SUPREME COURT OF QUEENSLAND

CITATION:	*Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 3)* [2013] QSC 95
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)
FILE NO/S:	BS 1714 of 2011
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	12 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Philip McMurdo J
ORDER:	**The first and fourth defendants should pay to the plaintiff two-thirds of its costs of the determination of the questions within my judgment of 14 November 2012.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTURE FROM THE GENERAL RULE – where plaintiff was ultimately successful – where defendants had some success – where impractical to award costs on basis of each issue – whether no costs order should be made PROCEDURE – COSTS – DEPARTURE FROM GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where plaintiff send letter to defendants demanding performance – whether letter constituted offer of comprise – whether defendants

unreasonable refused offer of compromise – where court required to determine whether parties required to go to arbitration – where no general arbitration clause – whether costs should be awarded on indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 681

A v B [2007] 1 All ER (Comm) 633, cited
Alborn & Ors v Stephens & Ors [2010] QCA 58, cited
Ansett Australia Ltd v Malaysian Airlines System Berhad [2008] VSC 156, cited
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26, cited
Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 2) [2012] QSC 348, cited
Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors [2012] QSC 67, cited

COUNSEL: F M Douglas QC with D Smith and D D Keane for the plaintiff
J McKenna SC with A Stumer for the first and fourth defendants
S Perovich appearing on own behalf

SOLICITORS: Delta Law for the plaintiff
Minter Ellison for the first and fourth defendants

[1] This judgment deals with the costs of that part of the case which was determined by my judgment on 14 November 2012.[1] That followed a trial of five questions, which were identified for separate trial and determination by earlier orders.[2] In the November judgment, each side had some success. But the parties are markedly at odds about the appropriate orders for costs. The plaintiff seeks all of the costs of the determination of those issues and, moreover, upon the indemnity basis. The relevant defendants (the first and fourth defendants, which I will call "the defendants") say that there should be no orders for costs or alternatively, that they should pay no more than 50 per cent of the plaintiff's costs and assessed upon the standard basis.

[2] The dispute for which these five questions were relevant was whether a price had become fixed for the shares which were purchased by the first defendant. The plaintiff contended that no price had been fixed and that it could be fixed only by following the dispute resolution mechanism in the parties' contract, involving a mediated settlement or, failing that, an arbitration. The defendants contended that the price had been fixed, by the LandMark White valuation being effective for the purposes of the Share Sale Agreement, by the Sergiacomi valuations being ineffective and by it now being too late to obtain an "Alternative Valuation" which could engage the dispute resolution mechanism.

[3] The defendants' arguments prevailed on the first and second of the questions determined by my judgment. I held that the LandMark White valuation was effective for the purposes of the Share Sale Agreement and that the Sergiacomi

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1 *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 2)* [2012] QSC 348.
2 *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors* [2012] QSC 67.

valuation was not effective. The plaintiff was successful on the third question: I held that the alternative Sergiacomi valuation was effective. The answer to the fourth and fifth questions was then inevitable: once there was a Valuation and an Alternative Valuation under the relevant provisions of the Share Sale Agreement, the parties were bound to go to mediation, and failing that, arbitration. Although there were five questions for determination, it would be misleading simply to say that success for the defendants upon but two of them meant that the plaintiff was the more successful party. Nevertheless, the plaintiff was the party which was ultimately successful, in the sense that its stance, which was that the price was yet to be agreed or fixed, was upheld.

[4] The starting point is r 681 of the UCPR, by which costs follow the event, unless the Court orders otherwise. It has been held that the words "follow the event" are to be read "distributively," meaning that where there are two or more issues or questions in an action, each of them is, or gives rise to, an "event" for which the costs are to be determined separately.[3] But the question is whether the Court should order otherwise and each side suggests that it should do so.

[5] The defendants correctly point to the impracticality of ordering costs, question by question, in this case. It would be time consuming and expensive and have the potential for yet further disputes between these parties. Therefore, the defendants argue, justice can be served by making no order as to costs, recognising that each side had some substantial success.

[6] Against that argument, the plaintiff submits that there was really one "fundamental question for determination, which was whether the mediation and arbitration provisions of the Share Sale Agreement were satisfied," and that the plaintiff was successful upon that question. And it is said that the plaintiff accepted that the LandMark White Valuation was a valuation for the purposes of cl 4.8 of the Share Sale Agreement although "not for the purposes of binding the plaintiff." It is also submitted that the only successful argument in relation to the Sergiacomi valuation was as to the effective date, a point which was raised only after the commencement of the proceedings.

[7] The position of the plaintiff in relation to the LandMark White Valuation was somewhat equivocal. It seemed prepared to accept that the valuation was valid as a step towards a mediation or arbitration. But it wished to guard against the contingency that the Sergiacomi valuations would be held to be ineffective and that the price would fall to be determined according to the LandMark White Valuation. Therefore it also pleaded a case for the LandMark White Valuation being ineffective. Although the challenge to the LandMark White Valuation was not ultimately as extensively argued as the pleading may have permitted, the effect of that valuation was still an issue for necessary determination.

[8] The first Sergiacomi Valuation failed not only in relation to the effective date, but in relation to the identification or otherwise of the valuer.

[9] In my conclusion, the outcome of my judgment of last November would not be fairly reflected in there being no order for costs in favour of the plaintiff. There

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[3] *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60-61; [2001] QCA 191 at [83]-[84]; *Alborn & Ors v Stephens & Ors* [2010] QCA 58 at [7]-[8].

should be some order which reflects its ultimate success. But it would be unfair to award the entirety of the costs to the plaintiff when it failed on some of the distinct issues. In particular, the order for costs ought to recognise that the defendants had some success in maintaining the LandMark White Valuation. In my conclusion, the first and fourth defendants should pay to the plaintiff two-thirds of its costs of the determination of the questions within my judgment of 14 November 2012.

[10] I see no basis for awarding costs to the plaintiff upon the indemnity basis, and it is necessary to deal with the specific submissions which the plaintiff made in that respect.

[11] The first of them was that there was "an imprudent refusal of a reasonable offer of compromise." The plaintiff relies upon its letter of 28 July 2009 to Mango Boulevard, in which it enclosed the first Sergiacomi valuation. It called upon Mango Boulevard to agree upon the appointment of a suitable mediator. That is said to have been an offer of compromise. But in truth, it was not an offer: it was a letter simply calling for the performance of the Share Sale Agreement. And on my findings, the parties were not bound to go to mediation at that point. The plaintiff also relies upon a letter from its solicitors of 21 June 2011 to the defendants' solicitors, in which the further Sergiacomi valuation was enclosed. Again that offered no compromise.

[12] The plaintiff also seeks to liken this case to a decision of Colman J, sitting in the Commercial Court in the Queen's Bench Division, in 2007.[4] In that case, proceedings which were brought in the court in breach of an arbitration agreement were stayed. Colman J accepted that there should be an award of indemnity costs to compensate for the damage flowing from the breach of the agreement to go to arbitration, because:

> "The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterized as so serious a departure from 'the norm' as to require judicial discouragement by more stringent means than an order for costs on the standard basis."[5]

[13] In *Ansett Australia Ltd v Malaysian Airlines System Berhad*,[6] Hollingworth J doubted whether that statement represented the law in Victoria.[7] For present purposes, it is sufficient to say that this case is of quite a different kind. There is, of course, an arbitration agreement here. But the overall question was whether events had occurred which, on the proper construction of the parties' contract, obliged the parties to go to mediation and, failing that, to arbitration. Those questions had to be decided by a court. This was not a general provision requiring any dispute between the parties, upon any matter in relation to their contract, to be decided by arbitration.

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4 *A v B* [2007] 1 All ER (Comm) 633.
5 *A v B* [2007] 1 All ER (Comm) 633 at [15].
6 [2008] VSC 156.
7 *Ansett Australia Ltd v Malaysian Airlines System Berhad* [2008] VSC 156 at [22].