SUPREME COURT OF QUEENSLAND

CITATION: *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 211

PARTIES: **MIO ART PTY LTD**
ACN 101 121 875
(plaintiff)

v

MACEQUEST PTY LTD
CAN 101 563 649
(first defendant)

BMD HOLDINGS PTY LTD
ACN 010 093 348
(second defendant)

MANGO BOULEVARD PTY LTD
ACN 101 544 601
(third defendant)

URBEX PTY LTD
ACN 102 865 823
(fourth defendant)

BMD PROPERTIES PTY LTD
ACN 091 902 475
(fifth defendant)

MANGO HILL (PRIME) PTY LTD
ACN 110 696 565
(sixth defendant)

MANGO HILL (MEZZANINE) PTY LTD
ACN110697 400
(seventh defendant)

TASOVAC PTY LTD as Trustee of the Security Trust
ACN 108 013 467
(ninth defendant)

KENNETH ROWLAND BIRD
(tenth defendant)

GARY WILLIAM INGRAM
(eleventh defendant)

JAMES VARITIMOS
(twelfth defendant)

WAYNE ROBERT REX
(thirteenth defendant)

RUSSELL JOHN THOMSON

(fourteenth defendant)

DAVID JOHN DUNCAN
(fifteenth defendant)

ANDREW MARCOS
(sixteenth defendant)

SCOTT WILLIAM POWER
(seventeenth defendant)

MICHAEL CHRISTOPHER POWER
(eighteenth defendant)

KINSELLA HEIGHTS DEVELOPMENTS PTY LTD
ACN 100 484 299
(twentieth defendant)

FILE NO/S: BS 4352 of 2012

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 19 August 2013

DELIVERED AT: Brisbane

HEARING DATE: 30, 31 January, and 16 & 17 April 2013

JUDGE: Jackson J

ORDER: The order of the court is that:

On the plaintiff's application to amend the claim in 4352 of 2012:

1. the application is dismissed.
2. the applicant pay the respondents' costs of the application.

On the plaintiff's application for leave to bring the proceeding on behalf of KHD under s 237 of the *Corporations Act* 2001 (Cth) in 11109 of 2012 and 4352 of 2012:

3. the application is dismissed in both 11109 of 2012 and 4352 of 2012.
4. the applicant pay the respondents' costs of the application.
5. proceeding 11109 of 2012 is stayed.

On the first to seventh, tenth, eleventh and fourteenth to eighteenth defendants' application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

6. the statement of claim is struck out.
7. the respondent pay the applicants' costs of the application on the indemnity basis.

On the ninth defendant's application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

8. the statement of claim is struck out.
9. the respondent pay the applicant's costs of the application on the indemnity basis.

On the twelfth defendant's application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

10. the statement of claim is struck out.
11. the respondent pay the applicant's costs of the application on the indemnity basis.

On the thirteenth defendant's application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

12. the statement of claim is struck out.
13. the respondent pay the applicant's costs of the application on the indemnity basis.

In 4352 of 2012:

14. the plaintiff file and serve a further statement of claim on or before 30 September 2013.

And the court direct that:

15. Parties provide submissions as to cost by 4pm, 21 August 2013.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – AMENDMENT – where the plaintiff joins claims for relief under *Corporations Act* 2001 (Cth), s 233 and other claims – where the plaintiff applies for leave to bring the proceeding on behalf of a company under *Corporations Act* 2001 (Cth), s 236 – where the plaintiff applies to amend the claim and statement of claim – where the defendants cross-apply to strike out the statement of claim and dismiss the proceeding – where statement of claim adopts narrative style – whether statement of claim sufficiently pleads material facts for separate causes of action – whether the statement of claim sufficiently alleges fraudulent scheme

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where the plaintiff seeks leave under *Corporations Act* 2001 (Cth), s 237 to bring a cause of action

on behalf of the twentieth defendant against the other defendants – whether leave should be granted

Corporations Act 2001 (Cth), s 53, s 79, s 150, s 157, s 168, s 169, s 180, s 181, s 182, s 231, s 232, s 233, s 234, s 236, s 237, s 1071B, s 1317E, s 1071F, s 1317H, s1317J, s 1322
Trusts Act 1973 (Qld), s 15, s 82 (1)
Uniform Civil Procedure Rules 1999 (Qld) r 5, r 60, r 65, r 149, r 171, r 292, r 293

Gummow, *Knowing Assistance*, (2013) 87 ALJ 311
Jacob & Goldrein, *Pleadings Principles and Practice*, Sweet & Maxwell, London,
Treitel, *The Law Of Contract*, 7th ed, Sweet & Maxwell, London

Andco Nominees Pty Ltd v Lestato Pty Ltd (1995) 126 FLR 404; (1995) 17 ACSR 239, cited
Banque Commerciale SA (en liq) v Akhil Holdings Ltd (1990) 169 CLR 271; [1990] HCA 11, cited
Barnes v Addy (1874) 9 LR Ch App 244, cited
Beck v Tuckey (2007) 213 FLR 152; [2007] NSWSC 1065, cited
Breskvar v Wall (1971) 126 CLR 376, cited
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Bruce v Odhams Press Pty Ltd [1936] 1 KB 697, cited
Butler v Egg & Egg Pulp Marketing Board (1966) 114 CLR 185 at 191; [1966] HCA 38, cited
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304 at [174]; [2009] HCA 25, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd, (2007) 230 CLR 89 at [161]; [2007] HCA 22, cited
Fiduciary Ltd v Morning Star Research Pty Ltd [2005] NSWSC 442, cited
Frigger v Lean [2012] WASCA 66, cited
Gould v Vaggelas, (1985) 157 CLR 215; [1984] HCA 68, cited
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; [2012] FCAFC 6, cited
Harpur v Ariadne Australia Ltd [1984] 2 Qd R 523, cited
Hassall v Speedy Gantry Hire Pty Ltd [2001] QSC 327, cited
Lumley v Gye (1853) 118 ER 749; [1853] EngR 15, cited
Maddocks v DJE Constructions Pty Ltd (1982) 148 CLR 104; [1982] HCA 17, cited
Matyear v Prismex Technologies Pty ltd [2008] NSWSC 677.
Metyor Inc v Queensland Electronic Switching Pty Ltd, [2003] 1 Qd R 186; [2002] QCA 269, cited
Mylward v Weldon (1596) 21 ER 136; [1595] EWCH Ch 1, cited
Power v Ekstein [2009] NSWSC 130, cited
Power v Ekstein (2010) 77 ACSR 302, [2010] NSWSC 137,

cited
Re Independent Quarries Pty Ltd (1993) 12 ACSR 188, cited
Re Pembury Pty Ltd [1993] 1 Qd R 125, cited
Shelton v NRMA Ltd (2004) 51 ACSR 278; [2004] FCA 1393, cited
Short v Crawley No 30 [2007] NSWSC 1322, cited
Standard Bank PLC v Via Mat International Ltd [2013] EWCA Civ 490, cited
Sugarloaf Hill Nominees Pty Ltd v Rewards Project Limited [2011] WASC 19, cited
Trafalgar West Investments Pty Ltd v Superior Lawns Australia Pty Ltd [2012] WASC 460, cited
Venture Platinum Pty Ltd & Anor v Rogue Constructions Pty Ltd (2006) 56 ACSR 802, cited
Whitehouse v Capital Radio Network Pty Ltd (2004) 13 Tas R 27; [2004] TASSC 12, cited
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd (2006) 33 WAR 1; [2006] WASC 161, cited
Zhu v Treasurer of State of New South Wales (2004) 218 CLR 530; [2004] HCA 56, cited

COUNSEL:
F M Douglas QC and D Keane for the plaintiff ("Mio")
D Kelly SC, M Hodge and D Butler for the first to seventh, tenth, eleventh and fourteenth to eighteenth defendants ("BMD defendants")
C M Muir for the ninth defendant ("Tasovac")
B Cohen (solicitor) for the twelfth defendant ("Varitimos")
D Savage SC and P Corkery for the thirteenth defendant ("Rex")

SOLICITORS:
Delta Law for the plaintiff
Carter Newell for the first to seventh, tenth, eleventh and fourteenth to eighteenth defendants
King & Wood Mallesons for the ninth defendant
Bartley Cohen for the twelfth defendant
HWL Ebsworth for the thirteenth defendant

[1] **JACKSON J**: There are six cross applications presently requiring resolution. They fall into two groups. First, the plaintiff in proceeding 4352 of 2012, Mio Art Pty Ltd ("Mio"), seeks leave to amend the claim. As well, it seeks leave to bring a proceeding on behalf of the twentieth defendant, Kinsella Heights Development Pty Ltd ("KHD").

[2] Secondly, the defendants cross apply in 4352 of 2012 to strike out either the whole or parts of the statement of claim and to terminate that proceeding.

[3] Mio responds to the cross applications by a combination of submissions in opposition and by proposing some amendments to the statement of claim. The protagonists' contentions upon the applications to strike out have thus proceeded by reference to the proposed third further amended statement of claim ("3FASOC"), although the application to amend the claim and the applications to strike out as originally filed related to the filed second further amended statement of claim.

Accordingly, the applications proceeded as an application for leave to file the 3FASOC and cross-applications to strike it out, although it has not yet been filed.

[4] Both the personal claim by Mio and the proposed claim on behalf of KHD are complex. The 3FASOC is over 290 paragraphs long. The defendants claim, with some justification, that parts of it are nonetheless deficient.

[5] There is added complexity in the way Mio has sought leave to bring KHD's claim against the defendants. Such leave is ordinarily sought under s 237 of the *Corporations Act* 2001 (Cth), as the exclusive basis of power to do so. Prior to the present applications, no leave has been sought or granted. Yet, the 3FASOC and earlier versions of that pleading in 4352 of 2012 allege KHD's claims against the defendants. Relief is claimed to which only KHD could be entitled. Unhappily, the 3FASOC does not clearly distinguish between which claims are personal claims of Mio and which are KHD's claims.

[6] Before the hearing of these applications, Mio had not applied for leave under s 237 in 4352 of 2012. Instead, in that proceeding, Mio claimed orders under s 233 of the *Corporations Act* that it submits would vindicate KHD's claims against the other defendants. There is room for confusion or argument about which of KHD's claims come within the scope of Mio's claim for relief under s 233.

[7] Mio started a second proceeding, 11109 of 2012, over some of the same subject matter against some of the same defendants. The claim in that proceeding is KHD's claim. Mio is not entitled to bring that proceeding on KHD's behalf without leave granted under s 237. Mio did not first obtain leave. It now applies for leave after the event but as if it had done so beforehand.

[8] Adding to the procedural complexity by which Mio applied for leave to bring proceedings on behalf of KHD, the claim in 11109 of 2012 duplicates some, but not all, of KHD's causes of action and claims already made in 4352 of 2012. Mio's explanation was that the claim in 11109 of 2012 was intended to pick out particular claims that could proceed more expeditiously than the balance of the claims in 4352 of 2012. However, during the hearing of these applications, Mio abandoned that proposed method of proceeding.

[9] Instead, Mio now proposes to amend the claim in 4352 of 2012 to incorporate its final proposal to bring all relevant claims on behalf of KHD. At least that is my understanding. Thus, in effect, Mio seeks that its application for leave to bring a proceeding on KHD's behalf under s 237 be treated as one made in 4352 of 2012, notwithstanding that the formal application under s 237 was filed in 11109 of 2012.

[10] The untidiness of this process is illustrated by the requirement under s 236(2) of the *Corporations Act* that a proceeding brought on behalf of a company "must be brought in the company's name". The title in 4352 of 2102 does not comply with that requirement. Nevertheless, the result is that it is now unnecessary to consider the application in 11109 of 2012 by reference to the statement of claim filed in that proceeding. Attention is to be confined to the 3FASOC.

[11] What I have already said is enough to introduce the procedural context of the battle royal in which the parties engaged over four days of argument in the hearing of

these applications. The exhibits to the affidavit evidence relied upon ran to many thousands of pages. As well, there were many written submissions.

[12] Before diving into the substance, it will help if some background is set out.

Background

[13] The subject matter of the main proceeding is a land development project at Mango Hill, north of Brisbane on land owned by KHD. There are two shareholding factions in KHD. Mio is in one camp and claims to be entitled to be registered as a member of KHD as a trustee of 25% of the issued shares. The BMD defendants[1] include the third defendant, Mango Boulevard Pty Ltd ("Mango"). Mango is the holder of 50% of the issued shares in KHD and constitutes the second of the shareholding factions.

[14] At the highest level, the project was for the development of the land by subdivision and sale. The original shareholders of KHD were two individuals, Richard Spencer and Silvana Perovich. Mango became a shareholder as part of a complex corporate joint venture restructuring involving companies associated with Michael Power, Scott Power and Denise Power ("the Powers"). KHD and Mango became joint venturers to carry out the project. The corporate BMD defendants are companies associated with the Powers.[2] At the outset of the project arrangements, the relevant companies, apart from KHD, were:

(a) Mango, which became manager of the project;
(b) the second defendant, BMD Holdings Pty Ltd, which guaranteed Mango's obligations to the original shareholders and KHD; and
(c) the fourth defendant, Urbex Pty Ltd, which was also appointed as a project manager and development manager with relevant responsibilities.

[15] There are other companies associated with the Powers among the BMD defendants which were not referred to in the original suite of project documents. Their involvement in 4352 of 2012 stems from the financing facilities that were subsequently entered into by KHD and Mango, ostensibly to further the project.

[16] Using loose language for brevity, the Powers may be seen to be the principals of the corporate BMD defendants. The other individual defendants were at different times officers of the relevant corporate identities, appointed by or representing the BMD interests. They include two current directors of KHD, the twelfth defendant ("Mr Varitimos") and the thirteenth defendant ("Mr Rex"), who are separately represented in 4352 of 2012 and who are applicants to strike out the 3FASOC as against each of them.

[17] It is convenient to extract a more detailed description of the initial project arrangements from the 3FASOC in paragraphs [17] to [49]:

> "**Share Sale Agreement ("SSA")**
> 17. As at 4 July 2003 the Former Trustee (Spencer) was the registered owner of 50 ordinary shares in KHD.

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1 The first to seventh, tenth, eleventh and fourteenth to eighteenth defendants.

2 The sixth defendant, Mango Hill (Prime) Pty Ltd ("Prime") and the seventh defendant, Mango Hill (Mezzanine) Pty Ltd ("Mezzanine") became so in 2008.

18. As at 4 July 2003 Perovich was the registered owner of 50 ordinary shares in KHD.
19. On or about 4 July 2003, the Former Trustee (Spencer), Perovich, and Mango and KHD entered into an agreement known as the "Share Sale Agreement" ("SSA") pursuant to which:
    (a) the Former Trustee (Spencer) agreed to sell and Mango agreed to purchase 25 ordinary shares in KHD (the "Spencer Trust Sale Shares"); and
    (b) Perovich agreed to sell and Mango agreed to purchase 25 ordinary shares in KHD (the "Perovich Sale Shares").

    The plaintiff will refer to the other terms and conditions of the SSA at the hearing of this matter as if the same had been fully set out herein.
20. On or about 7 July 2003 the Former Trustee (Spencer) transferred the Spencer Trust Sale Shares to Mango.
21. On or about 7 July 2003 Perovich transferred the Perovich Sale Shares to Mango.

Shareholders Deed ("SHD")

22. On about 4 July 2003, the Former Trustee (Spencer), Perovich, Mango and KHD executed a deed known as the Shareholders Deed ("SHD"). The Plaintiff will refer to the terms of the SHD at the hearing of this matter as if the same had been fully set out herein.

Project Management Agreement ("PMA")

23. On about 24 June 2003 KHD and Mango also entered into an agreement known as the Project Management Agreement ("PMA"). The Plaintiff will refer to the terms of the PMA at the hearing of this matter as if the same had been fully set out herein.
24. On about 24 June 2003 KHD executed a mortgage over the Property in favour of Mango to secure the performance by KHD of its obligations under the PMA or the mortgage, or arising by operation of law, equity or otherwise out of the relationship established by the PMA, or any actual or alleged breach of the PMA. And on 15 October 2004 the mortgage was registered as Mortgage No.708139356 ("Mortgage-to-Mango re PMA").

Consultancy Services Agreement ("CSA")

25. On about 24 June 2003 KHD, Mango and Neolido Holdings Pty Ltd ("Neolido") entered into an agreement known as the Consultancy Services Agreement ("CSA"). The Plaintiff will refer to the terms of the CSA at the hearing of this matter as if the same had been fully set out herein.

Deed of Guarantee & Indemnity ("DGI")

26. On or about 24 June 2003 BMD Holdings, Spencer, Perovich and Neolido entered into a Deed of Guarantee and Indemnity as defined ("DGI") whereby BMD Holdings unconditionally guaranteed and indemnified the other parties in respect of KHD's obligations and Mango's obligations.

Covenants in the Shareholders Deed and terms of the agreements

27. Mango covenanted with KHD and the Original Shareholders (cl. 3.1 SHD) that Mango would "use its best endeavours to ensure

that KHD successfully conducts the Business"; wherein the SHD, except to the extent that the context otherwise required:

(a) "Business means the management of the Project" (cl. 1.1); and

(b) "Project means the acquisition and development of the Property, including but not limited to the lodgment and management of the Development Application and such further applications as may be required to obtain the necessary Development Permits to develop the Property" (cl. 1.1).

28. Mango, KHD and the Original Shareholders each covenanted with each other in the SHD that each Party would:

(a) be just and faithful in the party's activities and dealings with the other parties in all transactions concerning the Business and KHD (cl. 3.2(d));

(b) make approvals or decisions that are required of the party in good faith and in the best interests of KHD and the conduct of the Business as a commercial venture (cl. 3.2(c));

(c) not unreasonably delay any action, approval, direction, determination or decision which is required of the party (cl. 3.2(b)); and

(d) give, without concealment or suppression, a true account of all transactions concerning the Business and KHD when and so often as an account is reasonably required (cl. 3.2(d)).

Joint venture between KHD and Mango

29. KHD and Mango wished to record their agreement in relation to the management of the Development Application and the Project (Recital D of PMA), and this became the PMA in which they agreed "to associate in a joint venture on the terms set out in the PMA for the purpose of executing the Project" (cl. 3.1) where:

(a) "Project means the acquisition and development of the Property in accordance with the Development Application" (cl. 1.1) ("Joint Venture between KHD and Mango").

30. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA that "the due performance and fulfilment of the Parties of their respective obligations under the PMA and the Project generally shall be done by each respective party in good faith towards the other" (cl. 15.1).

31. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA that each would indemnify the other from and against any and all costs, losses, claims, damages and liabilities arising out of any negligent act or omission of the indemnifying party or that party's servants which is done or omitted or undertaken on behalf of the others or arising out of any assumption of any obligations or responsibility by the indemnifying party or by that party's servants or arising out of any wrongful act or omission or any act or omission contrary to the obligations of the indemnifying party under the PMA (cl. 4.2).

32. Neolido, KHD and Mango wished to record their agreement in relation to the management of the Development Application and the Project (Recital E of CSA), and this became the CSA.

Project funding and payment of costs

33. By the SHD, Mango, KHD and the Original Shareholders covenanted with each other that:
    (a) KHD would not encumber its assets other than as provided in the SHD, the CSA, the PMA and as might be required by Mango to secure a loan or loans for the development of the Property (cl. 4.7);
    (b) KHD would not enter into any commitment or liability other than in the ordinary course of ordinary business, unless otherwise agreed by all the Shareholders (cl. 4.4(f)); and
    (c) KHD would not acquire or dispose of any assets or business other than in the ordinary course of ordinary business, unless otherwise agreed by all the Shareholders (cl. 4.4(e)).
34. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA that:
    (a) Mango would bear wholly the commercial risk of the execution of the Joint Venture (cl. 6.1);
    (b) Mango would be liable for all costs of and incidental to the Project (cl. 7.3);
    (c) Mango would be responsible for raising all finance required to fund the Project ("Loan") (cl. 9.1);
    (d) Mango would bear all costs of arranging such Loan (cl. 9.1); and
    (e) Mango would pay any interest which may be payable in respect of the Loan (cl. 9.3); and
    (f) Mango would pay all costs in relation to the Project as and when they fell due (cl. 7.3).
35. Neolido, KHD and Mango agreed under the CSA that from the Effective Date Mango would be liable to pay all costs in relation to the Project (cl. 3.4), where the Effective Date was the date of the CSA.
36. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA that:
    (a) If necessary, the Loan could be secured over the Property (cl. 9.2); and
    (b) KHD would execute all such documents as may be required by Mango to secure the Loan over the Property, on such terms and conditions as are required by the Financer (cl. 9.2).
37. By the SHD:
    (a) Mango covenanted with KHD and the Original Shareholders that it would lend or procure a loan or loans in an amount sufficient to enable KHD to settle the Contract at any time prior to the Contract Settlement Date, but in any event no later than 90 days prior to the Contract Settlement Date, which was 30 August 2004 (cl. 5.2);
    (b) Mango and KHD covenanted with the Original Shareholders that Mango would not to lend money to or at the direction of KHD without the prior written consent of all other Shareholders and except on the terms approved of by the other Shareholders in KHD (cl. 8.1); and

(c) Mango and KHD covenanted with the Original Shareholders that KHD would not lend money nor give financial assistance to or at the direction of Mango or BMD or any Related Person of Mango or BMD without the prior written consent of all other Shareholders and except on terms approved of by the other Shareholders (cl. 8.2), and for the purposes of this term 'financial assistance' includes the giving of a guarantee, the granting of an Encumbrance, the assumption or release of an obligation or the incurring or forgiving of a debt (cl. 8.3).

Mango's and KHD's rights to participate in the Profit of the Project

38. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA that Mango's rights were limited to its rights under the Joint Venture to participate in the Profit of the Project (cl. 7.1), and in that respect:
    (a) Mango was entitled to all Profit of the Project up to a Profit on Cost Percentage of 25%, and 60% of any Profit in excess of that Profit (cl. 5.1); and
    (b) KHD was entitled to 40% of Profit in excess of a Profit on Cost Percentage of 25% (cl. 5.2).
39. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA (cl. 5.3) if at any Balance Date the accounts of the Joint Venture disclosed that the Profit in relation to the Joint Venture had not been distributed in accordance with cl. 5, then KHD and Mango agreed to make such adjustments between them (including cash payments if necessary) so as to ensure that each party received its correct entitlement, where, "Balance Date" means, except to the extent that the context otherwise requires, the date upon which the accounts of the Joint Venture were balanced, being the end of each Financial Year, or the date of completion of the Term (cl. 1.1).
40. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA (cl. 6.2) if at any Balance Date it appeared that any losses incurred by the Joint Venture had not been shared in accordance with cl. 6.1, then KHD and Mango would make such adjustments between them (including any cash payment as required) as was necessary in order to ensure that the risk of any loss has been shared in the correct proportions.
41. By the SHD, Mango, KHD and the Original Shareholders covenanted with each other that they would procure that the Directors of KHD adopt a dividend policy in terms of which:
    (a) dividends were declared in accordance with cl. 6.1(b) annually in arrears, at least 45 days after the end of each Financial Year;
    (b) dividends were declared so as to distribute 40% of all Profit (as defined) in relation to the Project above a profit on Cost Percentage of 25% in the following proportions: ¼ Perovich, ¼ Spencer and ½ Mango; and
    (c) Perovich and Spencer could, subject to the ability of KHD to pay franked dividends, elect whether the dividends were to be franked or unfranked (cl. 6.1).

42. For the purpose of the Joint Venture between them, KHD and Mango agreed in the PMA (cl. 11.1) that upon the sale of the Property or any of the Lots:
    (a) the proceeds of sale would be applied:
        (i) firstly, in payment of all Costs relating to the Project, where the expression "Costs" has the meaning in cl 1.1 of the PMA; and
        (ii) secondly, in distribution of the Profit pursuant to cl. 5; and
    (b) Mango would pay any shortfall in the proceeds required to pay any costs outstanding at that time (if any).

KHD's Board and management of its activities

43. By the SHD, Mango, KHD and the Original Shareholders covenanted with each other that Mango would be responsible for (i) management of all activities of KHD in the conduct of the Business; (ii) the day to day management of the financial affairs of KHD; and (iii) the general administration of KHD, subject to directions from the Board of KHD from time to time (cl 5.1).
44. In relation to the Board of KHD, Mango, KHD and the Original Shareholders covenanted with each other in the SHD that:
    (a) Mango and the Original Shareholders would unanimously agree on the number of Directors on the Board of KHD (cl. 4.2(b));
    (b) the Original Shareholders would be entitled to appoint an equal number of directors to the Board of KHD ("OSHs' Directors") as Mango appointed ("Mango's Directors") (cl. 4.1(b));
    (c) initially there would be four Directors, Hailey and Ingram, as the Mango Directors, and Perovich and Spencer, as the OSHs' Directors (cll. 4.1(c) and (d));
    (d) a Mango Director would be the Chairman of the Board of KHD (cl. 4.1(e));
    (e) a quorum for a meeting of the Board of KHD would be a Mango Director and an OSH Director (cl. 4.2(h));
    (f) meetings of the Board would be held once in every month (cl. 4.1(f));
    (g) the Chairman would have a casting vote at any meeting of the Board or of Shareholders at which there was an equality of votes (cl. 4.1(e)); and
    (h) a director could appoint an Alternate Director who was resident in Queensland if the director was not resident in Queensland or was temporarily absent from Queensland (cl. 4.2).
45. Under the Joint Venture between KHD and Mango and in relation to management of the Project, KHD and Mango agreed in their PMA that:
    (a) KHD and Mango would appoint a Management Committee to administer and co-ordinate the Project (cl. 10.1);
    (b) Mango would nominate two and KHD would nominate one Management Committee member (cl. 10.2);

(c) the Management Committee would appoint one of its members as Chairman, who would be entitled to vote and would have a casting vote in the event of an equality of votes (cl. 10.3);
(d) Mango would appoint Urbex as the Project Manager without tender (cl. 10.4);
(e) Urbex would undertake the Project under the direction and control of KHD and Mango in a good, commercially prudent and reasonable manner and in accordance with the provisions of the PMA (cl. 10.4);
(f) the Management Committee would appoint Urbex as the Development Manager without tender to lodge the Development Application in respect of the whole property and use its best endeavours to obtain Development Permits within 12 months from the date of the PMA in respect of the whole of the Property so as to maximise the potential yield and profit in relation to the Project (cl. 10.5);
(g) the Management Committee would appoint BMD Consulting to carry out all civil design work for the Project without tender (cl. 10.6);
(h) the Management Committee would appoint BMD Constructions to carry out all civil design work for the Project without tender (cl. 10.7);
(i) all appointments by the Management Committee would on reasonable arms-length commercial terms and conditions (cl. 10.7); and
(j) all appointments made by the Management Committee to administer and co-ordinate the Project would be made on reasonable arms-length terms and conditions (cl. 10.8).

46. The Management Committee was formed on 20 October 2003 and Mango's nominees were Bird and Thomson, with Mr Greg Long ("Long") as an alternate, and KHD's nominee was Perovich, with Spencer as an alternate; and the Management Committee appointed Thomson as its Chairman.
47. Under the CSA Neolido, KHD and Mango agreed that:
(a) Mango would appoint a director to be responsible for the day to day management of all the statutory approvals and consents that may be required for the Project (cl. 3.1);
(b) Mango would review and finalise the Development Application and ensure that one Development Application was lodged in respect of the whole Property (cl. 3.2); and
(c) Mango would use its best endeavours to obtain the Preliminary Approval and such other Development Permits in respect of the whole of the Property which are appropriate so as to maximize the potential yield and profit in relation to the Project, as expeditiously as possible (cl. 3.2).
48. Mango, KHD and the Original Shareholders covenanted with each other in the SHD that:
(a) subject to the contrary direction of the Board of KHD, Mango would use its best endeavours to ensure that KHD kept true records and books of account in which full, true and correct

> entries were made of all dealings or transactions concerning the Business and its affairs using generally accepted accounting principles consistently applied (cl. 7.3(d)); and
>
> (b) Mango would ensure that KHD prepared management and financial information and reports, including but not limited to the reports referred to in cll. 7.1(a) to (e).
>
> 49. The DGI unconditionally guaranteed and indemnified KHD's and Mango's Obligations the subject of these proceedings (cll. 3 and 4)."

[18] From these allegations, the 3FASOC proceeds to the detail of the acquisition of the land by KHD and arrangements made for financing in August and September 2004.

[19] It is convenient to leave off the detail at this point. Various details will be raised later. These reasons will be lengthy. To limit the excess, in some places I have used abbreviations from the 3FASOC without full explanation. Hopefully, that will not detract too much from the reader's comprehension. Up to this point in the narrative, it is not alleged that any of the defendants has breached a legal obligation owed to the original shareholders or KHD. Yet, already the paragraphs extracted above show enough to identify one of the principal difficulties confronting the parties in the hearing of the applications.

A narrative pleading

[20] The style of the 3FASOC is described by Mio as "narrative" and "wholly conventional". Thus (with a few exceptions, including paragraph [254]) paragraphs [1] to [260] allege factual matters, mostly in a chronological order, beginning with the constitution of relevant parties and ending with an allegation of a notice given by Mango to the directors of KHD on 4 February 2013.

[21] Paragraphs [261] and [262] are important. They contain the allegations of loss or damage.

[22] Paragraph [261] alleges that "by reason of the matters pleaded in paragraphs [1] to [260] KHD has suffered loss and damage." This is an unusual plea of loss or damage. The relevant loss or damage is that caused by a wrong. It is thus a material fact that the wrong caused loss or damage. For example, where a plaintiff has suffered loss by a defendant's breach of contract or negligence or fraud it is necessary to allege that the breach, negligence or fraud caused the loss. It is necessary to plead the connecting step which constitutes the material fact of causation.

[23] The loss or damage alleged in paragraph [261] is as follows:

> "By reason of the matters pleaded in paragraphs [1] to [260] KHD has suffered loss and damage.
>
> Particulars
>
> (a) KHD has suffered damages for delay of $44,131,027 as assessed in the expert report of K Conrad of 4 June 2012. That loss is ongoing and will be re-quantified in expert reports to be filed on any hearing of this matter;

> (b) KHD has suffered loss and damage in that, on the assumption that interest is capable of being accumulated on the Prime-to-Mango FA notwithstanding the provisions of cll. 7.2 and 9.2 of the PMA, and repayable under cl. 11.1 of the PMA, it has been exposed to interest charges of over $67 million because of the delays that have taken place in the development of the Project, which interest charges are not taken into consideration in the expert reports of K. Conrad;
> (c) KHD has suffered loss by reason of the underdevelopment of the Property as alleged in paragraph [213 (viii)] hereof which underdevelopment has and will cause a loss of profitability in the Project of $79,201,553
> (d) KHD has suffered loss of $14,505,000 up to 16 October 2012 being the sum of the amounts repaid to Mango from the sale of parts of the Property without taking into account any rights of set off or indemnity available to 67 KHD arising from the delays and under development of the Project which have taken place;
> (e) KHD is exposed to further losses arising from the possibility that the BMD Group and Mango could fail, and the securities, the subject of these proceedings, are called upon."

[24] Paragraph [262] alleges that Mio has suffered loss and damage "further or in the alternative" to paragraph [261]. The loss particularised under paragraph [262] is that Mio has lost the "ability to earn dividends [as a member of KHD and] calculated in accordance with paragraphs [38] to [42] hereof on profits that would otherwise have been earned."

[25] Thus, if Mio has a loss separate from KHD it is a loss of dividends. Any such loss must be calculated by reference to Mio's prospects of receiving 25% of the dividends which would or might have been payable by KHD to members. As against Mango, under the joint venture between them, KHD was entitled to a deferred profit share of 40% of 75% of the profits of the project. The first 25% of the profits on the project was to go to Mango. The other original shareholder and Mio's commercial and legal interests are (indirectly) to 7.5% of any project profits which are available for distribution by KHD as dividends from KHD's deferred entitlement to 30% of the profits on the project. Overall, Mango's commercial and legal interests are to 85% of profits on the project, through a priority joint venture profit share of 25%, a deferred profit share of 60% of the remaining 75% and a half share of any project profits that are available for distribution of dividends in KHD.

[26] Mio will have suffered no loss if KHD is entitled to recover and recovers its deferred entitlement to 30% of the profits on the project. Otherwise, there would be double recovery on Mio's part and double liability on Mango's part if KHD's claims succeed and are recoverable.

[27] From paragraph [263] to paragraph [291] of the 3FASOC, Mio alleges that the facts previously pleaded constitute a variety of causes of actions against each of the defendants. They may be summarised for present purposes, distinguishing between Mio's claims and KHD's claims. This will also serve to identify what Mio contends it is entitled to plead as a matter of right as opposed to claims which it may only bring on KHD's behalf with leave under s 237 of the *Corporations Act* or by means of its claims for relief on behalf of KHD under s 233 of that Act.

Oppression

[28] Mio's claims include a number of claims for relief against oppression made under s 233 of the *Corporations Act*. Mio alleges oppression in paragraph [291] of the 3FASOC.

[29] Relief against oppression in the conduct of a corporation's affairs is a statutory remedy under s 233.

[30] Section 234 of the *Corporations Act* provides that a "member of the company" or a "person to whom a share in the company has been transmitted… by operation of law" is permitted to make an application for an order under s 233.

[31] Mio alleges in paragraph [1(b)] of the 3FASOC that it "is a shareholder in KHD" and in paragraph [289] that it "being a member, or alternatively a person to whom a share in KHD has been transmitted by operation of law has standing to apply for an order."

[32] Mio submits that because it has been acknowledged that Mio was appointed as the new trustee of the Spencer Family Trust in other proceedings, the BMD defendants are unable to dispute that Mio is a member or a person to whom the Spencer Family Trust shares have been transmitted by operation of law. I do not agree. Appointment as the trustee may confer rights on Mio, but it does not foreclose argument about whether Mio qualifies under s 234.

[33] Mio submits that it is a member because it is shown as such in ASIC's register, which is prima facie evidence of membership. However, for most purposes, in law, a person is a "member of a company if they… agree to become a member… and their name is entered on the register of members".[3] The "register of members" is the one to be kept by the company under ss 168 and 169 of the *Corporations Act*. The BMD defendants have tendered evidence that Mio is not shown as a member in the register of members. At that point, the prima facie evidence that Mio is a member because it is shown as a member in ASIC's records is rebutted.

[34] The allegations in paragraph [289] and [290] that Mio is a person "to whom a share has been transmitted by law" are intended to pick up that expression in s 234 of the *Corporations Act.*

[35] Paragraph [1(c)] of the 3FASOC alleges that Mio assumed office as trustee of the Spencer Family Trust on or about 24 August 2007. The appointment was by instrument.

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[3] *Corporations Act*, s 231.

[36] Where a new trustee's appointment is made out of court, by instrument, s 15(1) of the *Trusts Act* 1973 (Qld) vests the trust property in the new trustee. However, where the consent of any person is requisite, vesting is subject to that consent: s 15(5) of the *Trusts Act*.

[37] The BMD defendants do not specifically submit in 4352 of 2012 that Mio is not qualified as a person to whom a share has been transmitted by law under s 234. Their submissions on standing are made in 11109 of 2012, in opposition to leave being granted under s 237 of the *Corporations Act*. Yet, in paragraph [24] of the BMD defendants' submissions, dated 15 January 2013 in 11109 of 2012, the BMD defendants partially responded to Mio's submissions in 4352 of 2012 about s 234.

[38] In those circumstances, and because the parties did not make submissions about the meaning of "a person to whom a share has been transmitted by operation of law" within s 234, it is inappropriate to consider that question further at this stage.[4]

[39] The cause of action under s 233 is made out if the statutory conditions and one of the grounds prescribed under s 232 exist.[5] The presently relevant conditions and grounds are alleged in paragraph [291] of the 3FASOC. The oppression is alleged to have occurred in "the conduct of KHD's affairs."[6] The alleged oppression is that the conduct "is contrary to the interests of the members as a whole", or under s 232(e) that the conduct is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against Mio."

[40] Accepting those elements, it may also be observed that the material facts for a cause of action of oppression are not easily identified. The line between what is necessary and what is superfluous additional narrative is not a bright line here. The types of conduct that can cause oppression are not otherwise limited. There is no particular time limit over which the conduct must occur. Otherwise disparate acts or omissions may be linked as a course of conduct that oppresses a plaintiff.

[41] In *Shelton v NRMA Ltd*,[7] Tamberlin J said that the pleading should spell out the respects in which the conduct is contrary to the interests of the members as a whole and the basis on which s 232(e) is relied on. But see also *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*.[8]

[42] However, none of the defendants contends that the 3FASOC does not disclose a reasonable cause of action for relief against oppression.

[43] That point aside, the BMD defendants' complaint about the cause of action for oppression is that the BMD defendants "should not be asked to decipher over 200 paragraphs of a complex pleading to try and ascertain the possible basis on which this claim is advanced."

[44] That complaint could be met by requiring Mio to identify any paragraph of the 3FASOC not relied upon for the relief sought under s 233. Given, however, that

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4 Compare *Re Independent Quarries Pty Ltd* (1993) 12 ACSR 188 at 190; *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 126 FLR 404; (1995) 17 ACSR 239.

5 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [174]; [2009] HCA 25.

6 See *Corporations Act*, s 53.

7 (2004) 51 ACSR 278 at [25]; [2004] FCA 1393.

8 (2006) 33 WAR 1 at [29]; [2006] WASC 161.

Mio seeks an order under s 233 authorising it to bring claims on behalf of KHD, the clarity of the pleading would also be enhanced by requiring Mio to specifically identify which paragraphs of the pleading are relied upon to support each of the particular orders of that kind which are claimed under s 233.

Breaches of covenant by Mango to both KHD and the Original Shareholders

[45] Mio's claims include a group of causes of action for breach of covenant by Mango. The covenants were given by Mango to each of KHD and the original shareholders.

[46] The starting point is that a covenant given to more than one person in a deed is construed as a several obligation if the interests of the obliges are not joint and a breach of covenant is, therefore, several liability.[9] Thus, upon a covenant made by Mango to KHD and the original shareholders, each of KHD and Mio is entitled to claim damages for breach of contract on the basis of several liability.

[47] It is necessary to keep in mind that Mio and KHD have separate causes of action for damages for breach of contract, for any such breach of covenant. While a breach of covenant might be established at the suit of either one, the damages of each are not the same. A judgment on KHD's claim for its loss and damage must be a judgment that Mango pay a sum of money to KHD, not to Mio.

[48] Mio's submissions at times failed to grasp this distinction. Mio submitted that "[t]here can be no question as to the standing of Mio Art to bring an action for breach of these covenants, in that it is privy to them having been appointed the trustee of the Spencer Family Trust."

[49] Mio's appointment as trustee of the Spencer Family Trust vested Richard Spencer's chose in action in Mio, as trustee, for damages for breaches of covenant or contract against Mango, as trustee.[10] That would entitle Mio to claim any damages for loss or damage suffered by Richard Spencer, as the trustee, or by Mio, as the trustee. That is the loss alleged in paragraph [262]. But Mio has no right to recover damages for the loss or damage suffered by KHD alleged in paragraph [261]. The only way Mio can do that is under s 233 or s 237 of the *Corporations Act*, resulting in a judgment in favour of KHD.

Breaches of contract by Mango of promises to KHD

[50] The same point applies to Mio's contention that it is entitled to bring a claim for Mango's breaches of contractual obligations owed to KHD or should be given leave to do so.

Breaches of covenant by KHD to Mio

[51] Mio also makes a claim for damages for breaches of covenant and contract against KHD in paragraphs [264] and [266] of the 3FASOC. It could be embarrassing for Mio to claim that the same acts or omissions were a breach of covenant by Mango to Mio (as successor to the claim of the original shareholder or in its own right as trustee) causing the loss alleged in paragraph [262] and at the same time to bring a proceeding on behalf of KHD against Mango for breach of the same covenants for

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9 Treitel, *The Law Of Contract*, 7th ed, London, Sweet & Maxwell, p 450.

10 *Trusts Act*, s 15(1).

the loss alleged in paragraph [261]. Mango cannot be liable to pay a judgment for both the Mio loss under paragraph [262] and the KHD loss under paragraph [261]. This is the sort of problem which was dealt with in *Gould v Vaggelas*[11] in relation to overlapping claims for damages for the tort of deceit.

[52] As well, I note that Mio is both claiming against KHD and purporting to make a claim on behalf of KHD, relying on s 233 of the *Corporations Act*, in the one proceeding.

Breaches of covenant or contract affected by the narrative pleading style

[53] Paragraph [263] of the 3FASOC alleges breaches of covenant made by Mango to KHD and the original shareholders, by identifying other paragraphs that allege particular covenants and the facts constituting the breach or breaches. Breaches of covenants given to KHD are claims of KHD. The other breaches are claims of Mio, personally. Notably, for the allegation of breaches of covenant, by failure to give a true account of all relevant transactions, reliance is placed on the whole of paragraphs [1] to [241].

[54] Such reliance on the whole of paragraphs [1] to [241] is the first occurrence of a problem which affects many of the alleged causes of action. What are the material facts for each alleged breach of covenant?

[55] Secondly, paragraph [264] alleges breaches of covenant and contract by KHD relying on the same facts as for the breaches alleged in paragraph [263]. Thus, it picks up the reliance on the whole of paragraphs [1] to [241].

[56] Thirdly, paragraph [265(b)] alleges further breaches of covenant or contractual obligations owed to Mio by Mango, in that Mango entered into commitments and liabilities other than in ordinary course of business. Paragraphs [1] to [241] are relied upon as the particulars.

[57] Lastly, paragraph [267] sets up paragraphs [1] to [241] as breaches of other contractual obligations of Mango to KHD. These are KHD's claims. But one illustration will suffice for present purposes. Particular (i) alleges that Mango breached its contractual promise of good faith to KHD for the purposes of the joint venture of the project "in that by [its] conduct as pleaded in paragraphs [1] to [241] it failed to act honestly with fidelity to the bargain, sought to undermine the bargain entered into, or the substance of the contractual benefit bargained for, and failed to act reasonably and with fair dealing, having regard to the interests of the Parties and to the provisions, aims and purposes of the SHD, the PMA and the CSA."

[58] When a "narrative" style of pleading is adopted, and there are numerous causes of action raised by the pleading, there can be real difficulty in ascertaining the material facts constituting a particular cause of action. The difficulty is increased where the narrative is longer, the number of causes of action is greater (particularly where there are alternative inconsistent allegations) and the causes of action are legally more complex. This case represents a paradigm of the problems that may occur.

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11 (1985) 157 CLR 215; [1984] HCA 68.

[59] The starting point is that (subject to any direction to the contrary) a plaintiff is entitled to join parties[12] and causes of action[13] in the one proceeding, where there is a common question of law or fact, but is required to plead only the material facts constituting each cause of action.[14] Nonetheless, a plaintiff is not usually obliged to specifically identify in the pleading which material facts go to which cause of action against each defendant. The old practice of common law pleading where the declaration alleged each count separately, which still obtains in criminal pleading, no longer obtains on the civil side and was never the method of pleading in equity.[15]

[60] This illustrates why and emphasises that, in a case of complexity, it is critical that the pleading allege "all the material facts… but not the evidence by which the facts are to be proved."[16] Otherwise, the would-be analyst of the pleading is left swimming in a sea of evidentiary facts while trying to identify the material facts for each cause of action. Drowning often follows, at the expense of the intent under *UCPR* 5 that the proceeding be conducted to "facilitate the just and expeditious resolution of the real issues… at a minimum of expense" and the requirement that "each pleading must… be as brief as the nature of the case permits" under *UCPR* 149(1)(a).

[61] The "material fact" model of pleading was a reform of the rules of court brought into effect under the *Judicature Act* 1876 (Qld)[17] for the administration in the one court of the rules of common law and equity. Brevity was the intent, in contrast to the prolix pleadings of common law and particularly equity[18] beforehand. Perhaps the drift of history has caused a loss of focus as to the importance of the purpose of the reform. That said, a lengthy pleading is not necessarily a vice. Where it is prepared with great precision and isolates the issues, there is no cause for complaint.

[62] But where a pleading alleges a lengthy historical account of facts that occurred over an extensive period of a commercial relationship, then particular specific causes of action are pleaded on the basis that the reader is invited to find the relevant material facts for any cause of action in all that has gone before, the price for the death of that hero, brevity, is not paid in the valuable coin of precision. Instead, the reader is invited on a would-be treasure hunt, with the unlikely satisfaction that after looking in every nook and cranny, and trying every combination possible, there will be an Archimedian "Eureka" moment.

[63] Where a pleader has fallen into this error, there is a remedy. It is to require that the pleading identify the material facts for each cause of action. That will exclude those facts which go to another cause of action, as well as any "narrative" non-material facts. A direction can be made, for example, that the pleader separately plead the material facts for each cause of action alleged.[19] But that is not often a remedy

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12 *UCPR* 65(1).
13 *UCPR* 60(1).
14 *UCPR* 149(1)(b).
15 A simple description of the pre-Judicature Acts processes of pleading may be found in Jacob & Goldrein, *Pleadings Principles and Practice*, Sweet & Maxwell, London, at 19-26.
16 *UCPR* 149(1)(b).
17 It is unnecessary to essay the progenitors of the Queensland Act.
18 See for example the court's retaliation to a prolix pleading in *Mylward v Weldon* (1596) 21 ER 136; [1595] EWCH Ch 1, referred to in *Standard Bank PLC v Via Mat International Ltd* [2013] EWCA Civ 490 at [29].
19 *Kirby v Sanderson Motors Pty Ltd* (2002) 54 NSWLR 135; [2002] NSWCA 44 at [21].

which will lead to expedition or a minimum of expense, and so must be used in sparing measure.

[64] At the risk of stating the obvious, it is as well to recall just what a material fact is. In its primary meaning, a material fact is a fact that the plaintiff must prove to succeed in a claim for relief upon a cause of action. The conceptual power of the material fact model of pleading is not recognised often enough. There is a trend to treat this most fundamental of procedural rules as something which is best overtaken by detailed factual and legal submissions. I could not disagree more strongly with that view and I am glad to say that the pleading rules have not been altered to countenance it. There is a place for detailed factual and legal submissions, but it is not as replacement for the identification of the material facts.

[65] The cases have long recognised the negative proposition that if any one material fact is omitted, the pleading of a cause of action is bad.[20] I prefer to look at it from the positive side. If a plaintiff proves all the material facts, it must succeed on the cause of action. Thus the case is reduced to its factual skeleton in law. By adhering to the concept of a material fact in the practice of pleadings, the courts serve the purposes of efficiency and cost-saving which inform the procedural rules. The only issues joined are upon material facts. The only evidence led proves or disproves the material facts. The decision in the case is not affected by the irrelevant and the decision maker is not distracted from the material facts.

[66] This model is based on the concept that the decisional process is ordinarily a judgment following a trial, where the issues of material fact as defined by the pleadings are determined. These days, civil trials are conducted by a judge sitting alone, except in rare cases. But the conceptual model of a trial of the issues of fact, resulting in findings and verdict, is still the basis of the process which can be traced backwards through the common law.

[67] Prior to a trial, the material fact conceptual model may come into play where the facts alleged do not disclose a reasonable cause of action or defence. The procedure upon demurrer no longer exists in civil proceedings, although it is retained in the criminal jurisdiction. Instead, the opposite party may apply to strike out all or part of the pleading on that ground.[21]

[68] As well, the court may strike out a statement of claim or part of a statement of claim if it: has a tendency to prejudice or delay the fair trial of the proceeding; or is unnecessary or scandalous; or is frivolous or vexatious; or is otherwise an abuse of the process of the court.[22] This is the basis of the defendants' strike out applications.

[69] Alternatively, if the facts alleged are sufficient to disclose a reasonable cause of action but are not supportable as a matter of evidence, the court may intervene upon an application for summary judgment.[23] Although evidence was relied upon by the parties on some points, no party applied for summary judgment on the current applications.

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20 *Bruce v Odhams Press Pty Ltd* [1936] 1 KB 697; *Colavon Pty Ltd v Bellingen Shire Council* [2008] NSWCA 355 at [98].

21 *UCPR* 171(a).

22 *UCPR* 171(b)-(d).

23 *UCPR* 292 and 293.

[70] Another relevant interlocutory principle emerges from the material fact model of pleading. The pleading must not oppress a defendant by vague or uncertain allegations, lacking particularity. This principle is applied with rigour where the allegations made against a defendant are of fraudulent or serious misconduct – "fraud must be pleaded specifically and with particularity."[24] In such a case, more precision is required than in other cases. As well, the proof required is affected, although the standard remains on the balance of probabilities – "the nature of the issue necessarily affects the process by which reasonable satisfaction is attained."[25] These are venerable principles that are re-expressed and applied in the context of the material fact model of pleading under the rules of court. At their root is the notion that a defendant is entitled to know the case it has to meet at trial.

[71] Informed by those considerations, the search in paragraphs [1] to [241] for the precise material facts that constitute the specific breaches of the covenant or contract is objectionable pleading. In my view, even if it does not offend the requirements that the pleading "must… be as brief as the nature of the case permits [and] not [contain] the evidence by which the facts are to be proved."[26] For brevity, I will call such a problem the "narrative defect". Unhappily, it will soon become apparent that it affects other pleaded causes of action in the 3FASOC – in fact it permeates the 3FASOC.

[72] The narrative defect obscures the articulation of exactly what constitutes the relevant breaches of covenant or contract.

Inducing breach of contract

[73] Mio makes a claim for damages for inducing breach of contract. Mio submits that "to the extent that the pleading alleges inducement of breaches of the PMA by Mango, [Mio] accepts that only KHD has standing to bring this claim." Mio submits that it has sought leave to do so in proceeding 11109 of 2012. As will become apparent later, ultimately Mio did not press that aspect of the application for leave under s 237 of the *Corporations Act*.

[74] The claim for damages for inducing breach of contract is a claim for compensatory damages in tort. The compensation is to be assessed on the footing that the plaintiff should be "put… in the same position as he would have been in… if the tort had not been committed."[27] That is, as if the defendants had not induced Mango to breach the PMA. The assessment compares the actual events that have occurred and the hypothetical case of what would have happened absent the tortious conduct.

[75] The 3FASOC alleges inducement of breaches of the SHD by Mango against parties defined as the "Other Defendants". They are the corporate BMD defendants. The allegation of inducement of breach of contract is made about each and every breach of covenant or breach of contract pleaded. The particulars rely on paragraphs [1] to [258] and [263] to [267] of the 3FASOC.

[76] There are some obvious possible defects. For example, although it is alleged that Macequest is one of the Other Defendants, and that the Other Defendants "procured,

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24 *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* (1990) 169 CLR 271 at 285; [1990] HCA 11.

25 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363; [1938] HCA 34.

26 *UCPR* 149(1)(a) and (b).

27 *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191; [1966] HCA 38.

induced and dealt with KHD in such a way as to cause" all the alleged breaches of contract, the only allegations made against Macequest are that it is an ultimate holding company and that it was party to arrangements alleged in paragraph [100] of the 3FASOC and defined as the "Parties' Intentions" and the "Parties' Agreement".

[77] As will appear later, the central attack on the 3FASOC made by the BMD defendants is that paragraph [100] is objectionable. But even if it were not, Mio does not allege that anything was done by Macequest to procure, induce or deal with KHD in any way. And it is not alleged that any of the actions of any party which may have procured, induced or dealt with KHD was done as Macequest's agent.

[78] The complaint at this point is the narrative defect. There is no specification as to what act by any of the Other Defendants was a tortious inducement of any breach of contract. Not only is it impossible for any of those defendants to tell what specific conduct is the subject of any of the alleged torts, it is impossible to tell which breach of contract the impugned act might go to.

[79] From *Lumley v Gye*,[28] which established the tort of inducing breach of contract, until the most recent formulation of the tort of interfering with contractual relations in the High Court,[29] I doubt that it has been thought that the tort could be constituted by conduct without identifying the act or acts which constitute the interference with the contractual relations as a material fact. In my view, the 3FASOC does not do so. The person searching for the tortious conduct is bound to drown in the sea of the narrative.

Paragraph [277]

[80] Paragraph [277] of the 3FASOC alleges:

> "Further, or in the alternative, each of Bird, Ingram, Thomson, Barrett, Mango, Varitimos and Rex engaged in the conduct in the premises alleged for the purpose of benefitting the Other Defendants so as to secure the profits of the development of the Property for the benefit of their corporations, and to inflict losses upon KHD and the Original Shareholders.
>
> Particulars
>
> The plaintiff relies upon the whole of the conduct pleaded in paragraphs [1] to [258] hereof."

[81] It is an allegation of fact of the purposes of the named defendants in engaging in the conduct alleged against them.

[82] Mio submitted that the role of this paragraph was to rely on the first basis of liability articulated by the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL (No 2)*.[30] That basis exists "where the third party is the corporate creature, vehicle, or alter ego of wrongdoing fiduciaries who use it to secure the profits of, or to inflict the losses by their breach of fiduciary duty…". Mio did not state how the

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28 (1853) 118 ER 749; [1853] EngR 15.

29 *Zhu v Treasurer of State of New South Wales* (2004) 218 CLR 530; [2004] HCA 56.

30 (2012) 200 FCR 296 at [242]-[246]; [2012] FCAFC 6.

Other Defendants fitted into that classification, but that point may be passed by. The causes of action are KHD's claims.

[83] In any event, as particulars of paragraph [277], Mio relies on the whole of the conduct pleaded in paragraphs [1] to [258]. Thus the cause of action or causes of action suffer from the narrative defect.

Inducement of breach of fiduciary duty

[84] Paragraph [278] of the 3FASOC alleges that the Other Defendants knowingly induced KHD's directors to breach their "Director's Duties" to KHD, owed in equity or under the statutory obligations of a director under the *Corporations Act*. Mio alleges in paragraph [269] that there were 7 distinct such duties. Because the duties are duties owed to KHD, the causes of action are KHD's claims.

[85] This category of cause of action is to be contrasted to liability as a knowing participant under the second limb of the rule in *Barnes v Addy*,[31] as explained in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.[32]

[86] More recently, the Hon. William Gummow AC has written an article further explaining his view of the scope of this cause of action.[33] Mio identified it as the third basis of liability in *Grimaldi*, and as a category of cause of action where it is not necessary to show any dishonest or fraudulent design. The cases referred to in the authorities are cases of breach of trust, not breach of a director's duties, but that point may be passed by.

[87] Yet again, as particulars of the knowing inducement, Mio relies on the whole of the conduct pleaded in paragraphs [1] to [258]. The causes of action suffer from the narrative defect.

Knowing participation in breach of fiduciary duty

[88] Paragraph [279] of the 3FASOC is intended to be a claim for knowing participation by the Other Defendants in a breach of Director's Duties by the directors of KHD, in accordance with second limb *Barnes v Addy* liability as explained in *Farah*. Mio alleges that there was a "fraudulent and dishonest scheme… to deprive KHD and the original shareholders of the benefit of the development of the property and the profits thereof and to benefit themselves and other entities in the BMD Group and the B&B Group…".

[89] Because the duties were duties owed to KHD, the causes of action are KHD's claims.

[90] As particulars, Mio relies upon paragraphs [1] to [258]. These causes of action suffer from the narrative defect.

[91] As well, Mio particularises that the fraudulent and dishonest nature of the scheme "arises from the Parties' Intentions and the Parties' Agreements…". That is, the matters alleged in paragraph [100] of the 3FASOC.

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31 (1874) 9 LR Ch App 244.

32 (2007) 230 CLR 89 at [161]; [2007] HCA 22.

33 Gummow, *Knowing Assistance*, (2013) 87 ALJ 311 at 315.

[92] A similar claim is advanced against the fifteenth to eighteenth defendants in paragraph [280] of the 3FASOC.

Involvement in directors' contraventions of *Corporations Act* duties

[93] Paragraph [281] of the 3FASOC sets up a claim against Mango and the Other Defendants as persons involved in the contraventions of the directors of KHD of obligations owed under the *Corporations Act*.

[94] The 3FASOC does not set out the factual basis of such liability. It appears to be that under the *Corporations Act* a company may recover compensation for loss or damage suffered by a contravention of a relevant provision of that Act from a person involved in the contravention.

[95] I note the following relevant provisions of the *Corporations Act*, namely:

(a) under s 79, a "person involved" in a contravention is defined to include a person who is "knowingly concerned" in the contravention;
(b) under s 1317E(1), relevant sub-sections of ss 180, 181 and 182 are defined as a "civil penalty provision";
(c) under ss 181(2) and 182(2) a person involved in a contravention of the section is a contravenor;
(d) under s 1317H(1) a court may order a person to compensate a corporation for damage suffered by the corporation if the person has contravened a civil penalty provision in relation to the corporation;
(e) under s 1317J(2) a corporation may apply for a compensation order; but
(f) under s 1317J(4), only ASIC or the corporation may so apply; and
(g) no reference is made in s 1317H or 1317J to a person involved in a contravention.

[96] Thus, the basis for liability as a "person involved" in the alleged contraventions of s 180 of the *Corporations Act* is not apparent. As well, the particular factual basis for the involvement is not alleged.

[97] Because it is the corporation which may recover the damages, the causes of action are KHD's claims.

[98] As particulars of the involvement of Mango and the other defendants in the contraventions by the directors, Mio relies upon paragraphs [1] to [258]. These causes of action suffer from the narrative defect.

Registration of Mio as a member

[99] Although Mio alleges that it is a shareholder and member of KHD in paragraphs [1(b)] and [289] of the 3FASOC, Mio does not allege (or appear to contend) that its name is entered in the register of members of KHD. As previously discussed, the evidence is that it is not.

[100] Paragraph 1 of the claims for relief is for an order under s 82 of the *Trusts Act* vesting the Spencer Family Trust Shares in Mio. Paragraph [290] alleges an entitlement to such an order, if Mio is not a person to whom a share in KHD has been transmitted by operation of law.

[101] As to s 82 of the *Trusts Act*, a change or retirement of a trustee is a basis for a court to make a vesting order.[34] It does not appear that there is any other person interested in the Spencer Family Trust who is a party to the proceeding.

[102] A vesting order is an order that is usually sought against the retiring trustee and any beneficiaries concerned. KHD is only interested in who is entitled to be registered as a member. An order against it may not be appropriate. That may be illustrated by the fact that Mr Vicca is a director of KHD. Any order that Mio's name be entered in the register of members, as a member, is one that binds the directors as an organ of the company. That includes Mr Vicca.

[103] The BMD defendants submit that relief could not be granted for the same reasons that they contend that Mio does not have standing for a grant of leave under s 237 of the *Corporations Act*. I do not agree. They are different questions. If Mio has been appointed trustee of the Spencer Family Trust, it may be entitled to relief by way of vesting order, irrespective of whether it is presently entitled to be registered as a member under s 236(1)(a)(i) of the *Corporations Act*. *Andco Nominees Pty Ltd v Lestato Pty Ltd*[35] illustrates the width of the Court's power under s 82. It is not appropriate to make a final determination of whether the discretion should be exercised in the course of the application by the BMD defendants to strike out the 3FASOC.

[104] Paragraph 2 of the claims for relief in the 3FASOC is for an order under s 1071F of the *Corporations Act* requiring the twelfth and thirteenth defendants to register the transmission of the Spencer Family Trust Shares in the books and records of KHD. The claim appears to be brought against Mr Varitimos and Mr Rex as directors of KHD[36] and KHD itself.

[105] Although the order claimed in paragraph 2 of the claims refers to "books and records" that is imprecise. As previously noted, a company must keep a register of members.[37] A person who has agreed to become a member and whose name is entered in the register of members is a member.[38] The person becomes a member upon their name being entered in the register.[39]

[106] The power in s 1071F is intended to enable the court to correct the register of members or to enforce a person's right to become a member. In this case, the correction or enforcement which may be required would be that Mio be entered as a member as transferee of the Spencer Family Trust's shares held by Richard Spencer. The proper defendants to such an application may include the directors as the "relevant authority" but an order is made against the company.[40]

[107] It may be possible to obtain an order to rectify the register of members of a company under s 233 of the *Corporations Act*. Paragraph [290] appears in a section of the

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34 For example, *Trafalgar West Investments Pty Ltd v Superior Lawns Australia Pty Ltd* [2012] WASC 460 at [58].

35 (1995) 126 FLR 404; (1995) 17 ACSR 239.

36 See, for example, *Frigger v Lean* [2012] WASCA 66 at [17].

37 *Corporations Act*, s 168.

38 *Corporations Act*, s 231.

39 *Maddocks v DJE Constructions Pty Ltd* (1982) 148 CLR 104 at 117; [1982] HCA 17.

40 For example, *Venture Platinum Pty Ltd & Anor v Rogue Constructions Pty Ltd* (2006) 56 ACSR 802.

3FASOC which is headed "Oppression", but s 233 is not the apparent basis on which order 2 is sought.

[108] As well, the usual basis for an order that a person be entered in the register of members under s 1071F is that the relevant authority of the company refuses or fails to enter the person in the register after a lawful request. Usually, a transferee of an issued share will lodge an instrument of transfer which complies with s 1071B and is executed by the existing shareholder as transferor.[41]

[109] From the paragraphs referred to above, and the submissions made by Mio and the BMD defendants, it appears that Mio's contention is that its appointment as trustee is the basis of its entitlement to be registered as the member holding the Spencer Family Trust's shares in KHD. But it is not alleged that Mio has requested that the directors of KHD enter it as a member in the register of members.

[110] The transfer of a share to a person requires that the person agrees to become a member of the company and their name is entered on the register of members: s 231. The constitution of many companies confers a power on the directors to approve a transfer of shares.

[111] In any event, subject to s 1071B(5), a corporation must only register a transfer of securities if a "proper instrument of transfer" has been delivered to the company: s 1071B(2) of the *Corporations Act*. An exception exists where a right to the security "has devolved by operation of law". That would include a trustee in bankruptcy. But it may or may not include a trustee appointed out of court. The parties did not address this question.

[112] The 3FASOC may plead an incomplete basis for an application for an order under s 1071F. That question was not argued on the applications to strike out and, accordingly, I do not consider it further.

Invalidity of meetings

[113] Paragraph 6 of the claim for orders in the 3FASOC seeks declarations pursuant to s 1322 of the *Corporations Act* that meetings of directors of KHD purportedly held on or about 30 August 2004, 15 December 2011, 23 February 2012, 29 March 2012 and 2 November 2012 are not valid proceedings of KHD. An order that each of the resolutions giving the Management Committee the power to appoint agents, sell the Land and receive settlement monies be set aside is sought. The ground is that each of the meetings of directors "has caused or may cause substantial injustice that cannot be remedied by other order of the Court".[42]

[114] It is not entirely clear against whom these orders are sought, but it would appear to include the relevant directors at the time and Mango as the other shareholder.

[115] At least in relation to the 15 December 2011 meeting and thereafter, the directors were Mr Varitimos, Mr Vicca and Mr Rex. Mr Vicca is not a party to the proceeding. The basis of the claim of invalidity of these meetings appears to be, at least in part, the absence of a quorum at a meeting of directors, as alleged in paragraph [244] of the 3FASOC. The absence of a quorum seems to be the product

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41 *Beck v Tuckey* (2007) 213 FLR 152; [2007] NSWSC 1065.

42 *Corporations Act*, s 1322(2).

of Mr Vicca's decision not to attend any meeting proposing a resolution which he does not consider to be in the interests of the successors to the original shareholders.[43]

[116] As to the meeting of 30 August 2004, the directors were Mr Ingram, Mr Byrd, Richard Spencer and Ms Perovich. Mio alleges in paragraph [93] of the 3FASOC that no meeting took place and in paragraph [94] that there was no notice and no quorum of directors at the meeting.

[117] The relief which is sought in paragraph 6 of the claim for orders is not sought under s 233 of the *Corporations Act*.

BMD defendants' application to strike out paragraph [100]

[118] In every place where I have identified that a cause of action suffers from the narrative defect, the paragraphs relied upon include paragraph [100] of the 3FASOC.

[119] That paragraph alleges as follows:

> "*Parties' Intentions, Parties' Agreement and the ensuing facts*
>
> 100. From at least 30 August 2004, Babcock & Brown Australia Pty Ltd ("B&BA"), BBA, Prime, Mezzanine and BBREF (at that time members of the Babcock & Brown Group of Companies ("B&B Group")) and Mango, Urbex, BMD Properties, BMD Holdings and Macequest (members of BMD Group) (collectively "the Parties") intended (the "Parties' Intentions") and agreed (the "Parties' Agreement") that:
>
> (a) interest would not be paid on (i) Prime-to-Mango FA; (ii) Mezzanine-to-Prime FA; and (iii) BMD/BBREF-to-Mezzanine FA, where if interest under (i), (ii) and (iii) was not paid, interest would be calculated at the rate payable thereunder capitalised and compounded monthly in arrears;
>
> (b) the entities liable to pay interest under each of the FAs (Mango, Prime and Mezzanine respectively) would not be in a position to pay any interest;
>
> (c) the Property owned by KHD would be subject to securities that could be called upon for the defaults of Mango, Prime and Mezzanine for the benefit of BMD Properties (and ultimately, BMD Holdings and Macequest) and BBREF (and ultimately, B&BA) and KHD deprived of the Property ("Option to Utilise the Property in payment of Interest");
>
> (d) that they would enter into a competing joint venture pursuant to which unless BMD Properties fulfilled the Payment Condition Precedent (paragraph [84](l) above) (which involved either the Original Shareholders agreeing to include the interest costs under the Mezzanine-to-Prime FA as "Costs" for the purpose of cl. 11.1 of the PMA and for the purpose of calculating "Profit" under the PMA or else being removed), BBREF would be given priority over BMD

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[43] Compare *Whitehouse v Capital Radio Network Pty Ltd* (2004) 13 Tas R 27; [2004] TASSC 12; *Re Pembury Pty Ltd* [1993] 1 Qd R 125.

Properties to repayment of its $6M plus interest calculated as in (a)(iii)) ("Option if OS could be removed");

(e) interest under the Mezzanine-to-Prime FA would, if possible, be included as a "Cost" for the purpose of cl. 11.1 of the PMA either of itself or as the component of the cost of the Prime-to-Mango FA, thereby depriving KHD of the opportunity of earning profits in respect of the Project and the Original Shareholders of the opportunity of being paid dividends (cl. 6.1 of the SHD) and the parties would try to achieve this ("Option to eliminate Profit and Dividends"); and

(f) the Parties would delay in the development of the Property and sale of lots so as to bring about the following consequences:

(i) the accumulation of interest under the Prime-to-Mango FA, and the BBREF/BMDP-to-Mezzanine FA to exorbitant levels;

(ii) the exposure of the Property to being sold to satisfy the obligations of Mango, Prime and Mezzanine to pay interest under the three FAs, rights capable of being exercised by Prime, Mezzanine, BMD Properties and BBREF as the interest accumulated;

(iii) the removal of the Original Shareholders as shareholders, by way of mortgagee sale or otherwise;

(iv) the depriving of KHD of the opportunity of earning profits;

(v) the depriving of the Original Shareholders of the opportunity of being paid dividends.

(g) the Original Shareholders would be kept from knowledge of (i) the Parties' Intentions, (ii) the Parties' Agreement; and (iii) the facts that arose as a result of the Parties' Intentions and the Parties' Agreement; and

(h) the Original Shareholders would be led to believe that (i) Mango would only be responsible for paying interest at a rate of 13.5% under the Prime-to-Mango FA in accordance with cll. 7.3 and 9.3 of PMA; and (ii) any securities provided by KHD pursuant to cl. 9.2 of PMA would be securities for the performance of Mango's obligations to Prime under the Prime-to-Mango FA, which obligations would be paid by Mango.

Particulars

(i) The plaintiff relies upon the following overt acts and circumstances.

As to (a): The fact that there was such an agreement is to be inferred from the fact that interest has never been paid on the facility agreements referred to, notwithstanding that in each case, interest on any view became due and payable within the meaning of cll. 7.3 and 9.3 of the PMA (as to the Prime-to-Mango FA see paragraphs [63] to [69] hereof; as to the Mezzanine-to-Prime FA see paragraphs [71] and

[195] to [200] hereof; and as to the BMD/BBREF-to-Mezzanine FA see paragraphs [88] and [195] to [200] hereof). The plaintiff will provide further and better particulars after discovery herein.

As to (b): The fact that there was an agreement that the relevant entities would not be able to pay any interest is to be inferred from the fact that they have never paid any interest under the relevant facilities, and the fact that they have never had the financial resources to pay the interest as set out in the affidavit of Mr Mortensen dated 5 June 2012 filed in the interlocutory proceedings herein and the deferral of interest payments under the Deed of Consent and Amendment (see paragraphs [195] to [200] hereof). The plaintiff will provide further and better particulars after discovery herein.

As to (c): The fact that there was an agreement is borne out by the nature of the securities as set out in paragraphs [56] to [99] hereof, and the fact that those securities involved the participation of at least BMD Holdings, BMD Properties, Mezzanine, Prime and Mango whether directly or indirectly.

As to (d): This is the legal effect of the Payment Condition Precedent under the BMD/BBREF-to-Mezzanine FA. The plaintiff also relies upon the Dec-2004 Mango and B&B JV Agreement referred to in paragraph [101] hereof. The plaintiff will provide further and better particulars after discovery herein.

As to (e): This is the legal effect of what was sought to be done under the Payment Condition Precedent under the BMD/BBREF-to-Mezzanine FA, and the Dec-2004 Mango-B&BA JV Agreement referred to in paragraph [101] hereof. The plaintiff will provide further and better particulars after discovery herein.

As to (f): The fact that:

(i) substantial delays at the interest rates stipulated could result in the accumulation of interest to exorbitant levels is a matter of calculation and is borne out by the calculations contained in the affidavit of Ms K Toombes dated 5 June 2012;

(ii) the accumulation of interest would expose the Property to being sold is borne out by the interest calculations tendered by the first to seventh defendants in the interlocutory proceedings herein, and the fact that each of Mango, Prime and Mezzanine are not in a position to meet those liabilities; as deposed to in the affidavit of Mortensen of 5 June 2012 and the fact that there are powers of sale conferred by all of the relevant securities;

(iii) (i) and (ii) would enable the removal of the Original Shareholders is borne out by the particulars provided to (i) and (ii);

(iv) delay and the accumulation of interest would deprive KHD of the opportunity of earning profits and the Original Shareholders the opportunity of being paid dividends is borne out by the evidence of Ms K Conrad in the interlocutory proceedings herein.

As to (g): The plaintiff relies upon the fact that the Original Shareholders were never informed as pleaded in paragraphs [56] to [99] hereof:

(i) of the terms of the Mezzanine-to-Prime FA nor provided with a copy of it;

(ii) that interest was to be accumulated beyond the expiration of the relevant facility agreements or at all;

(iii) that the B&B Group and BMD had advanced the funds for the BBREF/BMDP-to-Mezzanine FA, contrary to the provisions of cll. 4.4(f), 4.4(k) 4.7 and 8.2 of the SHD;

(iv) of the existence of the BBREF-to-Mezzanine FA and the December 2004 Mango-B&BA JV Agreement which knowledge was kept from the Original Shareholders;

(v) that Mango and the other Parties to the Parties' Agreement did not disclose and consistently refused to disclose to the Original Shareholders the true nature of the financial and other arrangements made between the B&B Group and the BMD Group;

(vi) the plaintiff will provide further and better particulars after discovery herein to draw the inference that there was such an agreement.

As to (h): The plaintiff relies upon paragraph [63] hereof and the failure of the Parties to disclose to the Original Shareholders the true nature of the financing arrangements between the B&B Group and the BMD Group, as set out in paragraphs [70] to [91] hereof, to draw the inference that there was such an agreement.

(ii) The plaintiff relies upon the Mango Boulevard Unit Trust Legal and Financial arrangements papers dated 29 March 2010 and July 2010."

[120] Mio also specifically alleges that pleaded actions or omissions had "the purpose… to further" the Parties' Intention and the Parties' Agreement and that the parties' Intention and Parties' Agreement "remained" over time.

[121] For example, paragraph [194] recognises the exit of the B&B Group in 2010, but alleges that the Parties' Intentions and Parties' Agreement were retained. Paragraph [257] alleges that the Parties' Intention and Parties' Agreement remained the same

"[a]s at June 2010 and at all times hereafter (sic)." Specific reliance on the subject matter of paragraph [100] appears in paragraphs [140], [143], [145], [177], [194], [197], [213], [257], [258] and [279].

[122] The BMD defendants contend that paragraph [100] is objectionable and that, given its central role in the 3FASOC, the consequence of striking out paragraph [100] is that the whole of the 3FASOC should be struck out.

[123] In support of their challenge to paragraph [100] and their contention that the whole pleading is "infected" by it, the BMD defendants rely upon a number of the principles noted earlier. They submitted that the "fraud allegations are opaque, inconsistent and remain essentially speculative…"

[124] The BMD defendants also submit that paragraph [100] "describes a labyrinth conspiracy with no reasonably understandable object. There is no immediately obvious or logical reason for the conspiracy." From this point, the submissions made are about the likelihood that the "conspiracy" existed. However, that is not a starting point for analysis of the adequacy of the pleading, as such. As noted, this is not a summary judgment application.

[125] The BMD defendants are on stronger ground, in my view, in submitting that the particulars to the subparagraphs of paragraph [100] do not provide support for some of the alleged intentions or agreement. They submitted that the question is whether the "fundamental task of defining and providing details of the fraud" has been adequately carried out. It is appropriate to consider some of the specific matters separately, by reference to the separate subparagraphs of paragraph [100].

[126] The common law requirement that fraud must be pleaded specifically and with particularity is amplified by:

(a) *UCPR* 150(1)(f) that "fraud" must be pleaded specifically;
(b) *UCPR* 150(1)(k) that "motive intention or other condition of mind, including knowledge or notice" must be pleaded specifically;
(c) *UCPR* 150(2) that "any fact from which any of [those] matters is claimed to be an inference must be specifically pleaded"; and
(d) *UCPR* 157(c) that particulars necessary to support a matter pleaded specifically under rule 150 must be included in a pleading.

[127] In subparagraph (a) of paragraph [100], Mio alleges an intention and agreement that interest would not be paid on some of the facilities. That is alleged to be an inference from the fact that interest was not paid. That does not seem to me to support an intention or agreement not to pay interest in the future. There is no reason to assume that Mango would have the capacity to pay interest other than by borrowing to do so or by developing the land and thereby generating cash-flow. That interest was not paid over a lengthy period and no action was taken by the lenders does support acquiescence by the relevant lenders in non-payment of interest, but that is not the same thing as an initial intention and agreement not to do so.

[128] In subparagraph (b), Mio alleges an intention and agreement that relevant entities would not be able to pay any interest. That is said to be an inference from the fact that they have never paid any interest under the relevant facilities and they never had the financial resources to pay the interest. Those facts do not seem to me to support

an alleged intention or agreement not to do so in the future. The intention disclosed by the terms of the PMA and SHD was that Mango would arrange finance to carry out development of the land. It may not have done so, or not done so on advantageous terms, or on terms which capitalised interest to enable development of the land, but those are not matters relied upon.

[129] In subparagraph (c), Mio alleges an intention and agreement that the land would be subject to securities that could be called upon for the defaults of Mango, Prime and Mezzanine. That is particularised as supported by the terms of the agreements and securities alleged in paragraphs [56] to [99]. The land is security for the defaults of those companies under those agreements and securities. The particulars support the pleaded intention and agreement between at least some of "the Parties."

[130] In subparagraph (d), Mio alleges an intention and agreement that the Parties would enter into a competing joint venture pursuant to which BBREF would be given priority over BMD Properties to repayment of its $6M plus interest is said to be the effect of the BMD/BBREF to Mezzanine FA agreement and the Mango and B&B JV Agreement (December 2004). That does appear to be the effect of those terms between at least some of the Parties.

[131] In subparagraph (e), Mio alleges an intention and agreement that interest under the Mezzanine-to-Prime FA would, if possible be included as a "Cost" for the purpose of cl 1.1 of the PMA. That is particularised as being the legal effect of the Payment Condition Precedent under the BMD/BBREF-to-Mezzanine FA. The pleading may be imprecise but the relevant condition contemplates that possibility.

[132] In subparagraph (f), Mio alleges an intention and agreement that the Parties would delay in the development of the land and sale of the lots so as to bring about the accumulation of interest to "exorbitant" levels to the detriment of KHD and the original shareholders in various ways. That is said to be supported by the fact that non-payment of interest could cause those results. In my view, those possibilities do not support the allegation that it was the initial intention and agreement to bring them about.

[133] In subparagraph (g), Mio alleges an intention and agreement to keep the Parties' Intentions and the Parties' Agreements from the original shareholders. That is said to be supported by several particular facts. On the other hand, the BMD defendants submit that Mio alleges that the existence of the borrowing by Mezzanine from BBREF and BMD Properties under the BBREF/BMD-to-Mezzanine FA and the terms of the Mezzanine-to-Prime FA were disclosed by 26 July 2006.

[134] In subparagraph (h), Mio alleges an intention and agreement that the original shareholders would be led to believe that Mango would only be responsible for paying interest at 13.5% under the Prime-to-Mango FA and any securities provided by KHD would be securities for the performance of Mango's obligations to Prime under the Prime-to-Mango FA. That is particularised by reliance upon paragraph [63] and the alleged failure of the Parties to disclose to the original shareholders the "true nature" of the financial and other arrangements made between the B&B Group and the BMD Group. However, the BMD defendants point out that Mio also alleges:

(a) in paragraph [120], that on 31 January 2005, Mr Varitimos as the BMD Groups' lawyer wrote to the original shareholders about transferring the "present facility" to the CBA; and

(b) in paragraph [175] and [176], that on 1 October 2008, a board paper was circulated revealing indebtedness extending beyond the Mango-Prime FA being sought to be secured over the land.

[135] One specific complaint of the BMD defendants is that in a number of places the particulars of the pleading say that "the plaintiff will provide further and better particulars after discovery..." That statement does not assist much either way. It signifies that Mio is apparently not able to provide better "particulars" at this point. There is no particular reason to think that disclosure will or will not enable Mio to add to relevant particulars, although it may be accepted that it does not presently know what is contained in the defendants' documents.

[136] The BMD defendants also submit that although paragraph [100] alleges that ten companies were "the Parties" who held the Parties' Intention and made the Parties' Agreement, there is an absence of pleaded acts for the inference that those parties joined in the relevant intentions and agreements. Five of the ten corporations involved were members of the B&B Group. The B&B Group were not in joint venture with KHD and were not members of KHD. They were not bound by either the SHD or the PMA. Mio did not appear to recognise this.

[137] There are a number of additional points made by the BMD defendants about Mio's allegations of other acts in furtherance or the continuation of the Parties' Intentions and the Parties' Agreement.

[138] However, before considering those points, it is appropriate to identify the principal points made by Mio in support of the viability of paragraph [100]. Mio submitted that "[t]he gravamen of the [statement of claim] is that the relevant provisions of the agreements have not been complied with by Mango and, to the extent relevant, [by] the other entities in the BMD Group. Rather, what has occurred is that:

(a) the development consent obtained significantly diminished the development potential of the Property;

(b) that the development which has been carried out on the Property has been the subject of considerable delays including total unexplained delays between 2008 to 2011;

(c) that such work which has been done on the Property has also been significantly delayed;

(d) that the financing arrangements which have been entered into are not in accordance with the agreements between the parties and have not been consented to by the original shareholders; and

(e) that overall, the corporate defendants, excluding Tasovac, have conducted themselves so as to deprive Mio Art of the possibility of obtaining profits from the development of the Property pursuant to the SHD, and have sought to deprive Mio Art of the clause of the Property by wrongfully encumbering it in breach of the relevant agreements."

[139] Mio originally identified the content of paragraph [100] as going to causes of action for unlawful conspiracy and a fraudulent and dishonest scheme in equity. It submitted that the content of paragraph [100] was "there for a purpose. That

purpose is to ground the claims of conspiracy and participation in breaches of fiduciary duty." Mio relied upon the pleading principle that in a case of a clandestine conspiracy particulars of the overt acts for the inference of conspiracy are sufficient.

[140] In the 3FASOC, Mio deleted the cause of action for the tort of conspiracy. Paragraph [100] should now be seen as supporting the cause of action of a fraudulent and dishonest scheme in equity only.[44]

[141] Paragraphs [16] to [31] of Mio's submissions in 4352 of 2012, dated 29 January 2013, develop a narrower focus of alleged fraudulent conduct than paragraph [100], concentrating on the August 2004 failure to disclose to the original shareholders the terms of the BBREF/BMD Properties-to-Mezzanine FA and the involvement of the directors of KHD and Mango, other than the original shareholders. But this is not a permissible way of assessing the viability of paragraph [100]. It is no answer to a contention that an allegation is overreaching or too wide to say that a narrower subset of the wider allegation can be identified that is or may be justifiable.

[142] Another revealing submission by Mio responded to the BMD defendants' contention that the 1 October 2008 board paper revealed that indebtedness extending beyond the Mango-Prime FA was secured over the land. Mio sought to deflect that allegation of disclosure to the original shareholders or their representative director. It submitted that "[a]s a result of the exit of the Babcock & Brown Group… BMD Properties succeeded to its share of the Mezzanine Financing Agreement. By 2008 when the proposal at paragraph [[175]]… was put it must have appeared to the BMD Group with both the original shareholders bankrupted (sic) and having early success in Proceedings No 1999 of 2006, that it was only a matter of a very short time before they had obtained the Original Shareholders shares… but that does not reflect on the original agreement".

[143] Such argument reveals a difficulty created by the time from which Mio alleges that the Parties' Intentions and the Parties' Agreement commenced and over which it extended. Even if it seemed to the BMD defendants in 2008 that it would only be a short time before they obtained the original shareholders' shares, that does not support the allegation that the intention and agreement to remove the original shareholders as shareholders arose in August 2004. The allegation made by Mio in paragraph [100] is of an August 2004 intention and agreement. That is alleged as a material fact for many of the causes of action alleged in the 3FASOC.

[144] In my view, paragraph [100] is not at present adequately supported by pleading facts which could give rise to the inference of the facts pleaded in subparagraph (f) of intention and agreement that the Parties would delay, in the development of the land and sale of the lots so as to bring about the accumulation of interest to "exorbitant" levels to the detriment of KHD and the original shareholders. It should be struck out.

[145] That element of paragraph [100] is critical. It is the path whereby on the "gravamen" of Mio's case theory the BMD defendants benefit and KHD and Mio suffer loss or most of their loss. See paragraphs [213], [255(c) and (d)], [261(a), (b) and (e)] and [263(c)]. If that part of paragraph [100] is struck out, in my view, the

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44 Presumably the "scheme" alleged in paragraph [279] of the 3FASOC.

whole paragraph should be struck out. Every paragraph previously identified with paragraph [100] is affected. In my view, it follows that the 3FASOC against the BMD defendants should be struck out.

[146] It is nevertheless appropriate to deal with some of the further submissions made by the BMD defendants in support of their application to strike out.

[147] Paragraph [107] of the 3FASOC alleges that the fourteenth defendant, Mr Thompson and Mr Barrett (who is not a party) fraudulently and dishonestly executed a power of attorney on behalf of KHD appointing a person as KHD's attorney. The facts relied on to support that allegation of dishonesty are that neither of those men was an officer of KHD who could execute a power of attorney and that they were aware of that fact or were recklessly indifferent to whether they had such a power. However, no further fact is alleged in support of this specific allegation of fraud.

[148] The BMD defendants have adduced prima facie evidence that suggests that the execution of the power was an error made by Mr Thompson and Mr Barrett which was soon corrected and that the relevant securities which were executed by an attorney on KHD's behalf were not executed under the invalid power but under a second valid power, which is referred to in paragraph [123] of the 3FASOC. However, when it came time to register the real property mortgages, it seems that through another error the first, invalid, power was registered and the mortgages were registered by reference to the (registered) invalid power.

[149] Mio's response to this is to complain that since it had raised the question of the invalid power of attorney during oral argument before me on 30 January 2013, it was incumbent on the BMD defendants to give that explanation to repel what would otherwise be an inference of fraud.

[150] I do not agree. In paragraphs [8] to [16] of the 3FASOC, Mio has pleaded out the many positions as officers which were overlapping among the relevant companies. Experience shows that many errors are made in the execution of security documents because of lack of authority. They often lead to invalidity. But a fraudulent motive is another, distinct, step which should not be assumed in a pleading from the fact of invalidity due to lack of authority. Mio could not point to any reason why Mr Thompson or Mr Barrett would have deliberately executed an invalid power of attorney on behalf of KHD or why, when a valid power was subsequently excecuted, the invalid power would have been fraudulently relied on as the basis for registering relevant mortgages.

[151] This allegation of specific fraud is a serious allegation to make. It is not made in a way that complies with the pleading rules because a suspicious mind chooses to characterise an invalid act as fraudulently motivated in order to see what the response is. That was what was done here.

[152] The BMD defendants also complain that Mio alleges in paragraph [271] of the 3FASOC that the conduct of the tenth defendant, Mr Bird, and the eleventh defendant, Mr Ingram was "fraudulent and dishonest" without adequate facts in support of the fraud being alleged. In my view, in some respects that is right.

[153] Particular (i) refers to paragraph [95], but that paragraph has been deleted. It also refers to paragraphs [123]-[125]. Paragraph [125] alleges that Ingram and Bird deliberately withheld knowledge of the power of attorney and the BBREF/BMDP-to-Mezzanine FA from the original shareholders. Mio alleges in the particulars under paragraph [125] that the failure to mention the BBREF/BMDP-to-Mezzanine FA in the documents to be signed in the "Attached Deed Poll" supports that the knowledge was deliberately withheld. That is possible about the BBREF/BMDP-to-Mezzanine FA. But it does not support the allegation that knowledge of the power of attorney was deliberately withheld.

[154] Particulars (ii) and (iii) of paragraph [271] continue the theme of deliberate failure to disclose the BBREF/BBMDP-to-Mezzanine FA and BMD Properties involvement in the lending, but add no further facts supporting the allegations of deliberate withholding.

[155] Particulars (iv) to (vi) are concerned with another theme, namely whether the securities granted by KHD were appropriate. The specific securities are not identified. Nor is there any allegation as to what should have been done instead. No attention seems to have been given to the circumstance that without entering into some agreed set of securities, it could not have been expected that any external lender would have funded even the acquisition of the land.

[156] Putting that to one side, there are no facts relied upon to support the contention that Mr Ingram and Mr Bird fraudulently and dishonestly breached their Director's Duties in causing and permitting KHD to enter into the relevant securities (whichever they are).

Duncan

[157] The BMD defendants orally illustrated their contentions by reference to the position of the fifteenth defendant, Mr Duncan. The point was made that there are no specific allegations of conduct by him and it was asked, rhetorically, how he would prepare for trial to answer the vague and impermissible allegations made in paragraph [100].

[158] As I read the 3FASOC, the only basis upon which Mr Duncan is joined as a party to 4352 of 2012 is that alleged in paragraph [280], namely that "in the premises alleged" he "knowingly participated in a fraudulent… scheme to deprive KHD… with knowledge of the breach of Director's Duties by Bird, Ingram, Varitimos and Rex…". That is a cause of action under second limb *Barnes v Addy* liability. It is KHD's claim.

[159] The only factual basis for Mr Duncan's knowing participation is the allegation that he was a director of some of the BMD defendants, namely BMD Holdings, Urbex, BMD Properties, BMD Constructions and BMD Consulting. The particulars under paragraph [280] add that "the transactions the subject of these proceedings were and are significant transactions of those entities…" and that "the Court is entitled to infer that they were aware of those transactions and of the conduct pleaded in paragraphs [1] to [258]…".

[160] In my view, this does not plead the material facts for the claim against Mr Duncan. The cause of action requires participation with the required element of knowledge[45] by a third party in a fraudulent breach of duty by a defaulting director. It is not enough to allege that the third party was a director of a company that benefitted from the breach.[46] But I can see no more alleged against Mr Duncan. Particular (e) under paragraph [280] does not answer the deficiency. It is a clear breach of *UCPR* 150(1)(f), 150(2) and 157(c).

[161] The same point can be made about the second limb *Barnes v Addy* claims made against other individual defendants on the footing that they were directors of BMD defendant companies.

[162] Two further points as against Mr Duncan will further serve to show how little attention Mio has given to the requirement that the material facts for such a claim must be alleged with precision.

[163] First, it is alleged that Mr Duncan participated in the "scheme" with knowledge of the breaches of the Director's Duties, by Mr Varitimos and Mr Rex, inter alia.

[164] It is curious that the "scheme" is not identified anywhere in the 3FASOC before paragraph [279]. Particular (ii) says that the "nature" of the scheme "arises from the Parties Intention and Parties Agreement and the conduct of Bird, Ingram, Thompson, Barrett, Varitimos and Rex." In other words, it is to be found in anything in any of those sources. But that may be passed by.

[165] Mr Varitimos's breaches are largely, although not exclusively, alleged to have occurred since October 2011 and Mr Rex's breaches are all alleged to have occurred after 16 September 2011. But Mr Duncan is not alleged to have been a director of any of the BMD defendants after 17 May 2010. Even if the fact of being a director were enough to constitute knowing participation (which it isn't), at the relevant times for breaches after 17 May 2010 Mr Duncan was not a director. There is no other pleaded basis to make a claim against Mr Duncan for any of those breaches.

[166] Secondly, as discussed below, Mio has made no attempt to identify whether it has suffered any loss by reason of Mr Varitimos' or Mr Rex's alleged breaches of Director's Duties. As against Mr Duncan, the same is true, in respect of any liability "to account as constructive trustee", which is a personal claim against him for a money sum. On the facts otherwise pleaded, there would no other basis for account by him.

[167] The last point can also be made about the second limb *Barnes v Addy* claims made against other individual defendants on the footing that they were directors of BMD defendant companies.

Varitimos's application to strike out

[168] Mio alleges that Mr Varitimos was a director of KHD from 8 April 2008. As previously stated, the causes of action alleged against him are for breaches of Director's Duties. A claim for a breach of those duties is one for compensation or damages. It is KHD's claim.

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45 *Farah constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [171]-[180]; [2007] HCA 22.

46 *Sugarloaf Hill Nominees Pty Ltd v Rewards Project Limited* [2011] WASC 19 at [72].

[169] I note in passing that paragraph 2 of the claims for relief in the 3FASOC is for an order requiring Mr Varitimos to register "the transmission of the Spencer Family Trust Shares in the books and records of KHD." It is not suggested that Mr Varitimos should not be a party to that claim for relief. However, it is not alleged in the body of the 3FASOC that Mr Varitimos has failed to register Mio as a member in the register of members following a request to do so supported by a transfer in proper form.

[170] The allegation in paragraph [272] is that "in the premises Varitimos as a director of KHD since 8 April 2008 breached each of the Director's Duties." Mio particularises the breaches in paragraph [272] by relying on paragraphs [161] to [258].

[171] Mio alleges in paragraph [273] that the conduct of Mr Varitimos "since 8 April 2008" was fraudulent and dishonest. There is an attempt to particularise that allegation by reference to paragraph [255]. Paragraph [255] alleges that at all material times "since at least October 2011" an honest and reasonable director would have engaged in particular conduct.

[172] An allegation that conduct was not honest and reasonable "since at least October 2011" does not support an allegation that conduct "since 8 April 2008" was not honest and reasonable conduct.

[173] Mio alleges in paragraph [266] that (a) in engaging in the conduct alleged in paragraphs [162] to [244] and (b) in failing to act as set out in paragraph [255] Mr Varitimos acted to the detriment of KHD and in the interests of Mango and the BMD Group.

[174] A notable thing about the allegations in paragraphs [162] to [244] which concern Mr Varitimos is that they canvas a period of dispute and breakdown among the directors of KHD from 8 April 2008 to December 2011. Mr Vicca was appointed director at the nomination of the original shareholders on 8 April 2008. Mr Varitimos and Mr Ingram were directors nominated by Mango and the BMD Group from then, until Mr Rex replaced Mr Ingram on 16 September 2011.

[175] It is important to keep in mind that Mr Varitimos is not responsible for any breach of duty by any of the directors of KHD in entering into any of the financing arrangements made prior to 8 April 2008.

[176] After that date, it is alleged that there were changes to some of the financing arrangements concerning Prime and lenders to Prime. It is not alleged that KHD's directors entered into any arrangements which caused it further loss.

[177] The substance of paragraphs [162] to [244] or [161] to [258] is difficult to summarise briefly and difficult to analyse as a pleading of material facts constituting a breach or breaches of Director's Duties by Mr Varitimos. Some examples may assist to illustrate the point.

[178] First, paragraphs [161] to [181] set out a narrative of discord between Mr Vicca, on the one hand, and Mr Ingram and Mr Varitimos, on the other. However, nothing in those paragraphs is conduct specifically identified as having constituted a breach of Director's Duty. Even if it were, there is no allegation that any of it caused loss and no obvious inference that it did. It must be kept firmly in mind that much of KHD's

losses are alleged to have been caused by being bound to the Mango-to-Prime FA and from having secured the land for that and various other facilities arranged by Mango, Prime and Mezzanine in 2004 and 2005. All of that occurred long before Mr Varitimos was appointed as a director. As well, other loss is alleged to have been caused by delay in development and under-development. Most of that is alleged to have been caused before Mr Varitimos was appointed as a director.

[179] Importantly, although paragraph [181] alleges that Mr Varitimos, as director, voted for a resolution authorising Mango to use its power of attorney, paragraph [185] specifically alleges that after December 2008 Mango did not seek to obtain the consent of KHD to any restructuring of the "finance arrangements for the joint venture."

[180] Secondly, although paragraphs [195] to [211] allege a number of changes made in the financing arrangements among a number of relevant entities including change to the Prime-to-Mango FA, it is not alleged that the directors of KHD or Mr Varitimos as such a director agreed to any changes on behalf of KHD. On the contrary, paragraph [212] alleges that the Board of KHD, which includes Mr Varitimos, were not informed.

[181] Thirdly, paragraphs [216] to [253] cover a number of topics but much of them is devoted to allegations as to the solvency of KHD and solvency of Mango and other members of the BMD Group. Paragraphs [247] to [253] specifically allege numerous facts as to the financial position of those corporations and Mr Varitimos's knowledge of those facts. Such allegations are potentially damaging to those companies. Mio submitted that "the question of the solvency or future solvency of the BMD group of companies is relevant to, amongst other things, the exercise, by the directors of KHD, of their discretion in relation to the payments of money to Mango. It is a fact which informs their exercise of discretion, and, as pleaded, it is a factor of which they were aware."

[182] At no point did Mio explain what the reference to "amongst other things" meant. There is no claim based on payments made to Mango as against Mr Varitimos. Paragraph [203] has been deleted in the 3FASOC.

[183] It is difficult to see how these can be material facts for KHD's claims against Mr Varitimos. Perhaps Mio wishes to say that Mr Varitimos' alleged failure to move KHD to sue the BMD defendants or some of them is motivated by a desire to protect the BMD defendants from claims which may be damaging to their financial health. But that is an allegation of serious misconduct or breach of duty. It cannot be made by alleging facts that are not otherwise relevant on the footing that the court will be invited to draw such an inference in the absence of a specific pleading of fraudulent purpose. Mio cannot be acting under any mistake about that. Accordingly, it does not appear why any of these facts are material facts as against Mr Varitimos.

[184] What, then, is the substance of the claim sought to be made against him? It seems to be at least bound up in paragraphs [254] and [255] which are as follows:

> "[254] At all material times since at least October 2011 KHD has had available to it:
>
> (a) an action claiming an equitable set off under cl. 4.2 of the PMA or an indemnity under cl. 4.2 of the PMA in respect

of losses caused by Mango in the exercise of its powers of management in failing to progress the development;

(b) an action to challenge the securities which had been granted over the Property in favour of Tasovac, BMD Holdings, BMD Constructions, Prime, or which have been assigned to Tasovac;

(c) a right to challenge the accumulation of interest under the Prime-to-Mango FA;

(d) a right to challenge the validity of the securities granted over the Property to the parties mentioned in (b); and

(e) a right to seek arbitration in respect of construction and development costs pursuant to cl. 10 of the PMA.

[255] At all material times since at least October 2011 an honest and reasonable person in the position as a director of KHD acting the interests of KHD, and with knowledge of the facts set out in paragraphs [214] to [254] above would have:

(a) challenged, by court proceedings if necessary, the amount alleged to be owing under the Prime-to-Mango FA and the Prime-to-Mezzanine FA;

(b) sought to establish by court proceedings or otherwise the amount of costs, properly due and owing from time to time under cl. 11 of the PMA;

(c) sought to establish a right of set off or indemnity under cl. 4.2 of the PMA for damages for delays in implementation of the Project and the underdevelopment of the Project in opposition to any claim made by Mango for reimbursement under cl. 10.2 of the PMA;

(d) sought to verify the costs claimed by related parties such as BMD Constructions, BMD Properties, BMD Consulting and Urbex in relation to the Project and if necessary, sought to articulate any such claims by way of Arbitration under cl. 10 of the PMA;

(e) sought to challenge the validity of the securities granted over the Property by KHD as surety for the obligations of companies within the BMD Group, if necessary, by bringing proceedings;

(f) sought to cause Mango to exercise its powers of management to accelerate the development of the Project and maximise its profitability including fulfilling its obligations to obtain financing for the Project under cl. 9.1 of the PMA so as to ensure that costs were not increased by delays, and the development profits thereby reduced;

(g) required the proceeds of sale of any developed lots to be used in reduction of the amounts secured in favour of the external lender over the Property, NAB, so as to ensure that the risk of a forced sale was avoided; and

(h) insisted that any security granted over the Land was solely for the purchase price of the Property and amounts properly expended on developing the Property and reimbursable under cl 11.1 of the PMA."

[185] These paragraphs bear some initial analysis. Subparagraph [254(a)] alleges an available "action claiming an equitable set off… or an indemnity… in respect of losses caused by Mango in the exercise of its powers of management in failing to progress the development". Subparagraph [255(c)] alleges that since at least October 2011 "an honest and reasonable… director of KHD… would have… sought to establish a right of set off or indemnity for delays in implementation… and underdevelopment of the Project."

[186] If it is assumed that is the basis of one cause of action against Mr Varitimos for the purposes of paragraph [272], Mio must plead as material facts the relevant delay in the exercise of Mango's powers of management in failing to progress the development which were a breach of contract or duty by Mango. Paragraph [213] in part and paragraph [263(c)] are allegations of that kind. Of course, KHD would have to prove that Mango's actions were unreasonably delayed.

[187] Which of the Director's Duties alleged in paragraph [269] is alleged to have been breached by these facts? Mio does not identify that. Perhaps it is more than one.

[188] What is the loss which was suffered by reason of such an alleged breach of duty? It cannot be the losses alleged in paragraph [261]. KHD has not lost any available action for an indemnity or lost the right to defend any claim by set-off against Mango because a proceeding was not started because the directors have not sought to establish the right of set-off or indemnity since November 2011. And only damage suffered after that date could be damage caused by breach of the relevant Director's Duties. Mio has not addressed whether KHD has suffered any loss by reason of any breach of Director's Duties by Mr Varitimos in this respect.

[189] Similar points could be made about each of the identified subject matters raised by paragraphs [254] and [255]. It would be unhelpful to go further into the detail.

[190] For present purposes, two overall points of importance have emerged as to the manner of pleading of KHD's claim against Mr Varitimos. First, there are many paragraphs within the range of paragraphs [161] to [258] that are just not material facts. Again the narrative defect affects the paragraphs relied upon against him.

[191] Secondly, although with some effort it is possible to identify facts which may otherwise disclose a reasonable cause of action or causes of action against him, it is clear that no consideration has been given to the loss or damage which may be recoverable as against him for any relevant breach of Director's Duties.

[192] If the relevant facts were precisely identified, they may disclose a cause of action or causes of action against him. The problem is that Mio has not been prepared to analyse KHD's case against him and to decide, among the universe of alternatives, what case it truly wishes to run. Yet, it is not apparent at this stage that there could be no such case.

[193] So far I have confined myself to separate points which emerge as to the claims made by Mio in the 3FASOC against Mr Varitimos. In addition to those points, Mr Varitimos relies on the challenges made by the BMD defendants and Mr Rex, in particular the challenge made to paragraph [100].

[194] Mr Varitimos is not alleged to have been involved in forming or making the Parties' Intention or the Parties' Agreement. The first occasion on which Mio alleges that his conduct was connected with them is in paragraph [177], where it is alleged that a refinancing proposal that was not proceeded with "was intended to further implement the Parties' Intentions and the Parties' Agreement."

[195] This allegation is one to which *UCPR* 150(2) applies by reason of *UCPR* 150(1)(f) and (k). No facts are pleaded from which the inference as to Mr Varitimos' intention is to be drawn.

[196] Next, in paragraph [194], Mio alleges that in 2008 and 2009 the Parties' Intentions and Parties' Agreement remained as pleaded in paragraph [100] "save that from April 2008... on 8 April 2008 Varitimos became a director of KHD and engaged in the conduct set out in paragraphs [161] to [193] above." At first blush, that allegation is unintelligible. It is not a material fact in support of any claim against anyone, as far as I can tell.

[197] Mio alleges in paragraph [258] that Mr Varitimos has acted "with the knowledge and at the request and direction of each of the Parties to the Parties' Agreement." To the extent that it is alleged that the Parties requested Mr Varitimos to act in any way, that allegation may be made against Mr Varitimos personally (see also paragraph [277]), but in substance that allegation does not appear to be one made against him.

[198] Finally, as previously mentioned, Mio submits that paragraph [277] supports the first basis of liability of the Other Defendants under *Grimaldi*. Still, it is a clear allegation of purpose. That purpose is an allegation of fraud and intention to which *UCPR* 150(2) applies by reason of *UCPR* 150(1)(f) and (k). No facts are pleaded from which the inference as to Mr Varitimos' intention is to be drawn.

[199] It can be seen that there is a substantial connection between the claims pleaded against Mr Varitimos and those pleaded against the Other Defendants and the other BMD defendants. In my view, if the 3FASOC should be struck out against them in its entirety, it should also be struck out against Mr Varitimos.

Rex's application to strike out

[200] In a similar vein to Mr Varitimos, Mr Rex applies to strike out the 3FASOC as against him. Mr Rex's position is more straightforward, because he has only been a director since 16 September 2011.

[201] Thus Mio makes similar allegations against Mr Rex to those made against Mr Varitimos. The relevant causes of action are KHD's claims.

[202] As well, paragraph [274] is limited to alleging a breach of each of the Director's Duties by Mr Rex to "since 16 September 2011" and the facts relied upon as particulars of those breaches are limited to those alleged in paragraphs [217]-[258].

[203] It is unnecessary to discuss Mr Rex's position in separate detail. For the same reasons which apply to Mr Varitimos, Mio has failed to adequately plead KHD's claim against Mr Rex.

Tasovac's application to strike out

[204] By paragraph 4(a) of the claim for relief MIO claims final relief setting aside the mortgages and guarantees given by KHD and held by Tasovac as the security trustee under the Security Trust Deed as amended. By paragraph 5(a) of the claim for relief Mio claims an order against Tasovac under s 233 of the *Corporations Act* that Tasovac discharge those mortgages and guarantees.

[205] To some extent, Tasovac's application relied on points already made. In particular, Tasovac relied on the narrative defect, although not by that name.

[206] But Tasovac's challenge to the 3FASOC went further. It relies on the fact that it is registered as mortgagee of four real property mortgages, which the claims appear to challenge as void. Although Mio has conceded in correspondence that it does not "allege any exception to indefeasibility against the securities held by Tasovac on behalf of the NAB. However… our client's intention is that [the other defendant parties] are not entitled to the benefit of indefeasibility, or alternatively, the beneficial interest in the Property is haled by Tasovac for the benefit of KHD."

[207] Paragraph [284] of the 3FASOC alleges that:

> **"**By reason of the transactions referred to in paragraphs [195] to [200] and [260] herein each and every security granted by KHD and held by Tasovac as trustee of the Security Trust for the benefit of NAB, Prime, Mezzanine, BMD Holdings, BMD Properties or any other company in the BMD Group has been discharged by reason of the conduct of those who held the security or those for whose benefit the security was held.
>
> Particulars
>
> By amending the terms of the Facility Agreements by the Deed of Consent and Amendment and otherwise, the rights of KHD, as a surety, have been materially varied without its consent."

[208] As against Tasovac, paragraph [284] does not recognise that it does not allege any exception to indefeasibility against the securities held by Tasovac. It seems to generally allege that, inter alia, the four registered real property mortgages held by Tasovac are defeasible because of the variations of contract alleged in paragraphs [195] to [200] and [260].

[209] Paragraph [286] of the 3FASOC alleges:

> "Further, or in the alternative to [284], by reason of the matters pleaded in paragraphs [263] to [283], to the extent that any of BMD Holdings, BMD Properties, Prime, or Mezzanine relies upon the principle of indefeasibility under the *Land Title Act 1994* (Qld) to claim an entitlement to the real property securities held by Tasovac as trustee of the Security Trust for and on behalf of the beneficiaries named therein, those interests are held upon constructive trust for KHD except insofar as they are for security of the obligations of Tasovac to NAB under the CBA/NAB-to-Prime- FA."

[210] Also, Mio alleges in paragraph [116] of the 3FASOC that a number of documents, including the Security Trust Deed, two mortgages, a charge and a deed of priority were invalid. And in paragraph [283(a)] that the Security Trust Deed is of no force and effect.

[211] It can be seen that Mio's concession as to the protected indefeasibility of Tasovac on behalf of the NAB is limited at best. That is consistent with Mio's written submissions, which included the contention that "statutory indefeasibility under ss 182 and 184 of the *Land Title Act* 1994 (Qld) does not result in a void instrument being of effect".

[212] This somewhat surprising statement seems to me to be directly at odds with the effect of cases such as *Breskvar v Wall*[47] if it is intended to convey any infirmity in the legal interest and title of the registered proprietor of Tasovac as mortgagee. I do not mean to convey that in an appropriate case a court might not declare a trust or constructive trust in relation to the title of the registered proprietor of a registered mortgage under the "in personam" exception to indefeasibility encompassed by "an equity arising from the act of the registered proprietor"[48] or more generally of the interest of a beneficiary under a trust on which the registered proprietor hold its legal title, where indefeasibility is not a relevant consideration.

[213] But as yet, if Mio seeks to bind Tasovac to relief of that kind, it has not adequately pleaded the basis, in my view.

[214] Given that the 3FASOC should in my view be struck out in its entirety against the BMD defendants and Mr Varitimos and Mr Rex, it is appropriate that it be struck out as against Tasovac for the same reasons as well as the points briefly mentioned above.

KHD's claims under s 233

[215] As previously stated, Mio submits that it can obtain relief requiring the first to eighteenth defendants to compensate KHD and Mio for the losses they have sustained. That is, the paragraph [161] and [162] losses. Mio also claims an order "authorising [Mio] to institute and prosecute proceedings the subject of the proposed claim in the name of and on behalf of KHD, or to prosecute the proposed claim insofar as it involves breaches of the PMA."

[216] Mio contends that this relief on behalf of KHD is to be made pursuant to s 233. Inter alia, Mio relies on *Short v Crawley No 30*[49] as support for this contention. There White J said:

> "**[176]** Under subs 260(2) (or s 246AA(2)) of the *Corporations Law*, the Court can make such order as it thinks fit including an order under s 260(2)(g) or s 246AA(2)(g) authorising a member to institute and prosecute specified proceedings in the name and on behalf of the company, where grounds for making such an order are established under s 260(2)(a) or (b), or s 246AA(2)(a) or (b). Such grounds include the conduct of a company's affairs in a manner which is contrary to the interests of the members as a

47 (1971) 126 CLR 376 at 386.
48 Section 185(1)(a) of the *Land Title Act* 1994 (Qld).
49 [2007] NSWSC 1322.

> whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member. Those provisions enable the Court, in an appropriate case, to outflank the rule in *Foss v Harbottle* (1843) 2 Hare 461; (1843) 67 ER 189, if a member can establish that the affairs of a company are being conducted oppressively, even if the member would not have standing under any of the exceptions in *Foss v Harbottle (Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 at 695 [138]). In that case, the Court of Appeal upheld the decision of Young J (as his Honour then was) that in an oppression suit, the Court can "short-circuit" the making of an order authorising a person to institute and prosecute the proceedings where, in the oppression suit, the liability of the defendant to the company is established (at 695–696 [137]–[144], 759–760 [506], 763 [527]–[528], 792–793).
>
> **[177]** Sections 232 and 233 of the Corporations Act are in substantially the same terms as the former ss 260 and 246AA. The plaintiffs submitted that s 233 of the Corporations Act was not affected by the introduction of Pt 2F.1 A. The defendants did not make any contrary submission. If that is so in relation to s 233 of the Corporations Act, it must also be so in relation to the predecessors of s 233 to the extent they have a continued operation in existing proceedings as deemed provisions of the Corporations Act. There was no dispute that Nabatu is entitled in the oppression proceedings to enforce whatever causes of action J & J O'Brien, Marsico or Trudale have against the other defendants. It is therefore unnecessary to consider the application for leave under s 237 of the Corporations Act. Had it been necessary to consider such an application, this was clearly a case for the grant of leave to the extent it was necessary. All of the criteria in s 237(2) were satisfied. However, it is not necessary to make any order under s 237. Nor is it necessary to make an order under s 260(2)(g) or s 246AA(2)(g) nunc pro tunc so as retrospectively to authorise Nabatu to institute and prosecute the proceedings on behalf of the companies."

[217] It will be seen at once that these remarks were directed to a case where it was not contended that relief under s 237 was not available. But in my view there is no reason to read s 233 as subject to s 237.[50] Power to authorise a member to institute and prosecute proceedings in the name and on behalf of the company is expressly granted in s 233, conditioned upon the factors specified in that section and s 232 including that there is oppression. Those criteria differ from s 237.

Mio's application for leave under s 237

[218] Despite my contrary attempts, the precise order that Mio seeks under s 237 of the *Corporations Act* is not formulated in the application.[51] The difficulty is not

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50 Compare *Power v Ekstein* [2009] NSWSC 130 at [77]-[78] and *Power v Ekstein* (2010) 77 ACSR 302, [2010] NSWSC 137.

51 Exhibit 20 refers to an annexure which is said to identify the extent of the leave sought, but there was no annexure to the exhibit.

answered exactly by the written and oral submissions made by the parties, but in substance I think the position was made tolerably clear. As previously mentioned, Mio's initial application under s 237 was made in 11109 of 2012 in respect of the claims and causes of action raised in that proceeding. Its position was that the same questions in 4352 of 2012 ought be decided separately and before the other claims and issues in that proceeding, and that 11109 of 2012 and the separated questions should proceed first.

[219] Mio abandoned that position, at least to some extent, at and following the partial hearing of the applications on 30 January 2013. Instead, it decided to include the relevant subject matters in more detail in the 3FASOC, so that the application for leave under s 237 proceeded by reference to the 3FASOC.

[220] By its written submission in both proceedings dated 22 March 2013, Mio submitted that "the grant of leave to bring proceedings on behalf of KHD ought to be limited to those issues which can properly be the subject of a discrete separate hearing without a hearing of the major and contentious issues in the proceedings." The further articulation of that proposal was that there should be a grant of leave "to raise the arguments of KHD concerning Mango's 'agreement to pay all costs in relation to the Project as and when they fell due' which is dealt with in paragraphs [10] to [25] of the applicant's outline of submissions [in] 11109 of 2012 [dated 7 December 2012][52]…and also the issue of discharge by conduct in paragraphs [55] to [58] of those submissions… as reflected in paragraph [284]…" of the 3FASOC.[53] That position was also supported in oral argument. I will call it the "limited leave proposal."

[221] On 17 April 2013, during the hearing of the application for leave under s 237, Mio sought leave to file an amended application in 4352 of 2012 seeking to consolidate the two proceedings. I understood this to be so that the informal proposal to deal with the limited leave proposal in 4352 of 2012 was regularised. That application could not be dealt with because Mr Varitimos and Mr Rex, who were parties to 4352 of 2012 were not present when the application was made. They were not interested in the application for leave under s 237, because no leave under that section was sought against them, and had thus been excused from attending on 17 April 2013.

[222] If Mio were to seek leave to bring the whole of KHD's claims in 4352 of 2012 under s 237, it would be necessary, having identified all of KHD's claims, as attempted earlier, to consider whether leave should be granted in respect of all the relevant alleged causes of action. There would be numerous difficulties which arise before reaching a substantive determination of the application under s 237.

[223] First, the conclusion I have reached that the 3FASOC should be struck out means that the decision upon the application under s 237 is necessarily made without the precise pleading of the proposed causes of action.

[224] Secondly, the arguments of the parties under s 237 were focussed on the claims made in 11109 of 2012 and the limited leave proposal. So there are some KHD claims and causes of action in 4352 of 2012 which have not been addressed at all.

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52 In argument, the BMD defendants identified this as probably constituted by paragraphs [43], [63]-[69] and [282] of the 3FASOC.

53 In argument, Mio confirmed that paragraph [284] of the 3FASOC was the critical allegation of discharge.

[225] Thirdly, KHD would ordinarily be joined as plaintiff to a proceeding conducted by Mio, on its behalf. If that were done in 4352 of 2012, KHD would be a plaintiff in the same proceeding in which Mio claims damages for breach of covenant or contract against KHD.

[226] Fourthly, Mio raises the same subject matters as part of its claim for relief under s 233 of the *Corporations Act*. The pre-conditions for an order under s 237 include that there is a serious question to be tried, that the proceeding is in the best interests of KHD and that the proceeding is being brought in good faith. None of these pre-conditions must be met for Mio to proceed on the same subject matters under s 233, so a determination under s 237 will not resolve whether Mio may make the relevant allegations in 4352 of 2012.

[227] Fifthly, the BMD defendants submit that Mio is not a member or a person entitled to be registered as a member of KHD and therefore is not qualified to apply for an order under s 237.

[228] Despite these difficulties, it is appropriate to enter upon the question of whether Mio should be granted an order under s 237 to some extent.

[229] I will set out my reasons in greater detail in what follows but, in my view, Mio should not be given leave to bring the proceeding in 4352 of 2012 on behalf of KHD at this stage. My principal reasons for reaching that conclusion are as follows. First, it does not seem appropriate to me that Mio makes a claim on behalf of KHD and a claim against KHD in the same proceeding. Secondly, Mio does not offer to be responsible for KHD's costs of the proceeding. It is not in the best interests of KHD to bring a claim at Mio's instance which will expose it to an adverse order for costs, for which Mio will not be responsible. Thirdly, if as Mio contends it can bring the same claims as part of its oppression claim, neither KHD nor Mio will be prejudiced in the long run if leave is not granted under s 237, unless relief is not available under s 233 for a reason which would not affect a claim brought under leave granted under s 237.

[230] On the last point, the reason why Mio wishes to obtain leave under s 237 is that it wishes to have the limited leave proposal claims separately determined as separate questions before the trial of the balance of 4352 of 2012 proceeds. In support of that approach, Mio relied upon the possibility that if it were successful in that course it might not proceed with the balance of 4352 of 2012. It might not, but it did not undertake that it would not.

[231] On Mio's approach, the fate of the limited leave proposal under s 237 is connected to the likelihood that there will be an order that there be a separate determination of the limited leave proposal questions. However, none of the parties addressed that point in any detail, although Mio submitted that the separate determination of those questions would not take much longer than the argument which took place on 17 April 2013.

[232] However, if the limited leave proposal were granted, yet 4352 of 2012 were not to proceed in that fashion, the trial of the proceeding would occur in circumstances where Mio, on behalf of KHD as plaintiff, would make claims against some of the defendants in some respects but not others at the time of the trial.

Identifying the s 237 claims in 11109 of 2012 as now pleaded in 4352 of 2012

[233] The claims made in the statement of claim in 11109 of 2012 are almost, but not entirely, covered by those contained in the 3FASOC. The following table, although not comprehensive, may assist in correlating them, and in identifying what is not within the limited leave proposal. The limited leave proposal paragraphs are marked in bold type face:

Identifying heading	Paragraph numbers of SoC in 11109 of 2012	Paragraph numbers in 3FASOC
Mango's agreement to pay all costs	**[39] and [41]-[52]**	**[43], [63]-[69] and [282]**
August 2004 and September 2004	[76] – [77]	[97] and [265(c) (particulars)]
December 2004 to March 2005	[76] – [77]	[265(c) (particulars)]
April 2007 to August 2007	[87] and [88]	[141] and [142]
April 2008	[93]	[155]
June 2010	[102] – [106]	[212]
Inducing breach of contract	[109]	[276]
Discharge by conduct	**[107]**	**[284]**

Best interests of KHD

[234] The parties initial submissions proceeded by reference to the statement of claim in 11109 of 2012, but it is more convenient to analyse the points by reference to the 3FASOC and the limited leave proposal.

[235] Much of the argument was directed to whether Mio had shown that there was a serious question to be tried on KHD's claims, to the extent that they had been raised in 11109 of 2012 or under the limited leave proposal. But for present purposes, I propose to defer those points to consideration of the question whether it is in the best interests of KHD to bring the proceeding as formulated by the 3FASOC.

[236] The first serious problem is that Mio does not simply propose to bring the proceeding on behalf of KHD. In the same proceeding, it makes numerous personal claims against the various defendants seeking to recover its own loss and damage as previously discussed. As previously discussed, included in the claims made is Mio's claim for damages for breaches of covenant or contract against KHD.

[237] It is possible to join a company as a defendant rather than plaintiff where the plaintiff has other claims against other defendant shareholders as well as the claim

on behalf of the company: *Metyor Inc v Queensland Electronic Switching Pty Ltd*.[54] But this does not meet the problem that Mio would be making a claim both against and on behalf of KHD in the one proceeding.

[238] Secondly, KHD will be exposed to the possibility of costs orders against it made by at least two groups of defendants, namely the BMD defendants and Tasovac. This is a common problem in circumstances where a company has failed or declined to bring the claim in question but a member or other qualified person wishes to do so. In many cases, the applicant will be required to indemnify the company against that exposure as a condition of granting leave. However, the applicant may not be worth "powder and shot."[55] On the other hand, the proposed defendants to the company's claims may already be exposed to the same subject matter in the same proceeding, as in this case.

[239] The BMD defendants specifically relied on the approach of Austin J in *Fiduciary Ltd v Morning Star Research Pty Ltd*,[56] (which was in some ways a similar case to the present) that the required conditions of leave under s 237 should be that the applicant pay the company's costs of the proceeding, indemnify the company against any adverse costs order and not claim contribution from the company in respect of any adverse costs order to the extent of any joint liability for costs. The BMD defendants specifically challenged the absence of any undertaking by Mio to proceed on any of those conditions. Tasovac relied on the BMD defendants submissions.

[240] Neither Mr Rex nor Mr Varitimos separately dealt with the application for leave to bring the proceedings on KHD's behalf, although the only claims against them are KHD's claims. That is explained by the circumstance that Mio did not seek leave to bring the proceeding on KHD's behalf either as against them, or as against the individual directors of KHD who sit within the BMD defendants' camp. That is, the only basis for relief against them at Mio's suit presently relied upon is the power to make orders under s 233.

[241] Mio responded on the question of costs by submitting that "the arguments now proposed [ie the limited leave proposal] are in very short compass", also referring to its success in other proceedings on other questions between some of the parties. Mio continued that "…KHD is now in a situation, where as a result of what has been done to it by the BMD defendants, it is insolvent and this is its only means of returning to solvency."

[242] In my view, Mio's success in other proceedings is irrelevant, in the absence of an undertaking by it to be responsible for any costs awarded against KHD and other evidence to show that Mio will have the ability to pay such costs, if awarded. The question is what will happen if KHD is unsuccessful in the claim Mio wants to make on its behalf and in its name. Equally, that question is not answered by saying that, if unsuccessful, KHD is insolvent in any event and will not be able to meet the order for costs, because of some generalised assertion of other wrongdoing by the BMD defendants.

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54 [2003] 1 Qd R 186 at [15]; [2002] QCA 269.

55 *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523 at 531.

56 [2005] NSWSC 442 at [138].

[243] Thus, if KHD is unsuccessful, on a hearing of separate questions before the trial of the balance of the issues and claims in 4352 of 2012, the relevant BMD defendants and Tasovac will be exposed to obtaining an order for costs against KHD, which will not be able to pay them (on Mio's case). However, if Mio remains the nominal plaintiff it would most likely be liable to an order for costs for the claims in the proceeding it brings on behalf of KHD. It would not then be able to conserve its own assets to pursue the balance claims against all defendants. That would be an unacceptable result, in my view.

[244] The furthest point to which Mio came on the question of costs was that "if push came to shove we would be able to find some security in stages to enable us to prosecute the leave which we would hope would be granted to us." Although that might be appropriate in some cases, in this case it seems to me that Mio's position is not satisfactory. On the one hand, it wishes to conduct a large and complex proceeding in the Commercial list of this court, as articulated in the 3FASOC, and to do so in respect of part of that proceeding with the benefit of leave to proceed on behalf of KHD. On the other hand, it does not meet the obvious costs implications of doing so and puts KHD and the other parties at risk for the other parties' costs if the other parties are successful in the proceeding. Its strategy so far has been not to offer to do what it can to protect them against that exposure to costs. The beneficiaries of the Spencer Family Trust on behalf of which Mio acts are not exposed. Instead, a half-hearted offer of "some" security is foreshadowed, as the panacea to justify the grant of leave.

[245] Thirdly, Mio already relies on the same allegations which comprise the limited leave proposal as part of its claim for relief for oppression under s 233 of the *Corporations Act*. Mio does not require leave under s 237 in order to be able to make the relevant claims. This is a factor which may, although it is not one which must, tell against the grant of leave.[57] Thus paragraph 4(e) of the claim in the 3FASOC claims an order that Mango or BMD Holdings pay to Prime the amount owing under the Prime-to-Mango FA and paragraph 4(f) claims an order that Prime pay the amount owing under the NAB/CBA-to-Prime FA and redeem and cause to be cancelled the relevant securities. The primary reason advanced for the limited leave proposal under s 237 is so that such relief might be obtained by a determination of separate questions before the hearing of the balance of 4352 of 2012. Although in Mio's submissions in 11109 of 2012 dated 12 April 2013 some reliance was placed on the prospect that if leave is granted KHD would be entitled to relief even if Mio is not under s 233, in my view there does not seem to be much of any real reason to think that if KHD were entitled to such relief a discretion would not be exercised under s 233. This is not a case where there are other parties interested as members of KHD.

Limited leave proposal – Mango's agreement to pay all costs

[246] In any event, I turn to the question of whether there is a serious question to be tried on the claims which comprise the limited leave proposal.

[247] What are "the arguments of KHD concerning Mango's 'agreement to pay all costs in relation to the Project as and when they fell due'"? Mio submits that on the proper

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57 *Hassall v Speedy Gantry Hire Pty Ltd* [2001] QSC 327; cf *Matyear v Prismex Technologies Pty ltd* [2008] NSWSC 677.

construction of the PMA and the Prime-to-Mango FA Mango is obliged to pay the amount of the outstanding debt under the Prime-to-Mango FA to Prime and that an order to that effect should be made. The sum is $84.9 million.

[248] The BMD defendants dispute that conclusion for several reasons:

(a) first, that the debt is not owed because of the Deed of Consent and Amendment dated 15 June 2010 made as between Mango and Prime to extend the period for repayment of $84.9 million until 30 June 2013;
(b) secondly, that no interest was payable because under clause 6.4 of the Prime-to-Mango FA it was payable only on demand and no demand was made;
(c) thirdly, that no order can be made requiring Mango to pay the amount of the debt, because specific performance will not be ordered; and
(d) fourthly, that on 30 January 2013 further agreement was made to extend the time when the debt is payable to 30 April 2021.[58]

[249] The BMD defendants submit that whether or not any amount was previously payable, the effect of a variation of the terms of the Prime-to-Mango FA in June 2010 as extended more recently is that no sum is presently payable and therefore no order for payment of the debt could be made against Mango.

[250] These are essentially questions of construction of the relevant contracts. It is not necessarily an answer to Mango's obligation to pay "all costs" under clause 7.3 of the PMA and to pay "any interest which may be payable" under clause 9.3 of the PMA that Mango and Prime extended the time for payment of any amount that was already payable. It depends on the proper construction of the PMA.

[251] For present purposes, in my view these questions raise a serious question to be tried for the purposes of s 237. It is inappropriate to say more about my view as to the strength or weakness of the argument where it is not to be finally decided.

[252] As well, I note that if the questions of construction are not resolved in Mio's favour, questions will remain whether Mango was in breach of contract, in failing to arrange finance for and to progress the development of the land in any event. In other words, the separate determination of the questions of construction will not resolve the question of Mango's liability to KHD in respect of Mango's alleged breaches of covenant and contract as alleged in the 3FASOC, or any other liability which would flow from that.

Limited leave proposal – discharge by conduct

[253] Mio alleges in paragraph [284] of the 3FASOC and submits that in particular the amendment of the Prime-to-Mango FA and other facility agreements by the June 2010 Deed of Consent and Amendment (and the June 2010 Consent to the Deed of Consent and Amendment) together with the discharge of the guarantee given by BMD Holdings in respect of Prime's obligation to the NAB and the 4 February 2013 extensions discharged all of the securities granted by KHD and held by the Security Trustee pursuant to the Security Trust Deed.

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58 Paragraph [260] of the 3FASOC.

[254] The BMD defendants submit that there is a fatal defect in that contention because all the securities contain a provision which maintains KHD's liability even if other securities are released.

[255] Mio submits in reply that the provisions relied upon do not on their proper construction extend to the variations of the loan agreement and securities in the present case because they are variations beyond the purview of the original guarantee given by KHD.

[256] These are again essentially questions of construction of the securities in the context of the guarantee as given by KHD.

[257] Again, for present purposes, in my view, these questions of construction raise a serious question to be tried for the purposes of s 237. Again, it is inappropriate to say more about the strength or weakness of the arguments where they are not to be finally decided.

[258] As noted before, the separate determination of the questions of construction will not resolve the question of Mango's liability to KHD in respect of Mango's alleged breaches of covenant and contract as alleged in the 3FASOC, or any other liability which would flow from that.

Good faith

[259] Under s 237, it is required that the applicant for leave is acting in good faith.

[260] A number of submissions were made by the BMD defendants to challenge Mio's good faith. First, they submitted that the proceeding is brought in Mio's interests, not KHD's interests. Since Mio's interests as trustee of the Spencer Family Trust and a person entitled to be registered as a member of KHD, depend at least in part on KHD's position in respect of KHD's claims, there is no obvious conflict between their positions which goes to Mio's good faith, in my view.

[261] Secondly, in paragraph [180] of the BMD defendants' written submissions in 11109 of 2012 dated 25 January 2013, a number of criticisms are raised of Mio's conduct of the proceedings to date. They do not go to Mio's good faith in respect of the limited leave proposal, in my view.

[262] Thirdly, in paragraph [111] of the BMD defendants' written submissions in 11109 dated 3 April 2013, criticism is made of Mio or someone related to Mio attempting to apply pressure to the BMD defendants by supplying negative information to a trade supplier of the BMD Group. That conduct may be reprehensible or a breach of legal obligation, but it does not go to the bona fides of Mio in making the limited leave proposal, in my view.

[263] On the contrary, in my view, there is no reason to treat the limited leave proposal as anything other than bona fide and I conclude that it is made in good faith.

Entitled to be registered as a member

[264] The last point which is raised in opposition to the grant of leave is the BMD defendants' submission that Mio is not a person "entitled to be registered as a member" of KHD within the meaning of s 236(1)(a)(i) of the *Corporations Act*.

[265] In my view, there was no reason disclosed by the evidence which necessarily repels a finding on the balance of probabilities that Mio is entitled to become registered as a member of KHD, for the purposes of making an application under s 237.

[266] The BMD defendants contrary contention relies upon the fact that on 23 April 2009 Mio declined to execute a deed of accession. Mio also contended that it was not a shareholder because it had not made an application to the board of KHD to make Mio registered as a shareholder of KHD. The BMD defendants submit that in the absence of a satisfactory explanation for that position, it is impossible for the court to be satisfied that Mio is entitled to be registered as a member.

[267] However, in support of this application Mio's director, Michael Spencer, stated that his prior view that Richard Spencer might continue to hold the shares has "passed." He was cross-examined. Nothing emerged to suggest that he had not truly changed his mind about Mio becoming a shareholder, regardless of whether it was right not do so when he declined on behalf of Mio in April 2009. On 9 January 2013, Mio's solicitors requested to have Mio registered as a shareholder. To the date of hearing the application, the request had not been satisfied.

[268] In the end, the BMD defendants' position on this point did not seem to have any substantial basis other than that Mio appeared to have changed its mind in 2009 and then back again in 2012 about whether it wanted to be registered. In my view, that does not represent a basis for concluding that Mio is not entitled to be registered as a member of KHD.

Dismissal of the proceeding

[269] The BMD defendants, Mr Varitimos and Mr Rex applied for orders that the proceeding against them be dismissed. The ground in each case was that Mio's unsuccessful efforts to plead a viable statement of claim thus far warranted dismissal. The BMD defendants added to that evidence of costs it had incurred as against Mio and the impact that the proceeding was having on employees and some of the BMD defendants.

[270] An important premise was that the defects in the statement of claim thus far demonstrate that a viable cause of action is not able to be pleaded. In my view, the cause of action for oppression is an important exception to that characterisation. There is no fundamental defect in the pleading in that respect, shorn of its excesses.

[271] Secondly, in my view, Mio has a number of reasonably arguable causes of action for breaches of covenant or breach of contract.

[272] Thirdly, in my view, Mio has a reasonably arguable cause of action for either a vesting order under s 82 of the *Trusts Act* or an order for registration as a member under s 1071F of the *Corporations Act* in respect of the Spencer Family Trust shares in KHD.

[273] Although Mio has persisted in the face of clear opposition to its excessive pleadings of fraud and a number of causes of action against a number of the defendants which are not viable or not viably pleaded, it does not seem to me that the proceeding should be summarily dismissed at this stage, against any of the defendants.

[274] That extends to Mr Varitimos and Mr Rex. From my discussion of their positions, it will be seen that there are significant flaws in the cases formulated against them to date, but they are at least concerned in the ongoing dispute as to whether Mio should be registered as a member. And there is at least a real possibility that Mio can formulate other claims against them, although it may not be able to do so.

[275] Also from the discussion relating to Mr Duncan, it can be seen that there is a real question about whether Mio can formulate a viable cause of action against some of the ex-directors of KHD and some of the other BMD defendants. However, individual applications were not made on their behalves based on their separate positions, so it would be inappropriate to engage in that analysis when Mio has not been faced with that contention before now.

[276] As to wasted costs, the defendants can be compensated by appropriate orders. If the costs they have incurred are excessive that is not Mio's responsibility.

[277] As to the impact on the BMD defendants' employees and business, there are significant detriments that being involved in litigation may cause. The defendants have brought an appropriate application to deal with the excesses of the 3FASOC. But at this stage there has been no determination of whether there is substance in any of the allegations which Mio may be entitled to make in a properly prepared statement of claim.

[278] In my view, Mio should have the opportunity in 4325 of 2012 to file a statement of claim that complies with the requirements of the *UCPR*. Because the subject of 11109 of 2012 is now taken up in 4352 of 2012, there is no justification for Mio to vex the defendants in that proceeding with duplication of the same allegations or subject matter. Proceeding 11109 of 2012 should be stayed, for the present, as an abuse of process.

Conclusion

[279] For those reasons, I propose to order that:

On Mio's application to amend the claim in 4352 of 2012:

1. the application is dismissed.
2. the applicant pay the respondents' costs of the application.

On Mio's application for leave to bring the proceeding on behalf of KHD under s 237 of the *Corporations Act* in 11109 of 2012 and 4352 of 2012:

3. the application is dismissed in both 11109 of 2012 and 4352 of 2012.
4. the applicant pay the respondents' costs of the application.
5. proceeding 11109 of 2012 is stayed.

On the BMD defendants' application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

6. the statement of claim is struck out.
7. the respondent pay the applicants' costs of the application on the indemnity basis.

On Tasovac's application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

8. the statement of claim is struck out.
9. the respondent pay the applicant's costs of the application on the indemnity basis.

On Mr Varitimos's application to strike out the statement of claim and to dismiss the proceeding in 4352 of 2012:

10. the statement of claim is struck out.
11. the respondent pay the applicant's costs of the application on the indemnity basis.

On Mr Rex's application to strike out the statement of claim and to dismiss the proceeding 4352 of 2012:

12. the statement of claim is struck out.
13. the respondent pay the applicant's costs of the application on the indemnity basis.

In 4352 of 2012 the plaintiff file and serve a further statement of claim.