SUPREME COURT OF QUEENSLAND

CITATION:	*Macquarie Capital Advisers Ltd & Anor v BrisConnections Management Company Ltd* [2009] QCA 272
PARTIES:	**MACQUARIE CAPITAL ADVISERS LIMITED** ABN 79 123 199 548 (first plaintiff/first respondent) **MACQUARIE BANK LIMITED** ABN 46 008 583 542 (second plaintiff/second respondent) **ACN 136 024 970 PTY LTD** ACN 136 024 970 (third plaintiff/third respondent) **v** **BRISCONNECTIONS MANAGEMENT COMPANY LTD** ABN 67 128 614 291 (first defendant/fourth respondent) **AUSTRALIAN STYLE INVESTMENTS PTY LTD** ACN 109 510 198 (second defendant/appellant) **DEUTSCHE BANK AG** ABN 13 064 165 162 (third defendant/fifth respondent)
FILE NO/S:	Appeal No 4954 of 2009 SC No 3323 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2009
JUDGES:	McMurdo P, Holmes JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted.** **2. Appeal allowed to the extent of adding the following order, as the penultimate order, to the orders made by the learned primary judge: sub-par 9d and sub-par 14d of the defence and counterclaim are dismissed.** **3. Appellant pay the costs of the five respondents to the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where fourth

respondent trustee and responsible entity of two trusts – where constitutions of trusts permitted fourth respondent to enter into "Transaction Documents" – where fourth respondent entered an underwriting agreement with first respondent and bridging finance agreement with second respondent – where appellant, a unit-holder, sought declaration, by way of counterclaim in proceedings commenced by first, second and third respondents, that certain covenants in agreements void, because by entering agreements with the impugned covenants, fourth respondent had committed a fraud on the power conferred by constitutions – where primary judge made declaration that fourth respondent had not committed a fraud on the power, and dismissed that part of appellant's counterclaim based on the fraud on the power allegation – where appellant appealed against the making of the declaration, arguing it was unnecessary in the end to determine the fraud on the power question, and sought clarification of the orders pronounced below – whether primary judge erred in making declaration

Uniform Civil Procedure Rules 1999 (Qld), r 156

Australian Securities Commission v Ampolex Ltd (1995) 38 NSWLR 504, cited
Ibeneweka v Egbuna [1964] 1 WLR 219, cited

COUNSEL: G T Bigmore QC, with S Rubenstein, for the appellant
D F Jackson QC, with D G Clothier, for the first, second and third respondents
J G Santamaria QC, with P D Crutchfield and C M Muir, for the fourth respondent
R Forbes (*sol*) for the fifth respondent

SOLICITORS: MacDonnells Law acting as Town Agent for Lander & Rogers for the appellant
Freehills for the first, second and third respondents
Corrs Chambers Westgarth for the fourth respondent
Mallesons Stephen Jaques for the fifth respondent

[1] **McMURDO P:** I agree with Holmes JA.

[2] **HOLMES JA:** According to its notice of appeal, the appellant appeals against:

> "(a) that part of the judgment of [the trial judge] where His Honour dismissed that part of the appellant's counterclaim relying on the fourth respondent (BrisConnections) committing a fraud on the power by entering into the underwriting agreement dated 9 May 2008 between among others the first respondent (Macquarie Capital), BrisConnections and the fifth respondent (Deutsche) (the Underwriting Agreement) and the IPO Equity Bridge Syndicated Facility Agreement dated 2 June 2008 between

among others the second respondent (Macquarie Bank) and BrisConnections (the IPO Equity Bridge Facility) …; and

(b) paragraph 2 of the orders made 14 April 2009 being the declaration as follows:

'2 I declare that the first defendant did not commit a fraud on the power conferred on it by the constitutions of the BrisConnections Investment Trust or the BrisConnections Unit Trust by entering into the Underwriting Agreement with the first plaintiff or the IPO Equity Bridge with the second defendant [sic].'"

However, in the course of argument, it became apparent that the real foci of complaint were, in relation to (a), a failure in the orders to identify with sufficient clarity those parts of the appellant's counterclaim dismissed, and in relation to (b), the making of the declaration in circumstances where, the appellant said, it was unnecessary and no party had sought it.

[3] During the argument, it also emerged that the primary judge's orders had not been filed, as r 661(3) of the *Uniform Civil Procedure Rules* 1999 (Qld) requires where orders are returnable before this Court. The consequence was that leave was required to bring the appeal: r 661(4)(b). A transcript of his Honour's orders as pronounced in court was obtained; it was common ground that, in accordance with r 660(1)(a), the orders there recorded constituted the orders made by the court. In the absence of any objection, leave to appeal should now be granted.

Background

[4] The fourth respondent, BrisConnections Management Company Ltd, is the trustee and responsible entity for two trusts, each constituting a managed investment scheme, whose purpose, put shortly, is to build an airport road and tunnel link. Under the constitutions of the trusts, which were in identical terms, the beneficial interest in each trust was divided into units and the unit-holders were, by definition, members of the trust. The constitutions conferred broad powers on BrisConnections, including powers to borrow or raise money and to enter into an arrangement for underwriting the purchase of units.

[5] In particular, article 11.3 of each constitution permitted BrisConnections to enter into "Transaction Documents" (defined to include project, finance and other documents for the airport link project) and to perform its obligations under them. Article 11.3 further absolved BrisConnections, subject to the *Corporations Act* 2001 (Cth), of any obligation under the constitution the performance of which would result in a breach of an obligation or the occurrence of an event of default under the Transaction Documents, or render false any representation or warranty in the Transaction Documents.

[6] BrisConnections entered an underwriting agreement with the first respondent, Macquarie Capital Advisers Limited, for an initial public offering of units. The fifth respondent, Deutsche Bank AG, was also an underwriter of the offer. A product disclosure statement was duly issued. Prospective investors could purchase stapled units in the trusts at an issue price of $3.00, to be paid in three instalments: the first payable immediately, the others at nine month intervals. BrisConnections also entered into a financing arrangement, the "IPO Equity Bridge", with the second

respondent, Macquarie Bank Limited. The underwriting agreement contained covenants prohibiting the trusts from deferring the call payment dates without the underwriters' consent (cl 5.8), and from varying their constitutions without the underwriters' consent (cl 10.1(c)), while under the IPO Equity Bridge, BrisConnections undertook not to amend the trust deeds or to do anything to cause its removal as responsible entity (cl 18.3). The events of default provided for in the IPO Equity Bridge agreement included, not surprisingly, the winding up of BrisConnections or the trusts.

[7] At a stage after the public offering, the appellant, Australian Style Investments Pty Ltd, purchased a substantial holding in the trusts. In February 2009, it requisitioned BrisConnections to call meetings of unit-holders to vote on resolutions to wind up the trusts, with alternative resolutions which included: a resolution amending the trust constitutions to require BrisConnections, at the unit-holders' direction, to exercise its power to defer or cancel calls for the second or third instalments; a resolution to direct BrisConnections to defer the first call; and a resolution for the removal of BrisConnections as responsible entity.

The issues before the trial judge

[8] In the face of impending meetings to consider the resolutions, Macquarie Bank Limited, Macquarie Capital Advisers Limited and the third respondent, a substantial unit-holder (from this point, collectively referred to as "the Macquarie parties"), sought urgent relief before Justice Dutney. His Honour identified certain parts of their application which it was necessary to determine as a matter of urgency before the unit-holders' meeting. They were those parts which sought, in effect, to ensure that, in accordance with the covenants in the two agreements, BrisConnections proceeded with the second instalment call at the set date, and did nothing, including putting resolutions, towards its own removal as responsible entity or towards varying the constitutions of the trusts; and (although not the subject of any covenant) that it did not take any step which would result in a winding up of the trusts.

[9] Australian Style Investments sought an adjournment of the application, asserting that it would be necessary at the same hearing to deal with parts of its counterclaim which sought a declaration that the covenants were void, as well as damages; more time was needed to establish the latter. To understand the context in which the adjournment application and the substantive hearing proceeded, it is necessary to set out some parts of Australian Style Investments' defence and counterclaim, which pleaded a fraud on the article 11.3 power in the entering of the agreements containing the covenants, and false representations in the product disclosure statement.

[10] The pleading of the fraud on the power was at par 9 and par 14 of the defence, repeated in the counterclaim:

> "9. …
>
> a. The inclusion in the Underwriting Agreement of clauses 5.8 and/or 10.1(c) constituted, as the plaintiffs must have well known, a very serious breach of the fiduciary duty owed by BCMCL to the beneficiaries of the Trusts, including the duties prescribed by ss.601FC(1)(c) and 601GC(1)(a) of the *Corporations Act 2001*; and

b. The existence of the said clauses 5.8 and/or 10.1(c) places, as the plaintiffs must well know, BCMCL in a position of conflict between its own and the plaintiffs' interests (in ensuring that Article 4.6(a) of the Constitutions is not invoked and that neither Trust Deed is amended) and the interests of the beneficiaries of the trusts who may wish to request BCMCL to revoke or postpone a Call and/or to amend the Trust Deeds as they are entitled to do by the said sections; and

c. The said clauses were not mentioned or foreshadowed in the PDS [section 11.5.22]; and therefore

d. The plaintiffs and BCMCL are privy to a fraud on the power conferred by Article 11.3 of the Constitutions (which power was at all material times expressly subject to the *Corporations Act 2001* including the said sections), so that the Underwriting Agreement is not a Transaction Document within the meaning of the Constitutions and is not enforceable against BCMCL if such enforcement would prejudice ASl's Rights or the rights of other beneficiaries; …"

"14. …

a. The inclusion in the IPO Equity Bridge of clause 18.3 constituted, as the plaintiffs must have well known, a very serious breach of the fiduciary duty owed by BCMCL to the beneficiaries of the Trusts, including the duties prescribed by ss.601FC(1)(c) and 601GC(1)(a) of the *Corporations Act 2001*; and

b. The existence of the said clause 18.3 places, as the plaintiffs must well know, BCMCL in a position of conflict between its own and the plaintiffs' interests (in ensuring that neither Trust Deed is amended) and the interests of the beneficiaries of the trusts who may wish to amend the Trust Deeds as they are entitled to do by the said sections; and

c. The said clause was not mentioned or foreshadowed in the PDS [section 11.5.15];

d. The plaintiffs and BCMCL are privy to a fraud on the power conferred by Article 11.3 of the Constitutions (which power was at all material times expressly subject to the *Corporations Act 2001* including the said sections), so that the IPO Equity Bridge is not a Transaction Document within the meaning of the Constitutions and is not enforceable against BCMCL if such enforcement would prejudice ASI's Rights or the rights of other beneficiaries; …"

("BCMCL" is BrisConnections.) Paragraph 16 of the defence asserted that because of the matters pleaded in pars 9 and 14, the covenants to call, not to amend and not to default (if any) were not enforceable by the Macquarie parties against BrisConnections.

[11] Paragraph 37 of the defence pleaded seven alleged false representations in the product disclosure statement, including implied representations constituted by the non-disclosures alleged in sub-par 9c and 14c. That paragraph was repeated in the counterclaim, which went on to plead that those representations were defective within the meaning of s 1022B(1)(c) of the *Corporations Act*, and false or misleading within the meaning of s 1041E of the Act, contravening those sections. Paragraph 82 pleaded that Australian Style Investments, having suffered loss and damage by its reliance on the representations, was entitled to the relief sought, set out in that paragraph, and again in the general prayer for relief, as follows:

> "a. Recovery pursuant to s.1022B(2)(c);
>
> b. Relief pursuant s.1022C by way of a declaration that the Alleged Covenants are void; and
>
> c. Recovery pursuant to s.1041I of the *Corporations Act 2001*; and further or alternatively
>
> d. Damages for breach of the PDS Contract (if any)."

[12] In applying for the adjournment, counsel for Australian Style Investments explained (consistently with the pleading at par 82) that, on the basis of deficiencies in the product disclosure statement, his client sought to have the covenants declared void under s 1022C of the *Corporations Act*. The learned judge rejected the application for an adjournment. He said that the matter should proceed to a final hearing, with this qualification, that he was "excluding and ordering to be tried separately the claim for damages contained in the counter-claim".

[13] On the substantive hearing before the learned judge, however, Australian Style Investments identified a different basis for seeking the declaration. In its written submissions, it contended that in purporting to contract away the unit-holders' statutory rights, BrisConnections had committed a fraud on the power conferred by article 11.3, with the consequence that the underwriting agreement and the IPO Equity Bridge agreement or the provisions containing the covenants were void or voidable. The Macquarie parties' notice of the fraud on the power could be inferred from various sources. Consequently, Australian Style Investments went on to assert, "Paragraphs 9 a-d and 14 a-d of the Defence are established". Under the heading "Counter-claim", it said that statutory relief should be granted, in the form of a declaration that the parts of the two agreements containing the offending provisions were void.

[14] Those contentions were reiterated and enlarged upon in oral argument, although it should be added that towards the close of his submissions, counsel agreed that there was some difficulty in seeing the need for a declaration if the learned judge found that the covenants did not affect the unit-holders' statutory rights. But he said that he had no instructions to concede that the counterclaim could be dismissed, and left the matter on this footing:

> "I can't say that if we were successful in resisting the plaintiff's claims against all the defendants we would need to prosecute the counter-claim in relation to the declaration as to the voidness of the parts or the whole of the underwriting agreement or the IPO equity bridge. I can't say we wouldn't, either."

[15] It is not surprising, then, that at the beginning of his judgment, the learned primary judge, having identified the relief sought by the Macquarie parties which he considered it necessary to deal with, went on to observe:

> "I have also been asked to consider the allegation in ASI's counterclaim that in entering into the Underwriting Agreement and the IPO Equity Bridge [BrisConnections] has committed a fraud on its power as trustee."[1]

The judgment and orders

[16] In the result, his Honour refused the orders sought by the Macquarie parties. Inter alia, he concluded that BrisConnections' agreements with Macquarie Bank and Macquarie Capital Advisers did not deprive the unit-holders of their statutory rights to requisition meetings and vote on resolutions, including resolutions to alter the constitutions of the trusts, or to wind them up or to remove the responsible entity. Having reached the conclusion that their claim for relief should fail, his Honour turned to the fraud on the power argument in Australian Style Investments' counterclaim. He summarised his conclusions as follows:

> "The argument advanced in support of this claim was that to the extent that the Underwriting Agreement or the IPO Equity Bridge abrogated the second defendant's statutory rights or rights under the constitutions to propose and vote on resolutions, the entry into those agreements by BCM was contrary to the interests of members and thus a fraud on the power.
>
> There are two short answers to this submission. First, the only resolution in relation to which I have not found the members' rights to vote take precedence is resolution 4. As there is no competing statutory right of members to defer the calls or any right to that effect in the existing constitutions, the entry into of the agreements cannot be said to be a fraud on the power in the way submitted.
>
> Second, the constitutions, by clause 11.3, expressly authorise BCM to enter into the Underwriting Agreement and the IPO Equity Bridge. No authority has been cited that supports the submission that it can be a fraud on the power to enter into a transaction, which the trust deed expressly authorises."[2]

[17] The learned judge ended his judgment with orders, the first of which was:

> "That part of ASI's counterclaim which relies on BCM committing a fraud on the power by entering into the Underwriting Agreement and the IPO Equity Bridge is dismissed."[3]

He went on to dismiss those aspects of the Macquarie parties' claims for relief with which he had dealt, and adjourned the hearing of the balance of their claims and Australian Style Investments' counterclaim to a date to be fixed.

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1 *Macquarie Capital Advisers Ltd & Anor v Brisconnections Management Co Ltd (as responsible entity for the Brisconnections Investment Trust & the Brisconnections Holding Trust) & Ors* [2009] QSC 82 at [3].

2 At [100]–[102].

3 At [103].

[18] However, the terms of those orders did not precisely accord with the orders as pronounced by his Honour on delivery of his judgment. (It should be mentioned here that this was a judgment given under some pressure and at impressive speed, delivered on the next court day following the hearing.) In pronouncing the orders, his Honour dismissed the Macquarie parties' claims, but did not dismiss any part of the counterclaim. Instead, he continued as follows:

> "I declare that the first defendant did not commit a fraud on the power conferred on it by the constitutions of the BrisConnections Investment Trust or the BrisConnections Unit Trust by entering into the underwriting agreement with the first plaintiff or the IPO Equity Breach with the second plaintiff.
>
> The remaining claims and the balance of the second defendant's counterclaim are adjourned to a date to be fixed … ."

The appellant's written case on appeal

[19] The notice of appeal identified as its subject the two findings described in par [2] above. By way of grounds, it complained of error, firstly, in his Honour's finding that the constitutions of the trusts "expressly authorised" BrisConnections to enter into the underwriting agreement and the IPO Equity Bridge agreement, and, secondly, in his finding that entry into those agreements did not constitute a fraud on the power.

[20] Other grounds asserted that the learned judge should have considered and found that the inclusion of the relevant covenants in the underwriting agreement and the IPO Equity Bridge agreement was contrary to the interests of the trusts' members, constituted a breach of the fiduciary duties owed by BrisConnections to them, and gave rise to a conflict of interest between BrisConnections' position and that of the members, while the failure to include reference to the covenants in the product disclosure statement was contrary to the members' interests and a breach of the fiduciary duties owed by BrisConnections. All of those matters meant that by entering the agreements BrisConnections committed a fraud on the power conferred by the constitutions of the trusts to enter Transaction Documents. The learned judge had also erred in failing to consider whether Macquarie Capital Advisers had knowledge of those matters. (The notice of appeal omits any similar reference to Macquarie Bank in connection with the IPO Equity Breach agreement, but that, presumably, is an oversight.)

[21] The orders sought were that the appeal be allowed, the judgment insofar as it related to "the determination of part of the appellant's counterclaim" be set aside, and that the declaration be set aside.

[22] In its written outline of argument, Australian Style Investments asserted that the constitutions of the trusts did not authorise BrisConnections to execute the underwriting agreement and the IPO Equity Bridge agreement while they contained the covenants complained of; that there was no express authorisation for BrisConnections to enter those agreements to be found in the constitutions of the trusts, which did not mention any such covenants; and that by purporting to oust and fetter the members' statutory rights, BrisConnections had committed a fraud on the power conferred by the relevant article.

The appellant's oral submissions on the appeal

[23] In this Court, counsel for Australian Style Investments focused his arguments on the inappropriateness of the making of the declaration; the uncertainty as to what parts of the counterclaim survived; and, to a lesser extent, the finding that the constitutions expressly gave BrisConnections the power to enter into the underwriting agreement and the IPO Equity Bridge agreement containing the contentious covenants.

[24] Rather than seeking to support the grounds in the notice of appeal alleging a fraud on the power, counsel said that, on further reflection, it was unnecessary for this Court to determine the issue, because the learned judge at first instance had not needed to determine it. The allegation was intended as a defence rather than as a basis for relief; that defence became irrelevant when his Honour found that the unit-holders' statutory rights prevailed over the rights created by the underwriting agreement and the IPO Equity Bridge agreement. Indeed, counsel conceded, on the basis of the judge's finding that the statutory rights of the unit-holders had not been interfered with, no fraud on the power had been committed.

[25] But, counsel continued, for that reason, the declaration was inappropriate. The issue was moot, and declarations ought not to be made unless the circumstances required them. He relied on Lord Radcliffe's caution in *Ibeneweka v Egbuna*:[4]

> "the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making"

and these observations by Kirby P in *Australian Securities Commission v Ampolex Ltd*:[5]

> "Every judge knows that there are limits to the use of the declaratory power… reached when the issue presented is purely hypothetical; involves no present or likely future conflict; arises out of facts which are unclear or not yet fully known or found; and where the issue is moot and the request for a declaration arises from a wholly theoretical concern or out of idle curiosity."

[26] Pressed as to what prejudice the existence of the declaration created for his client, counsel said that if Australian Style Investments wished to maintain an argument that non-disclosure of the existence of the covenants in the product disclosure statement had caused it damage, the declaration might be regarded as an endorsement of BrisConnections' conduct, making it impossible for it to contend that BrisConnections had acted contrary to its interests and rights.

[27] Counsel maintained the argument that the learned primary judge had erred in fact when he referred to an "express" authorisation for BrisConnections to enter into the underwriting agreement and the IPO Equity Bridge agreement. There was no evidence that the form of those agreements as executed, containing the relevant covenants which purported to oust or fetter the statutory rights of investors, was in contemplation when the trusts were constituted.

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4 [1964] 1 WLR 219 at 225.

5 (1995) 38 NSWLR 504 at 508.

[28] The learned judge had most probably intended to strike out sub-pars 9d and 14d, but not the remaining parts of those paragraphs. Sub-paragraphs 9a and 14a, and 9b and 14b, raised, respectively, a breach of fiduciary duty and conflict of interest, which, counsel argued, demonstrated the materiality of the non-disclosure in sub-par c. Sub-paragraph d raised the fraud on the power point, purely to show that not only BrisConnections, but also Macquarie Bank and Macquarie Capital Advisers as privies, could not rely on the covenants. It was of concern that the learned judge might have struck out the claim based on s 1022C, which, according to counsel, relied on the argument that the product disclosure statement was defective. No finding had in fact been made about the product disclosure statement, or its failure to disclose the existence of the covenants.

The respondents' submissions on appeal

[29] The Macquarie parties submitted that the entering of the IPO Equity Bridge agreement was an exercise of the power to borrow conferred by the constitutions, and the agreement itself fell within the definition of "Transaction Document", as a finance document in relation to the project. Similarly, clause 11.8 specifically permitted BrisConnections to enter into an underwriting arrangement on such terms as it determined. If necessary, the Macquarie parties relied on a notice of contention, the essence of which was that properly construed, the underwriting agreement and the IPO Equity Bridge agreement did not purport to fetter the statutory rights of the unit-holders, so there was no conflict between the agreements and those rights.

[30] The making of the declaration was simply an effective means of resolving the fraud on the power issue, in circumstances where there had been a serious allegation made against BrisConnections, extending to Macquarie Capital and Macquarie Bank as privies. It was within the judge's power. It was unnecessary to deal with any deficiency in the remaining orders as to what parts of the counterclaim were still on foot, because the declaration itself created a *res judicata* or issue estoppel.

[31] BrisConnections adopted those submissions. Deutsche Bank complained that it was not properly joined in the appeal because it was not a party to the counterclaim and had made no submissions at first instance in relation to any of the matters pleaded in it, including the fraud on the power claim. It was neither "directly affected by the relief sought in the notice of appeal" nor "interested in maintaining the decision under appeal."[6]

Discussion

The fraud on the power argument

[32] It is not now necessary to embark on any consideration of those grounds of the appeal alleging error in the finding that there was no fraud on the power. At first instance, that contention was based squarely on the assertion that in entering the contentious covenants in the underwriting agreement and the IPO Equity Bridge agreement, BrisConnections had purported to oust or fetter the unit-holders' statutory rights. It is difficult to see how, even if that were the case, it followed that BrisConnections was acting in pursuit of any improper or collateral purpose, as opposed to having produced an unconsidered consequence. However that may be,

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6 *Uniform Civil Procedure Rules* 1999 (Qld), r 749.

once the finding was made that the unit-holders' statutory rights to requisition meetings and vote on resolutions were unaffected, the argument, as counsel properly conceded here, fell away. It is equally unnecessary to deal with the notice of contention. The correct construction of the agreements does not matter once the conclusion as to their ineffectiveness to oust the unit-holders' statutory rights is accepted.

The declaration

[33] The declaration articulated the finding that BrisConnections had not committed a fraud on the power in entering the underwriting agreement and the IPO Equity Bridge agreement. That finding is not now the subject of challenge, but there was nothing moot or hypothetical about the context in which it was made: there was a real dispute, plainly identified as such by Australian Style Investments in its submissions to the primary judge. His Honour was specifically asked to deal with the allegation of fraud on the power made in the counterclaim as giving rise to a claim for relief by way of declaration. The issue was capable of resolution on the material before the learned judge, and the declaration actually made was, as the respondents said, an effective means of resolving it, particularly in circumstances where a serious and unattractive allegation was made against them. The declaration was limited in its terms to the finding that there was no fraud on the power, and no compelling argument was advanced as to how its making could impede Australian Style Investments in its pursuit of other causes of action.

[34] The making of the declaration was unusual in circumstances where no party had sought it; but it was not beyond the learned judge's power: r 156 of the *Uniform Civil Procedure Rules* enables the court to grant relief other than that specified in the pleadings, irrespective of whether there is any claim for general relief. (Indeed, counsel for Australian Style Investments did not seek to contend that it was beyond the learned judge's jurisdiction.) It was a means of determining a controversy which undoubtedly existed, in circumstances which rendered its making appropriate. I would not allow the appeal as against that order.

The finding of express authority to enter the agreements

[35] The learned judge's statement that the constitutions, by clause 11.3, expressly authorised BrisConnections to enter into the underwriting agreement and the IPO Equity Bridge agreement was correct in its terms. That clause clearly did contemplate entry of Transaction Documents, a description which both of those agreements met. That finding of itself may not, with respect, have supported a conclusion that there was no fraud on the power, given that the specific complaint was made in respect of particular clauses in the agreements, as opposed to entry of agreements of the kind. But that is immaterial given the first finding, that since the statutory rights took precedence, no fraud on the power could have been committed in the way contended for by Australian Style Investments. His Honour's decision and orders did not require the support of any conclusion about the power given by clause 11.3. What he said as to the latter was accurate, so far as it went; and it is of no consequence if it did not go far enough to warrant the conclusion drawn.

Uncertainty as to what parts of the counterclaim were dismissed

[36] Australian Style Investments does have some basis for complaint of a lack of clarity in the orders for disposition of the counterclaim. Firstly, it is evident that the orders

as pronounced omit the order contained in the judgment, for dismissal of "[t]hat part of ASI's counterclaim which relies on BCM committing a fraud on the power…" To that extent, there does seem to be error in the orders pronounced. Secondly, although hardly a point of appeal, there is something to be said for clarification of which paragraphs of the counterclaim are to be dismissed in accordance with his Honour's findings.

[37] Australian Style Investments contended that only sub-pars 9d and 14d, which specifically adverted to the fraud on the power, were affected; the respondents asserted that sub-pars 9a, b and d and sub-pars 14a, b and d were the relevant allegations underlying the fraud on the power pleading. There is no doubt that, in putting his case at first instance, counsel for Australian Style Investments did contend that each of the sub-paragraphs in par 9 was relevant to the fraud on the power argument. On the other hand, it is conceivable that sub-pars a and b were intended to perform the dual purpose of supporting both the pleading of fraud on the power and that of material non-disclosure in the product disclosure statement, and should remain for the latter purpose. Sub-paragraphs 9d and 14d, the only sub-paragraphs solely referable to the fraud on the power allegation, should be dismissed. The relief sought in the counterclaim can properly be regarded as flowing from the pleading in connection with the product disclosure statement and should be left intact.

[38] I would allow the appeal to the very limited extent of varying the orders below by including a further order, for dismissal of sub-pars 9d and 14d of the defence and counterclaim. Since that relief could readily have been obtained by application to the learned primary judge under r 667, and given that Australian Style Investments has either abandoned or failed on the substantive matters in the appeal, it should pay the respondents' costs.

[39] **Orders**

1. Leave to appeal is granted.
2. The appeal is allowed to the extent of adding the following order, as the penultimate order, to the orders made by the learned primary judge: sub-par 9d and sub-par 14d of the defence and counterclaim are dismissed.
3. The appellant is to pay the costs of the five respondents to the appeal.

[40] **WHITE J:** I have read the reasons for judgment of Holmes JA with which I agree and there is nothing more that I can usefully add. I agree with the orders proposed by her Honour.