

# SUPREME COURT OF QUEENSLAND

CITATION: *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 5)*  
[2013] QSC 358

PARTIES: **MIO ART PTY LTD** as trustee of the **Spencer Family Trust**  
ACN 121 010 875  
(Plaintiff)  
v  
**MANGO BOULEVARD PTY LTD**  
ACN 101 544 601  
(First Defendant)  
**SILVANA PEROVICH**  
(Second Defendant)  
**ROBERT WILLIAM WHITTON** as trustee of the  
**bankrupt estate of Silvana Perovich**  
(Third Defendant)  
**BMD HOLDINGS PTY LTD**  
ACN 010 093 348  
(Fourth Defendant)

FILE NO/S: BS 1714 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 12 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 12 December 2013

JUDGE: Philip McMurdo J

ORDER: **1. The application filed 6 December 2013 be dismissed; and**  
**2. Apart from the costs of the application filed 6 December 2013, each party's costs of today be that party's costs in the proceedings.**

CATCHWORDS: PROCEDURE - JUDGMENTS AND ORDERS - AMENDING, VARYING AND SETTING ASIDE - CORRECTION UNDER SLIP RULE - where the plaintiff filed an application seeking orders under the slip rule to amend one or more declarations made in a previous judgment - whether there was a slip in the previous order made -

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whether an order under the slip rule could be made.

*Uniform Civil Procedure Rules 1999 (Qld), r 388*

COUNSEL: F M Douglas QC, with D Smith, for the plaintiff  
M Hodge for the first and fourth defendants  
The second defendant appeared on their own behalf  
J N Conomos (*sol*) for the third defendant

SOLICITORS: Delta Law for the plaintiff  
Carter Newell for the first and fourth defendants  
The second defendant appeared on their own behalf  
James Conomos Lawyers for the third defendant

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HIS HONOUR: I think it's as well that I record my reasons for making no order as to costs, which I hope will further record what I understand to be now the consensus between the parties on the issue that gave rise to it. On 6 December, an application was filed by the plaintiff, seeking orders under the slip rule, to the end of amending one or more of the declarations which I made in my judgment of 14 November 2012. The apparent concern which gave rise to that application was that the Perovich interests, as I will describe the second and third defendants, might not have the benefit of an outcome of the arbitration if that results in a valuation which in turn requires the payment of a price beyond the so-called first tranche.

The true position about which all parties have agreed in the course of this morning's hearing is that whether or not the Perovich interests are active participants in the arbitration, they will be bound by and have the benefit of the arbitrator's award and its impact upon the operation of the share sale agreement. The "dissatisfied party", in terms of the share sale agreement, was the plaintiff. It was the plaintiff, as I ultimately declared, which was entitled to progress this dispute through the steps of mediation and arbitration. I have to say that my reasons for judgment in some places loosely referred to the plaintiff and the Perovich interests as the dissatisfied parties, but ultimately, the declaration which I made accords with the way in which the plaintiff correctly pleaded the case, which was that it was the "dissatisfied party".

According to its proper interpretation, as all parties now agree, the share sale agreement permits the dissatisfied party, although it is but one of two sellers of the relevant shares, to pursue an arbitration. In that event, the dispute to be resolved by the arbitrator is one between all parties to the share sale agreement. The award will bind, therefore, the Perovich interest, whether or not they actively participate in the arbitration. Therefore, there is no need for any order to be made as was sought by the application and, in any event, no order could have been made under the slip rule, because there was no slip in the orders which were made.

There is, however, a debate about costs. I was referred to some of extensive correspondence between the parties on this question. I have the impression that for at least much of that correspondence, the parties were at cross-purposes. Overall, the positions stated by the first and fourth defendants in that correspondence is closer to the true position as I've just summarised it and as the parties now agree. But I do not see where the correspondence from those defendants made it clear that the Perovich interest would have the benefit or burden of the arbitrator's award, whether or not they actively participated in the arbitration.

It is the concern about that which gave rise to this application. Therefore it does not seem to me to be fair to visit the costs of that application upon the unsuccessful applicant.

The matter of costs is also affected by the fact that the parties had to be here today for other issues in relation to these proceedings. There will be no order for costs of the application filed on 6 December 2013. I've already made orders for amended pleadings and a further review date in these proceedings.

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It will be ordered that apart from the costs of the application filed 6 December, each party's costs of today will be that party's costs in the proceedings.