SUPREME COURT OF QUEENSLAND

CITATION: *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors; Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2014] QCA 339

PARTIES: **In Appeal No 3670 of 2014:**

MIO ART PTY LTD
ACN 121 010 875
(appellant)
v
BMD HOLDINGS PTY LIMITED
ACN 010 093 348
(first respondent)
MANGO BOULEVARD PTY LTD
ACN 101 544 601
(second respondent)
URBEX PTY LTD
ACN 102 865 823
(third respondent)
BMD PROPERTIES PTY LTD
ACN 091 902 475
(fourth respondent)
MANGO HILL (PRIME) PTY LTD
ACN 110 696 565
(fifth respondent)
MANGO HILL (MEZZANINE) PTY LTD
ACN 110 697 400
(sixth respondent)
TASOVAC PTY LIMITED as TRUSTEE OF THE SECURITY TRUST
ACN 108 013 467
(seventh respondent)
KENNETH ROWLAND BIRD
(eighth respondent)
GARY WILLIAM INGRAM
(ninth respondent)
JAMES VARITIMOS
(tenth respondent)
WAYNE ROBERT REX
(eleventh respondent)
KINSELLA HEIGHTS DEVELOPMENTS PTY LTD
ACN 100 373 368
(twelfth respondent)

In Appeal No 10321 of 2013:

MIO ART PTY LTD
ACN 121 010 875
(appellant)

v
MACEQUEST PTY LTD
ACN 010 563 649
(first respondent)
BMD HOLDINGS PTY LTD
ACN 010 093 348
(second respondent)
MANGO BOULEVARD PTY LTD
ACN 101 544 601
(third respondent)
URBEX PTY LTD
ACN 102 865 823
(fourth respondent)
BMD PROPERTIES PTY LTD
ACN 091 902 475
(fifth respondent)
MANGO HILL (PRIME) PTY LTD
ACN 110 696 565
(sixth respondent)
MANGO HILL (MEZZANINE) PTY LTD
ACN 110 697 400
(seventh respondent)
TASOVAC PTY LIMITED as TRUSTEE OF THE SECURITY TRUST
ACN 108 013 467
(eighth respondent)
KENNETH ROWLAND BIRD
(ninth respondent)
GARY WILLIAM INGRAM
(tenth respondent)
JAMES VARITIMOS
(eleventh respondent)
WAYNE ROBERT REX
(twelfth respondent)
RUSSELL JOHN THOMSON
(thirteenth respondent)
DAVID JOHN DUNCAN
(fourteenth respondent)
ANDREW MARCOS
(fifteenth respondent)
SCOTT WILLIAM POWER
(sixteenth respondent)
MICHAEL CHRISTOPHER POWER
(seventeenth respondent)
KINSELLA HEIGHTS DEVELOPMENTS PTY LTD
ACN 100 373 368
(eighteenth respondent)

FILE NO/S: Appeal No 3670 of 2014
Appeal No 10321 of 2013
SC No 4352 of 2012

DIVISION:	Court of Appeal
PROCEEDING:	In Appeal No 3670 of 2014: General Civil Appeal In Appeal No 10321 of 2013: Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2014; 19 November 2014
JUDGES:	Margaret McMurdo P, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The appellant's application in CA 10321/13 for an extension of time within which to appeal against the costs orders be dismissed with costs.** **The appeal against the orders made on 3 April 2014 in CA 3670/14 be dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the subject dispute arose out of a land development project at Mango Hill north of Brisbane on land owned by Kinsella Heights Developments Pty Ltd (KHD) – where the appellant contends that the conduct of the eighth, ninth, tenth and eleventh respondents procured and induced the first, second and fourth respondents – where the appellant contends the conduct engaged in was conduct that benefited the first respondent to the detriment of KHD and was in breach of a shareholders' deed and joint venture agreement – where the primary judge ordered that paragraphs 131–134, 136 and 165 of the fourth further amended statement of claim be struck out; paragraph 4(b) of the prayer for relief be struck out; and that the prayer for relief in paragraph 4(g) be struck out against the first, fourth, fifth and sixth respondents – where the appellant was directed to make specified amendments to the pleading – whether the primary judge erred in striking out paragraph 165 of the statement of claim – whether the primary judge erred in striking out paragraph 4(g) against the first, fourth, fifth and sixth respondents and giving directions that the amount of all claims made under that paragraph against the tenth and eleventh respondents be quantified – whether the primary judge erred in determining that paragraphs 131–134 and 136 of the statement of claim were irrelevant and should be struck out – whether the primary judge erred in striking out paragraph 4(b) of the prayer for relief

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the appellant applies for an extension of time within which to appeal against an order made on 3 October 2013 ordering the appellant to pay the named respondents' costs on the indemnity basis of their respective applications to strike out the third further amended statement of claim – where on 19 August 2013 the primary judge ordered that the third statement of claim be struck out – where there was no appeal from that order – whether the primary judge erred in awarding indemnity costs on the basis that he said that the appellant made excessive pleadings of fraud and agreed that the appellant made an unmaintainable allegation of an exception to indefeasibility in relation to the seventh respondent – whether leave to extend time in which to appeal should be granted

Corporations Act 2001 (Cth), s 233, s 232
Land Title Act 1994 (Qld), s 182, s 184
Uniform Civil Procedure Rules 1999 (Qld), r 149(1)(b), r 155, r 368(1), r 368(2)

Allstate Life Insurance Company v Australia & New Zealand Banking Group Ltd (1995) 58 FCR 26; [1995] FCA 1368, considered
Barnes v Addy (1874) LR 9 Ch App 244, cited
Breskvar v Wall (1971) 126 CLR 376; [1971] HCA 70, cited
Capital Finance Corporation (Australasia) Pty Ltd v Peter Pan Management Pty Ltd (in liq) [2003] VSCA 93, followed
Di Carlo v Dubois [2002] QCA 225, considered
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; [2012] FCAFC 6, distinguished
Hunter v Organic & Natural Enterprise Group Pty Ltd [2013] QCA 331, considered
In re The Will of F B Gilbert (dec) [1946] 46 SR (NSW) 381; [1946] NSWStRp 24, followed
Martinovic v Chief Executive, Queensland Transport [2005] 1 Qd R 502; [2005] QCA 55, cited
Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors [2014] QSC 55, considered
Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471; [2007] NSWCA 377, cited
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257, cited
Schache v GP No 1 Pty Ltd [2012] QCA 233, considered
White Industries (Qld) Pty Ltd v Flower & Hart (a firm) (1998) 156 ALR 169; [1998] FCA 806, considered
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, considered
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd (2006) 33 WAR 1; [2006] WASC 161, considered

COUNSEL:

In Appeal No 3670 of 2014:
F M Douglas QC, with T O Prince, for the appellant
W Sofronoff QC, with D J Butler, for the first to sixth, eighth and ninth respondents
C Muir for the seventh respondent
P K O'Higgins for the tenth respondent
D Savage QC, with N Shaw, for the eleventh respondent

In Appeal No 10321 of 2013:
F M Douglas QC, with T O Prince, for the appellant
W Sofronoff QC, with D J Butler, for the first to seventh, ninth, tenth and thirteenth to seventeenth respondents
C Muir for the eighth respondent
P K O'Higgins for the eleventh respondent
D Savage QC and N Shaw for the twelfth respondent

SOLICITORS:

In Appeal No 3670 of 2014:
Delta Law for the appellant
Carter Newell for the first to sixth, eighth and ninth respondents
King and Wood Mallesons for the seventh respondent
Bartley Cohen for the tenth respondent
HWL Ebsworth for the eleventh respondent

In Appeal No 10321 of 2013:
Delta Law for the appellant
Carter Newell for the first to seventh, ninth, tenth and thirteenth to seventeenth respondents
King and Wood Mallesons for the eighth respondent
Bartley Cohen for the eleventh respondent
HWL Ebsworth for the twelfth respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons in CA 10321/13 for dismissing the appellant's application for an extension of time to appeal with costs.

[2] I also agree with his Honour's reasons for dismissing the appeal in CA 3670/14 with costs.

[3] I agree with the orders proposed by his Honour.

[4] **MUIR JA**: **Introduction** On 3 April 2014, the primary judge ordered that:[1] paragraphs 131 to 134, 136 and 165 of the fourth further amended statement of claim (the statement of claim) be struck out; paragraph 4(b) of the prayer for relief be struck out; and that the prayer for relief in paragraph 4(g) be struck out against the first, fourth, fifth and sixth respondents.

[5] The appellant was directed to:

> "(a) identify in the pleading any respects in which the conduct alleged in paragraph 166 is unfair beyond the individual matters otherwise alleged;

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1 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at 2.

(b) identify in the pleading the amounts of any losses alleged against the [tenth or eleventh respondents] other than the losses alleged in paragraphs 162 and 163;

(c) state in the claim for relief the amounts of all claims made under paragraph 4(g) against the [tenth or eleventh respondents] for payment of compensation; and

(d) amend the pleading to specifically allege all losses within the indemnity under clause 4.2 of the Project Management Agreement;

(e) state in the claim for relief the amount claimed in respect of the indemnity under clause 4.2 of the Project Management Agreement."

[6] The orders were made on:

- an application by the first to sixth, eighth and ninth respondents seeking orders striking out all, except certain paragraphs, of the statement of claim with no leave to re-plead;

- an application by the tenth respondent seeking the same orders and, in addition, seeking orders for summary determination of part of the appellant's claim and summary declaratory relief; and

- an application by the eleventh respondent seeking orders for the summary determination of a number of the appellant's claims and orders that the balance of the statement of claim, in so far as it contained claims against the eleventh respondent, be struck out.

[7] The appellant appeals against the primary judge's orders and directions.

The pleaded factual background

[8] Before considering the grounds of appeal, it is desirable to identify the parties to the appeal and to state some of the pleaded allegations relevant to the issues raised on the appeal. The subject dispute arises out of a land development project at Mango Hill north of Brisbane on land owned by Kinsella Heights Developments Pty Ltd (KHD). Where the BMD Group is referred to in the statement of claim, it means the first respondent, BMD Holdings Pty Ltd, and its subsidiaries. The holding company of BMD Holdings is Macequest Pty Ltd (Macequest). It is not a party to the proceedings. Other companies in the BMD Group include the second respondent, Mango Boulevard Pty Ltd (Mango), the third respondent, Urbex Pty Ltd (Urbex) and the fourth respondent BMD Properties Pty Ltd (BMD Properties). They are all wholly owned subsidiaries of BMD Holdings.

[9] The remaining respondents in the BMD Group are:

(a) the fifth respondent, Mango Hill (Prime) Pty Ltd (Prime) (formerly named Babcock & Brown Mango Hill Pty Ltd) which became a wholly owned subsidiary of Macequest from 4 December 2009 until 16 June 2010 and became a wholly owned subsidiary of Urbex from 16 June 2010; and

(b) the sixth respondent Mango Hill (Mezzanine) Pty Ltd (Mezzanine) (formerly named Babcock & Brown Mango Hill (Mezzanine) Pty Ltd). The ownership of its shares changed in the same way and at the same times as the changes in respect of Prime's shares.

[10] The natural person respondents are:

(a) the eighth respondent, Kenneth Bird. He was a director of:

- KHD from 11 August 2003 to 8 April 2008;
- Mango from 11 August 2003; and
- Urbex from 19 November 2002 to 30 June 2008,

(b) the ninth respondent, Gary Ingram. He was a director of:

- KHD from 10 July 2003 to 16 September 2011; and
- Mango from 31 July 2003,

(c) the tenth respondent, James Varitimos. He was a director of KHD from 8 April 2008 and a solicitor engaged by Mango or companies within the BMD Group; and

(d) the eleventh respondent, Wayne Rex. He was a director of KHD from 16 September 2011 and, at all materials times from about November 2010, was the general manager of Urbex.

[11] On or about 2 May 2002, Neo Lido Pty Ltd as agent for KHD entered into a contract for the purchase of land at Mango Hill (the property) for a purchase price of $22m.

[12] KHD was incorporated in April 2002. Fifty shares in its capital were then issued to each of Silvana Perovich and Richard Spencer in his capacity as trustee of the Spencer Family Trust (the original shareholders).

[13] On or about 4 July 2003, Spencer, as trustee of the Spencer Family Trust, Perovich and Mango entered in to an agreement described in the statement of claim as the "Share Sale Agreement" under which Spencer and Perovich each sold 25 ordinary shares in KHD to Mango.

[14] On 24 August 2007, the appellant replaced Spencer as trustee of the Spencer Family Trust.

[15] The statement of claim explains at some length the various agreements entered into to formalise the relationships between Spencer, Perovich, Mango and KHD and for the financing of the proposed development. These agreements will be described only to the extent necessary to enable allegations in the statement of claim referring to them to be understood.

[16] On or about 24 June 2003, KHD and Mango entered into a joint venture agreement, described as the Project Management Agreement (PMA). It provided inter alia that; Mango would be liable for all costs of and incidental to the project; Mango would be responsible for financing the project; and, if necessary, loans for financing the project could be secured by mortgages over the property.

[17] A Shareholders' Deed (the SHD) was entered into on or about 4 July 2003 between Spencer, Perovich, Mango and KHD. It was agreed under it that: the initial directors of KHD would be Brent Hailey and Ingram (appointed by Mango), Perovich and Spencer; a quorum for director's meetings would be one director appointed by Mango and one director appointed by the original shareholders; and that a director appointed by Mango would be Chairman of KHD's board of directors and would have a casting vote.[2]

[18] On or about 31 August 2004, Mango entered into an agreement with Prime under which Prime agreed to lend Mango $28m (Prime-to-Mango FA).[3]

[19] To enable it to lend the $28m, Prime entered into finance agreements, including a facility agreement with Mezzanine, dated 3 September 2004 under which Mezzanine agreed to lend $12m to Prime (Mezzanine-to-Prime FA).[4]

[20] On or about 3 September 2004, Mezzanine (as borrower), Babcock & Brown Real Estate Finance Pty Ltd (BBREF) (as senior lender) and BMD Properties (as junior lender) entered into a facility agreement under which BBREF and BMD Properties each agreed to lend $6m to Mezzanine to lend to Prime to enable Prime to lend to Mango (BBREF/BMDP-to-Mezzanine FA).

[21] On or about 8 April 2008, Bird resigned as a director of KHD and Mango appointed Varitimos in his place. Mr Noel Vicca was appointed a director of KHD to fill the vacancies caused by the removal of Perovich and Spencer as a result of their bankruptcies.[5]

[22] It is now proposed to address the grounds of appeal. The content of ground 1 is repeated and expanded on in subsequent grounds.

Ground 2 – The primary judge erred in striking out paragraph 165 of the statement of claim

[23] Paragraph 165 of the statement of claim concerns conduct allegedly engaged in by Ingram, Bird, Rex and Varitimos and allegedly procured or induced by Mango, BMD Properties and BMD Holdings.

[24] Paragraph 165 states:[6]

> "The conduct of Ingram, Bird, Rex and Varitimos identified in paragraphs 155–156 and 160–163 is conduct that was procured or induced by Mango, BMD Properties and BMD Holdings.
>
> **Particulars**
>
> (i) The conduct was conduct that benefited the BMD Group to the detriment of KHD and was in breach of the SHD and PMA as hereinbefore pleaded.
>
> (ii) Each of Bird, Ingram, Varitimos and Rex at the relevant times were nominee directors of Mango, a wholly owned subsidiary

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2 Statement of claim, paragraphs 18 and 25.
3 Statement of claim, paragraph 39.
4 Statement of claim, paragraph 47.
5 Statement of claim, paragraph 95.
6 Record at 138.

of the BMD Group and subject to the direction and control of BMD Holdings.

(iii) Each of Bird, Ingram, Varitimos and Rex owed a duty of loyalty to companies within the BMD Group. Bird was a director of Mango, Urbex, BMD Properties and BMD Holdings. Ingram was a director of Mango and BMD Properties. Varitimos was a solicitor engaged by Mango or companies within the BMD Group. Rex was the general manager of Urbex.

(iv) Each of Mango, BMD Properties and BMD Holdings is fixed with the knowledge of each [of] their directors.[7]

[(iv) In the circumstances, Bird, as a director of Mango, BMD Properties and BMD Holdings, and Ingram, as a director of Mango and BMD Properties, owed a duty to their respective companies to communicate to them all matters relating to the financing of the Project, including any security provided by KHD. Accordingly, each of Mango, BMD Properties and BMD Holdings is fixed with knowledge of each of their respective directors (Bird and Ingram) in relation to the said matters.]

(v) In those circumstances, Mio Art contends that the Court would infer that the conduct pleaded was procured and induced by Mango, BMD Properties and BMD Holdings."

[25] The first challenge to the primary judge's findings in respect of paragraph 165 of the statement of claim concerned paragraphs [43]–[47] of the reasons:[8]

"[43] The BMD defendants submit that par 165 is bad as a matter of pleading. It alleges that the conduct of relevant directors being Messrs Ingram, Bird, Rex and Varitimos 'identified in paragraphs 155-156 and 160-163' was conduct 'that was procured or induced by Mango, BMD Properties and BMD Holdings'.

[44] For a company to procure or induce the acts or omissions of the directors of another company will generally require a positive and knowing involvement in those acts or omissions. There are useful potential comparators in both the criminal law involving accessories before the fact and in statutory provisions such as s 75B of the former *Trade Practices Act* 1974 (Cth). The context here is not on all fours with those comparators, but procuring or inducing in their ordinary meaning connote action beyond mere knowledge, something at least akin to encouragement. The ordinary meaning of procure includes to try to bring something about and the primary ordinary meaning of induce is to lead, persuade or influence a person.

[45] In my view, there is a substantial reason why it matters whether par 165 is struck out as inadequately pleaded or

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7 This particular was replaced during the hearing at first instance by the one set out under it.

8 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [43]–[47].

> particularised. Under s 79 of the [*Corporations Act* 2001 (Cth)], procurement may make the procurer a 'person involved in' a relevant contravention. Under ss 181(2), 182(2) and 183(2) of the [*Corporations Act*] a 'person involved in a contravention' is deemed to be a contravenor of those sections. Under s 1317H of the [*Corporations Act*], a contravenor is liable to compensate a corporation which suffers loss or damage by reason of a contravention of ss 181, 182 or 183 of the [*Corporations Act*].
>
> [46] Thus, if Mango, BMD Properties, or BMD Holdings were a person who procured or induced a contravention of s 181, 182 or 183 by one of Messrs Bird, Ingram, Varitimos or Rex, that might justify an order against it under s 233 for any oppressive conduct which comprised the relevant contravention, if it were also conduct which attracts s 233.
>
> [47] On the other hand, absent exposure to liability as a contravenor of that kind, no other apparent factual basis is alleged for any order against BMD Properties or BMD Holdings, except that they are lenders to Prime secured by guarantee and mortgages granted over the land by KHD." (citations omitted)

[26] The appellant argued, in effect, that the primary judge addressed the wrong questions in paragraphs [45], [46] and [47]. The question he should have addressed was whether there was a reasonable basis for the appellant's allegation. The fact that proof of an allegation may have significant consequences for a respondent in some other circumstance in some other statutory context is irrelevant as to whether the allegation can be made. Nor is the concept of procurement or inducement immutably linked with the concept of knowing involvement developed in *Yorke v Lucas*[9] as the primary judge appeared to accept. In related areas, the use of those words does not carry with it a meaning of involvement akin to fraud.[10]

[27] The appellant's submissions mistake the purpose of the primary judge's discussion relating to possible contraventions of the *Corporations Act* 2001 (Cth). The primary judge was merely making the point that, absent allegations of breach of the *Corporations Act* of the nature of those identified by him, there appeared to be no pleaded facts supporting any orders against BMD Properties or BMD Holdings "except that they are lenders to Prime secured by guarantee and mortgages granted over the land by KHD".[11]

[28] The discussion in *Grimaldi v Chameleon Mining NL (No 2)*[12] to which the appellant referred has no relevance for present purposes. It concerned the liability of a third party who knowingly induced or procured a breach of trust or breach of fiduciary duty. The appellant relied on the observation of the Court in paragraph 245 in that regard, "As with corporate alter ego cases, it is not necessary to show any dishonest or fraudulent design here."

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9 (1985) 158 CLR 661.

10 See *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 357 [245]; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 42–43.

11 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [47].

12 (2012) 200 FCR 296.

[29] These observations cast no doubt on the primary judge's observations in paragraph [44] of his reasons concerning the meaning of "procure" and "induce". Nor does *Allstate Life Insurance*[13], another authority relied on by the appellant, assist. The passages from the reasons of Lindgren J relied on by the appellant concerns a discussion by his Honour, with whose reasons Lockhart and Tamberlin JJ agreed, of what needed to be established to prove the tort of procuring or inducing breach of contract. Lindgren J concluded that "the alleged tortfeasor must intend that what he is inducing will be a breach of contract".[14] He later observed that "the authorities establish conclusively that the gravamen of the tort is intention".[15]

[30] The appellant's submissions say little, if anything, about the primary issue under consideration: was the allegation of procurement or inducement of specified conduct by the identified companies sufficiently supported by pleaded facts?

[31] Paragraphs [49]–[58] of the reasons state:[16]

> "[49] The particulars of the allegation of procurement or inducement subjoined to par 165 are that each of Messrs Ingram, Bird, Rex and Varitimos was a nominee director of Mango and that Mango was a wholly owned subsidiary of the BMD Group. Additionally, it is alleged that Mr Varitimos was a solicitor engaged by Mango or companies within the BMD Group and that Mr Rex was the general manager of Urbex.
>
> [50] Mio substituted a particular under par 165 to the effect that because Mr Bird was a director of Mango and Mr Ingram was a director of BMD Properties each of them owed a duty to the relevant company to communicate all matters relating to the financing of the Project including any security provided by KHD. In a non sequitur, it is then alleged that '[a]ccordingly, each of Mango, BMD Properties and BMD Holdings is fixed with knowledge of each of their respective directors (Bird and Ingram) in relation to the said matters'.
>
> [51] These 'particulars' are not allegations of acts or omissions of procurement or inducement of any of the conduct alleged in pars 155 to 156 or 160 to 163. They are not even proper particulars of knowledge by Mango, BMD Properties or BMD Holdings so as to show consent to particular conduct.
>
> [52] In my view, the 4FASOC does not allege material facts (or particulars which could serve the purpose) for the rolled-up allegation in par 165 that either Mango, BMD Properties or BMD Holdings procured or induced Mr Bird or Mr Ingram to act in particular ways. It is also appropriate in the circumstances to identify some of the effects of making the allegations of procurement or inducement in that rolled-up way."

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13 *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1995) 58 FCR 26.

14 *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 42.

15 *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 43.

16 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [49]–[58].

[32] The primary judge then examined paragraphs 165, 155, 156, 160 to 163 as well as the paragraphs to which those paragraphs respectively referred. He noted that many of these paragraphs had nothing to do with the conduct of one or more of Ingram, Bird, Varatimos or Rex. Some paragraphs concerned the conduct of one of those respondents, others referred to the conduct of two of them.

[33] After considering paragraphs 156, 70 and 71, the primary judge concluded:[17]

> "Nothing appears to support the allegations of procurement or inducement, except that Mr Bird and Mr Ingram were nominee directors."

[34] Referring to paragraph 160 and to paragraphs 95 to 115, to which paragraph 160 refers, the primary judge observed:[18]

> "No care has been taken by the pleaders to identify which of the relevant paragraphs allege facts comprising the conduct of Mr Ingram, Mr Bird and Mr Varitimos during particular periods which is alleged to have been procured or induced by Mango, BMD Properties and BMD Holdings. The variety of the allegations contained in par 160, which results from crossreferring to all of pars 95 to 115 is such that, in my view, the BMD defendant's challenge to the allegation that the conduct was procured or induced by Mango BMD Properties and BMD Holdings is a good one. It is not enough to simply allege that the gentlemen in question were nominee directors and that Mr Varitimos was a solicitor engaged in respects which are unidentified."

[35] The primary judge went on to analyse paragraphs 162, 163, 130 and 140. He criticised the width of the allegations in paragraph 138, to which paragraph 140 referred, and concluded that the allegations in paragraph 165 and the cross-referenced paragraphs did not support the allegations in paragraph 165 of procuring or inducing.

[36] The appellant asserted that the primary judge construed paragraph 165 as if it alleged that each of Ingram, Bird, Rex and Varitimos had engaged in the conduct in paragraphs 155–156 and 160–163. It was submitted that it is plain from paragraph 165 that that was not so and that this construction of paragraph 165 was not advanced by any of the respondents. The appellant asserted that if the primary judge had raised the matter during oral argument, the appellant could have disabused him of his error. Paragraph 165 alleged that the conduct of each of the various directors as set out in the paragraphs **relevant to that director** had been procured or induced. The primary judge's construction ignores the word "identified". Moreover in the context of an application, effectively for summary judgment, it is inappropriate to strike out a pleading because ambiguities in it that may cause confusion.

[37] Other submissions were that:

- The primary judge erred in concluding that the allegation in paragraph 165 was insufficiently supported by pleaded facts and particulars.
- The primary judge's assertion in paragraph [50] of the reasons that the second sentence of particular (iv) to paragraph 165 was a "*non sequitur*" was erroneous.

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17 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [55].

18 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [56].

No respondent suggested that and the primary judge did not raise that point during the hearing. A corporation is fixed with the knowledge of its agents on a particular subject matter where those agents have a duty to communicate that knowledge to the corporation, as particularised.[19]

- A more fundamental error is the primary judge's unwillingness to accept, on a strike out application, even the possibility of drawing an obvious inference from the pleaded facts. Paragraphs 155–156 and 160–163 of the statement of claim alleged numerous breaches of directors' duties by Ingram, Bird, Rex and Varitimos. The substance of the allegations is that the breaches were to the prejudice of KHD and the benefit of the BMD Group; that can be collected from the various paragraphs and is made explicit in particular (i) to paragraph 165.

[38] The last of these submissions must be based on the theory that an allegation in one paragraph of a statement of claim can be supported or justified by an allegation in another, even if the former particularises the matters on which it relies to support or justify its allegations. The theory is, of course, erroneous. Here the role of paragraphs 155–156 and 160–163 is to indentify the conduct allegedly procured or induced by the identified companies, not to provide the factual basis for the allegations of procuring or inducing.

[39] The appellant's complaint that the primary judge construed paragraph 165 as if it alleged that each of Ingram, Bird, Rex and Varitimos had engaged in the conduct in paragraphs 155–156 and 160–163 has some merit. Paragraph 165 is not without ambiguity but, to my mind, its most obvious meaning is that the conduct of each of the named respondents indentified in the subject paragraphs was procured or induced by all of Mango, BMD Properties and BMD Holdings. In other words, the allegation is that where a particular respondent is alleged to have acted or not acted in a particular way, he was induced or procured by the three companies to so act or not act.

[40] On this construction, considering the "conduct … identified in paragraphs 155–156" to which the reader is referred by paragraph 165, paragraph 155 directs the reader to "[t]he conduct pleaded in paragraphs 65 and 66". It is there alleged that Ingram executed the August 2004 Power of Attorney whilst possessed of particular knowledge which he failed to impart to Spencer (his co-signatory) or Perovich. There is also an allegation against Mango.

[41] Paragraph 156 refers to paragraphs 70 and 71. Paragraph 70 alleges the execution of the Mango Power of Attorney by two officers of Mango who are not respondents. Paragraph 71 alleges the execution of the December 2004 Power of Attorney by Ingram and Bird.

[42] Paragraph 160 commences "[t]he conduct pleaded in paragraphs 95 to 115 is conduct of KHD's affairs that is contrary to the interests of the members of KHD as a whole…"[20] The basis for the allegation is then stated as follows:

(a) The failure of Mango, Ingram and Varitimos to provide Vicca with the information concerning project financing arrangements described in paragraphs 95 to 114 was objectively likely to result in Vicca being unable to satisfy his duties as a director of KHD.

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19 See *Nationwide News Pty Ltd v Nidu* (2007) 71 NSWLR 471 at [40]–[43] and the cases there cited.

20 Record at 136.

(b) The conduct of Ingram pleaded in paragraphs 111 and 114 involved a breach by Ingram of: his duty as a director of KHD to act in the interests of KHD's members; his duty to exercise due care, skill and diligence; and his fiduciary duty not to prefer the interests of Mango over KHD's interests.

(c) The conduct of Varitimos pleaded in paragraphs 113 and 114 involved a breach by Varitimos of his duty as a director of KHD to act in the best interest of its members and to exercise due care, skill and diligence.

(d) The conduct of Ingram, Varitimos and Mango pleaded in paragraph 115 was calculated to cause loss or damage to KHD.

[43] Paragraph 160 refers to 95–115, paragraph 161 refers to 129, paragraph 162 refers to 130 and paragraph 163 refers to 140. In paragraphs 95–115 there are allegations about Varitimos which are neutral or unlikely to have anything to do with procuration or inducement. For example, engaging in correspondence with Vicca (paragraphs 99–101 and 108) and making an observation about a lender's limited recourse (paragraph 106). Many of these paragraphs contain no reference to natural person respondents. Only paragraphs 111 and 114 make specific reference to Ingram. There is no reference to Rex and the only reference to Bird is the noting of his resignation as a director of KHD.

[44] The heading to paragraphs 95–115 is "D.1 Conduct of Mango, Ingram and Varitimos in April–December 2008".[21]

[45] Paragraph 95 alleges that on or about 8 April 2008, Varitimos was appointed by Mango as a director of KHD in place of Bird and that Vicca was appointed a director of KHD to fill the vacancy caused by the removal of Perovich and Spencer.

[46] Paragraphs 96 and 97 address a request by Vicca for full disclosure of relevant documentation relating to the finance facilities in respect of which the property was held as security and with Varitimos' response to the request. Reference was made to: the receipt of $6.4m from the sale of part of the property (paragraph 98), correspondence between Varitimos and Vicca about the treatment of such monies (paragraph 99), the payment of such monies to Mango after demand for payment under cl 11 of the PMA without reduction of the indebtedness secured in favour of the PMA over the property (paragraph 100) and the letters and emails from and to Vicca in relation to documentation relating to the finance facilities (paragraphs 101–102).

[47] There are a number of allegations about meetings of the board of directors of KHD and the conduct of Vicca in relation to board meetings and requests for information. Those present at board meetings are not normally identified.

[48] Paragraph 161 alleges that the conduct of Rex, Varitimos and Mango pleaded in paragraph 129 was contrary to the interests of KHD. Paragraph 129 particularises the position allegedly taken by Mango, Rex and Varitimos in a dispute between Vicca and the original shareholders on the one hand and Mango, the BMD Group and Rex and Varitimos as directors of KHD on the other.

[49] Paragraph 130 alleges that since in or about December 2011 Varitimos and Rex purported to hold a number of meetings of directors of KHD without a quorum for the purposes of benefitting Mango at the expense of the original shareholders. Paragraph 162 alleges that such conduct is conduct in the affairs of KHD contrary to the interests of KHD that has caused it loss and damage.

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21 Record at 116.

[50] Paragraph 163 makes further such allegations concerning the conduct of Varitimos and Rex. That conduct, described in paragraph 140, is the failure and refusal of those respondents since May 2012 to act as set out in sub-paragraphs (a) to (h) of paragraph 138.

[51] Paragraph 138 alleges that at least since October 2011 an honest and reasonable person as a director of KHD complying with that person's duties and knowing the facts set out in paragraphs 131 to 136 would have:[22]

> "(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 10.9 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 Property 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."

[52] Paragraph 103 refers to a discussion at a meeting of directors of KHD on 11 June 2008 concerning the company's current financial position and other financial matters. Paragraph 104 deals with another such meeting. Paragraphs 105 to 108 concern meetings of the board of KHD and communications in which Vicca complained about and sought information on the borrowings secured against the property, to which communications Varitimos made specified responses.

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22 Record at 129–130.

[53] There are a number of allegations about meetings of the board of directors of KHD and conduct of Vicca in relation to board meetings and requests for information. Arguably, if any one of Ingram, Bird, Rex or Varitimos (the nominee directors) was at such a board meeting, his conduct at the meeting, although not specifically referred to, would come within the conduct referred to in paragraph 165. A similar question arises in respect of written communications from Vicca. Further difficulty with paragraph 165 and the paragraphs to which it refers is that, generally, it is necessary to sort through numerous allegations and exercise a judgment as to which of them constitutes "conduct" within the meaning of paragraph 165. That necessity arises because many of the paragraphs identified in the other paragraphs specified in paragraph 165 and in cross-referenced paragraphs cannot be regarded as conduct of the nominee directors.

[54] The diffuse and imprecise nature of the pleading, in my view, is likely to obscure whatever case the appellant wishes to conduct and to mislead the respondents as to the case they have to meet. These considerations in themselves would justify the striking out of paragraph 165.

[55] Because of the way in which the case was presented at first instance, the central issue in respect of paragraph 165 was whether the particulars in paragraph 165 could sustain its allegations. Some of the particulars may be relevant to an allegation that specific conduct of each of the nominee directors who was a director of KHD was in breach of a stated duty as a director of KHD or was contrary to the interests of KHD but that is not their role in this paragraph. The fact that specified conduct of each nominee director benefitted one or more members of the BMD Group to the detriment of KHD may or may not say something of the propriety of his or their conduct. It says nothing, however, about whether such conduct was procured or induced by the identified companies.

[56] It is impossible to see how the wide range of conduct within paragraph 165 "was in breach of the SHD and PMA as hereinbefore pleaded".[23] Paragraph 94 alleges a breach of the PMA by Mango. Paragraph 154 refers to the breach alleged in paragraph 44. No other breach of the PMA is alleged and no breach at all of the SHD is alleged. Particular (i) is thus inaccurate and misleading.

[57] The allegation in particular (ii) was accepted by senior counsel for the appellant as asserting no more than that the nominee directors were subject to whatever lawful directions they may have been given by their appointor. Neither it, nor any of the other particulars, expressly alleged that any of the nominee directors was or might be disposed to act on a direction from his appointor if to do so would involve a breach of his duties as a director. Nor did any particular allege that any of the identified companies did an act with a view to procuring or inducing any of the nominee directors to engage in the alleged conduct.

[58] If the appellant wished to argue that for some reason or reasons the nominee directors would act in breach of their duties to KHD at the behest of the identified companies that would need to be specifically alleged. There are allegations elsewhere in the pleadings that Bird and Ingram acted in breach of their respective fiduciary duties[24] but the pleading does not rely on these allegations to show a probability that Bird and Ingram were subject to direction by the identified companies and would

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[23] Particular (i) to paragraph 165 of the fourth further amended statement of claim.

[24] See e.g. paragraphs 156(b), 160(b) and 160(c).

have been disposed to follow their directions or suggestions even if to do so would have breached their respective duties.

[59] Even if use were to be made of these allegations and other allegations of breach of duty against particular respondents, it would remain necessary to plead sufficient facts to support the inference that the alleged wrongful conduct was not merely the result of the relevant nominee's own untrammelled choice to benefit one or more of the identified companies, rather than the result of some act by one or more of the identified companies. After all, a company can act only through its directors or other authorised officers or agents. On the face of things, it would be more likely that one or more of the nominee directors caused the identified companies to act in particular ways than vice versa. That is particularly so as there is no flavour in the plethora of allegations, that in respect of conduct alleged to have been engaged in by them, the nominee directors were acting in concert or pursuant to some resolution of, or direction by, a particular board of directors. Furthermore, the inference on which the appellant relied is that the procuring and inducing was done by all of Mango, BMD Properties and BMD Holdings, a rather unlikely proposition.

[60] During the hearing, counsel for the appellant tentatively formulated the following further particular of the allegation in paragraph 165:

> "… the conduct of Ingram, Bird, Rex and Varitimos was in breach of their respective duties to KHD, to the benefit of the BMD Group and to the benefit of KHD as hereinbefore pleaded in paragraph 155 to 156 and paragraph 160 to 163."

[61] No such attempt to improve this part of the pleading, apart from the substitution of particular (iv) to paragraph 165, was made at first instance. Whether the primary judge erred as alleged by the appellant is to be determined by reference to the pleading before him. There was no formal application for leave to make such amendment and it was not put forward as the precise particular the appellant would wish to add. Having regard to the history of the pleadings, the primary judge had ample justification for not granting leave to amend that was not confined to a draft which the respondents had an opportunity to consider.

[62] If the primary judge did mistakenly construe one aspect of paragraph 165 as alleged, the mistake did not affect his conclusion that the allegations in the paragraph were unsupported by requisite allegations of material fact and that the paragraph should be struck out.

[63] This ground of appeal was not made out.

Grounds 5–7 – The striking out of paragraph 4(g) against the first, fourth, fifth and sixth respondents and the directions that the amounts of all claims made under that paragraph against the tenth and eleventh respondents be quantified

[64] The appellant accepted that if paragraph [165] was properly struck out, the claim under 4(g) in respect of BMD Properties was unsustainable. It was submitted, however, that the pleading supported claims for relief against BMD Holdings, Mezzanine and Prime.

[65] At first instance, the appellant put forward a proposed new paragraph 168 with a view, amongst other things, to supporting its claims under paragraph 4(g). The proposed

new paragraph did not find favour with the primary judge who did not give leave to amend the fourth statement of claim to include it. There was no appeal against the primary judge's orders in that respect.

[66] The appellant's outline of argument identified no basis for sustaining paragraph 4(g) in so far as BMD Holdings, Mezzanine and Prime were concerned beyond stating that Mezzanine's conduct alleged in paragraph [57] involved the giving of time and the variation of loan agreements with Prime, a related company, such that KHD as surety of Prime's obligations was materially prejudiced by the accruing of substantial additional interest in Mezzanine's favour. It was contended that the conduct was *prima facie* oppressive. Reference was then made to s 233 of the *Corporations Act* and it was asserted that the primary judge's approach involved imposing an unwarranted limit on the powers conferred on the court by s 233.

[67] Paragraph 57 alleges that Mezzanine since 3 September 2005 failed to demand repayment by Prime of the money owing by Prime under the Mezzanine-to-Prime FA and since 15 June 2010 agreed to give Prime additional time to repay and has otherwise agreed to vary the terms of the Mezzanine-to-Prime FA.

[68] Paragraph 158 alleges that the conduct of Mezzanine pleaded in paragraphs 57 and 59 is conduct in KHD's affairs contrary to the interests of its members in that the conduct has allowed interest to accumulate under the Mezzanine-to-Prime FA and the BBREF/BDMP-to-Mezzanine FA in favour of Mezzanine and BMD Properties respectively. Such accumulation under the Mezzanine-to-Prime FA is alleged to be to the prejudice of KHD as surety of Prime's obligations under that agreement.

[69] Paragraph 59 alleges that the drawdown made under the BBREF/BDMP-to-Mezzanine FA was on or about 3 September 2004.

[70] As the primary judge pointed out when considering the proposed new paragraph 168, it is not alleged that Prime could or would have made repayments to Mezzanine, and no facts are alleged which arguably establish a basis for a claim by KHD against Mezzanine for recovery of, or compensation in respect of, the accumulated interest.[25] Presumably the allegations that would be relied on in respect of Prime are those in paragraph 157 which, in turn, pick up paragraphs 45, 55 and 82. The wording of paragraph 157 is substantially the same as 158 except that in sub-paragraph (a) of the former, there is a reference to the Tricom-to-Prime FA rather than the BBREF/BMDF-to-Mezzanine FA and in sub-paragraph (b), there is a reference to the Tricom-to-Prime FA as well as the Mezzanine-to-Prime FA.

[71] Paragraph 55 alleges a failure to demand repayment by Mango of the money owing under the Prime-to-Mango FA and the agreement to give Mango additional time to repay and to vary the terms of the Prime-to-Mezzanine FA.

[72] The observations made in respect of Mezzanine also apply to Prime with necessary adaptations to take into account the different securities.

[73] The pleading does not allege that any of the unidentified losses referred to in paragraph 4(g) were caused by either of Prime or Mezzanine.

[74] The allegations against BMD Holdings of conduct contrary to the interests of the members of KHD are contained in paragraph 159 which refers to the conduct of BMD Holdings in paragraphs 78, 80 and 83.

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25 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [83].

[75] Paragraph 78 alleges an assignment of the April 2007 Tricom-to-Prime FA to BMD Holdings. Paragraph 80 alleges that on 26 August 2007, BMD Holdings, Prime and CBA-CS entered into a "Recognition Deed" under which BDM Holdings was added as a party to the "Security Trust Deed as Junior Beneficiary, in substitution for Tricom." Paragraph 83 makes allegations of failure to demand repayment of moneys and the giving of additional time to pay under the Tricom-to-Prime FA.

[76] As with the allegations in respect of Mezzanine and Prime, paragraphs 159, 78, 80 and 83 do not disclose any basis for concluding that the conduct complained of was causative of loss to KHD or the appellant.

[77] At first instance, the appellant attempted to remedy this deficiency by reliance on the proposed paragraph 168, but the attempt failed. Again, the fact that there may be jurisdiction for a court to grant the relief claimed under s 233 of the *Corporations Act* in appropriate circumstances does not lead to the conclusion that the appellant is entitled to claim any relief within the jurisdiction of the court, irrespective of the inappropriateness of that relief to the appellant's pleaded case.

[78] The primary judge did not err in the manner alleged nor did the primary judge err as alleged in giving directions in respect of the quantification of the appellant's claims. The appellant asserted in its outline of argument in respect of the relief under s 233, that any requirement in the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR) for the appellant to plead or particularise the loss referred to in paragraph 4(g), would be constitutionally invalid as tending to "alter, impair or detract" from the operation of the remedial scheme created by s 233 of the *Corporations Act*. This was said to be because loss is not an element of the statutory cause of action for oppression and is therefore not a material fact required to be alleged under r 149(1)(b). Moreover, the appellant claims compensation not damages and r 155 of the UCPR refers to the former, not the latter.

[79] Another argument advanced was that it is impossible to identify with precision the amount of the appellant's loss at this early stage of the proceeding as that will depend on the relief granted.

[80] It is unnecessary to consider the constitutional issue. In oral argument senior counsel for the appellant disavowed reliance on any constitutional point. He also accepted that a commercial list judge dealing with a matter on the commercial list had power to give directions of the nature of those under consideration. The concession was warranted. Clause 18 of Practice Direction 3 of 2002 in respect of the commercial list states:

> "Commercial List Judges may make such orders and give such directions as appropriate to ensure the just, efficient and expeditious disposal of cases."

[81] Rule 368(1) of the UCPR also confers case management powers on judges that would permit the giving of directions such as those under consideration. In view of the scope of such powers it is unnecessary to debate whether "damages" in r 155 includes reference to claims for equitable compensation. The point is of academic interest only but I note that sub-rule (2) refers to "loss or damage suffered", suggesting that a restrictive meaning should not be given to "damages".

[82] Having regard to the complexity of the pleading and the absence of particularisation of the allegations of loss and damage, the primary judge's directions in respect of

loss, damage and compensation were plainly appropriate. As things now stand, it is possible only to speculate as to the likely quantum of such claims and their composition and calculation. It is not the case, as the appellant argues, that quantification should be deferred until the court has determined the relief that ought be granted. It may be that if the appellant is successful, some of the particularisation provided pursuant to the primary judge's directions will need to be disregarded, revisited or supplemented. If the matter goes to trial and the appellant is unsuccessful, it will be in the same position as most unsuccessful plaintiffs who claimed damages or equitable compensation. Quantification of claims serves the fundamental purposes of fully informing defendants of the claims against them to enable them to: assess the merits of those claims; decide whether to contest any of them; formulate offers of settlement and, if necessary, prepare to meet them. In this, case having regard to the variety of claims and the complexity of the allegations relating to loss, damage and compensation, proper particularisation is even more desirable than usual.

[83] The appellant failed to establish this ground.

Ground 3 – The primary judge erred in determining that paragraphs 131–134 and 136 of the statement of claim were irrelevant and should be struck out

[84] The primary judge found that paragraphs 131–134 and 136 of the statement of claim were irrelevant and unnecessary. In the course of his discussion about these paragraphs, he expressed the concern that they were:[26]

> "… possibly a stalking horse for the contention that Mr Varitimos and Mr Rex have acted to benefit companies in the BMD Group to assist in their alleged insolvency rather than acting in good faith and in the best interests of KHD, in breach of s 181 of the [*Corporations Act*], or so as to gain an advantage for the BMD defendants, in breach of s 182 of the [*Corporations Act*]."

[85] The primary judge observed that if his concerns were justified, as the allegations were of improper conduct or fraud, they would need to be clearly pleaded.

[86] Paragraphs 131 and 132 respectively make allegations of the parlous financial condition of BMD Holdings and the BMD Group "since at least 30 June 2011" and "since 30 June 2012".[27] Paragraphs 133 and 134 deal with the financial position "since at least 30 June 2011" of Mango and KHD. Paragraph 136 alleges that the financial solvency of the BMD Group, BMD Holdings and Mango depends upon the recovery by Mango and the other companies within the BMD Group, including Prime, of the amount of $113.5m said to be owing by Mango under the Prime-to-Mango FA.

[87] The appellant criticised the primary judge's assertion in paragraph [113] of his reasons that he did not understand the appellant's submission to the effect that paragraphs 131–134 and 136 "identif[y] contextual factual matters against which the commercial fairness and propriety of the BMD Defendants' conduct is to be judged". The criticism was not justified. It is apparent that the primary judge was not asserting difficulty in comprehending the meaning of what was said. His point, it may be inferred, was that the submission provided no basis for the allegations.

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26 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 at [115].

27 Record at 127.

[88] The appellant argued that the allegations in paragraphs 131–134 and 136 were directly relevant to assessing whether the conduct alleged in respect of Varitimos and Rex in paragraph 140 was contrary to the interests of KHD. If, as alleged, the BMD Group was in a poor financial position, the failure to take action to protect KHD's position, including to challenge the validity of the securities granted over KHD's property, was much more likely to be contrary to the interests of KHD. If the BMD Group went into insolvency, the Group's creditors would have access to KHD's property to the detriment of its shareholders.

[89] Paragraph 163 alleges that the conduct of Varitimos and Rex alleged in paragraph 140 is conduct in the affairs of KHD contrary to its interests. Paragraph 140 alleges that Rex and Varitimos as directors of KHD failed and refused to act as set out in paragraph 138(a)–(h). Those sub-paragraphs particularise how "an honest and reasonable person in the position as a director of KHD complying with his or her duties as a director, and with knowledge of the facts set out in paragraphs 131 to 136" would have acted.[28]

[90] If the conduct alleged in each of 138(a)–(h) was conduct a hypothetical director would have engaged in, it is difficult to see how knowledge of the matters in paragraphs 131–134 and 136 would have affected that director's decision.

[91] Sub-paragraph (a) states that the hypothetical director would have "challenged, by court proceedings if necessary, the amount alleged to be owing under the Prime-to-Mango FA and the Prime-to-Mezzanine FA".[29] If there was doubt about the amount owing that could be resolved only by such a challenge, presumably a reasonable director would attempt to have the challenge made. However, the director would do so irrespective of his or her knowledge of the financial resources of companies in the BMD Group.

[92] Such a decision would also be dependent on the hypothetical director's belief, informed by legal advice, of the prospects of succeeding on a court challenge. The hypothetical director would not have challenged the amount alleged to be owing, irrespective of what he knew about the matters in 131–134 and 136 if satisfied that the amount alleged to be owing was accurate, or that the prospects of a legal challenge succeeding to any material degree were modest. None of these obvious matters are alleged and the allegations are thus fanciful as they presently stand.

[93] Sub-paragraph (b) alleges that such a director would have "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".[30] Again, if there was reasonable doubt about any such amount which required dispelling, a reasonable director would take appropriate steps to do so. The financial resources of companies in the BMD Group would have no bearing on that decision.

[94] Sub-paragraph (e) refers to a hypothetical director seeking "…to challenge the validity of the securities granted over the Property by KHD as surety for the obligations of companies within the BMD Group".[31] If there was merit in this course of action and if there was reasonable doubt about the validity of the securities, a reasonable

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28 Record at 129.
29 Record at 129.
30 Record at 129.
31 Record at 129.

director might decide to act as alleged. But again, if the financial resources of companies in the BMD Group were relevant to the decision making process they were of marginal relevance, at best.

[95] The appellant contended that the paragraphs under consideration were within the relevant matrix of facts, against which the alleged conduct needed to be judged in order to determine whether it was oppressive. Reference was made to *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*[32] and *Hunter v Organic & Natural Enterprise Group Pty Ltd*.[33]

[96] In *Hunter*, reference was made[34] to the primary judge's observation that in determining whether or not conduct is unfair within the meaning of s 233 of the *Corporations Act* regard should be had to "… the entire context in which the conduct takes place. Individual acts are not to be looked at in isolation and, relevantly … the entire course of conduct relied upon by the plaintiff is to be judged as a whole".

[97] In *Youlden Enterprises*, Martin CJ, referring to conduct alleged to fall within s 232 of the *Corporations Act*, observed that the question whether particular conduct fell within the section was "…a process of characterisation undertaken in the context of the evidence as a whole and against the particular findings of fact that are made from that evidence".[35]

[98] The above propositions may be readily accepted but they have little to do with the requirements of the UCPR relating to pleadings. Rule 149 requires a pleading to be as brief as the nature of the case permits and to contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved. The paragraphs under consideration are not material facts and their inclusion contravenes the brevity requirement. The pleading, even without the addition of the surplusage in paragraphs 131 – 134 and 136, is long and difficult to comprehend. The primary judge did not err in ordering the paragraphs be struck out.

[99] This ground was not made out.

Ground 4 – The primary judge erred in striking out paragraph 4(b) of the prayer for relief

[100] It was submitted by the appellant that the primary judge erred in concluding that no allegations other than those in paragraph 165 supported the orders sought in paragraph 4(b).

[101] The appellant's argument proceeded as follows. The primary judge rejected the contention that the conduct referred to in paragraphs 157–159 was not conduct in the affairs of the company and it is difficult to see how it could be said not to be contrary to the interests of KHD as a whole. At general law, the conduct in question would discharge KHD's obligations as surety guaranteeing the Mezzanine-to-Prime FA and Tricom-to-Prime FA. Accordingly, an appropriate order to remedy the effect of the oppression to KHD in the particular case would be that sought in paragraph 4(a) of the statement of claim, a paragraph which was not struck out. Paragraph 4(b) of the relief sought is simply a different, and probably cheaper and simpler way, of achieving the same result.

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32 (2006) 33 WAR 1 at [30].
33 [2013] QCA 331 at [38].
34 *Hunter v Organic & Natural Enterprise Group Pty Ltd* [2013] QCA 331 at [38].
35 (2006) 33 WAR 1 at [30].

[102] Paragraph 4(b) sought: "An order discharging the Mezzanine-to-Prime FA and the Tricom-to-Prime FA". The primary judge observed in paragraph [104]–[105] of his reasons:

> "[104] However, [the] conclusion [that there is a power under s 233 of the *Corporations Act* to grant the type of relief claimed in paragraph 4(b)] does not answer the question in this case about the claim in par 4(b) of the relief. Each of the Mezzanine-to-Prime FA and the Tricom-to-Prime FA was entered into in circumstances where a lender who was not a party to the joint venture arrangements between KHD and Mio or the shareholders agreements and arrangements within KHD made the advance to Prime. KHD's involvement in the lending to Prime was as a guarantor and third party mortgagor. There is no allegation of any other relationship involving KHD and either of Mezzanine or Tricom as lender to Prime. Once par 165 is struck out, the complaints against the lenders about the debts owing under those facility agreements are limited to the allegations that the lenders allowed Prime as borrower not to repay debts and thereby allowed interest to accrue.
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> [105] In my view, those facts do not, on their face, support a reasonable basis for the claim that the court would make an order discharging the Mezzanine-to-Prime FA or the Tricom-to-Prime FA. There is no articulated reason why Prime's obligations to its lenders should be struck down as the appropriate means of ending any oppressive conduct of KHD's affairs."

[103] On the face of it, the primary judge's views seem unexceptional.

[104] If as the appellant contended the conduct relied on by it would justify an order discharging KHD's obligations as guarantor under the Mezzanine-to-Prime FA and the Tricom-to-Prime FA it does not follow that the quite different order sought by paragraph 4(b) was justifiable by reference to paragraphs [157]–[159]. Conduct that may be sufficient to discharge a guarantor of its obligations may have little or no bearing on the relief open or likely to be granted under s 233 in a particular case.

[105] In this case, the appellant claims an order discharging two loan agreements. That would appear to involve, in the case of the Mezzanine-to-Prime FA, relieving Prime of its obligation to repay Mezzanine the principal outstanding under the Mezzanine-to-Prime FA together with capital and outstanding interest. It would also involve relieving Prime of its obligation to its lenders under the Tricom-to-Prime FA.

[106] The primary judge, although accepting that there may be jurisdiction to make such an order, was unable to discern anything in paragraphs [157]–[159] that would support such remarkable relief. There is nothing. It was appropriate that 4(b) be struck out.

The costs issues

[107] The appellant applies for an extension of time within which to appeal against paragraphs 3 to 6 inclusive of an order made on 3 October 2013 ordering the appellant to pay the named respondents' costs on the indemnity basis of their respective applications to strike out the third further amended statement of claim (the third statement of claim).[36]

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[36] Orders of 19 August 2013.

[108] On 19 August 2013 the primary judge ordered that the third statement of claim be struck out. There was no appeal from that order. The order of 3 October 2013 dealt with the costs of the matters determined on 19 August 2013. There are two grounds of appeal relied on in the notice of appeal. They are that the primary judge erred in awarding indemnity costs on the basis that he said that the appellant made:[37]

> "a) excessive pleadings of fraud;
>
> and agreed that Mio Art made:
>
> b) an unmaintainable allegation of an exception to indefeasibility in relation to Tasovac."

[109] The appellant argued that it was not appropriate for the primary judge to characterise the pleading as one which made "excessive allegations of fraud". The essential question was, and remains, whether honest and reasonable persons in the position of the directors would have conducted themselves in relation to the joint venture and KHD in the manner alleged in the second and third statements of claim. These are not allegations of objective dishonesty. There was no pleading of "actual fraud" in the third statement of claim.

[110] The basis of the allegation that some of the respondents' conduct was fraudulent and dishonest is set out in paragraph 39 of the appellant's submissions at first instance where it is said:[38]

> "At present, the law as to what constitutes a 'dishonest and fraudulent design' is not certain, the court in *Farah* merely indicating that not every breach of trust or fiduciary duty is dishonest or fraudulent, but the Western Australian Court of Appeal has confirmed that it does not require conscious wrongdoing on the part of the trustee or fiduciary and that if conduct can be regarded as fraudulent or dishonest according to equitable principles that will be sufficient. Accordingly … the allegation of a dishonest and fraudulent scheme in [identified paragraphs], in the sense of a scheme to which honest men in the circumstances would not be a party, is sufficient."

[111] The pleaded conduct was found not to amount to a conspiracy as alleged in paragraph 100 of the third statement of claim but was sufficient to justify the description of "fraudulent and dishonest" within the above principles.

[112] The initial hearing before the primary judge was adjourned to enable the appellant to investigate a possibility of actual fraud and to consider some matters raised by the primary judge. In the period between that time and the next hearing, fraud in relation to the execution of documents under a power of attorney was pleaded. That led to the filing of affidavit evidence by the BMD respondents which inferred that "this may have been done in error". On the basis of the limited evidence provided, the appellant did not continue with the allegation of actual fraud in the fourth statement of claim.

[113] As for the indefeasibility issue, the allegations in the third statement of claim did not seek to interfere with the beneficial entitlement to the subject mortgages "in so far as Tasovac held the benefit of them for the National Australia Bank". It was

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37 See Record book No 10321/13 at 256.

38 See Supplementary Record Book Vol 1 in No 10321/13 at 39.

alleged, however, that in so far as Tasovac held the mortgages pursuant to the security and a trust for and on behalf of BMD Holdings and/or Mezzanine, it held them on a constructive trust for KHD, except in so far as they were security for the obligations of Tasovac to the National Australia Bank.

[114] The reference in paragraph 212 of the primary judge's reasons 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" as being at odds with the effect of cases such as *Breskvar v Wall* [39] unfairly misrepresents the submissions made by the appellant. Those submissions contained the following:

> "[The appellant] does not contend that the security trust deed is of no effect as between [the seventh respondent] and the BMD [respondents]. 'Statutory indefeasibility under ss 182 and 184 of the *Land Title Act* 1994 (Qld) does not result in a void instrument being of effect'. Rather those provisions confer a statutory interest on the registered proprietor … for certain purposes. The question for whom does [the seventh respondent] hold its interest, after accounting to NAB for $13.75M – for the benefit of KHD or the beneficiaries under the security trust deed, BMD Properties and BMD Holdings? – is not a matter affected by the indefeasibility of [the seventh respondent's] title."

[115] The "excessive pleadings of fraud" point will be considered first. The primary judge summarised his reasons for ordering costs on an indemnity basis as follows:[40]

> "In my view, the reasons why it should be ordered that [the appellant] pay the costs of the strike out applications to be assessed on the indemnity basis are those advanced by the BMD [respondents] and [the seventh respondent]. [The appellant] was well informed from early on that its allegations of an overarching intention and agreement, described in the 3FASOC as a fraudulent scheme, were challenged as insufficiently supported for an allegation of fraud. In the face of the challenges, [the appellant] twisted and turned and made some minor variations, but doggedly persisted in the core content, and in some respects added to it, as described in the reasons for judgment on the applications to strike out and dismiss, until the order made striking out the [third statement of claim]. That was the basis of the finding of 'its excessive pleadings of fraud.'"

[116] The primary judge's reference to the reasons advanced by the BMD respondents and Tasovac are, in respect of the BMD respondents, persisting in defective pleadings despite ample and repeated notice of their deficiencies and "excessive pleadings of fraud". Tasovac's submission referred to by the primary judge criticised "… the making of allegations that ought never to have been made and the undue prolongation of a case by a groundless contention … the pleading against it of an unmaintainable allegation of an exception to indefeasibility".[41]

[117] In his reasons delivered on 19 August 2013, determining the strike out applications, the primary judge found that:

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39 (1971) 126 CLR 376.

40 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271 at [46].

41 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271 at [44].

(a) there was an insufficient basis for making a number of the allegations in paragraph 100 of the third statement of claim. That paragraph alleged fraud;

(b) there was an "absence of pleaded facts for the inference" that the 10 companies identified in paragraph 100 joined in the fraud. Five of those companies were not part of the joint venture between the original shareholders and the BMD respondents and were not bound by the joint venture agreements;

(c) although the fraud ultimately advanced by the appellant in its submissions was narrower than the allegations contained in paragraph 100, that was "no answer to a contention that the allegations were overreaching";[42]

(d) there was an insufficient basis for alleging that Mr Thompson (a director of Mango) and Mr Barrett (company secretary of certain BMD companies) in executing the Mango power of attorney were fraudulent and dishonest;

(e) there was an insufficient basis for alleging that Mr Bird and Mr Ingram were "fraudulent and dishonest" with respect to an allegation that their knowledge of a power of attorney was deliberately withheld;

(f) there were no facts relied on to support the contention that Mr Bird and Mr Ingram "fraudulently and dishonestly" breached their directors' duties in causing and permitting KHD to enter into certain securities; and

(g) there was insufficient basis for making allegations of knowing participation in a fraudulent scheme against Mr Duncan and certain respondents on the basis that they were directors.

[118] The primary judge also criticised the pattern in the pleading of making an allegation and referring to a host of prior allegations in support of it. For example, paragraph 278 alleged:

> "Further, or in the alternative, in the premises alleged, each of the Other Defendants knowingly induced or procured Bird, Ingram, Varitimos and Rex to breach the Director's Duties to KHD for their own benefit or for the benefit of other companies in the BMD Group and B&B Group."

[119] That allegation was particularised as follows:

> "[The appellant] relies upon the whole of the conduct pleaded in paragraphs (1) to (258) hereof."

[120] Many of those paragraphs contained allegations of fact which could have no conceivable bearing on the allegations and which, in many cases, were not even allegations of conduct.

[121] None of the findings discussed above were appealed against and they form the background against which the costs orders were made. They explain the primary judge's finding that:[43]

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42 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 211 at [141].

43 *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013] QSC 271 at [41]–[42].

> "… [A] careful reading of the [third statement of claim] revealed that there was a problem in identifying with any precision the case which [the respondents] would have to meet. A serious problem of that kind is no mere technicality or matter of fashion – it goes to the very heart of the fairness of the adjudicative process…
>
> Secondly, in any event, the narrative defect was but one of a series of major complaints about the [third statement of claim]. To focus on that point overlooks the central role played by paragraph [100] in the decision made upon the applications, which was an inadequate pleading of a fraudulent scheme against the [respondents] and others over a period of more than 8 years."

[122] The appellant claimed that the primary judge erred in failing to appreciate that it did not allege "actual fraud" but only that the respondents had engaged in a "dishonest and fraudulent design" as that term is used in the second limb of *Barnes v Addy*.[44] That contention is not within the grounds of appeal and it is inconsistent with some of the findings of the primary judge referred to above. It also does not sit very well with paragraphs 277, 278 and 279 which provided:[45]

> "277. 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.
>
> 278. Further, or in the alternative, in the premises alleged, each of the Other Defendants knowingly induced or procured Bird, Ingram, Varitimos and Rex to breach the Director's Duties to KHD for their own benefit or for the benefit of other companies in the BMD Group and the B&B Group.
>
> **Particulars**
>
> The plaintiff relies upon the whole of the conduct pleaded in paragraphs [1] to [258] hereof.
>
> 279. Further, or in the alternative, in the premises alleged, each of the Other Defendants knowingly participated in a fraudulent and dishonest scheme (in the sense that it was not a scheme to which honest men in the circumstances would be parties) 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 with knowledge of the breach of Director's Duties by Bird, Ingram, Varitimos and Rex to KHD and the

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44 (1874) LR 9 Ch App 244.

45 Record at 81–82.

dishonesty of Thomson and Barrett and are thereby liable to account as constructive trustees.

Particulars

(i) the plaintiff relies upon paragraphs [1] to [258] hereof;

(ii) the fraudulent and dishonest nature of the scheme arises from the Parties' Intentions and the Parties' Agreement and the conduct of Bird, Ingram, Thomson, Barrett, Varitimos and Rex;

(iii) the knowledge of the Parties arises because of the knowledge of Bird, Ingram, Rex, Varitimos, Thomson and Barrett."

[123] The foregoing paragraphs contain or refer to conduct involving actual fraud engaged in by certain respondents. Paragraph 100 alleges knowing participation by named respondents in a clandestine scheme or clandestine schemes to deliberately injure KHD and to wrongfully benefit the respondents financially to the detriment of KHD and the original shareholders.

[124] In light of the unchallenged finding referred to above, it is difficult to understand why an indemnity costs order was not well within the proper exercise of the primary judge's discretion. There was nothing unconventional about the primary judge's approach. An indemnity costs order was open even without reference to the unsupported allegations of fraud.

[125] Rule 702 of the UCPR provides that unless the rules or an order of the court otherwise provides, costs must be assessed on the standard basis. Rule 703 enables costs to be awarded on the indemnity basis.

[126] In *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)*,[46] it was said that:

> "The authorities do not support the proposition that simply instituting or maintaining a proceeding on behalf of a client which has no or substantially no prospect of success will invoke the jurisdiction. There must be something more namely, carrying on that conduct unreasonably".[47]

[127] Those observations were referred to with apparent approval in *Schache v GP No I Pty Ltd*[48] and *QUYD Pty Ltd v Marvass Pty Ltd*:[49]

> "Persistence in a hopeless case has been recognised as a circumstance which might make it appropriate for an indemnity costs order to be made."

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46 (1998) 156 ALR 169 at 236.

47 *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* (1998) 156 ALR 169 at 236, referred to in *Martinovic v Queensland Transport* [2005] 1 Qd R 502 at 508; *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41 at 52 per Fraser JA, McMurdo P and Philippides J agreeing.

48 [2012] QCA 233 at [41].

49 [2009] 1 Qd R 41 at 52.

[128] This Court in *Di Carlo v Dubois*[50] relevantly observed:

> "… [T]he court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity. Any shift to a general or common rule that indemnity costs should be the order of the day is a matter for the legislature or the rule maker."

[129] This being an application for an extension of time for an appeal against an interlocutory order, the following statement of Sir Frederick Jordan in *Re the Will of F B Gilbert (dec)* [51] is apposite:

> "… I am of opinion that … there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal."

[130] Those oft repeated sentiments may be supplemented by the following observations of Phillips JA, in *Capital Finance Corporation (Australasia) Pty Ltd v Peter Pan Management Pty Ltd (in liq)*:[52]

> "An appeal against the exercise of discretion is always difficult to sustain, and particularly so where the appeal is over costs. The appellant carries a heavy onus in seeking to establish error in such cases and where, as here, there is no matter of principle involved and the questions raised relate to the facts, the task is the more difficult. When the arguments could have been, but were not, put below to the judge during argument on costs, the task, in my opinion, is all but insuperable…"

[131] The other issue in relation to costs is whether the primary judge erred in accepting Tasovac's submission that the appellant made "an unmaintainable allegation of an exception to indefeasibility in relation to Tasovac".

[132] Tasovac held a trust fund on the terms set out in a security trust deed as follows:

(a) first, held for the senior beneficiaries – currently National Australia Bank;

(b) second, for the junior beneficiaries – currently the first respondent BMD Holdings; and

(c) third, for the Mezzanine beneficiaries – currently the sixth respondent being Mezzanine.

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50 [2002] QCA 225 at [38].
51 [1946] 46 SR (NSW) 381.
52 [2003] VSCA 93 at [9].

[133] The securities held pursuant to the security trust deed included four real property mortgages registered under the *Land Title Act* 1994 (Qld).

[134] The relief claimed in the third statement of claim included an order setting aside the mortgages. The solicitors for Tasovac wrote to the solicitors for the appellant on 14 March 2013 seeking clarification that the appellant did not allege fraud or any other exception to indefeasibility in respect of the securities held by Tasovac. The solicitors for the appellant responded on 14 March:

> "In relation to the specific concern raised by you in this paragraph, we wish to make it clear insofar as Tasovac holds the benefit of the securities for NAB we have quite deliberately not sought to allege any exception to indefeasibility against the securities held by Tasovac on behalf of NAB. However, insofar as your client holds those securities for the benefit of the other defendant parties to the proceedings then it is our client's intention that they are not entitled to the benefit of indefeasibility, or that alternatively, the beneficial interest in the property, and the securities, is held for Tasovac for the benefit of KHD."

[135] The claim for relief remained. It included claims for orders that the mortgages be set aside. Unsure of the appellant's position, Tasovac persisted in its challenge to the third statement of claim.

[136] Tasovac succeeded in its application for the striking out of the third amended statement of claim on the basis that it disclosed no reasonable cause of action against it and had a tendency to prejudice or delay the fair trial of the proceedings. It was relevant to the costs order in favour of Tasovac that it had been drawn into the morass created by paragraph 291 in the third statement of claim.

[137] There is no basis for concluding that the primary judge erred as alleged. For the above reasons, the appeal against the costs orders made on 3 October 2013 has no prospects of success. For that reason leave to extend time in which to appeal should not be granted.

Conclusion

[138] I would order that the appellant's application in CA 10321/13 for an extension of time within which to appeal against the costs orders be dismissed with costs.

[139] I would also order that the appeal against the orders made on 3 April 2014 in CA 3670/14 be dismissed with costs.

[140] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.