SUPREME COURT OF QUEENSLAND

CITATION:	*Comprite Pty Ltd v Returned & Services League of Australia (Queensland Branch)* [2010] QSC 355
PARTIES:	**COMPRITE PTY LTD** **ACN 010 486 736** (plaintiff) **v** **RETURNED & SERVICES LEAGUE OF AUSTRALIA (QUEENSLAND BRANCH)** (defendant)
FILE NO/S:	BS 1047 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2010; Further submissions received 9 February 2010
JUDGE:	Daubney J

ORDER:

1. (a) The defendant's application filed 4 September 2009 is dismissed.

(b) The defendant shall pay the plaintiff's costs of and incidental to that application, to be assessed on the indemnity basis.

2. The defendant has leave to counter-claim against the plaintiff in the form of the draft counter-claim which is Exhibit "PGM-3" to the affidavit of Peter Glen Mylne sworn on 25 January 2010 and filed herein, such leave being limited to have effect only to the extent necessary to give effect to Order 3 below.

3. (a) The plaintiff shall have judgment upon the counter-claim, with costs thereof (including the costs of the plaintiff's application filed 14 October 2009), and including any reserved costs in respect of previous counter-claims in this proceeding and the costs of proceeding BS 942 of 2006, such costs to be assessed;

(b) The plaintiff shall be at liberty forthwith to

enter such judgment.

4. The defendant's application filed 25 January 2010 is otherwise dismissed, with costs.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where the plaintiff has sued for money owing – where the defendant has counter-claimed for monies which it asserts were paid to the plaintiff by mistake – where defendant has filed several versions of the counter-claim – where the counter-claim has repeatedly failed to identify the individuals who the defendant asserts held the mistaken beliefs it alleges – where previous versions of the counter-claim have been struck out – where specific orders have been made in relation to the filing of an amended counter-claim – where the defendant has applied for leave to deliver a further amended counter-claim – where the plaintiff has cross-applied for summary judgment on the counter-claim – whether leave to deliver the amended counter-claim should be granted – whether the plaintiff should have judgment on the counter-claim

Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 5

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175, applied
Comprite Pty Ltd v Returned & Services League of Australia (Queensland Branch) [2008] QSC 234, cited
Comprite Pty Ltd v Returned & Services League of Australia (Queensland Branch) [2009] QSC 163, cited
Mango Boulevard P/L v Spencer & Ors [2008] QCA 274, cited

COUNSEL: SL Doyle SC with PR Franco for the plaintiff
GA Thompson SC with R Clutterbuck for the defendant

SOLICITORS: Russell and Company for the plaintiff
Mylne Lawyers for the defendant

[1] Between about August 1997 and 29 December 2005, the plaintiff ("Comprite") conducted the management, marketing and promotion of art unions for the defendant ("the RSLQ"). By this proceeding, Comprite has sued the RSLQ for money alleged to be owing by the RSLQ to Comprite in respect of the last few art unions for which Comprite's services were provided.

[2] In defending this claim, the RSLQ has sought to plead a set off and counter-claim for monies which the RSLQ asserts were paid by it to Comprite by mistake. The general characterisations of the money said to have been overpaid to Comprite by mistake are:

(a) Mark ups charged by Comprite on printing and stationery costs (the RSLQ contending that its contractual obligation was only to reimburse Comprite for its actual costs), and

(b) List rental charged by Comprite for the use of certain databases (the RSLQ contending that the use of the databases was within Comprite's management fee charged under a Management Agreement entered into between the parties on 1 April 1999 and Comprite was not entitled to impose an extra charge for the use, or "rental", of these databases).

[3] The history of the RSLQ's attempts to properly plead this claim relying on allegations of overpayments by mistake, both in proceedings instituted by the RSLQ (BS 942/06) and as a counter-claim in the present proceeding is unfortunate, to say the least. The following chronology is instructive:

6 February 2006	The RSLQ commences proceeding BS 942/06 against Comprite claiming alleged overpayments
8 February 2006	Comprite commences present proceeding (BS 1047/06) against the RSLQ
23 March 2006	Comprite files an application for further and better particulars of the RSLQ's statement of claim
5 April 2006	de Jersey CJ orders the RSLQ to provide further and better particulars of its statement of claim
25 May 2006	Comprite files an application to strike out the RSLQ's statement of claim
8 June 2006	Muir J orders the RSLQ's statement of claim be struck out
5 July 2006	The RSLQ files an amended statement of claim in BS 942/06 (amended in whole) claiming alleged overpayments
21 August 2006	Comprite files an application to strike out the RSLQ's amended statement of claim
6 September 2006	The RSLQ files a further amended statement of claim claiming alleged overpayments
7 September 2006	Mullins J orders that the majority of the RSLQ's further amended statement of claim be struck out and orders the RSLQ to file and serve a further pleading by 28 September 2006
31 October 2006	Mackenzie J extends the time for the RSLQ to file and serve a further pleading to 15 December 2006

19 December 2006	The RSLQ files a further amended statement of claim (amended in whole) in BS 942/06 claiming alleged overpayments
17 January 2007	Comprite's solicitors request further and better particulars of the RSLQ's further amended statement of claim, including particulars of each person who held an allegedly mistaken belief in respect of each alleged overpayment
13 September 2007	Chesterman J orders that BS 942/06 and BS 1047/06 be consolidated, and that Comprite have the carriage of the consolidated proceeding
14 February 2008	Comprite files a further amended statement of claim
7 May 2008	Comprite files a second further amended statement of claim
22 July 2008	The RSLQ files a defence and counter-claim claiming alleged overpayments (including a claim for misleading and deceptive conduct)
28 July 2008	Comprite's solicitors write to the RSLQ's solicitors seeking further and better particulars of the defence and counter-claim, including particulars of each person who held an allegedly mistaken belief in respect of each alleged overpayment
20 August 2008	The RSLQ's solicitors refused to provide the requested particulars, asserting, inter alia, that the relevant states of mind were held by the RSLQ "as a body corporate"
26 September 2008	de Jersey CJ orders the RSLQ's counter-claim be struck out
22 October 2008	Mackenzie J orders the RSLQ to file and serve an amended pleading by 17 November 2008
18 November 2008	The RSLQ files an amended defence, set off and counter-claim by which it claims alleged overpayments
5 January 2009	Comprite requests further and better particulars of the RSLQ's amended defence, set off and counter-claim, including particulars of each person who allegedly held a mistaken belief in respect of each alleged overpayment

6 February 2009	The RSLQ provided some further and better particulars, but refused to provide particulars of each person who allegedly held a mistaken belief in respect of each alleged overpayment
25 June 2009	Byrne SJA orders that the amended counter-claim be struck out, and required delivery of a draft amended counter-claim by 14 August 2009
14 August 2009	The RSLQ delivers a draft amended counter-claim, some statements and a list of authorities
20 October 2009	RSLQ's application for leave to file and serve an amended counter-claim in the form of the draft delivered in accordance with the order of Byrne SJA and a cross-application by Comprite for judgment in respect of the RSLQ's counter-claim are heard by me
14 January 2010	While judgment in respect of the applications heard in October 2009 was pending, the RSLQ's legal advisers advise Comprite and the Court that the RSLQ wanted to reopen the matter to adduce fresh or new evidence, and that it would be filing an application to adduce further evidence in the proceedings in the following week
25 January 2010	RSLQ files an application for leave to deliver another version of its amended pleading (not the pleading which was the subject of the argument in October 2009, and not an application for leave to adduce further evidence on the application heard in October 2009)
3 February 2010	Hearing of this further application by the RSLQ
7 February 2010	Supplementary submissions by counsel for the RSLQ which, inter alia, confirm the position stated in oral argument that the RSLQ wished to further amend one paragraph of the draft pleading which was the subject of argument on 3 February 2010

[4] It will be apparent even from that skeleton chronology that one of the long-standing issues has been Comprite's request that the RSLQ identify, and the RSLQ's ongoing inability or failure to identify, the individuals who, on behalf of the RSLQ, held the allegedly mistaken beliefs and caused each alleged overpayment to be made under a mistake.

[5] In the course of giving the judgment by which he struck out the RSLQ's then version of its counter-claim, de Jersey CJ said:[1]

> "[12] The defendant seeks to mount a case of reliance (para 26(a)), to the effect that it made the payments in question "in reliance upon being charged by the plaintiff", presumably because of an implied representation that the amounts claimed were payable. It also mounts a case of "mistaken belief" that the amounts were due (para 26(c)(i)). The natural persons who, on behalf of the defendant corporation, did so rely, or hold that belief, should be particularized: *Australian Commercial Research and Development Ltd v Commonwealth* [1995] 2 Qd R 336, 339. The plaintiff sought such particulars and they were denied, on the basis that the defendant so relied "as a corporate entity". But the individuals involved should have been named, to enable the plaintiff to meet the claim.
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> [13] This is particularly significant in view of the affidavit of Mr Kay. He was the person in charge of art unions on behalf of the defendant for much of the relevant period. It was he who dealt with budgets and authorized payments. In his affidavit filed 4 September 2008, he deals in quite a detailed way with the budgetary and payment processes, leading to his assertion that "every charge which RSL Queensland paid to Comprite during my tenure as promoter was correct. There was no overcharging."
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> [14] The particular alleged overcharging which assumed prominence at the hearing before me concerns stationery and printing costs, and "mail list rental".
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> [15] Mr Kay explained the basis on which the plaintiff was entitled to charge, and did charge, for the former. Its entitlement was agreed upon at a meeting on 31 January 2001. The defendant's relevant deponent, Mr Mialkowski, was not involved with the art union committee at the time of that agreement. There is nothing in Mr Mialkowski's affidavit to suggest that the position he adopts, in denying various amounts to the plaintiff in respect of printing and stationery costs after the arrangement between the parties changed, is based on information given to him by any person who did participate at the meeting which led to the agreement.
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> [16] A fair reading of Mr Mialkowski's affidavit leads one to conclude that he has no particular factual foundation for the position he has taken in relation to those instances of alleged overcharging. Indeed, when he stopped making payments in those areas, on the basis of a suspicion as to the plaintiff's entitlement, he capitulated when the plaintiff sought the renewal of the payments. The contrast with Mr Kay's affidavit is important. This feature bears on whether the counter-claim in its present form can be resurrected, or whether the defendant should start again and thereby confront the precise basis for a formulation of its claim.
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> [17] The defendant relies of course on *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

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[1] *Comprite Pty Ltd v Returned & Services League of Australia (Queensland Branch)* [2008] QSC 234 at [12] – [18].

> [18] The counter-claim is presently inadequate in that it fails to identify the material facts going to why, as a matter of contract, the plaintiff was not entitled to the charges made; in that it fails to identify the natural persons who mistakenly made the payments; and in that it fails to specify the mode of calculation of the alleged excess."

[6] By October 2008, the RSLQ had still not filed an amended counter-claim, and Mackenzie J ordered that it file and serve an amended counter-claim by 17 November 2008, and further ordered that it be an amended counter-claim which:

> "... in respect of each alleged item of overcharging by the Plaintiff, specifies the amount of the alleged overcharging ... [and] the natural person or persons who's (sic) state of mind was the state of mind of the Defendant for the purpose of any alleged reliance, mistake or other allegation of state of mind of the Defendant."

[7] Whilst the RSLQ then filed an amended pleading on 18 November 2008, this further version clearly did not comply with the ruling of de Jersey CJ or the order of Mackenzie J. The solicitors for Comprite took issue with this, and in particular with the RSLQ's failure to provide particulars of the individuals whose state of mind was said to be that of the RSLQ for the purpose of any alleged reliance, mistake or other allegation of state of mind. This led to the application before Byrne SJA. On the hearing of that application, the RSLQ's solicitor swore an affidavit in opposition to the orders sought by Comprite saying, inter alia, that the RSLQ "contends that payment in each instance was made by [the RSLQ] as a corporate entity". The solicitor also swore that the identities of the individuals who signed the relevant cheques could be ascertained from records held by the RSLQ's bank, but that step had not been taken "because it is not [the RSLQ's] case that the state of mind of the actual signatories on the cheques is relevant to the state of mind of [the RSLQ] with respect to the payments".

[8] When giving judgment on Comprite's application to have the counter-claim struck out, Byrne SJA referred to both the judgment of the Chief Justice and the order of Mackenzie J to which I have also referred, and then said:[2]

> "[6] The present counter-claim was delivered on 17 November. It identifies members of a committee of the defendant who are alleged to have laboured under the pertinent mistakes.
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> [7] But the pleading does not identify the person(s) who functioned as the defendant's guiding mind in authorising the payments that are said to have been made by mistake.
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> [8] The plaintiff sought particulars to identify the persons who made the payments under the allegedly mistaken beliefs. That information was refused: a decision sought to be justified (see defendant's solicitor's letter of 3 February 2009) on the footing that "the payments were made by the [defendant], not by any individual or individuals…". The reasons of the Chief Justice and Mackenzie J's order were interpreted to require identification only of person(s) who entertained a mistaken belief, as distinct from the person(s) who made the payment while labouring under the mistakes, with the defendant's

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[2] *Comprite Pty Ltd v Returned & Services League of Australia (Queensland Branch)* [2009] QSC 163 at [6] – [17].

solicitor contending that "the [defendant] made the payments, and the issue is as to who, on behalf of the [defendant] made the mistake alleged." That stance was also taken at the hearing.

[9] A possible explanation for the reluctance to name those who authorised the payments is that those who were mistaken did not make the payments, and those who authorised the payments may have supposed that the alleged overpayments were not due, but paid them nonetheless, or else, when paying, have been indifferent to whether there was a legal liability to do so: see, generally, K Mason, J W Carter & G J Tolhurst, *Restitution Law in Australia*, 2nd Ed (2008) [416], [422]. At least that is what seemed to emerge as a distinct possibility from the evidence and, more importantly for present purposes, from yet another amendment to the counter-claim that was proposed during the hearing.

[10] Relevantly, the further amendments now advanced are to this effect: that if the persons who, on behalf of the defendant, laboured under the relevant mistakes had known the truth, they would have acted to prevent the payments being made by those others who actually caused them to be made.

[11] That new case is not pleaded in the alternative. So it assumes, it seems, that those who authorised the payments were not relevantly mistaken or else that any misapprehension on their part was not a cause of the payments.

[12] Nothing was cited to suggest that the new case is fairly arguable: not a case or commentary from anywhere; and that the proposition was advanced does not make it so.

[13] Assuming, as the proposal did, that leave is required to amend the pleadings to raise the new case, the discretion should be exercised against permitting amendments that are not shown to propound a fairly arguable case.

[14] What, then, should be done?

[15] Neither the amended pleading nor the particulars so far furnished identify the natural persons who authorised the payments, despite the Chief Justice having indicated that that should be done and Mackenzie J having ordered it. Nor does the current pleading clearly allege that those who paid were influenced by a mistake to do so. Those considerations, taken with the nine months that have elapsed since the Chief Justice struck out the counter-claim, suggest that affording the defendant yet another chance to plead (and properly particularise) a sensible case may well be pointless and only productive of more delay and expense.

[16] However, the mistakes alleged concern legal liabilities to pay money. So perhaps those who made (or authorised) the payments shared the mistake. And if the payment was made because of the mistake, there may be a right to recover. Moreover, the defendant's solicitors have sworn an affidavit which indicates that the defendant can identify at least many of those who authorised the relevant payments.

[17] The non-compliance with Mackenzie J's order and the unsatisfactory state of the pleading and particulars require the material paragraphs of the counter-claim to be struck out. But the defendant should be afforded a (probably final) opportunity to attempt to plead appropriately, but on terms, as to which I shall hear the parties. These might include that there be delivered with the proposed counter-claim: (i) proper particulars; (ii) a letter from the defendant's solicitor certifying that those who settle the new pleading, after proper enquiry into the facts and the law, have formed the opinion (if they do) that the newly pleaded case has reasonable prospects of success; and (iii) references to the cases, commentaries and any statutory provisions to show that the new pleading advances a case that has reasonable prospects of success."

[9] After hearing further from the parties, Byrne SJA made the following order on 25 June 2009:

"1. The Further Amended Counterclaim filed on 17 November, 2008 is struck out.

2. The defendant may file and serve a further counterclaim in accordance with the following orders and directions.

3. The defendant shall pay the plaintiff's costs of and incidental to the Application on an indemnity basis, such costs to be assessed by STEPHEN HARTWELL, of Hartwells Legal Costs Consultants.

4. The Application is otherwise adjourned to a date to be fixed, to be relisted upon seven days written notice.

THE COURT DIRECTS THAT:

1. By 4.00 pm on Friday, 14 August, 2009:-

(a) the defendant must deliver to the Plaintiff a draft of its proposed amended counterclaim;

(b) if such draft counterclaim contains any claim for recovery of sums allegedly paid under a mistake:-

(i) when delivering such draft counterclaim, the defendant must also deliver:-

A. a signed statement of the evidence of each person who the defendant wishes to allege held the mistaken belief pursuant to which he or she authorised the defendant to make the relevant payment(s) (which statement need not contain any other evidence); and

B. references to the cases, commentaries and any statutory provisions to show that the proposed new pleading would advance a case that has reasonable prospects of success; and

(ii) the defendant must (without derogating from the order of Mackenzie J made on 22 October, 2008) identify therein:-

A. each person who, on its behalf, authorised or made each such payment; and

B. the substance of the mistake under which such person(s) allegedly authorised or made each such payment.

2. If the defendant does not, by 4.00 pm on Friday, 14 August, 2009, deliver to the Plaintiff a draft of its proposed amended counterclaim:-

(a) The plaintiff shall thereupon have judgment upon the counterclaim, with costs thereof, including any reserved costs in these proceedings, and costs of proceedings BS 942 of 2006, such costs to be assessed; and

(b) The plaintiff shall be at liberty forthwith to enter such judgment.

3. If, by 4.00 pm on Friday, 14 August, 2009, the defendant delivers to the plaintiff a draft of its proposed amended counterclaim:-

(a) The plaintiff must, by 4.00 pm on Friday, 28 August, 2009 advise the defendant in writing whether it consents to the grant of leave to file and serve a counterclaim in terms of the draft, including (if it does not consent) a concise statement of its reasons therefor;

(b) If the plaintiff does not so consent, the defendant must, by 4.00 pm on Friday, 4 September, 2009, file and serve on the plaintiff:-

(i) an application for leave to file and serve such a counterclaim, returnable as soon thereafter as is mutually convenient to the parties' respective senior counsel; and

(ii) all affidavits which it proposes to read in support of such application."

[10] The directions made by Byrne SJA called for, inter alia, delivery by the RSLQ of a draft of its proposed amended counter-claim. As is apparent from the chronology above, such a draft was delivered and was then the subject of the application (contemplated by Direction 3(b) made by Byrne SJA) which was heard by me in October 2009.

[11] As is also apparent from the chronology, after that application was heard, the RSLQ, initially contending that it wished to adduce further evidence in respect of that application, came before me again on what was, as it transpired, another application for leave to deliver yet another version of the amended counter-claim ("the 2010 draft counter-claim"). It would seem that the first notice that was given to Comprite of the RSLQ's intention to seek leave in respect of this latest version of the counter-claim came when the RSLQ's solicitor's affidavit filed in support of the latest application was served on Comprite, presumably some time soon after it was sworn on 25 January 2010. In argument before me on the present application, counsel for the RSLQ confirmed that the application that had been heard in October 2009 was abandoned and that the current application was not "a case involving adducing fresh evidence in an extant application" but was "simply a new application supported by fresh material".[3]

[3] 3 February 2010, Transcript 1-4 ll 5-8.

[12] The starting point for the RSLQ's present application, therefore, is an understanding that this is not the application for which Byrne SJA expressly made provision in his order. Rather, it is a completely new application, not made in accordance with previous directions, seeking an outcome for which the RSLQ undoubtedly requires the Court's leave. The RSLQ has no entitlement to the order it now seeks. It had the opportunity to make an application for leave to file and serve an amended pleading pursuant to the orders of Byrne SJA, but has now abandoned that application.

[13] It is, therefore, appropriate to see whether there is any, let alone any satisfactory, explanation for the RSLQ bringing the current application. Comprite submitted that such explanations as are offered are illusory and that, given that the RSLQ by its present application effectively seeks an indulgence, the absence of an explanation militates strongly against an exercise of the Court's discretion in respect of the relief. The absence of an explanation is not, of course, determinative of the exercise of discretion, but the strength (or weakness) of any explanation, or the fact that there is no real explanation, are clearly relevant matters to be considered when determining whether, and if so how, to exercise the discretion.

[14] Comprite pointed to several matters which highlighted the paucity of such explanations as had been offered. In order to understand the arguments on this point, it is necessary to say something more about the various recent versions of the pleadings which have been produced by the RSLQ.

[15] It will be recalled that the order of Byrne SJA required that the RSLQ, as a preliminary, not merely deliver a draft of its proposed amended counter-claim but also deliver "a signed statement of the evidence of each person who [the RSLQ] wishes to allege held the mistaken belief pursuant to which he or she authorised [the RSLQ] to make the relevant payment(s) ...".

[16] The draft counter-claim which was the subject of the hearing in October 2009 ("the 2009 draft counter-claim") identified the following former officers of the RSLQ as relevant to the issue of the alleged payments by mistake:

(a) Mr Sydney Kay;

(b) Mr Raymond Townsend;

(c) Mr Geoffrey Opray;

(d) Mr George Mialkowski

[17] I will leave Mr Kay's position to one side for the moment, because he needs to be dealt with in a separate category from the other three.

[18] In respect of each of the other three officers, the 2009 draft counter-claim asserted that, during the time of their respective tenures, each was a signatory to the cheque account from which payments of Comprite's invoices were made, that each of them authorised payments by the RSLQ of invoices submitted by Comprite "and made or caused those payments to be made by signing cheques in payment of those invoices" (including invoices containing the alleged overcharge for printing and stationery and the data rental fees), and that those amounts were paid by reason of a mistake. The mistake pleaded in the 2009 draft counter-claim was as follows:

"(a) Each of Mr Mialkowski, Mr Opray and Mr Townsend authorised those payments and signed cheques on the defendant's bank account in respect thereof in circumstances where each of them was ignorant that, upon the proper construction of the Management Agreement:

(i) the services and functions which the plaintiff was obliged to provide and undertake under the Management Agreement included utilizing its buyer database in marketing the defendant's art unions;

(ii) the only fees payable to the plaintiff for the services and functions it was obliged to undertake under the Management Agreement were those fees specified in the Schedule to the Management Agreement.

(b) further, each of Mr Mialkowski, Mr Opray and Mr Townsend authorised those payments to be made by the defendant and signed the said cheques in the belief that the amounts stated on the invoices and remittance advices were due and payable to the plaintiff under the written Management Agreement in circumstances where the amounts stated on the invoices and remittance advices were not in fact due or payable to the plaintiff.

(c) further, in relation to the additional printing and stationary fees, each of Mr Mialkowski, Mr Opray and Mr Townsend, authorised the payments to be made by the RSLQ and signed the cheques in the mistaken belief that the invoices submitted for payment by the plaintiff to the defendant for printing and stationary were for the defendant's share of the cost charged by third party printers for printing and stationary, and did not include any addition fee to the plaintiff.

Particulars

The defendant relies on the statements of Mr Mialkowski, Mr Opray and Mr Townsend dated 14 August 2009 provided with this pleading to the plaintiff pursuant to the directions made by Bryne SJA on 19 June 2009."

[19] It will be noted that in this version of the counter-claim, all of the allegedly mistaken payments were said to have been made by cheque. Consistent with that, and in an attempt to comply with the order of Byrne SJA, signed statements by each of Mr Townsend, Mr Opray, and Mr Mialkowski were delivered. In Mr Townsend's statement, signed on 14 August 2009, he said:

"7. I was a signatory to all RSL cheque accounts from 2002 to 2009 and authorised payment to Comprite under this belief.

8. When I authorised payments and signed cheques on the RSL's bank account in payment of Comprite's invoices, I did not know that under the terms of the Management Agreement, Comprite was obliged to provide its buyer database in marketing the RSL's art unions at no additional fee or charge, nor did I know that the fees, which were specifically provided for in the Schedule to the Management Agreement, covered Comprite making available that database for the RSL's art unions.

> 9. In authorising payments and signing cheques in payment of Comprite's invoices which included printing and stationery, I did so in the belief that the invoices submitted for payment by Comprite, which included printing and stationery, were only for printing and stationery in relation to the RSL's art unions, was the amount which had been charged by the printers and that it did not include any additional fee or mark-up added to that cost by Comprite.
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> 10. I authorised payments to be made by RSL and signed cheques in payment of Comprite's invoices in the belief that the amounts stated on the invoices and remittance advices were due and payable to Comprite under the written Management Agreement which had been signed in April 1999. To my knowledge, that Management Agreement has never been varied or amended.
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> 11. I was on no occasion aware that Comprite was charging any additional fee for printing and stationery beyond that which it was authorised to charge in the Agreement."

[20] Mr Opray's statement similarly consistently referred to him authorising payments and signing cheques on the RSLQ's bank account in payment of Comprite's invoices, as did the statement by Mr Mialkowski.

[21] The 2009 draft counter-claim also alleged that the aggregate of the amounts it had mistakenly paid to Comprite for mark-ups on the cost of printing and stationery amounted to some $5,448,255.82.

[22] In the 2010 draft counter-claim, however, the case was changed to allege that payments from the RSLQ to Comprite were made by cheque until 23 October 2002, and that thereafter the payments were made by electronic transfer. Cognate changes were made to the allegations with respect to the payments authorised by each of Mr Opray, Mr Townsend and Mr Mialkowski. So, for example, in respect of Mr Opray, the 2010 draft counter-claim alleged that Mr Opray was one of the three persons (the others being Mr Mialkowski and Mr Townsend) on behalf of the RSLQ "who authorised payment by [the RSLQ] of the invoices submitted by [Comprite] and made or caused those payments to be made by: (i) in the period from 1 January 2002 to 23 October 2002, endorsing his approval on either or both of the Comprite invoice and accompanying remittance advice and signing cheques in payment of those invoices; (ii) in the period from 23 October 2002 until termination of the Management Agreement in December 2005, endorsing his approval on either or both of the Comprite invoice and accompanying remittance advice and signing an Electronic Payment Register with respect to that payment."

[23] Similar pleadings appear in respect of each of Mr Townsend and Mr Mialkowski. Further changes encompassed the allegation that the allegedly mistaken payments made after October 2002 were authorised by Mr Mialkowski, Mr Opray and Mr Townsend but made by electronic transfer.

[24] The 2010 draft counter-claim also effected a significant reduction in the amount alleged to have been paid to Comprite for mark-ups on the cost of printing and stationery – the amount referred to had come down to $1,905,126.66.

[25] It appears that no further statements by any of Mr Townsend, Mr Opray or Mr Mialkowski were delivered at the time that the 2010 draft counter-claim was

provided to Comprite. At the hearing of the application before me, however, affidavits by each of these men were filed by leave. The affidavit of Mr Townsend was dated 1 February 2010. The affidavit of Mr Opray was dated 2 February 2010. The affidavit of Mr Mialkowski was dated 1 February 2010. The hearing was on 3 February 2010. Clearly enough, these affidavits had been obtained specifically for the purposes of the hearing before me.

[26] In his affidavit, Mr Mialkowski referred to the statement that he had previously made and signed in the proceedings, and said:

> "2. I now remember that there was a change in the process of payment of Comprite and other creditor invoices.
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> 3. It was in or about October of 2002 that the method of payment of Comprite and other creditor invoices changed.
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> 4. Cheques were generally not drawn but payments were made through the RSL bookkeeper who worked from Comprite premises. Michelle Mepsted was the person authorised to perform electronic banking on behalf of the RSL. Prior to the electronic banking taking place, she would arrange to have sent through to me at RSL headquarters, a summary sheet with Comprite and other creditor invoices to support the amount sought to be paid into respective account. I would then look through the verifying documentation before approving payment. The summary sheet would be a summary of payments to be made. The summary sheet had frequently already been signed off by Mrs Olsen, and when I had affixed my signature to it this would give approval for the bookkeeper to make the payments. The summary along with the invoices would be returned to Ms Mepsted. I do recall occasions that I was asked to sign electronic transfer confirmation documentation.
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> 5. I relied upon the contents of the invoices presented to me as being true and correct before I would effect payment.
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> 6. I believed, that at the time of signing the summary sheet or remittance advice authorising payment, that the amounts that were contained within the remittance advice and the invoice presented by Comprite represented the cost charged by the respective third party supplier for printing and stationery, and did not include any additional fee or mark-up.
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> 7. I also believed prior to authorising payment, that the amount charged was truly reflective of that which the RSL was obliged to pay relating to printing and stationery and that only the cost of stationery and printing incurred to third parties was referred to therein, and did not include a mark-up.
>
> 8. I was also of the belief that any payment that was made was for an amount that was due and payable to Comprite under the written management agreement. I believed that the payment that was made was only for RSL's share of the cost charged by third party printers for printing and stationery and did not include any additional fee payable to Comprite."

[27] In his affidavit, Mr Opray referred to his previous statement and said:

> "2. I have been asked whether the mechanism of payment of Comprite invoices ever changed. Payment of Comprite invoices altered in October of 2002. I was the State Secretary of the RSL and was responsible for the day to day running of the Queensland State headquarters.
>
> 3. I remember that in October of 2002 the system changed because Mr Mialkowski would not attend Comprite premises as did his predecessor, Mr Kay. I also recall that a system of electronic banking was set up that replaced the old method of issuing and signing cheques either at or away from Comprite premises."

Mr Opray then described the process that he followed when authorising the payment of invoices.

[28] Mr Townsend, in his affidavit, also referred to his previous statement and then said:

> "To the best of my knowledge at that particular time I believe that the method of payment of invoices to Comprite may have changed when George Mialkowski was elected Treasurer of RSL Qld in July of 2002. At that same time I was elected a Vice-President of RSL Qld and in doing so also became a member of the RSL Qld State Managing Council."

He then referred to changes that were effected in the way payments were made to Comprite after Mr Kay had ceased his involvement in the RSLQ, and described the process he followed for authorising payment of Comprite invoices.

[29] The principal affidavit in support of the application which was heard in October 2009 was sworn by the RSLQ's solicitor, Mr Mylne. In that affidavit Mr Mylne deposed, amongst other things, to having "caused inquiries to be made at the Commonwealth Bank in respect of the accounts held at the Bank with respect to the operation of [the RSLQ's] art unions during the period from 1999". He described what those inquiries had disclosed about the signatories to the accounts. Mr Mylne then said:

> "16. I have sought production of copies of the cheques drawn on the relevant bank accounts during the period since the Management Agreement was signed from the Commonwealth Bank. I have been informed by Amber Boggis and believe that she is an officer of the Commonwealth Bank familiar with the defendant's accounts and that the Bank will be able to produce the cheques, and is exploring methods of doing this in electronic form based on the volume of cheques involved."

[30] The principal affidavit in support of the RSLQ's current application was also sworn by Mr Mylne. He referred to his ongoing contact with the Commonwealth Bank, and stated that he "continued to press the CBA for production of the cheques relevant to this proceeding". Ultimately, on 5 November 2009, he was provided with a CD-ROM containing images of approximately 9,000 cheques, most of which were irrelevant to the issues in this proceeding. He said he then arranged for Mr McKinnon, the forensic accountant he had retained to give evidence in this proceeding, to attend Mr Mylne's office. Mr Mylne said he sorted the cheques, identifying those which were relevant to the proceeding, and those were then given to Mr McKinnon for cross-referencing.

[31] Mr Mylne then stated:

> "9. Two matters of significance emerged during the process of identifying and cross-referencing the relevant cheques to which I have referred above. First, it emerged that the CBA had been unable to produce all of the relevant cheques.
>
> 10. Secondly, in relation to transactions occurring subsequent to 23 October 2002 payment of Comprite invoices was not effected by cheque. Payments from that date forward appeared to have been made by direct electronic bank transfer. The bank had imaged a number (but not all) of the electronic transfer documents. Prior to receiving the CD-R, reviewing and reconciling the cheques I had not been aware that payments had been made from the relevant accounts by electronic transfer. I was under the mistaken belief that all payments had been made by cheque. In my communications with the CBA no mention had been made of electronic payments."

[32] Counsel for Comprite submitted to me that two important issues relevant to the exercise of my discretion emerged from the matters to which I have just referred:

(a) No explanation whatsoever is provided from any of Mr Townsend, Mr Opray or Mr Mialkowski for the fact that the written statements they had previously given, and which had been provided in purported compliance with the order of Byrne SJA, were incorrect; and

(b) It is quite wrong for the RSLQ to seek to represent to me, through its solicitor's affidavit, that the making of payments by electronic transfer was a matter of significance that emerged only during the process of identifying and cross-referencing the relevant cheques after provision of the CD-ROM by the Commonwealth Bank in November 2009.

[33] In respect of the first of these matters, the 2010 draft counter-claim contains an annexure in which is identified whether a particular payment was made by cheque or by electronic payment and the relevant person who authorised each respective payment. In fact, according to this schedule, neither Mr Opray nor Mr Townsend signed any of the cheques identified in the schedule; each of them is identified only in the capacity of having authorised an electronic payment. No explanation whatsoever has been provided by or on behalf of either of those men for the fact that they each gave a statement in September 2009 for the purposes of complying with the order of Byrne SJA in which each of them only referred to payments being made by them signing cheques. Nor have they explained the circumstances under which they came to swear the affidavits which were late sworn and filed before me on the present application. According to the schedule, Mr Mialkowski was both a signatory to cheques and also authorised electronic payments, but there is similarly no explanation as to the, at best, omission of information in his September 2009 statement or as to the circumstance which led to him swearing his current affidavit. None of them confesses to having made a mistake or an oversight in their previous statements. There is simply no explanation whatsoever.

[34] Counsel for the RSLQ submitted that this was really a question of credit as to these three witnesses, who could, in due course at trial, be tested under cross-examination. But that misses the point that it is the RSLQ which, by its present application, seeks an indulgence of the Court. In such a circumstance, it behoves the moving party to give a proper and adequate explanation as to why it is that the evidence of these

witnesses has changed. As I have already said, there is simply no such explanation provided.

[35] The closest one comes to an explanation is Mr Mylne's statement in his most recent affidavit that he was under the mistaken belief that all payments had been made by cheque and that in his communications with the Commonwealth Bank no mention had been made of electronic payments. These current assertions by Mr Mylne, however, were the second of the matters on which counsel for Comprite focused. As was submitted by counsel for Comprite, it was hardly news that payments had actually been made by electronic transfer. Since late 2006, Mr Mylne has been in possession of his forensic accountant's report in which Mr McKinnon reported on his investigations into the payments made by the RSLQ to Comprite. In that report, Mr McKinnon expressly referred to the electronic payments which had been made by the RSLQ to Comprite. Indeed, Mr McKinnon specifically mentioned having received and examined the "RSL electronic payments register". Mr McKinnon received that document on 9 June 2006. Mr McKinnon also had copies of the RSLQ's bank statements, which clearly indicated payments having been made by electronic transfer. Payments made by electronic transfer can easily be distinguished on the face of the bank statements from payments made by cheque.

[36] Further, in his affidavit sworn for the purposes of the current application, Mr Mylne said that he was aware from a previous affidavit sworn in 2006 by Ms Raewyn Mepsted in BS 942/06 "that she had deposed to having been employed as a bookkeeper by RSL from May of 1999 to April of 2003, and that during this period worked in that capacity from Comprite's premises". He then said:

> "I have now been able to locate Ms Mepsted and interview her in relation to the system Comprite adopted for the payment of accounts by RSL."

He said that in this interview, which occurred on 6 January 2010, Ms Mepsted informed him of matters which he then identified in his affidavit. His deposition as to the matters of which he was informed by Ms Mepsted in that conversation included:

> "(h) That an electronic payment system was introduced on or about the 23 October 2002. From that time on Ms Mepsted would enter invoice details into a MYOB accounting system. She would then print from the MYOB program an Electronic Payment Register. Pamela or Brad Olson authorised the Electronic Payment Register by placing their initials or signatures on the electronic payment register report ("EPR"). Now produced and shown to me and marked "PGM1" is a true copy of a sample EPR and corresponding tax invoice signed by Geoff Opray and Pamela Olson authorising a list rental payment for art union 214. A remittance summary sheet would then be sent to the RSL containing details of the invoices and attaching copies of invoices to be paid by the electronic payment. Now produced and shown to me and marked "PGM2" is a true copy of a sample Tax Invoice from Comprite signed and initialled by G Mialkowski, initialled by Pamela Olson for art union 202. ..."

[37] There are a number of significant difficulties with these matters deposed to by Mr Mylne. The first is his statement that he had "now been able to locate Ms Mepsted and interview her". Counsel for Comprite submitted that Mr Mylne was clearly, by this choice of words, seeking to convey the impression that Ms Mepsted had hitherto been difficult to locate, if not unreachable, and that it was only recently that Mr Mylne had "been able to locate" her. Counsel for the RSLQ

asked me not to put such a construction on Mr Mylne's statement, but was unable to advance that submission any further. It is, in my view, quite clear that Mr Mylne's words were chosen to convey the impression that Ms Mepsted had been difficult to locate and that Mr Mylne had only recently been able to find her. In fact, however, the affidavit of Ms Mepsted to which Mr Mylne referred in his affidavit was filed in BS 942/06 on behalf of the RSLQ. Moreover, that affidavit disclosed her residential address. On 1 February 2010, Comprite's solicitor searched the White Pages and found Ms Mepsted listed there with her phone number and precisely the same residential address.

[38] In addition, the documents marked "PGM1" and "PGM2" to Mr Mylne's affidavit, which he referred to in the context of his interview with Ms Mepsted on 6 January 2010, were not new documents for the RSLQ. On the contrary, precisely these documents, or copies of these documents, were referred to in Mr McKinnon's report in 2006.

[39] It is difficult for the RSLQ to resile from or claim no knowledge of Mr McKinnon's report. The version of the counter-claim which was struck out by de Jersey CJ in September 2008 expressly incorporated Mr McKinnon's report as the further and better particulars of the counter-claim it then advanced. His Honour referred to the RSLQ providing particulars in that way, and found that the incorporation of the report was "inappropriate, and properly described as vexatious and oppressive".

[40] Counsel for Comprite submitted that, having regard to the fact that the electronic payments had been expressly referred to and taken up in Mr McKinnon's report which was then used, or sought to be used, as the particulars of the previous incarnation of its counter-claim, RSLQ had itself advanced a case of a payment by electronic transfer since October 2002, and it was plainly fictitious for the RSLQ now to say, through its solicitor, that these matters came as a surprise to it only when Ms Mepsted was interviewed by Mr Mylne in January 2010. There is, with respect, clear merit in that submission.

[41] Counsel for the RSLQ submitted that, regardless of what had occurred previously, the solicitor for the RSLQ deposed to having been mistaken in respect of the electronic payments until interviewing Ms Mepsted in January 2010 and invited me to recognise that Mr Opray, Mr Townsend and Mr Mialkowski were voluntary workers. However, as counsel for the RSLQ subsequently, and very properly, clarified:

1. Mr Opray was paid by the RSLQ as the State Secretary, but also occupied various voluntary positions in the past. At all times material to the proceeding he was a paid employee, and is now in retirement;

2. Mr Mialkowski had held a number of voluntary positions in the RSLQ, one of which was State Treasurer. He later became the art union manager and later again fundraising manager, both of which were salaried positions. He retired from the RSLQ at the end of 2009;

3. Mr Townsend was not, and has never been, a salaried employee of the RSLQ, but held an honorary position as a vice-president;

4. The RSLQ is not a company, and none of its State Council board members are salaried employees;

5. The State Secretary (equivalent to a chief executive) is a salaried position.

[42] Counsel for the RSLQ sought, however, to divert attention away from the patent difficulties exposed in the way this case has been advanced on behalf of the RSLQ by referring to Messrs Opray, Townsend and Mialkowski and submitting:

> "It may well have been that they had in the back of their minds that electronic payments were used to pay some of these accounts but didn't convey that ... . The critical point is that the three of them were the only people who were authorised to operate on the accounts and whether that was done by cheque or whether it was done by signing another piece of paper, from which an electronic transfer was effected is, in our respectful submission, not particularly material if you identify in relation to each transaction, as we have, who was the party who authorised that particular [payment]."

[43] Counsel's speculative submission was not, however, backed up by any evidence from these witnesses in circumstances where, on an application of this nature, it should have been.

[44] Counsel for the RSLQ also submitted that there had been "a shift in the approach to this litigation as a clean broom has come into the matter which has focused attention on what needed to be pleaded in terms of identifying people who authorised the payments".

[45] Whilst I accept, of course, the sincerity with which that submission was made, its force was diminished when I was reminded by counsel for Comprite that in an affidavit in this proceeding sworn by Mr Mylne on 17 October 2006, he said:

> "Having had an unfortunate experience with its statement of claim to date, the RSL has retained a new team of counsel and those counsel are reviewing the material and requested further time to plead than that allowed under the timetable ordered by Justice Mullins or forecast by me in my letter dated 29 September 2006."

[46] In short, to adopt the phrase suggested by counsel for Comprite, this was a case where the "new broom excuse" was being advanced again.

[47] Turning, then, to the situation concerning Mr Kay, the 2010 draft counter-claim, in the form initially advanced on this application, relevantly made the following allegations:

> "32. In so far as the payments made by the defendant to the plaintiff between 1 April 1999 and on or about 19 December 2001 authorised and made or caused to be made by Mr Kay comprised amounts for the database rental fee and amounts for the additional printing and stationary fees, those amounts were paid by reason of a mistake namely, that:
>
> (a) Mr Kay authorised and made or caused those payments to be made in the belief the amounts were properly payable to the plaintiff, but ignorant that, upon the proper construction of the Management Agreement:
>
> (i) the services and functions which the plaintiff was obliged to provide and undertake under the Management

Agreement included utilizing its buyer database in marketing the defendant's art unions;

(ii) the only fees payable to the plaintiff for the services and functions it was obliged to undertake under the Management Agreement were those fees specified in the Schedule to the Management Agreement and did not include either the data base rental fee or the additional printing and stationary fees;

(iii) the expenses of the art union which the defendant was obliged to pay relating to printing and stationary comprised only the cost of stationery and printing for the defendant's art unions incurred to third party suppliers.

(b) further or alternatively, Mr Kay authorised and made or caused those payments to be made by the defendant ignorant that, upon its execution on 1 April 1999, the written Management Agreement contained the entire agreement between the defendant and the plaintiff;

(c) further or alternatively, Mr Kay authorised and made or caused those payments to be made in the belief that the amounts stated on the invoices and remittance advices were due and payable to the plaintiff under the written Management Agreement in circumstances where the amounts stated on the invoices and remittance advices were not in fact due and payable to the plaintiff;

(d) further or alternatively, in relation to the additional printing and stationary fee, either:

(i) in the mistaken belief that the invoices submitted for payment by the plaintiff to the defendant for printing and stationary were for the cost charged by third party printers for printing and stationary in relation to the defendant's art unions; or

(ii) if he knew that the invoices submitted for payment by the plaintiff to the defendant for printing and stationary included the additional printing and stationary fee, in the mistaken belief that the Management Agreement had been varied to provide for the plaintiff to be paid the additional printing and stationary fee.

Particulars

The defendant relies on paragraph 4 of the Affidavit of Mr Kay sworn on 17 October 2008 in this proceeding."

[48] The fundamental difficulty in this pleading is that it sits ill with evidence Mr Kay gave in this proceeding as long ago as September 2008. In an affidavit sworn on 3 September 2008, Mr Kay, who was the promoter of the art unions and chairman of the Art Union Committee until December 2001, described in detail the arrangements entered into between him, on behalf of the RSLQ, and Comprite. He expressly deposed to the fact that he was the person who dealt with Comprite on

behalf of the RSLQ in relation to the various management issues, including the costs and expenses of the art unions, until mid-2001. He said that the agreement for the management of the art unions with Comprite also changed over time to keep up to date with current practices and to comply with the requirements of the State Treasury. He described the budgeting process for each art union and also the procedure followed when bills were rendered by Comprite to the RSLQ. He said that before signing each remittance advice and cheque for the invoices rendered by Comprite from time to time, he carefully studied the invoices to ensure that the charges were payable by the RSLQ. He specifically deposed to a meeting which occurred on 31 January 2001 in which Mr Olson of Comprite presented a proposal to change the printing arrangements for the RSLQ art unions. He described in detail the agreements that were reached between him and the other then members of the RSLQ Art Union Committee on the one hand, and Comprite on the other, in relation to the changes to the printing arrangements. He said that the budgets and invoices which the RSLQ thereafter received from Comprite were in accordance with the arrangements which had been approved at that meeting. He also said that, as at the time he swore the affidavit (3 September 2008), he had never given any instructions to the RSLQ or its lawyers regarding any alleged overcharging by Comprite. He said, indeed, that no lawyer representing the RSLQ had ever interviewed him about that or any other issue.

[49] The significance of that evidence by Mr Kay was adverted to by the Chief Justice in his judgment striking out the then counter-claim in September 2008. I have already quoted the Chief Justice's judgment above, and refer particularly to his Honour's observations in paragraph [16] of that judgment.

[50] In a further affidavit sworn by Mr Kay in this proceeding on 28 May 2009, he specifically deposed to a meeting he attended with other members of the RSLQ art union committee and representatives of Comprite on 24 July 1996. One of the matters discussed at that meeting was a proposal for the RSLQ to have use of Comprite's database. Mr Kay said in this affidavit:

> "Mrs Olson had explained to us that Comprite had compiled large data bases called (I believe) the National Consumer File and the National Business File. She had asked if the RSL was willing to pay a fee for access to those data bases, in order to assist in marketing the art unions. I discussed this with the other members of the committee. We all agreed to pay the fee which Mrs Olson had proposed. At the meeting of the RSLQ Art Union Committee on 19 May 1996, we resolved (as is recorded in the minutes) to approve a charge by Comprite for mail list acquisition and rental at a rate of $90 per 1,000 names on these lists."

[51] Mr Kay referred to the fact that Comprite included this rental charge on each of its subsequent estimates for each art union and on the invoices produced by Comprite in respect of those art unions. He affirmed the evidence he had previously given about his own procedure in checking invoices, and said that he approved the invoices for payment:

> "I intended to do so; and I made no mistake in doing so."

[52] He further said:

> "I understand that the written agreement [the Management Agreement] does not mention this particular charge. However, as I have explained, the RSLQ Art Union Committee agreed to pay these charges well before the

> agreement was signed. It continued to pay those charges after the agreement was signed (at least during my time on the Committee)."

[53] I have already outlined the mistake allegations which the RSLQ would seek to advance in the 2010 draft counter-claim. In written submissions delivered after the conclusion of oral argument, counsel for the RSLQ formally conceded a point he had made in oral argument which was that the RSLQ would not seek to press paragraph 32(d) of the draft counter-claim.

[54] The insuperable difficulty which the RSLQ has in respect of the other subparagraphs, however, is that, whilst the RSLQ now seeks to characterise Mr Kay's mistake as one concerning the effect of the Management Agreement, those allegations simply fly in the face of his clear evidence concerning the circumstances in which he and others, on behalf of the RSLQ, agreed to make payments for the database rental fee and for printing and stationery fees, that he was, during his tenure, the relevant "mind" of the RSLQ in its dealings with Comprite, that the agreements to pay those charges were reached before the Management Agreement was entered into, and that, with his knowledge and approval, the RSLQ continued to pay those fees after the Management Agreement had been signed.

[55] The RSLQ produced no statement by Mr Kay for the purposes of complying with the order of Byrne SJA. A suggestion that Mr Kay would not co-operate with the RSLQ was dispelled by reference to an affidavit by Mr Kay sworn on 17 October 2008 in which he relevantly said that "when, and if, anyone from [the RSLQ] or its solicitors contact me regarding these proceedings and/or my involvement with the conduct of [the RSLQ's] art union, I will, of course co-operate (as set out in the letters from my solicitors, Robert Bax & Associates)". Those letters simply required that any interviews with Mr Kay be conducted in the presence of his solicitors.

[56] For completeness, I should also note that it is not to the point in respect of the mistake case sought to be advanced by the RSLQ, that Mr Townsend, Mr Opray and Mr Mialkowski may have been ignorant of the arrangements and agreements entered into between the RSLQ, through Mr Kay, and Comprite. It is clear on the material before me that Mr Kay's mind was the operative mind for the RSLQ in respect of the matters which are said to be the subject of the alleged mistaken payments, and subsequent ignorance by the other gentlemen of matters known by Mr Kay cannot be relied on as if Mr Kay's evidence did not exist. Moreover, there has been nothing put on by the RSLQ to address the difficulty expressly identified by the Chief Justice in paragraph [16] of his judgment, viz that Mr Mialkowski, in his affidavit, had no factual foundation for the position he had taken on the alleged instances of overcharging. The same might be said of Mr Townsend and Mr Opray.

[57] By the 2010 draft counter-claim, the RSLQ would also seek to pursue a claim for misleading and deceptive conduct against Comprite, alleging contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("*TPA*"). The gist of this case is that Comprite, by submitting invoices which included amounts for printing and stationery, but which did not disclose the alleged "mark-ups", made false representations that the invoiced amounts were the expenses which had actually been incurred by Comprite to third party suppliers. There are a number of difficulties with these claims. Not the least of those is the fact that the counter-

claim, as drafted, sought to recover for numerous payments in respect of which the limitation period under the *TPA* had well and truly expired. In supplementary submissions, counsel for the RSLQ indicated its intention to confine such claims to those which were authorised by Messrs Mialkowski, Opray and Townsend, being claims within the limitation period. That alone would have had the effect of reducing the *TPA* claim to $1,341,402.80.

[58] But there is an even more fundamental difficulty, namely that the premise on which the *TPA* claim is based (that Comprite represented that it was merely passing on the cost of third party printing and stationery invoices) is unsustainable in light of Mr Kay's evidence that he was aware of the true position and authorised payments to be made to Comprite on the basis of that true position. As with the mistake case, it is not to the point that Messrs Mialkowski, Opray and Townsend did not ascertain the facts from Mr Kay, or did not become aware of that which Mr Kay himself knew.

[59] Moreover, the proposed 2010 counter-claim simply pleads in relation to the *TPA* claim that:

> "In reliance upon the representations ... and induced thereby, the defendant paid to Comprite the amounts which were invoiced by Comprite."

[60] No particulars are given of this allegation. In particular, the pleading does not identify the particular persons whose states of mind were those of the RSLQ for the purposes of that reliance. The necessity for the RSLQ to identify precisely these sorts of particulars when making allegations involving the states of mind of persons in the RSLQ has been clear for several years, and indeed was expressly referred to in the order of Mackenzie J made on 22 October 2008.

[61] Counsel for the RSLQ urged me to regard this as a case in which the amendments sought are to enable the RSLQ to properly plead a case which has long been advertised and known to Comprite. That, however, overlooks the fact that the RSLQ has been given repeated opportunities to formulate and plead such a case properly, if it were able.

[62] Counsel also submitted that there would be no prejudice to Comprite if leave were granted, that there would be no disruption to the Court list, and that mistakes made by the RSLQ's advisers in the past in the conduct of the counter-claim ought not be visited on the RSLQ such as to deny it the opportunity to advance this counter-claim.

[63] Those submissions, however, do not take account of the prejudice which has been, and would continue to be, suffered by Comprite by being delayed in the prosecution of its claim. Nor do they take account either of the fact that the RSLQ has already been given repeated indulgences in respect of the counter-claim it sought to advance or the philosophy underlying the *Uniform Civil Procedure Rules*, which is "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[4]

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[4] *UCPR* r 5(1).

[64] Acknowledging that the pursuit of a "just resolution" is the paramount purpose of the Rules, the majority in the High Court in *Aon Risk Services Australia Limited v Australian National University*[5] said:

> "Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs."

[65] The High Court in that case also dispelled the notion that an order for costs occasioned by an amendment would always overcome injustice to the amending party's opponent.

[66] It seems to me that the following passage in the conclusion of the judgment of the majority in *Aon Risk Services* is particularly apposite to the present case:

> "111 **An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed.** The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully working out in a significant succession of cases (204). On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
>
> 112 A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. **But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.**
>
> 113 In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy (205). It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings." (emphasis added)

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5 (2009) 239 CLR 175 at 213.

[67] It was for the RSLQ to persuade me on the present application that this was an appropriate case for the exercise of the discretion to grant leave to file and serve a further form of counter-claim. Having regard to:

(a) the absence of any proper explanation for the circumstances in which the application is brought;

(b) the history of repeated failed attempts to plead a counter-claim properly;

(c) the history of non-compliance with orders and directions made in connection with previous versions of the counter-claim;

(d) the unexplained inconsistencies between the previous and the current statements of Messrs Townsend, Opray and Mialkowski;

(e) the lack of a statement in support by Mr Kay;

(f) the evidence of Mr Kay which undermines the premise on which the proposed counter-claim is sought to be advanced; and

(g) the delay and expense to Comprite which would inevitably follow if leave were granted;

I am not satisfied that this is an appropriate case for the exercise of the discretion to grant leave to the RSLQ to file and serve a further version of its counter-claim. The application filed on behalf of the RSLQ on 25 January 2010 will, therefore, be dismissed with costs.

[68] As already noted, the RSLQ expressly abandoned the application which was heard before me in October 2009. Comprite's costs of and incidental to that application were rendered completely nugatory by the RSLQ's subsequent change of heart and further application for leave. It is appropriate in those circumstances, therefore, for that application to be dismissed and for the RSLQ to pay Comprite's costs of and incidental to that application, to be assessed on an indemnity basis. The solicitors for Comprite put some material before me with a view to substantiating the quantum of costs which had been thrown away by reason of the abandonment of that application. It seems to me, however, that this is not a case in which it is appropriate for me to make a summary assessment of the indemnity costs properly payable by the RSLQ to Comprite, and it will be necessary for those costs to be assessed.

[69] The remaining question, then, is as to the disposition of this matter. It ought be clear from the foregoing that, in my opinion, the RSLQ has exhausted its opportunities to pursue a counter-claim based on these alleged mistaken payments (and the cognate *TPA* claim). At the hearing in October 2009 and again before me on this application, Comprite made a cross-application for judgment on the counter-claim. The difficulty for it in that regard, however, is that there is presently no such counter-claim on foot between the parties. The previous counter-claim was struck out by the order of Byrne SJA. True it is that his Honour's order also made provision for judgment to be entered if a draft counter-claim was not delivered by 14 August 2009, but that condition was satisfied, albeit that the application for leave to file and serve that pleading was subsequently abandoned.

[70] This is not a case like *Mango Boulevard P/L v Spencer & Ors*,[6] on which Comprite relied. In that case, an order provided both for the striking out of paragraphs of a counter-claim and for judgment on the counter-claim. Muir JA[7] considered that the order striking out paragraphs in the counter-claim "should not be regarded as preventing a court from having recourse to the allegations in the counter-claim in order to ascertain the issues determined by the judgment ... because those allegations were in the counter-claim at the time of judgment and the striking out order should be regarded as having no effect as a result of the judgment on the counter-claim".

[71] It seems to me, however, that the objective of finality renders it highly desirable that there now be an end to these attempts by the RSLQ to advance this counter-claim. It is equally highly undesirable for matters to be left in a state which would even arguably permit the RSLQ to seek to re-activate this counter-claim. It is clearly desirable that there should be a judgment, with the effect alluded to by Muir JA in *Mango Boulevard*. In order to enter judgment, however, there needs to be a counter-claim in existence. Accordingly, and only for the purpose of entering judgment and achieving finality in the matter, I propose giving the RSLQ leave to counter-claim in the form of the 2010 draft counter-claim and will then immediately give Comprite judgment on that counter-claim.

[72] It also seems to me that the costs order contemplated in the order for judgment contained in the order made by Byrne SJA is equally appropriate to the judgment which I now propose to enter.

[73] Accordingly, there will be the following orders:

1. (a) The defendant's application filed 4 September 2009 is dismissed.

   (b) The defendant shall pay the plaintiff's costs of and incidental to that application, to be assessed on the indemnity basis.

2. The defendant has leave to counter-claim against the plaintiff in the form of the draft counter-claim which is Exhibit "PGM-3" to the affidavit of Peter Glen Mylne sworn on 25 January 2010 and filed herein, such leave being limited to have effect only to the extent necessary to give effect to Order 3 below.

3. (a) The plaintiff shall have judgment upon the counter-claim, with costs thereof (including the costs of the plaintiff's application filed 14 October 2009), and including any reserved costs in respect of previous counter-claims in this proceeding and the costs of proceeding BS 942 of 2006, such costs to be assessed;

   (b) The plaintiff shall be at liberty forthwith to enter such judgment.

4. The defendant's application filed 25 January 2010 is otherwise dismissed, with costs.

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6 [2008] QCA 274.

7 At [66].