

SUPREME COURT OF QUEENSLAND

CITATION: *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)* [2013]
QSC 271

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

v

MACEQUEST PTY LTD
CAN 101 563 649
(first defendant)

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

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

URBEX PTY LTD
ACN 102 865 823
(fourth defendant)

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

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

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

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

KENNETH ROWLAND BIRD
(tenth defendant)

GARY WILLIAM INGRAM
(eleventh defendant)

JAMES VARITIMOS
(twelfth defendant)

WAYNE ROBERT REX
(thirteenth defendant)

RUSSELL JOHN THOMSON
(fourteenth defendant)

DAVID JOHN DUNCAN
(fifteenth defendant)

ANDREW MARCOS
(sixteenth defendant)

SCOTT WILLIAM POWER
(seventeenth defendant)

MICHAEL CHRISTOPHER POWER
(eighteenth defendant)

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

FILE NO/S: BS 4352 of 2012
DIVISION: Trial
PROCEEDING: Application
DELIVERED ON: 3 October 2013
DELIVERED AT: Brisbane
HEARING DATE: On the papers
JUDGE: Jackson J
ORDER: The order of the court is that:

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

1. the applicant pay the respondents' costs of the application including the costs reserved on 31 January 2013.

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

2. the applicant pay 75% of the respondents' costs of the application including the costs reserved on 31 January 2013.

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

3. the respondent pay the applicants' costs of the application on the indemnity basis including the costs reserved on 31 January 2013.

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

4. the respondent pay the applicant's costs of the application on the indemnity basis including the costs reserved on 31 January 2013.

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

5. the respondent pay the applicant's costs of the application on the indemnity basis including the costs reserved on 31 January 2013.

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

6. the respondent pay the applicant's costs of the application on the indemnity basis including the costs reserved on 31 January 2013.

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the plaintiff applied to amend the statement of claim – where defendants cross-applied to strike out the statement of claim – where the plaintiff adopted a narrative style of pleading – where the plaintiff filed and served a third amended statement of claim – where costs were reserved – meaning of costs “of and incidental to” the application – whether costs should be assessed on the indemnity basis.

Acts Interpretation Act 1954 (Qld), s 14A

Civil Proceedings Act 2011 (Qld), s 15

Corporations Act 2001 (Cth), s 237

Statutory Instruments Act 1992 (Qld), Sch 1

Supreme Court of Queensland Act 1991 (Qld), s 85

Supreme Court Act 1995 (Qld), s 221

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 162, r 171, r 351, r 360, r 361, r 370, r 698, Ch 17A, r 678, r 679, r 680, r 681, r 682, r 684, r 686, r 691, r 702, r 703, r 704, r 947I

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor

[2013] QSC 216, cited

Amos v Monsour Legal Costs Pty Ltd [2008] 1 Qd R 304;

[2007] QCA 235, cited

BHP Coal Pty Ltd v O & K Orenstein and Koppel AG (No 2)

[2009] QSC 64, cited

Cinema Press Ltd v Pictures & Pleasures Ltd [1945] KB 356, cited

Cocias v Mt Isa Mines Ltd [1967] QWN 22, cited

Gideona v Atherton [2005] QSC 309, cited
Gunns Ltd v Marr (No 3) [2006] VSC 386, not followed
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2001] QCA 191; [2003] 1 Qd R 26
McFadzean & Ors v Construction, Forestry, Mining, Energy Union & Ors (2007) 20 VR 250 at [157]-[160]; [2007] VSCA 289, cited
Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 3) [2013] QSC 95, cited
PCRZ Investments Pty Ltd v National Golf Holdings Limited [2002] VSCA 24, not followed
QIC Logan Hyperdrome Pty Ltd & Anor v Briridge Pty Ltd & Anor [2011] QSC 43, cited
Queensland Building Society Authority v Mahony [2012] QDC 226, cited
The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd & Ors [2009] QSC 84, cited
Todrell Pty Ltd v Finch (No 2) [2008] 2 Qd R 95; [2007] QSC 386, cited
Warley Hospital Inc v Attorney-General for the State of Victoria [2011] VSC 145; (2011) 33 VR 102, cited

COUNSEL:

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

SOLICITORS:

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

- [1] **JACKSON J:** On 19 August 2013, I made orders disposing of six cross applications made by the parties.¹ The parties sought and were given an opportunity to file brief written submissions as to costs. These are the reasons for the costs orders.
- [2] Subject to two qualifications, it is not disputed that the costs order on the plaintiff’s application to amend the claim in 4352 of 2012 should be that the applicant pay the respondents’ costs of the application.
- [3] The first qualification is that on 31 January 2013, I ordered that the costs be reserved. I did not by that order intend to deal with the costs of the applications generally, but the costs thrown away by the adjournment. In proposing an order that

¹ *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 211.

the applicant pay the costs of the application I did not propose any specific order for reserved costs because under UCPR 698 it is provided that:

“If the court reserves costs of an application in a proceeding, the costs reserved follow the event, unless the court orders otherwise.”

- [4] As I interpret that rule, it is intended to make it unnecessary to make a specific order dealing with reserved costs, unless they are not to follow the order for costs of the application. That interpretation means that the practice followed under previous rules of court that reserved costs must be specifically dealt with does not generally apply in making an order for costs of an application under the UCPR. However, I accept that the scope of the particular order for reserved costs I made on 31 January 2013 relating to each of the applications is not as clear as it could be, so that there is reason to order that the costs on each of the applications should include the costs which were reserved on 31 January 2013.
- [5] Secondly, the BMD defendants and Mr Rex submit that the form of order should include the costs “of and incidental to” the application. The addition of the words “and incidental to” is thought to add something to the scope of the costs which would be recoverable: *Warley Hospital Inc v Attorney-General for the State of Victoria*,² and *Queensland Building Society Authority v Mahony*.³ The view, taken from the statutory contexts in other jurisdictions, seems to be that adding the words “and incidental to” extends the ambit of an order for costs “of” an application to costs incurred as part of the preparations for litigation.
- [6] Any power to award costs is purely the creature of statute. The statutory text should always be the start point and, most often, the end point in dealing with a contention such as this. The power to order costs in this Court is now conferred by s 15 of the *Civil Proceedings Act 2011 (Qld)* (“CPA”) as follows:

“A court may award costs in all proceedings unless otherwise provided.”

- [7] The power is taken up in Chapter 17A of the UCPR pursuant to the rule making power conferred by item 21 of Schedule 1 and s 85 of the *Supreme Court of Queensland Act 1991 (Qld)*. Obviously, s 15 of the CPA post-dates Ch 17A but there was a prior statutory provision in similar terms to s 15.⁴ Chapter 17A is a statutory regimen for the award and assessment of costs in a proceeding pursuant to the power of the Court to order costs.
- [8] UCPR 678 applies Ch 17A to costs payable under an order of the Court. UCPR 679 contains two particularly relevant definitions for Ch 17A:

“*assessed costs* means costs and disbursements assessed under this chapter.

...

costs of the proceeding mean costs of all the issues in the proceeding and includes—

(a) costs ordered to be costs of the proceeding; and

² [\[2011\] VSC 145](#); (2011) 33 VR 102.

³ [\[2012\] QDC 226](#).

⁴ *Supreme Court Act 1995 (Qld)*, s 221.

(b) costs of complying with the necessary steps before starting the proceeding; and
 (c) costs incurred before or after the start of the proceeding for successful or unsuccessful negotiations for settlement of the dispute.”

- [9] Thus, the definition already makes express provision for costs incurred before the proceeding for a particular purpose, within the meaning of “costs of the proceeding”.
- [10] Next, UCPR 682 expressly provides that the costs a court may award must be decided in accordance with Ch 17A.
- [11] In passing, I also note that UCPR 686(a) expressly provides that costs may be assessed without an order for assessment having been made if the court orders a party to pay another party’s costs. Yet practitioners still regularly seek an order that costs be assessed. That habit seems to have ensued from the requirement under a prior statutory regime that an order for taxation of costs was required.
- [12] Similarly, practitioners still regularly seek an order that costs be assessed on the standard basis, when UCPR 702(1) expressly provides that “[u]nless these rules or an order of the court provides otherwise, a costs assessor must assess costs on the standard basis.”
- [13] These habits persist, notwithstanding that the UCPR were introduced more than ten years ago. Old habits die hard.
- [14] Returning to the specific question at hand, UCPR 702(2) provides that:

“When assessing costs on the standard basis, a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed.”

- [15] Two other rules are of some significance. They are UCPR 680 and 681:

“680 Entitlement to recover costs

A party to a proceeding can not recover any costs of the proceeding from another party other than under these rules or an order of the court.

681 General rule about costs

(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.

(2) Subrule (1) applies unless these rules provide otherwise.”

- [16] I note, but for brevity will not set out, the detailed provision made in Ch 17A for the assessment by a costs assessor of a party’s costs of a proceeding or costs of an application which have been ordered to be paid by a court.

- [17] In my view, it is undesirable for this Court to further indorse a practice of making orders for costs “of and incidental to” an application, for three reasons. First, I have read the cases on which the distinction between an order for costs “of [a proceeding]” on the one hand and costs “of and incidental to [a proceeding]” on the other hand are said to arise. They do not speak with a single voice or give any clear meaning to the difference in scope between the two formulations.
- [18] Secondly, to introduce the practice in orders for costs made under s 15 of the CPA and Ch 17A of the UCPR would seem to depend on acceptance of the proposition that an order made under them that a party “pay the costs of the application” to another party does not include proper costs of preparation for the application. That is not a proposition which seems to me to be supported by the provisions of Ch 17A at all. In my view, the inclusion of the words “and incidental to” is at best unnecessary and at worst introduces confusion as to the operation of an order made without those additional words.
- [19] Thirdly, the text of Ch 17A evinces a clear intention to avoid the need to make some of the forms of order previously made, as a matter of course, under the prior statutory provisions. There is no reference in any part of the text of Ch 17A to costs which are “incidental”. The language of Ch 17A is admirably consistent in referring to costs “of” a proceeding or “of” an application, although reference is made to costs of a party “in” a proceeding in a couple of places.
- [20] The only places where there is reference to “incidental” costs in the UCPR lie outside the context of Ch 17A.⁵ Those references do not lead me to conclude that orders for costs made under s 15 and Ch 17A ought to follow that terminology.
- [21] Accordingly, I decline to make the orders for costs of the applications in the present proceeding as orders for the costs “of and incidental to” the relevant application. To be clear, I do not intend that this should have the consequence that any costs actually, necessarily and reasonably incurred in relation to the application are not recoverable under the orders as made, including costs of preparation.
- [22] On the plaintiff’s application for leave to bring the proceeding on behalf of KHD under s 237 of the *Corporations Act* 2001 (Cth) in 11109 of 2012 and 4352 of 2012, it is disputed that an order should be that the applicant pay the respondents’ costs of the application. Mio submits that the order for costs should reflect that it succeeded on some of the disputed questions.
- [23] Under s 237, an applicant must be qualified and must succeed in establishing five elements, including that the applicant is acting in good faith, that it is in the best interests of the company that leave be granted and that there is a serious question to be tried. The BMD defendants, in particular, disputed those points. Mio failed at the hurdle that a grant of leave was in the best interests of the company, but would have been successful on most of the other issues. In effect, it submits that it should only be ordered to pay the costs of the application on the issues on which it failed and that an order for costs of the other issues should be made in its favour or that the successful defendants should only receive 50% of their costs of the application.

⁵ UCPR 351 refers to the costs of and incidental to an ADR process. UCPR 370 refers to security for the “costs of and incidental to the proceeding”. UCPR 947I refers to the “costs of and incidental to” the registration of a judgment. And item 1 of Schedule 3 refers to the “costs of and incidental” to the attendance of both counsel and solicitor or clerk and counsel or solicitor in the Magistrates Court.

- [24] The UCPR no longer provide for an order for the costs of issues. UCPR 680 is set out above. The other statutory provision which is relevant is UCPR 684:

“684 Costs of question or part of proceeding

(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.

(2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates.”

- [25] I repeat two things I said recently about the costs of “issues”:

“The width of the power where each party can claim some success is now reflected in UCPR 681 and 684. The word ‘event’ in the former rule is to be read as including the plural ‘events’, so that an order for costs may reflect the success of particular parties in respect of separate events decided in the proceeding.⁶ As well, the latter rule refers to making an order for costs in relation to ‘a particular question in, or a particular part of, a proceeding’ whereas the previous comparable rule referred to costs of several ‘issues’, which had a potential confining affect.⁷ It is unnecessary to further explore the operation of UCPR 681 and 684 together...

In a number of cases prior to the introduction of the UCPR, courts expressed concern that taxation of issues often had disconcerting and unfair results, as well as being troublesome and difficult to carry out. A rough apportionment of costs “intelligently made”, has been said to lead to a fairer result.”⁸

- [26] In my view this is true of the costs of Mio’s application for leave under s 237. Costs were incurred in a number of respects because of the way in which Mio brought the application for leave under s 237 as discussed in the reasons. The respondents were responding to an ever moving opponent. Still, additional costs and time in evidence were spent because of the dispute about whether Mio is a person entitled to be registered as a member of KHD and a deal of argument was devoted to whether there was a serious question to be tried as to KHD’s suggested claims upon the limited leave proposal. Some time and evidence was also spent on whether Mio was acting in good faith. In my view, it is reasonable that the order for costs on this application be limited to 75% of the successful respondents’ costs. That reflects their success yet that on some of those issues their opposition added to the costs to an extent where they should not all be recoverable.

⁶ See *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2001] QCA 191; [2003] 1 Qd R 26 at [79]-[84]; *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 3)* [2013] QSC 95 at [4].

⁷ *Todrell Pty Ltd v Finch (No 2)* [2008] 2 Qd R 95; [2007] QSC 386 at [11]-[15]; *BHP Coal Pty Ltd v O & K Orenstein and Koppel AG (No 2)* [2009] QSC 64 at [7].

⁸ *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216; *Cinema Press Ltd v Pictures & Pleasures Ltd* [1945] KB 356 at 363-364; *Cocias v Mt Isa Mines Ltd* [1967] QWN 22 at 38-39; cf *McFadzean & Ors v Construction, Forestry, Mining, Energy Union & Ors* (2007) 20 VR 250 at [157]-[160]; [2007] VSCA 289.

- [27] The remaining costs applications are by the respective defendants or groups of them for the costs of the applications to strike out the statement of claim and dismiss the proceeding. Each application was successful on the event of an order to strike out the statement of claim, but was not successful on the event of an order to dismiss the proceeding.
- [28] Mio submits that because none of the defendants were successful on their application for dismissal, the order for costs should be limited to 75% of the relevant successful defendant's costs. In my view, that outcome is not warranted.
- [29] Within the meaning of UCPR 681, the order sought for dismissal could be treated as a separate event upon the application. However, it is not uncommon that orders for strike out and dismissal are sought in one application. The applications in the present case were not unreasonably brought in respect of the orders for dismissal. In the face of clear opposition based on the same grounds on which the defendants were successful, Mio has through successive iterations of the statement of claim insisted that it is entitled to maintain the statement of claim in substantially the same form. After a day of oral argument on the question of the adequacy of the statement of claim on 30 January 2013, Mio sought leave to amend the pleading into what became the proposed Third Further Amended Statement of Claim ("3FASOC"). But the substance of the major grounds of the defendants' complaints was not addressed, for the most part. After so many unsuccessful iterations, it was not overreaching for the defendants to apply for there to be an end. The reason why the applications for dismissal were unsuccessful was that some of Mio's causes of action are viable or potentially viable. As against some of the defendants that position is weaker than others.
- [30] However, little time, overall, was spent on the dismissal aspect in the hearing of the applications. In my view, Mio should pay the respondents' costs of the applications to strike out and dismiss.
- [31] The last question is whether Mio should be ordered to pay the costs of the applications to strike out and dismiss on the indemnity basis. Mio submits not, because although UCPR 171(2) provides for an order for costs on the indemnity basis "such orders should not be made lightly and only when warranted" relying on a case where the discretion to order indemnity costs was said to be warranted only "where the losing party had misconducted itself in relation to the proceeding or where the institution of the proceeding was plainly unreasonable..."⁹ I do not accept that misconduct or unreasonableness in starting a proceeding constrain the exercise of the discretion to award indemnity costs under the UCPR.
- [32] Again the only sure starting point is the statute, which has particular features in Queensland. Thus, UCPR 703 provides that "[t]he court may order costs to be assessed on the indemnity basis" and that basis calls for the allowance of "all costs reasonably incurred and of a reasonable amount..."¹⁰
- [33] But UCPR 171(2), under which these applications to strike out the pleading were decided, also expressly provides that the court may "order the costs of the application to be paid by a party calculated on the indemnity basis".

⁹ *Gunns Ltd v Marr (No 3)* [2006] VSC 386 at [5]; see also *PCRZ Investments Pty Ltd v National Golf Holdings Limited* [2002] VSCA 24 at [36].

¹⁰ See *Amos v Monsour Legal Costs Pty Ltd* [2008] 1 Qd R 304; [2007] QCA 235.

- [34] What is the effect of the specific reference in UCPR 171 to costs on the indemnity basis? There are few references in the UCPR to costs being ordered on that basis. Apart from the general power in UCPR 703, they are confined to the contexts of an application to strike out particulars (UCPR 162(2)) or to strike out a pleading (UCPR 171(2)), a successful offer to settle (UCPR 360(1) and 361(3)), provision for costs of appearances in the Magistrates Court (UCPR 691(4)) and the costs of trustees out of a fund (UCPR 704).
- [35] Should the reference to costs on the indemnity basis in UCPR 171 have the effect that the Court should be more prepared to make such an order under that rule than on the disposition of other interlocutory applications? Such authority as there is does not support that view.¹¹ The specific reference in the text to an order for costs on the indemnity basis does not detract from the fact that the grant of power is in discretionary terms – “the court... may...order...”
- [36] The purpose of UCPR 171 is that a pleading which engages one of the grounds to strike out a pleading should not proceed to engage the obligations of the opposite party to plead in response and to proceed to trial on the infringing pleading. That purpose is informed by the objective that a claim should proceed in a timely way and that the rules are to be applied with the objective of avoiding undue delay, expense and technicality and to facilitate the just and expeditious resolution of the real issues, under UCPR 5.
- [37] In my view, the interpretation which best achieves that purpose¹² does not dictate that there should be a greater predisposition towards making an order for costs to be paid on the indemnity basis in the case of applications to strike out under UCPR 171 than in the case of other interlocutory applications, notwithstanding the specific reference to the indemnity basis in the text.
- [38] In my view, it is not possible to discern any reason why the drafter might have considered that the discretion to order costs on the indemnity basis should be more readily exercised on a strike out application than on other interlocutory applications.
- [39] What, then, are relevant the considerations which inform the exercise of the discretion in this case? Many possible factors may do so in a particular case.¹³
- [40] Mio characterised the “chief” basis of the orders for strike out as the “adherence of the [statement of claim] to the narrative style of pleading” and sought to justify that style as “part of the modern judicial trend”.
- [41] That is no justification for the 3FASOC. First, the reasons for judgment do not for a minute suggest that all narrative is objectionable. It was the 3FASOC that was objectionable. In my view, a careful reading of the 3FASOC revealed that there was a problem in identifying with any precision the case which defendants would have to meet. A serious problem of that kind is no mere technicality or matter of fashion - it

¹¹ *Gideona v Atherton* [2005] QSC 309; *QIC Logan Hyperdrome Pty Ltd & Anor v Briridge Pty Ltd & Anor* [2011] QSC 43.

¹² Section 14A of the *Acts Interpretation Act* 1954 (Qld). Section 14(1) and Schedule 1 of the *Statutory Instruments Act* 1992 (Qld) apply provisions of the *Acts Interpretation Act*, including s 14A, to the *UCPR* as a statutory instrument.

¹³ See the discussion in *Halsbury's Laws of Australia*, at [325-9570] and the detailed analysis of Martin J in *The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd & Ors* [2009] QSC 84 at [82]-[102].

goes to the very heart of the fairness of the adjudicative process. The method deployed by Mio in the 3FASOC did not “make known to the court and to parties the nature of the... case... in [this] complex matter...”

- [42] Secondly, in any event, the narrative defect was but one of a series of major complaints about the 3FASOC. 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 defendants and others over a period of more than 8 years.
- [43] The BMD defendants submit that an order for costs on the indemnity basis “is appropriate having regard to both the notice given to the plaintiff of the defects... and the excessive pleadings of fraud.” They rely on notice of their core complaints given for the successive iterations of the pleading on 11 July 2012, 26 September 2012 and 21 November 2012. The application to strike out the pleading was filed on 14 December 2012 and after the exchange of lengthy written submissions proceeded to a day’s hearing of oral argument on 31 January 2013 before it was adjourned and brought back on after Mio propounded the 3FASOC. Hence, I arrived at the conclusion stated in the reasons for judgment on the applications to strike out and dismiss that “Mio has persisted in the face of clear opposition to its excessive pleadings of fraud and a number of causes of action against a number of the defendants which are not viable or not viably pleaded.”¹⁴
- [44] Tasovac submits that the relevant circumstances “include the making of allegations that ought never to have been made and the undue prolongation of a case by a groundless contention” and relies on the pleading against it of an unmaintainable allegation of an exception to indefeasibility.
- [45] Mr Rex submits that Mio’s pursuit of him in this proceeding was a “high handed presumption” and made other submissions predicated in part on a contention that the part of the case which alleges Mio’s entitlement to be entered on the register of members as a member is one “of (sic) which he has no interest”. I put aside any further consideration whether that claim is one that can be properly brought against him. I have dealt with that in the reasons for judgment on the application.
- [46] In my view, the reasons why it should be ordered that Mio pay the costs of the strike out applications to be assessed on the indemnity basis are those advanced by the BMD defendants and Tasovac. Mio 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, Mio 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 3FASOC. That was the basis of the finding of “its excessive pleadings of fraud.”
- [47] It follows, in my view, that the appropriate order in the present case is that Mio pay the costs of the applications to strike out and dismiss to be assessed on the indemnity basis.

¹⁴ At [274].