328
Oldfield v Gold Coast City Council [2010] 1 Qd R 158, cited
Oshlack v Richmond River Council (1998) 193 CLR 72, cited
Re Quality Blended Liquor Pty Ltd (No 2) [2014] QSC 307, cited
Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co. (No. 2) [1953] 2 All ER 1588
Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 3) [2015] QSC 164, cited

COUNSEL: V B Brennan for the applicants
P K O'Higgins for the respondents

SOLICITORS: Corney & Lind Lawyers for the applicants
Neumann and Turnour for the respondents

Background

[1] This trial concerned two competing groups in the Congregational Christian Church in Samoa-Australia (Ipswich Congregation) ("the Association" or "the Ipswich Church").

[2] The Association was, until late 2016, directly affiliated with the Mother Church in Samoa; such an affiliation was recognised by the Association's constitution.

[3] There were ongoing disputes with Reverend Reupena and the Mother Church which underlay the dispute before the Court.

[4] The members were split into two groups euphemistically called "the Remainder Group" (named by virtue of their desire to "remain" as part of the Mother Church) and "the Reupena Group" (named after the second respondent who is the Church pastor and the Association's permanent President).

[5] The applicants in the proceeding were the Remainder Group.

[6] The second to fourth respondents formed part of the Reupena Group. The third respondent was the Association's secretary at the time the proceedings were commenced. The fourth respondent was the Association's treasurer in 2017, having been appointed on 11 December 2016 with a commencement date of 1 January 2017. However, according to the minutes of the general meeting on 20 December 2015 and the Office of Fair Trading Association extract records as at 17 November 2016, Mrs Faamaau Moe was the treasurer at the time the proceedings were commenced.[1]

[7] The applicants sought an order winding up the Association on the just and equitable ground pursuant to Part 10 of the *Associations Incorporation Act* 1981 (Qld).

[8] The respondents made an open offer ("the respondents' open offer"), which the applicants say was sent on the Friday afternoon before the trial commenced on the following Monday.[2] This open offer was not accepted by the applicants and the trial proceeded.

[9] The applicants initially sought the alternative order of the appointment of a receiver, together with various declarations. The applicants formally abandoned the appointment of a receiver at the end of the trial, but the declarations were not abandoned by the applicants.

[10] The applicants' submissions sought the following findings:

(a) The expulsion of the applicants from the Association's membership and thereafter, their exclusion from the Association's premises and affairs was not, as alleged by the respondents, a mass resignation. And, allied to that

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1 *Faamate & Ors v Congregational Christian Church in Samoa-Australia (Ipswich Congregation) ABN 90 103 392 182 & Ors* [2019] QSC 194 at [68]-[71].

2 The letter is annexed to the Affidavit of James Tan sworn 18 October 2019, JPT-01, p 22-24, however, there is no time stamp on the letter. The applicants submit that as the letter was sent after 4:00pm, it is taken to have been served on the Monday pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 103.

contention, they were, at all times from 4 September 2016, members of the Association.

(b) The use of the Association's funds to defend what was, in effect, a dispute between members was impermissible and, accordingly, oppressive conduct.

(c) The second respondent's unilateral appointment of the management committee was inconsistent with statutory and constitutional requirements and was, therefore, invalid.

(d) The second respondent's borrowing of the Association's funds to finance his personal litigation against the Mother Church was inconsistent with the Association's constitution and another example of financial mismanagement sufficient, with others, to be oppressive conduct.

(e) The Association did not maintain a register of members and, therefore, had failed to comply with statutory and constitutional requirements.

(f) The purported amendment to the Association's constitution on 4 September 2016 was invalid as it failed to comply with statutory and constitutional requirements.

(g) The (admitted) non-compliance with the Association's financial reporting obligations was a failure to comply with statutory and constitutional requirements.

(h) The admission of the 19 new members was an attempt by the Reupena Group to dilute the applicants' proportion of the membership and was, therefore, oppressive.

[11] The respondents' primary position, at the end of the trial, was that the application to wind up ought to be refused and no appointment of a receiver ought to be made.

[12] However, the respondents submitted that if it became necessary to do so in the context of an appointment of a receiver, the respondents would concede that all of the applicants were members[3] (plus those on their list for which the first applicant did not account and which appeared on the respondents' list), for the purpose of a receiver convening a general meeting to determine the Association's future.

[13] The trial took nine days, eight of which were largely comprised of evidence-in-chief and cross-examination of a number of witnesses (facilitated by an interpreter).

[14] My reasons were published on 9 August 2019.[4] The ultimate order of the Court was dismissal of the applicants' application for winding up , and that the parties prepare a draft order giving effect to the reasons for judgment that, *inter alia*, a receiver be appointed to convene a general meeting of all members to determine the future of the Association.

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[3] Except for the nineteenth and twentieth applicants.

[4] *Faamate & Ors v Congregational Christian Church in Samoa-Australia (Ipswich Congregation) ABN 90 103 392 182 & Ors* [2019] QSC 194 ("*Reasons*").

[15] In my reasons, I made a number of declarations in respect of the applicants' alternative application for declaratory relief, namely:

(a) The applicants are members of the Association (except for the nineteenth and twentieth applicants).

(b) The purported amendment to the Association's constitution which is alleged to have occurred on 4 September 2016 was invalid.

(c) The Association's constitution is the document exhibited as TMF-2 to the first applicant's affidavit.

(d) Any appointment to the Association's management committee, not in compliance with clauses 11 to 13 of the Association's constitution, was invalid.

[16] Throughout my reasons I also made a number of findings, including:

(a) The Remainder Group did not resign from the Association on 4 September 2016. The Reupena Group excluded the Remainder Group from the Association.[5] The applicants were members of the Association, except for the nineteenth and twentieth applicants.[6]

(b) The Reupena Group's use of the Association's funds to finance the defence of the proceeding was not an act of oppression. [7]

(c) The second respondent's unilateral appointment of the committee members was contrary to the provisions of both the *Associations Incorporation Act* 1981 (Qld) and the constitution,[8] and any appointment to the committee not in compliance with clauses 11 to 13 of the constitution was invalid.[9]

(d) The Association's loans to the second respondent "in isolation, [was] of little weight when considering the winding up of the Association on the just and equitable grounds".[10]

(e) The Association had failed to maintain an accurate membership register at least until September 2016.[11]

(f) The purported amendment to the Association's constitution was invalid.[12]

(g) The Association consistently (and admittedly) failed to comply with its statutory and constitutional obligations with respect to the creation, maintaining and submitting of its annual financial reports.[13]

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5 *Reasons* at [403]-[404].
6 *Reasons* at [562].
7 *Reasons* at [428]-[438].
8 *Reasons* at [390].
9 *Reasons* at [396].
10 *Reasons* at [427].
11 *Reasons* at [361].
12 *Reasons* at [562].
13 *Reasons* at [466].

(h) The admission of new members was not an act of oppression on behalf of the respondents.[14]

[17] The resolution of these controversies was not only in response to the applicants' alternative application for declaratory relief, but also assisted in the determination of the ultimate order.

[18] I asked the parties to provide me with an order that gave the most practical effect to the reasons in relation to the work of the receiver. The parties provided me with a draft order on 9 October 2019.

[19] The question of costs remains.

[20] I requested the parties to make submissions on the question of costs, and stated that I would deal with the question of costs on the papers, unless either party requests a hearing.

[21] On 3 October 2019, I heard an application to stay the orders appointing a receiver, pending delivery of judgment in the applicants' appeal, or further order. This application was dismissed.[15]

[22] The parties also made submissions with respect to the order appointing a receiver, and a timeline for costs.

[23] Relevantly, the draft order received by my chambers on 9 October 2019 reflected an agreed timeline for submissions in respect of costs.

[24] I received written submissions as to costs from the applicants on 10 October 2019, followed by submissions from the respondents on 17 October 2019 and submissions in reply from the applicants on 18 October 2019. Each party indicated that they did not require an oral hearing on the matter of costs.

[25] On 1 November 2019, I requested whether the applicants have any submissions on the respondents' submission that no order for costs ought to be made against the second respondent personally. I received further submissions from the applicant on 4 November 2019 and from the respondents on 8 November 2019.

Relevant legal principles

[26] The general rule for costs is r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the *UCPR*"), which provides that:

> "(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise."

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14 *Reasons* at [481].

15 The parties agreed that the applicants are to pay the respondents' costs of that unsuccessful stay application, and the draft order delivered to chambers on 9 October 2019 reflected this.

[27] In *Oshlack v Richmond River Council*,[16] ("*Oshlack*") McHugh J (with whom Brennan CJ agreed) endorsed a statement of Devlin J in *Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co. (No. 2)*[17] that:

> "... Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure [...]"

[28] The rationale for that statement of general principle was explained by McHugh J in *Oshlack* in the following terms:[18]

> "... The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation.
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> As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."

[29] The discretion in awarding costs is a wide one but it must be exercised judicially and not be reference to irrelevant considerations.[19] The general rule that a successful party in litigation is entitled to an order of costs in its favour, is grounded in reasons of fairness and policy[20] and should only be departed from where the other party can point to "some good reason".[21]

[30] There are exceptions to the usual order as to costs, which focus on:

(a) the conduct of the successful party which disentitles it to the beneficial exercise of the discretion;[22] or,

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16 (1998) 193 CLR 72 at 96 [66] per McHugh J, with whom Brennan CJ agreed.

17 [1953] 2 All ER 1588 at 1590 per Devlin J.

18 (1998) 193 CLR 72 at 97 [67]-[68] per McHugh J, with whom Brennan CJ agreed (footnotes omitted).

19 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Latoudis v Casey* (1990) 170 CLR 534.

20 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72.

21 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22] per Chesterman J, as his Honour then was.

22 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 98 per McHugh J, with whom Brennan CJ agreed. See also *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158 at 177 [71] per Muir JA, White and Wilson JJ.

(b) the existence of "special" or "exceptional" circumstances.[23]

[31] Conduct of the successful party which may disentitle it to the beneficial exercise of the discretion may include:[24]

(a) the "lax" conduct of the successful party which invited the litigation;

(b) unnecessary protraction of the proceedings;

(c) success on a point not argued before a lower court;

(d) prosecution of the matter solely for the purpose of increasing the recoverable costs; and

(e) obtaining relief which the unsuccessful party had already offered in settlement of the dispute.

[32] The usual circumstance in which a court will deprive the successful party of the costs relating to an issue on which it was unsuccessful is when that issue is clearly dominant or separable.[25]

[33] The phenomenon of each party claiming to have been successful, or to have each enjoyed a substantial measure of success, was noted by Applegarth J in *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino (No 2)*:[26]

> "[5] Ordinarily, the fact that a successful plaintiff fails on particular issues does not mean that it should be deprived of some of its costs. As Muir JA observed in *Alborn v Stephens*, "a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs." Still, a successful party which has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them.
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> [6] The proposition that a successful party will be deprived of its costs or be ordered to pay part of the other parties' costs only in special circumstances or for good reason is well-established. Principles or even rules of thumb which refer to "a successful party" beg the question of the standard by which success is to be measured. Is a plaintiff which makes a multi-million dollar claim on a variety of legal grounds but obtains a judgment for nominal damages, namely $10, based upon limited success on only one of the various causes of action pursued by it successful?

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23 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120, 126 per Kirby J.

24 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-98 [69], cited in *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158 at 177 [71].

25 *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [64]-[65] per Campbell JA, with whom Mason P and Beazley JA agreed (Mason P and Beazley JA except in relation to indemnity costs).

26 [2013] QSC 170 at [5]-[8] per Applegarth J (footnotes omitted).

> [7] In one sense such a plaintiff has been successful, namely in establishing the defendant's liability, and unsuccessful in establishing an entitlement to anything of value. Equally, it might be said that the defendant in such a case has been successful, namely in defending the plaintiff's multi-million dollar claim for damages, and that the plaintiff's success in establishing a single breach of contract is no real success at all in litigation which has a commercial objective, namely an award of substantial damages.
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> [8] The phenomenon of each party claiming to have been successful, or to have each enjoyed a substantial measure of success, is familiar."

[34] I note that r 684 of the *UCPR* provides:

> "(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
>
> (2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."

[35] In *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)*,[27] McMurdo J (as his Honour then was) stated the following with respect to the interpretation of r 684:

> "[7] [...] The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule? That this remains the approach under r 681 and r 684 comes not only from the terms of the rules themselves but also from the recognised purposes for it. [...]
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> [8] Thus in *Todrell Pty Ltd v Finch & Ors*, Chesterman J approved this passage from the judgment of Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd*:
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> > "Notwithstanding that the court has power to deprive a successful party of costs, or even order a successful party to pay costs, that is a course to be taken in unusual cases and with a degree of hesitancy."
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> I adhere to the view I expressed in *Australand Corporation (Qld) Pty Ltd v Johnson & Ors* that ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and severable and has occupied a significant part of the trial."

[36] As Jackson J observed in *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor*,[28] the discretion plainly extends so as to allow the Court to decide costs by

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27 [2009] QSC 64 at [7]-[8] per McMurdo J, as his Honour then was (footnotes omitted).

28 [2013] QSC 216 at [5] per Jackson J.

reference to particular questions in, or a particular part of, a proceeding. His Honour further observed that the Courts have from time to time encouraged an "intelligently made" apportionment of costs to reflect separate events of questions decided:[29]

> "[12] In my view, an order which divided the costs according to the events of the relief sought in the separate paragraphs, or the questions raised on the separate paragraphs of the application would be difficult or potentially difficult to assess.
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> [13] Accordingly, I am not minded in the circumstances of this case either to make an order for costs in favour of Yolla on the questions raised by paragraphs 2, 3 and 4 of the application or to make an order for costs in favour of Aion which limits the costs to those incurred in relation to paragraph 1 of the application.
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> [14] Yet, it is true that Yolla has enjoyed some success, whether or not Aion describes that as "ancillary" to the "principal relief".
>
> [15] In a number of cases prior to the introduction of the UCPR, courts expressed concern that taxation of issues often had disconcerting and unfair results, as well as being troublesome and difficult to carry out. A rough apportionment of costs "intelligently made", has been said to lead to a fairer result.
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> [16] Given my impression as to where the costs in the proceeding are likely to have been incurred and because I think it is desirable to avoid the difficulties of assessment of costs based on separate events or questions decided in the application, in my view the appropriate order is that the Yolla pay 80% of Aion's costs of the proceeding to be assessed.
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> [17] Such an order, as a rough apportionment, should reflect the considerations that Aion should obtain the costs of the central question in the proceeding but that it was not entitled to the orders it sought by way of declaration of trust or transfer of the land."

[37] The Court, in exercising its discretion in relation to costs, is entitled to take an impressionistic and pragmatic view as to what were the real heads of controversy in the litigation and will strive to avoid assessments of costs in a complicated form, according to issues in a technical sense.[30]

The applicants' submissions

[38] The applicants' ultimate submission is that the respondents should pay the applicants' costs of the proceeding, including reserved costs.

[39] The applicants submit that their alternative relief sought the declarations as made by the Court. Although the applicants abandoned that part of the alternative relief, which sought the appointment of the receiver, they did not abandon the declaratory relief. The respondents opposed both the primary and alternative relief.

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29 [2013] QSC 216 at [12]-[18] per Jackson J (footnotes omitted).

30 *Vision Eye Institute Ltd & Anor v Kitchen & Anor (No 3)* [2015] QSC 164 at [13] per Applegarth J.

[40] The applicants submit that therefore they are entitled to the costs of the proceedings, unless their conduct which disentitles them to the beneficial exercise of the discretion, or there are "special" or "exceptional" circumstances.

[41] The applicants refer to their rejection of the respondents' open offer as the only arguably disentitling conduct and submit that, in the circumstances, it was entirely reasonable for the applicants to reject the respondents' open offer.

[42] The respondents' open offer was in the following terms:[31]

> "1. Paragraphs 1 to 4 of the Amended Originating Application be dismissed;
>
> 2. Until further order, appointment of a receiver and manager to the assets and undertaking of the first respondent, with the receiver being directed to:
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> a. convene an extraordinary general meeting of the members of the first respondent for the purposes of electing a management committee;
>
> b. issue appropriate notice to all members of the first respondent (as required by the Act and the Constitution);
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> c. preside as chair at the meeting and exercise the rights as chair; and
>
> d. determine who is eligible to vote as a member of the first respondent at the meeting (as at 3 September 2016).[32]
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> 3. The notice of the meeting be given to:
>
> a. each of the applicants; and
>
> b. each person determined by the receiver to be eligible to vote, as required by 2(d) above, as at 3 September 2016.
>
> 4. Specifying the rights and powers of the receiver including to manage the assets of the first respondent.
>
> 5. The current management committee of the first respondent resign from their respective positions but be at liberty to stand for re-election at the meeting referred to above.
>
> 6. The receiver's reasonable costs and expenses be paid from the assets of the first respondent.
>
> 7. Liberty to apply.
>
> 8. Each party bear their own costs, or alternatively, the Court determine (on a date to be fixed), the appropriate order as to costs if not agreed."

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31 Affidavit of James Tan sworn 18 October 2019, JPT-01, p 22-24.

32 I note an issue at trial was whether the applicants had resigned at a meeting on 4 September 2016. I found that they had not resigned, see *Reasons* at [443].

[43] The applicants submit that the rejection of the respondents' open offer was entirely reasonable, in the circumstances, for the following reasons:

(a) The terms of the offer relevantly included the appointment of a receiver to determine who was eligible to vote as a member of the Association at an extra-ordinary general meeting to be convened and chaired by the receiver.

(b) The extra-ordinary meeting would have been conducted pursuant to an invalid constitution.

(c) The membership determination was to be limited to members as at 3 September 2016.

(d) The applicants would still have to satisfy the receiver they were members of the Association for the purpose of voting at the extra-ordinary general meeting which would have required a trial of some description (in any event).

(e) The open offer did not deal with the declaratory relief or the rights of the new members. The 19 new members would have been directly affected by an order made consistently with the respondents' open offer and they were not before the Court to express their consent or dispute the terms of the order especially regarding their being excluded as members for the purposes of the extra-ordinary general meeting.

(f) The open offer only dealt with costs on the basis that each party was to bear their own costs or the Court was to determine costs "on a date to be fixed", notwithstanding the proceeding having been on foot for almost two and a half years.

[44] Accordingly, the applicants submit that the respondents' open offer was either not capable of "acceptance" or would not, in any event, have quelled the controversy between the parties, or any part thereof.

The respondents' submissions

[45] The respondents submit that the appropriate costs order is that the applicants pay:

(a) 50% of the respondents' costs of the proceeding, including reserved costs, up to and including day 1 of the trial on 18 March 2019, on the standard basis; and

(b) 100% of the respondents' costs of the proceeding thereafter, on the standard basis.

[46] The respondents submit the following matters support their position:

(a) The applicants sought the extreme remedy of winding up the first respondent on just and equitable grounds[33] and this application was dismissed.

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33 And abandoned a number of integers of that claim at the end of the trial.

(b) The insolvency ground was dropped at the end of the trial by the applicants (in the face of expert evidence confirming solvency), although the application started life in December 2016 as an application to wind up in insolvency only (which itself was dropped in March 2017 and reinstated in August 2018).

(c) The starting point therefore is that costs would usually follow the event and the applicants pay the respondents' costs of the proceeding.

(d) The Court ordered the appointment of the receiver for the purpose of convening a meeting of members of the Association, which recognises the validity of concerns raised by the applicants, despite the applicants disclaiming relief by way of appointment of a receiver.

(e) As noted in the reasons for judgment, the respondents offered to accept appointment of a receiver on the first day of the trial and that offer was rejected.

(f) If the offer was accepted by the applicants it would have avoided the need for a trial and, given the respondents' concession offered about membership of the applicant, avoided any real dispute about the applicants' membership.

(g) The offer was capable of acceptance by the applicants as:

(i) the offer was plainly made so that all applicants could attend the meeting convened by the receiver and the receiver was tasked with identifying all members entitled to vote (about which complaint had been made) (consistently with the respondents' concession that the applicants were members for the purposes of the meeting, made at the end of the trial) and at which an election of all committee members would occur;

(ii) it contained a sensible compromise on costs and a mechanism to resolve costs should agreement not be reached;

(iii) the entire constitution was not invalid merely because an amendment may have been invalid, and in any event such concerns could have been dealt with by the receiver or at the meeting;

(iv) issues about new members could be resolved by the receiver if necessary or at the meeting (and are no different to the situation now existing); and

(v) the concession as to notice to the applicants and the appointment of a receiver to convene the meeting would have quelled the controversy between the parties, or a very significant part of the controversy, allowing all members to exercise their rights at a Court-supervised (via a receiver) election (as is now the case).

(h) In March 2018, the respondents attempted to engage the applicants in discussions about calling a meeting of all members to test the proposition that there was a "deadlock". The applicants did not ultimately agree to participate in that process. That process would have at least determined the "numbers"

before further time and money was spent on determining disputed questions of membership and winding up, and have led to a similar practical result as the judgment.

(i) Additionally, the respondents made other offers of settlement to the applicants, involving various means, which were not accepted. The respondents submit that although those offers are not directly comparable to the orders made by the Court in the proceeding following the trial, they do demonstrate numerous attempts by the respondents to resolve the matter by various means. They militate in favour of an exercise of the Court's discretion as to costs in the respondents' favour.

(j) The respondents recognise that the Court has made declarations sought by the applicants as to membership and the first respondent's constitution. The Court has found that the applicants raised proper concerns about the membership list, the alleged resignation of the applicants and the management of the Association. The declarations, like the respondents' concession on membership if a receiver was appointed, will facilitate the work of the receiver by clarifying membership of the applicants and the constitution of the Association. The costs orders ought to reflect that measure of success. On the other hand, in about mid-2017, the respondents sought to have the issue of membership separately determined by the Court. The applicants successfully opposed that application (including obtaining a costs order). A separate determination on the membership in the applicants' favour would have likely quelled a significant part of the dispute and avoided additional costs since that time.

[47] In summary, the respondents submit that any costs order made by the Court ought to recognise that the applicants failed in seeking their primary relief and the respondents incurred significant costs in defending grounds which were ultimately unsuccessful or abandoned, such as insolvency and individual bases for the just and equitable ground. The respondents submit that any order for costs should also recognise that:

(a) a reasonable offer was made on day 1 of the trial to avoid the trial, which was rejected;

(b) the respondents made various attempts to resolve the matter prior to trial by various means, without success; and

(c) the applicants had success on the matters the subject of the declarations.

[48] The respondents submit that the conduct, evidence and outcome of the trial supports the view that the applicants failed in their primary goal, which was to wind up the first respondent.

[49] The respondents submit that although the issue of membership played an important part in the trial, it was largely as a basis for the winding up application including the applicants' standing.

[50] The respondents submit that the practical relief ordered by the Court is that of receivership supported by the declarations which were made (which are not entirely

the same as those sought by the applicants) and is consistent with the offer made by the respondents at the start of the trial.

Discussion – the appropriate order as to costs

[51] A large portion of the trial was taken up with the issue of whether the applicants were members of the Association. I found that the applicants had not resigned from the Association at the 4 September 2016 meeting but were excluded from the Association. The respondents' position at trial was that they had resigned. I found that the applicants (save for two, the nineteenth and twentieth applicants) were members of the Association.

[52] Further, in my reasons, I indicated that the applicants raised justifiable complaints about the management of the Association.[34] In my view, the most concerning aspect of the applicants' grievances were the problems with the accuracy of the membership lists, their expulsion from the Association and how the Association was managed under the autocratic leadership of Reverend Reupena (the second respondent) without reference to the Constitution.[35]

[53] However, despite my concerns about the management of the Association, it is an extreme step to wind up a solvent company and I was satisfied there was a lesser remedy than winding up available to resolve matters.

[54] Despite the applicants not being successful upon the winding up application they were largely[36] successful at trial on the declarations they sought. They vindicated their position that they were members of the Association,[37] amendments to the Association's constitution were invalid and the second respondent's unilateral appointment of the committee members was contrary to the provisions of both the *Associations Incorporation Act* 1981 (Qld) and the constitution.[38]

[55] It is noted that the declaratory relief was resisted by the respondents, during the proceeding to the end of the trial.

[56] The respondents made an open offer on the Friday afternoon before the trial. At the hearing, counsel for the respondents submitted that this open offer was made to "avoid the need for a trial on just and equitable grounds, given particularly the findings of solvency and to accept the appointment of a receiver".[39] However, notably, the declaratory relief sought by the applicants was not included in the open offer made by the respondents on the eve of the trial.

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34 *Reasons* at [530].

35 *Reasons* at [542].

36 NB: The applicants sought a declaration that "the purported undocumented amendment to clauses 11 and 12 of the first respondent's constitution which is alleged to have occurred on or about 20 October 2013 is invalid" which was not made. The applicants also sought a declaration that "the appointment of the second, third and fourth respondents as the first respondent's committee is invalid", whereas the declaration I made, at [562] of *Reasons*, was "any appointment to the first respondent's management committee, not in compliance with clauses 11 to 13 of the first respondent's constitution, was invalid".

37 Except for the nineteenth and twentieth applicants.

38 *Reasons* at [390].

39 Transcript of the hearing on 18 March 2019, p 6, line 23-25.

[57] In my view the rejection of the respondents' open offer by the applicants was reasonable for the following reasons:

(a) The open offer did not address the declaratory relief.

(b) In particular, the validity of both the amended constitution and the unilateral appointment of the Association's Committee were not included in the open offer.

(c) Accordingly, any extra-ordinary general meeting conducted pursuant to the open offer would have been conducted pursuant to an invalid constitution which had deleted the primary objective of the Association being part of the mother church.

(d) The applicants may still have had to satisfy the receiver they were members of the Association for the purpose of voting at the extra-ordinary general meeting which may have required a trial of some description (in any event).

[58] In relation to membership of the Association, I note, that the respondents' concession about membership[40] was only made at the end of the trial in their final written submissions.

[59] The invalid amendment of the constitution, by deleting reference to the Mother Church, was an important issue in the trial and is reflective of the issues between the parties. As noted in my judgment:[41]

> "[462] In this case there is a constitution that states that the Association is part of the Mother Church. However, the present relationship between the Mother Church and Reverend Reupena and his loyal congregation is not consistent or in accordance with clause I of the constitution.
>
> [463] The Mother Church has disavowed Reverend Reupena and the Reupena Group has disavowed the Mother Church. This ultimately is a matter for the members of the Association and the Mother Church to resolve."

[60] As noted in my judgment, the resolution of the constitution issue is an important factor in the future steps of the Association:[42]

> "[558] When any meeting is convened it should be acknowledged that the Association is a part of the Mother Church as the amendment to the constitution deleting such a connection was invalid.
>
> [559] The Reupena Group should now appreciate that their fellow members, the Remainder Group, have been excluded from their association

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40 That if it became necessary to do so in the context of an appointment of a receiver, the respondents would concede that all of the applicants were members (plus those on their list for which the first applicant did not account and which appeared on the respondents' list), for the purpose of a receiver convening a general meeting to determine the Association's future, see respondents' closing submissions at [137].

41 *Reasons* at [462] – [463] (footnotes omitted).

42 *Reasons* at [558]-[560] (footnotes omitted).

> and that all members belong to an association that is part of the Mother Church and will remain so until the constitution is validly amended. Whether this occurs is a matter for the membership of the Association.
>
> [560] As noted previously, the receiver should supervise the process of any proposed amendment to the constitution."

[61] In my view, the validity of the amended constitution could not have been dealt with by the receiver at the meeting. The applicants submit that the respondents' statement that contentious issues as to the validity of the amended constitution could be "dealt with by the receiver or at the meeting" fails to appreciate that the validity of both the amended constitution and the unilateral appointment of the Association's management committee were not included in their open offer. The applicants submit that, more importantly, there is no basis stated for the proposition that the receiver would have jurisdiction to determine those contentious matters of law. I agree with this submission.

[62] In my view, the issues surrounding the amendment of the constitution had to be resolved prior to the receiver convening a final meeting to determine the Association's future.

[63] The validity of the amended constitution and the management committee were not included in the respondents' open offer and the receiver would not have the jurisdiction to determine these contentious matters of law.

[64] In my view, in these circumstances, the open offer made by the applicants at the door of the trial would not have quelled the controversy between the parties.

[65] I also acknowledge the history of offers between the parties.

[66] The respondents submit that although these offers are not directly comparable to the orders made by the Court in the proceeding following the trial, they do demonstrate numerous attempts by the respondents to resolve the matter by various means. The respondents submit that these various offers militate in favour of an exercise of the Court's discretion as to costs in the respondents' favour.

[67] As noted in my judgment, that the applicants also tried to resolve this matter very early. However, such an offer of reconciliation was rejected:[43]

> "[326] On 31 October 2016, an "invitation to reconcile" was extended by the applicants, via their solicitors: "our clients wish is that the members resolve their dispute peacefully and by way of open discussions in line with the ethos and objects of the Association as set out in the Constitution".
>
> [327] Mr Tisema,[44] the then secretary of the Association, acknowledges that he had no intention of resolving their dispute peacefully and by way of open discussion in line with the ethos and objects of the Association as set out in the constitution.

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43 *Reasons* at [326]-[328] (footnotes omitted).

44 The third respondent.

> [328] The Repeuna Group made it clear that the Remainder Group were not welcome and it is no surprise that they never attended any functions or services at the Association premises again."

[68] In my view, these offers, as exhibited by affidavits from both parties' solicitors, are irrelevant to the outcome of the hearing because they do not exhibit any offer which is comparable to the outcome of the hearing.

[69] In deciding the costs issue I have given consideration to all of the issues raised by the parties, in particular:

(a) The respondents' open offer would not have quelled the controversy between the parties and it was reasonable for the applicants to reject it.

(b) The applicants were largely successful in the declaratory relief they sought.

(c) The respondents resisted the declaratory relief throughout the trial.

(d) The factual matters underpinning the declaratory relief took a large portion of the trial.

(e) The issues concerning the declaratory relief formed part of the underlying issues of the winding up application.

(f) The applicants were not successful in their application for winding up the Association.

(g) The applicants conceded the Association was solvent in closing submissions.

[70] It is true that the applicants enjoyed some success, but not complete success.

[71] Accordingly, I consider it appropriate for the applicants to receive a percentage of their costs (on the standard basis). In my view, it is preferable to approach the matter on a broad-brush basis, by a rough apportionment of costs "intelligently made", so as to reduce the applicants' costs to a specified percentage of assessed costs, rather than to make an order for the assessment of costs of separate issues and separate orders as to the payment or non-payment of costs of those issues.[45]

[72] The apportionment is a matter of impression; it is not merely arithmetical but involves some judgment and approximation.[46]

[73] Given my impression as to where the costs in the proceeding are likely to have been incurred and because I think it is desirable to avoid the difficulties of assessment of costs based on separate events or questions decided in the application,[47] in my view the appropriate order is for the applicants to receive 65% of the proceeding to be assessed.

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45 *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors (No. 2)* [2019] QSC 249 at [31] per Jackson J.

46 *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64 at [17] per McMurdo J, as his Honour then was.

47 *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 at [16] per Jackson J.

[74] In my view, such an order, as a rough apportionment, fairly reflects both the outcome and the costs associated with the determination of different questions or issues in the proceedings.[48]

Who should pay the applicants' costs?

[75] The applicants, in their application,[49] sought an order that the second respondent (Reverend Reupena) pay the applicants' costs of the application including any reserved costs.

[76] However, in the applicants' written submissions they state that "an order should be made that the Respondents are to pay the Applicants' costs of the proceeding including reserved costs."

[77] The respondents' submissions highlight this difference between the applicants' application and their written submission and state that no order ought to be made against Reverend Reupena personally, even if there was an order to be made in favour of the applicants.

[78] I requested further submissions from the parties and, in response, the applicant submitted that the second respondent should be responsible jointly and severally (with the first respondent, the Association) for the applicants' costs either entirely, or on a percentage basis, for the following reasons:

(a) The second respondent (Reverend Reupena) "effectively rule[d] the Association with a dominating presence". He exerted an "autocratic leadership … without reference to the Constitution"; and, he used his "power and influence … to chart the course of the Association". He did so both before and after 4 September 2016.

(b) He was solely and entirely responsible for the decision to unilaterally appoint the Association's management committee inconsistently with the Association's constitution, the consequence of which required declaration 4.

(c) Reverend Reupena "determined that the congregation should be split; that the Remainder Group should leave". He was the person responsible for the Remainder Group's expulsion on 4 September 2016 and their exclusion which followed the 11 September 2016 confrontation requiring declaration 1.

(d) In the circumstances, it was Reverend Reupena's actions and his own self-interest which led to the discontent within the Association and the

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48 *Re Quality Blended Liquor Pty Ltd (No 2)* [2014] QSC 307 at [16] per A Wilson J, citing *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216 at [15]-[16] per Jackson J.

49 Amended Originating Application filed 3 August 2018, para 5(c)(ii); Further Amended Originating Application, 26 March 2019, para 5(c)(ii).

> Association's departure from its constitutional and statutory requirements. From its genesis to its conclusion, Reverend Reupena was the architect of the proceeding and he should not escape the costs consequences of his voluntary assumption of that role.

[79] The respondents submitted that no order ought to be made against the second respondent, however, if any costs order was to be made against the second respondent:

> "he ought to be indemnified by the first respondent, which as noted by the Court, had an interest in defending the claims, or any order ought to be joint."

[80] I note that a large portion of the trial concerned whether the applicants had been excluded from the Association and the whether the subsequent amendment to the Association's constitution was valid. The exclusion of the Remainder Group was pleaded[50] and determined[51] to be by the Reupena Group (a group of members of the Association),[52] and not solely by the second respondent. The (invalid) change to the constitution was by the Reupena Group.[53]

[81] The second to fourth respondents form part of the Reupena Group.[54]

[82] After considering these matters, I am of the view that, in the circumstances of this case, the order for costs ought to be, as per the respondents' alternate submission, i.e. any order ought to be joint.

Order

[83] The respondents pay 65% of the applicants' costs of the proceeding, to be assessed.

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50 Amended Originating Application filed 3 August 2018, paras 12(a) and 12(b); Further Amended Originating Application, 26 March 2019, paras 12(a) and 12(b).

51 *Reasons* at [404].

52 Amended Originating Application filed 3 August 2018, paras 12(a) and 12(b); Further Amended Originating Application, 26 March 2019, para 11(c)(ii).

53 *Reasons* at [446].

54 *Reasons* at [71].