Supreme Court of Victoria

Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3) [2012] VSC 399 (14 September 2012)

Last Updated: 14 September 2012

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL AND EQUITY DIVISION

COMMERCIAL COURT

LIST C

S CI 2011 5977

SUNLAND WATERFRONT (BVI) LTD	First Plaintiff
SUNLAND GROUP LIMITED (ACN 063 429 532)	Second Plaintiff
v	
PRUDENTIA INVESTMENTS PTY LTD	First Defendant
(ACN 091 390 742)	Second Defendant
HANLEY INVESTMENTS PTY LTD	Third Defendant
ANGUS JOHN LUXMOORE REED	Fourth Defendant
MATTHEW JAMES JOYCE	

JUDGE:	CROFT J
WHERE HELD:	Melbourne

DATE OF HEARING:	6 August 2012
DATE OF JUDGMENT:	14 September 2012
CASE MAY BE CITED AS:	Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)
MEDIUM NEUTRAL CITATION:	[2012] VSC 399

COSTS – Discretion of the Court to award costs – whether Defendants entitled to indemnity costs – whether proceedings commenced or continued in wilful disregard of known facts or clearly established law – whether Plaintiff should have known it had no prospects of success – whether assessment of prospects of success involved hindsight – whether proceedings have been commenced or continued for a collateral or ulterior purpose – conduct of Plaintiffs. as litigant – whether Defendants obliged to warn Plaintiffs that case was hopeless and doomed to fail – whether costs to be awarded on a gross sum basis – *Colgate Palmolive Company v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 – *J Corp Pty Ltd v Australian Building Labourers Federation Union of Workers (WA Branch) (No 2)* [1993] FCA 42; (1993) 46 IR 301 – *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 – *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209 – *NMFM Property Lty Ltd v Citibank Ltd (No 11)* [2001] FCA 480; (2001) 187 ALR 654 – *Sidemeneo (No 456) Pty Ltd v Ward* [2011] VSC 559 – *Seven Network Limited v News Limited* [2007] FCA 1062 – *Supreme Court Act* 1986 sub-s 24(1) - *Jurisdiction of Courts (Cross Vesting) Act* 1987 - *Civil Procedure Act* 2010 – *Supreme Court (General Civil Procedure) Rules* 2005 r 63.07

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr G.A. Thompson SC with Dr S. Monks	Thomsons Lawyers
For the First, Second and Third Defendants	Mr J.T. Rush QC with Mr H.R. Carmichael	Freehills
For the Fourth Defendant	Mr P.W. Collinson SC with Mr N.D. Hopkins	Norton Rose

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1 The present applications follow the publication of my reasons for judgment in this proceeding on 8 June 2012.[1] The references and abbreviations used in the Judgment are also

used in these reasons for judgment with respect to the present applications.

2 The present applications are made by Prudentia, Reed and Joyce; the first, third and fourth defendants, respectively. The second defendant, Hanley, seeks liberty to apply and otherwise reserves its position on costs. Reference to the defendants in these reasons is subject to this reservation.

3 In addressing the issues raised in these applications, I do not, with some exceptions, propose to repeat what I said in the Judgment insofar as it is relevant to the principles by which they are to be decided.[2] In most cases, it is sufficient to make reference to the parts of the Judgment relevant to the principle relied upon, either in general or more specific terms. It is, however, useful to put the present applications in the context of the Sunland case and my findings in that case, hence the background material which follows.

Background

4 As set out in the judgment, I found that the plaintiffs had comprehensively failed to establish their claims. For present purposes, it is helpful to recall the background to this proceeding, as set out in the Judgment:[3]

> "2. These proceedings relate to a piece of land situated in Dubai in the United Arab Emirates ("UAE"). This land, known as "Plot D17", is a lot in a land development site known as "the Dubai Waterfront". At the time Plot D17 was being created in the planning and development of the Dubai Waterfront, the Dubai property market was, as it was said, very "hot" and there was a great deal of speculation in land with plots being bought and sold with significant financial gains being made by buyers and sellers, whether or not the plot had actually been developed or was to be developed by a particular buyer or subsequent purchaser. The Dubai authorities were, it seems, somewhat concerned at the degree of land speculation, both generally and insofar as it may have inhibited the process of actual land development and building on these plots. Plot D17 remains a piece of sand near the shore of The Gulf.
>
> 3. Nakheel PJSC ("Nakheel"), is one of the major Dubai government development entities and the creator of several large scale projects, including the Palm Islands, the Dubai Waterfront and the World Islands. For each project Nakheel establishes a master developer entity which owns the land and arranges plot sales and infrastructure installation. Nakheel's corporate entity for the project known as "The Dubai Waterfront" was Dubai Waterfront LLC ("DWF"). Joyce was the managing director of DWF in 2007. Other individuals with whom the Sunland entities dealt were Mr Jeff Austin ("Austin"), who was, in 2007, the Director – Project Control of DWF, Mr Anthony Brearley ("Brearley"), who, in 2007, was Senior Legal Counsel of DWF and Mr Marcus Lee ("Lee"), who, in 2007, was the Director Commercial Operations of DWF. Both Joyce and Lee are currently the subject of criminal proceedings in Dubai. Reed was, in 2007, the Managing Director of Prudentia and also a director of Hanley Investments Pte Ltd ("Hanley"). Reed is also currently the subject of criminal proceedings in Dubai. For convenience Prudentia and Hanley are referred to from time to time as "the Prudentia parties".

4. The plaintiffs, the Sunland parties, are, with respect to the first plaintiff, Sunland Waterfront (BVI) Ltd ("SWB"), a company incorporated in the British Virgin Islands and owned by the second plaintiff, Sunland. Sunland is a public company which is listed on the Australian Stock Exchange ("ASX"). Mr Soheil Abedian ("Abedian") is currently the Chairman of Sunland. In 2006, he moved to Dubai and took up the position of Managing Director of Sunland Group (Dubai branch), but was, in any event, employed by Sunland Group Limited. He is also a director of SWB. Mr David Brown ("Brown") arrived in Dubai in March 2006 to establish a Sunland branch in the Emirate, in the role, of "International Design Director". Brown continued in that role and became the Chief Operating Officer for Sunland Group (Dubai branch) on 13 September 2007. His main area of work and responsibility was the studying of the viability of projects. Brown worked closely with and reported to Abedian, who confirmed in evidence that "...almost everything that [Brown] did that involved significant events or decision making, he would always check with [Abedian]".[4] The documentary evidence, particularly emails, supports this position. The Sunland parties plead that SWB was introduced by Sunland into the transaction for the purchase of Plot D17 on 14 September 2007,[5] though it is said that it was actually introduced on the preceding day.[6] In any event, SWB had no role prior to that date. Even after its introduction, SWB was treated as a wholly owned corporate vehicle of Sunland's and it had no independent existence in the present context in any real sense. Consequently, and against this background, I have, unless indicated to the contrary, referred to the relevant Sunland party or parties simply as "Sunland". Also, the word "it" where used with reference to Sunland connotes the singular or plural in such references, as appropriate.
5. In more recent years, the Dubai authorities became concerned about, what may be termed, the "propriety" of a number of land and associated transactions, particularly involving Dubai government entities such as Nakheel and DWF. As a result, investigations were commenced by Dubai authorities in relation to allegations of bribery in or associated with these transactions. As Logan J found in the course of these proceedings before the Federal Court, the Sunland entities were themselves under investigation by Dubai authorities in this context,[7] a position which was reinforced by the evidence before this Court, in the course of the trial."

5 The plaintiffs' claims were summarised in the Judgment, as follows:[8]

"**Sunland's misrepresentation claims**

10. In general terms, Sunland alleges that during 2007, Reed, a director of Prudentia and Hanley, and Joyce, the managing director of DWF, either as principal or as a 'party involved', made various representations concerning Plot D17. In reliance on the representations, it is alleged that SWB entered into an agreement with Prudentia which materially provided for the payment of a 'consultancy fee' of AED44 million in consideration for which Prudentia agreed to transfer its right to negotiate and enter into a plot sale and purchase agreement with DWF for the acquisition of Plot D17 ('the Prudentia Agreement'). Some time later, following a decision by Prudentia to incorporate a subsidiary, Hanley, 'as part of expanding its business into Asia', SWB came to discharge its agreement with Prudentia and enter into a fresh agreement with Hanley ('the Hanley Agreement'). On 26 September 2007, SWB signed a sale and

purchase agreement with DWF for the purchase of Plot D17 for a price of AED 120 per square foot. On 1 October 2007, Sunland authorised the release of a cheque payable to Hanley in the sum of AED 44,105,780 which Hanley then negotiated to its credit. Reed is alleged to have been an agent of Hanley, who was seized with the knowledge of the representations and their falsity.

11. More particularly, the basis of the claim by Sunland in this proceeding is that representations were made to Sunland concerning the status of Plot D17 and that those representations were false and misleading. As indicated previously, SWB was introduced into the impugned transaction on 13 or 14 September 2007.

...

13. Sunland claims that these representations were false and that it relied upon them in taking a number of steps in relation to the purchase of Plot D17. On this basis, Sunland claims that the making of the alleged representations constituted a breach of s 52 of the *Trade Practices Act* 1974 (Cth) ('TPA') and a breach of s 9 of *the Fair Trading Act* 1999 (Vic) ('FTA'). Sunland also claimed that tortious liability in deceit flowed from such representations.
14. Additionally, Sunland claims that Reed made the representations as agent for Prudentia, and later Hanley, or as a person involved in the contraventions by Prudentia and Hanley under s 75B of the TPA. In relation to the alleged deceit, Reed is said to be liable to Sunland as a joint tortfeasor with Joyce. By reason of the conduct pleaded in the Second Further Amended Statement of Claim, Reed is also said to have engaged in conduct in breach of ss 53(aa), 53(g) and 53A of the TPA and also ss 9, 12(b), 12(k) and 12(n) of the FTA.

...

16. 16. Sunland claims that each of Prudentia and Hanley breached s 52 of the TPA by reason of the alleged making of representations by Reed. Prudentia and Hanley are also alleged to have breached ss 53(aa), 53(g) and 53A of the TPA. Hanley is said to be a 'person involved in' Prudentia's contraventions under s 75B of the TPA. Prudentia and Hanley are also said to be vicariously liable for Reed's alleged deceit. Further, by reason of the conduct pleaded in the Second Further Amended Statement of Claim, Sunland claims that each of Prudentia and Hanley engaged in conduct in breach of ss 9, 12(b), 12(k) and 12(n) of the FTA. By reason of the conduct pleaded against Joyce, Sunland claims that Joyce contravened ss 52, 53(aa) 53(g) and 53A of the TPA. In relation to the alleged deceit, Joyce is said to be liable to Sunland as a joint tortfeasor with Reed. No claims were made against Joyce under the FTA."

6 I found that Sunland had not established that the Representations (and Hanley Representations) had been made:[9]

> "240. Sunland's case failed to establish its allegations in terms of the Representations or the Hanley Representations. Further the evidence Sunland relied upon evidences no misrepresentation, by words or other conduct, with respect to something in the nature of a "right" of negotiation or a preferred negotiating position on the part of Reed or Prudentia in relation to Plot D17. Rather, the Sunland case evidences that Prudentia did hold such a position in relation to Plot D17.

> Sunland has failed to adduce evidence which casts doubt on the apparent preferred negotiation position enjoyed by Prudentia in relation to Plot D17 and the evidence shows that Sunland did in fact step into Prudentia's shoes to hold negotiations with DWF and, ultimately, sign a SPA for the purchase of Plot D17.
>
> ...

244. 244. On the basis of my consideration of the evidence in relation to the transaction or transactions involving various parties with respect to Plot D17, I am of the opinion that Sunland has entirely failed to establish that the Representations were made by any of the defendants in breach of the statutory provisions relied upon as alleged and consequently the basis of its claims based on misrepresentation, under the TPA and the FTA must fail at the outset. Additionally, this also means that the claim in the tort of deceit must fail as one does not even reach the position of considering whether any representation or representations were fraudulent in the relevant sense as there are, in my view, none to consider which would fall into this category."

7 I also found that even if the Representations (and Hanley Representations) had been established, Sunland had not proved that these representations were false or misleading:[10]

> "239. It was for Sunland to prove that Prudentia or Reed had no "right" over Plot D17. Sunland has called no such evidence. It might well have been thought that Brearley or Mustafa would have provided critical evidence to support such an assertion if indeed it be true (but which on the evidence it could not be). Sunland has not demonstrated by evidence the falsity of the Representations, as best as the Representations as alleged by Sunland could be understood, that were, as Sunland contended, relied upon by its witnesses, Brown and Abedian. Thus, in Sunland's contention that on a "... proper analysis of the pleadings, it was unnecessary for the Plaintiffs to adduce evidence as to the falsity" of the Representations, Sunland has ignored the necessity of proof of a vital element of the allegations put against Reed, the Prudentia parties and also against Joyce." (citations omitted)

8 Further, even if the Representations (and Hanley Representations) had been established, and were found to be false or misleading, I found that Sunland had not relied on these alleged representations to make the payment:[11]

> "363. On the basis of these authorities and the conduct of the parties and the events which have already been examined in detail, I am of the opinion that it is clear that there was no reliance on the part of Sunland on the representations or conduct of Reed, the Prudentia parties or Joyce which could be said to have caused any loss or damage to it. In particular, I am of the opinion that, for the reasons already set out in detail, Sunland simply made a commercial decision to ensure that it was in a position to purchase and develop Plot D17 exclusively without having to do so under any joint venture arrangement with the Prudentia parties, having regard to the very

> significant profit potential that it assessed was likely to flow to it on this exclusive basis. Consequently, Sunland was little concerned about the basis upon which it paid the fee – it simply wanted Reed and the Prudentia parties to 'walk away'." (citations omitted)

9 Sunland also failed to establish its case for tortious liability in deceit[12] and, critically, that it had suffered any loss and damage, assuming that a basis of liability against some or all of the defendants had been established.[13] Sunland had some success on jurisdictional issues,[14] but these issues were not of significance from a costs perspective as they consumed a relatively insignificant proportion of trial time – and, having regard to the written material before the Court – pre-trial time. They are also insignificant in relation to whether a special costs order should be made against Sunland as these issues were treated in a manner which did not attract the application of the principles of relevance to the exercise of the discretion to grant a special costs order. In any event, success in these respects did not detract from the position that Sunland's case failed comprehensively.

10 On 8 June 2012, I reserved the question of costs.

General costs principles

11 The jurisdiction of the Court as to costs is conferred by sub-s 24(1) of the Supreme Court Act 1986, in the following terms:

> "24(1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid."

This general discretion must be exercised in accordance with Order 63 of the *Supreme Court (General Civil Procedure) Rules* 2005 ("the Rules").

12 The usual order as to costs is an award of costs to the successful party on a party and party basis.[15] This position is reflected in rule 63.31 of the Rules. While the Court has a discretion to make special costs orders, guidance is provided by previously identified categories of circumstances that warrant a special costs order. In Colgate Palmolive Company v Cussons Pty Ltd, Sheppard J identified some of the categories as:[16]

> "...the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud ...; evidence of particular misconduct that causes loss of time to the Court and to other parties ...; the fact that the proceedings were commenced or continued for some ulterior motive ... or in wilful disregard of known facts or clearly established law ...; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions ...; an imprudent refusal of an offer to compromise ...; and an award of costs on an indemnity basis against a contemnor..." (citations omitted)

13 In Colgate Palmolive, Sheppard J also noted and affirmed[17] observations by French J (as

he then was) in J Corp Pty Ltd v Australian Building Labourers Federation Union of Workers (WA Branch) (No 2):[18]

> "Although there is said to be a presumption in such cases that the action was commenced or continued for some ulterior motive or in willful disregard of known facts or clearly established law, it is not a necessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case ...". (Underline emphasis added)

14 Similarly, in Ugly Tribe Co Pty Ltd v Sikola, Harper J identified circumstances that warrant a special costs order: [19]

> "7. In seeking costs on an indemnity basis, the first defendant is asking the Court to depart from its usual course: *Spencer v Dowling*.[20] Special circumstances must be present to justify such a departure: *Australian Electoral Commission v. Towney (No 2)*.[21] These include:
>
> (i) The making of an allegation, known to be false, that the opposite party is guilty of fraud: *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) FCA 202; (1988) 81 ALR 397.
>
> (ii) The making of an irrelevant allegation of fraud: *Thors v Weekes* (1989) 92 ALR 131.
>
> (iii) Conduct which causes loss of time to the Court and to other parties: *Tetijo Holdings Pty Ltd v Keeprite Australia Pty Ltd* (unreported, Federal Court, French J, 3 May 1991).
>
> (iv) The commencement or continuation of proceedings for an ulterior motive*: Ragata Developments Pty Ltd v Westpac Banking Corporation* (unreported, Federal Court, Davies J, 5 March 1993).
>
> (v) Conduct which amounts to a contempt of court: *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59.
>
> (vi) The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law*: J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA) Branch (No 2)* [1993] FCA 42; (1993) 46 IR 301.
>
> (vii) The failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial: *National Australia Bank v Petit-Breuilh (No 2)* (unreported,

[1990] VSC 395, 18 October 1999).

8. The categories of special circumstances are not closed: *Tetijo Holdings*, supra. The cases must not, therefore, be read 'in an endeavour to establish a set of inflexible guidelines which should thereafter be determinative of the manner in which the Court's discretion is to be exercised [for this] would be to fetter the Court's discretion': *National Australia Bank v Petit-Breuilh*, supra."

15 In relation to commencing or continuing proceedings with no chance of success, Woodward J in Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd said that a special costs order may be warranted when:[22]

> "... it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established laws."

16 The Victorian Court of Appeal in Macedon Ranges Shire Council v Thompson said that:[23]

> "*Where the proceeding has no prospect of success*
>
> [15] Costs may be ordered whenever it appears that an action has been commenced in circumstances where the applicant properly advised should have known it had no chance of success. When a litigant presses on where on proper consideration their case should have been seen to be hopeless, the discretion to make a special costs order may be enlivened. French J (as he then was) in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers Western Australia & Anor*[24] considered that the discretion to award such costs would be enlivened when a party persisted, for whatever reason, in what should on proper consideration have been seen to be a hopeless case, and alluding to the presumption referred to by Woodward J in *Fountain Selected Meats* said that it was an unnecessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. But where the litigant did not recognise that its case was without merit a court may be disinclined to make a special costs order.[25] The Court must measure the litigant's conduct against the facts then known or which ought to have been known, the inquiries that the litigant ought reasonably to have made and the legal advice which the litigant ought reasonably to have obtained.[26] This exercise may be subject to some qualification in respect of a self represented litigant."

17 It is important to emphasise in the present circumstances that it is the conduct of a party as a litigant that is relevant to the issue of a special costs order. This has two dimensions, as the judgment of Lindgren J in NMFM Property Pty Ltd v Citibank Limited (No 11) makes

clear:[27]

> "54. Citibank relies on a statement made by Gummow J in *Botany* [*Botany Municipal Council v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories* (1992) 34 FCR 412] at 415. His Honour there said:
>
> > 'I accept that the discretion conferred by s43 [of the *FCA Act*] is not so circumscribed that an order of this character [for indemnity costs] may be made only against an ethically or morally delinquent party.'
>
> The first thing to be said is that this statement is not authority for the proposition that an order for indemnity costs must be made against a party found to have been, in any respect, 'ethically or morally delinquent'. Nor did his Honour intend to suggest that the presence of ethical or moral delinquency will always afford a sufficient ground on which to make an order for indemnity costs. His Honour was saying only that the presence of ethical or moral delinquency is not an essential condition of a valid exercise of the discretion.

55. In the course of argument I raised with counsel for Citibank a hypothetical case in which a cause of action founded on fraud succeeded. He seemed to accept that consistently with his submission, the discretion to order indemnity costs could always be properly exercised in such a case, even though the fraud was not in any way associated with the launching of the claim or cross-claim or the manner of conduct of the litigation by the party found to have been fraudulent. Counsel for NM, on the other hand, submits that it is only ethical or moral delinquency of the latter kind that is relevant to the exercise of the discretion.
56. The ordinary rule is that an award of costs is on the party and party basis, and that it is only in a special case that the discretion to depart from that rule will be properly exercised: *Venture Industries* at 153 per Black CJ, 158 per Cooper and Merkel JJ. In my opinion, there is no counterpart ordinary rule that in the absence of special circumstances indemnity costs will be ordered where the losing party was guilty of ethical or moral delinquency in the antecedent facts which have given rise to the litigation. Even in a proved case of fraud, for example, in my opinion the presumption is that a costs order against the fraudulent party will be on the party and party basis. The conduct of a party that is relevant to the issue of indemnity costs is the party's conduct *as litigant*. But, as noted below, the knowledge that a party has, including knowledge of his or her past conduct, may be relevant to an assessment of his or her conduct as litigant.
57. Senior counsel for Citibank submits that there have been cases where the underlying or background conduct of a party has been relied on in support of the making of an order for indemnity costs. He referred to two cases. In the first, *Australian Guarantee Corp Ltd v De Jager* [1984] VR 483 ('AGC'), a mortgagee finance company ('AGC') was ordered to pay the costs of a wife-mortgagor ('Mrs De Jager') of successfully defending AGC's action for possession. AGC had forwarded the mortgage for registration knowing that what it assumed to be Mrs De Jager's signature had not been attested, although it purported on the face of the document to have been. It transpired that her signature had in fact been forged, although this had not been known to AGC. Tadgell J held that AGC was guilty of fraud for the purposes of s42 of the *Transfer of Land Act* 1958 (Vic) and

therefore did not enjoy the benefit of the indefeasibility of title provided for in s41 of that Act. The fraud consisted of forwarding the instrument for registration with knowledge that it would falsely appear to the Registrar of Titles to satisfy the legislative requirement of attestation. In relation to costs, Tadgell J stated (at 502):

> 'Upon the facts as I have found them the pursuit of the action was in my opinion a high-handed presumption. In the end, it was conceded for AGC that Mrs De Jager's signature was a forgery. Having pursued the action with the knowledge...that it had, and failed, AGC allowed itself a luxury. The Court ought to do what I can to ensure that Mrs De Jager is not out of pocket over it.'

Citibank may be taken to submit, by analogy, that in all the circumstances, NM's pursuit of Citibank for contribution or indemnity should be seen to be 'a high-handed presumption'.

58. In my opinion it was AGC's conduct 'as litigant' that attracted the award of indemnity costs against it. It sought to enforce the mortgage against Mrs De Jager whose signature, it always knew, had not been attested, and therefore might or might not have been forged. As litigant, it assumed the role of an innocent mortgagee, knowing it had something to hide and hoping it would not be found out."

18 Thus ethical or moral delinquency in the antecedent facts giving rise to litigation are insufficient to displace the general rule, or presumption, that costs are to be awarded on a party and party basis in the absence of special circumstances. Nevertheless, the knowledge of a party as a litigant in relation to past conduct may be relevant to assessment of the conduct of that party as a litigant.[28] The other dimension which follows from this approach is that it is the conduct of the party that is to be assessed, not that of its legal advisers except insofar as the conduct of those advisers has affected the conduct of the party. For the reasons which follow, I am of the opinion that the knowledge of Sunland, through its principal witnesses, Brown and Abedian, including, what must clearly follow, the knowledge of their past conduct with respect to the Plot D17 transaction is highly relevant to an assessment of Sunland's conduct as a litigant.

19 Also relevant to the question of costs are the provisions of the Civil Procedure Act 2010. In the present circumstances, the following provisions and aspects of those provisions are particularly relevant:

(1) among other things, the object of the *Civil Procedure Act*, is to reform and modernise the practice, procedure and processes relating to civil proceedings in the Supreme Court, and other courts. Importantly, provision is made for an overarching purpose in relation to the conduct of civil proceedings which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute in those proceedings;[29]

(2) in the exercise of its powers, the Court must seek to give effect to the overarching purpose, whether these powers arise from the procedural rules or practices of the Court or otherwise;[30]

(3) an overarching obligation is cast upon parties and legal practitioners representing or acting on behalf of a party, whether they be barristers or solicitors, to act honestly at all times in

relation to a civil proceeding and not to make any claim or make a response to any claim in a civil proceeding that is frivolous, vexatious, an abuse of process or does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, have a proper basis;[31]

(4) an overarching obligation applies to the persons referred to in the preceding paragraph to disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control of which the person is aware and which the person considers, or ought reasonably consider, are critical to the resolution of dispute. Disclosure must occur at the earliest reasonable time after the person becomes aware of the existence of the document or at such other time as the Court may direct. These provisions do not apply to any document which is protected from disclosure on the grounds that privilege which has not been expressly or impliedly waived or under any other Act (including any Commonwealth Act) or other law;[32] and

(5) in exercising any power in relation to a civil proceeding, including the exercise of the discretion as to costs, the Court may take into account any contravention of the overarching obligations.[33]

For the reasons which follow it is not necessary to discuss the application of these provisions specifically. Nevertheless, as indicated in detail in these reasons, there has clearly been contravention of the overarching obligations on the part of Sunland. Accordingly the Court's discretion as to costs has been exercised in accordance with these provisions and having regard to the nature and extent of these contraventions, on the bases and the manner set out below.

20 The present applications include applications for the award of costs with respect to these proceedings when they were conducted in the Federal Court prior to their transfer by Logan J, on 3 November 2011, to this Court. His Honour did not make any costs order on the transfer of these proceedings, though, in a number of interlocutory proceedings, costs were awarded in favour of a particular party or parties but, in many instances, costs were simply reserved. Under s 11(3) of the Jurisdiction of Courts (Cross Vesting) Act 1987, the court to which a proceeding is transferred, in effect, steps into the shoes of the court from which the proceeding has been transferred, with power conferred on the transferee court to make further orders in the proceedings as though the steps already taken in the transfer court had been taken in the transferee court.[34] This position is, however, subject to what is, effectively, an exception to this general power with respect to costs. Thus, s 12 of this Act confers power on this Court to make an order as to costs that relates to the conduct of this proceeding before its transfer or removal from the Federal Court to the extent that those costs have not already been dealt with by that Court.[35] The jurisdiction to grant a special costs order in this Court and the Federal Court of Australia is relevantly the same, with the same principles applicable.[36]

21 The costs principles potentially applicable in the present circumstances have many aspects in common with the principles concerning the jurisdiction of the Court to stay a proceeding which amounts to an abuse of process. Joyce did not seek a stay of the proceedings on this basis, but now relies upon the principles with respect to abuse of process to inform the discretionary considerations with respect to the award of costs.

22 A proceeding is an abuse of process when the plaintiff uses the processes of the court to effect an object not within the scope of the process, or for a purpose other than that for which

the proceeding is properly designed, or to secure some collateral advantage beyond what the law offers.[37] An improper purpose of this nature will render the proceeding an abuse of process if it is the predominant purpose of the moving party in the proceedings, though it is not necessary that this be the sole purpose of that party.[38] The cases also emphasise that a proceeding may be an abuse of process even if the moving party in that proceeding has a prima facie case.[39]

Bases of costs applications

23 The defendants seek special costs orders on the following broad bases:

(a) the proceedings were commenced or continued in wilful disregard of known facts or clearly established law, thus in circumstances where Sunland, properly advised, should have known that it had no chance of success; and

(b) where, in all the circumstances, the proceedings must be presumed to have been commenced or continued for a collateral purpose or ulterior motive.

In this context, it is also submitted against Sunland that it made allegations in the proceedings that ought never to have been made.

Application of general costs principles

Wilful disregard of known facts and law

Representation case

24 At the heart of Sunland's pleaded case was, as submitted against it, the proposition that it had a state of mind, induced by the pleaded representations, that Reed or Prudentia had a contractual right to acquire Plot D17. It was, however, clear from the evidence given by Brown and Abedian that each of them understood that neither Reed nor Prudentia had any binding agreement in respect of Plot D17 and no legal interest in the Plot.[40] It was "plain" during the cross-examination of Brown and Abedian that they both understood that neither Reed nor Prudentia had any binding agreement of this nature.[41]

25 Even if it could be said that the representations relied upon by Sunland involved something less than a contractual right, a legal right, to acquire Plot D17 and something less in the nature of a "right" or "control", this case was not established.[42] Not only was a case of this nature not established, but Sunland was unable to articulate the nature or content of the alleged representations, whether it was put on the basis of a legal right, some other right or control.

26 More particularly in relation to Sunland's inability to articulate the nature of the alleged representation, it was submitted against it that:[43]

> "4.2.1 Whereas precision in pleading fraud or misrepresentation is necessarily expected[44] the oral representations alleged in paragraphs 12, 13 and 18 in the [Second Further Amended Statement of Claim] were expressly qualified ('*words to the effect*'),[45] and expressed allegations in imprecise language and in the disjunctive upon critical matters; *'I have the right over'* or *'I control Plot D17'* (underlined

> emphasis added).[46] His Honour found in judgment that '... *the pleading and the Sunland evidence elaborate an amorphous "right" and "control" in development land yet to come into existence in terms which the Prudentia parties did not represent*".[47] A fact relevant to the exercise of discretion in favour of the award of indemnity costs and which indicates the commencement and continuation of unsustainable claims *'... is unequivocal evidence, in Brown's own words, against the "right" or "control" that Sunland contended was the basis for its conduct in deciding to remove Reed and Prudentia from the Plot D17 transaction by paying a fee*.'[48]
>
> 4.2.2 Sunland did not allege that Austin or Joyce represented that Reed or Prudentia had 'control' over plot D17 by expressly using the word 'control'.[49] Brown's evidence as to what Austin and Joyce said to him is imprecise.[50] As His Honour observed, *'... a case such as the one advanced by Sunland, as does any case so serious, the requirement of nothing less than strict and cogent proof upon admissible matters arising from and limited to the pleading'*.[51] The pleading and evidence referred to in the preceding paragraph, is the first illustration of *Colgate Palmolive* categories and circumstances which may ground the making of a special order as to costs in this case namely: *'The making by Brown and Soheil Abedian of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud*'; *'the wilful disregard of known facts*'; and *'the making of allegations which ought never have been made*'. ..."

27 The conclusions that, in the present context, flow from this inability are helpfully and, in my view, accurately summarised in submissions against Sunland, with reference to its pleaded case and my findings at trial:[52]

> "4.3.1 Upon such imprecise premises, and in the face of contradictory documentary evidence of which Brown was the author, the Sunland parties pleaded in paragraph 19 [of the Second Further Amended Statement of Claim], a representation in ambiguous terms that Reed or Prudentia or both of them *'had a right to acquire Plot D17 or the land on which Plot D17 was located'*, which representation was alleged to be false by reason that *'neither Reed nor Prudentia had a right to acquire Plot D17 or the land on which Plot D17 was located*'.[53] The 'right' was not defined.[54] The course of evidence revealed that the pleaded claim of 'right' was wholly contrived and artificial and was contrary to facts known and understood by Brown and Abedian that D17 was an unsub-divided plot, the price per square foot of BUA of which was yet to be settled and in respect of which Sunland sought from Reed and obtained, pursuant to the earliest draft terms of an MOU/Implementation Agreement, Prudentia's agreement that Sunland would negotiate the terms of a sale and purchase agreement with Dubai Waterfront on behalf of a wholly owned

> Sunland subsidiary which would transfer the sale to a jointly owned special purpose vehicle.
>
> 4.3.2 The particulars of alleged falsehood were three hearsay statements of Dubai officials not called to give evidence by the Sunland parties, two of whom were alleged to state what Sunland irrefutably knew, that *'Reed did not own the land' ... 'the site'*.[55] Such hearsay allegations ought never have been made or maintained. In terms, they were relevant to the pleading of 'right' or 'control' only because they confirmed that the alleged 'right' or 'control' representation derived from an enforceable agreement to acquire D17 which Sunland knew did not exist. For this reason the 'right' and 'control' representation alleged was entirely irrelevant to the commercial facts underlying the *'walk away'* offer and the later payment to Hanley[56] which were steps taken by Sunland in full knowledge that there was no enforceable agreement[57] and Sunland was prepared to proceed on that basis.[58]
>
> 4.3.3 The Sunland parties did not resile from their pleading. The Sunland parties do not resile from nor is there any evidence, other than in respect of one statement of Brown concerning his introduction to D17, that they have qualified or withdrawn or formally acted to correct similar false statements made to Dubai investigators and the Dubai criminal court in respect to the prosecution of Joyce and of Reed *in absentia*. The now disproved oral representations alleged in the [Second Further Amended Statement of Claim] constituted not just building blocks upon which the Australian proceeding was based, but are at the heart of the prosecution of Joyce, Lee, Reed, and Brearley, as defendants to the criminal proceeding in Dubai.[59]

28 Sunland's inability to put its case in relation to the alleged representation or representations with any particularity or accuracy must, having regard to the extent that its case did fail in this aspect, raise a significant question as to whether Sunland did ever think that it had a case in this respect. The force of this question is even greater when it is considered that the Sunland case relied, almost exclusively, on the evidence of Brown and Abedian and, further, that the representation aspect of the case relied upon the evidence of Brown, as Abedian was not privy to the critical communications, oral and written, relied upon in this respect.[60] Sunland's inability to identify the alleged representation or representations and its evidence which can only be described in a number of instances as grasping at possibilities not thought of previously,[61] simply reinforces the conclusion that it must have known that the representation case had no chance of success. It should, of course, be kept in mind in this context that Brown and Abedian were very senior officials in Sunland and not third party witnesses or others who might not be thought privy to its corporate mind.

29 Sunland sought to discount the failure of its case on this issue, and on other issues discussed further below, on the basis that criticism of its case and the issues raised in the present context is to view matters in hindsight, rather than, appropriately, foresight at the time it commenced and continued its case. In this respect, reference was made to Sidemeneo (No 456) Pty Ltd v

Ward[62] and other authorities which I discussed in my judgment.

30 Sunland's position in this respect is that it was entitled to rely upon the witness statements of Brown and Abedian and the other witnesses upon which it relied and to have the opportunity to test the evidence raised against it by the defendants in the course of the trial. In the way in which the trial unfolded, the defendants decided not to rely upon the witnesses and evidence which Sunland might have expected them to rely upon and, consequently, it contends that it was thereby denied the opportunity to test its case properly in light of all the evidence. The defendants were, however, not obliged to call any particular evidence or any evidence at all if they decided that they would approach the trial on the basis that they would simply test Sunland's evidence in the course of the trial and make submissions accordingly. There are, of course, risks associated with this course, but they were risks which the defendants were entitled to choose to take. An obvious possible risk with such a course is the plaintiff, in this case Sunland, seeking to invoke the rule in Jones v Dunkel,[63] as it sought to do.[64] Nevertheless, it was not successful in this respect and so was not able to assist its own case on the basis of adverse inferences against the defendants on the application of this rule.[65]

31 Consequently, I am of the view that Sunland's position must be evaluated on the basis of the evidence it did rely upon, particularly having regard to the fact that the critical and significant evidence which it did rely upon was principally the written and oral evidence of Brown and Abedian, two of its very senior officers.

32 Apart from the inability of Sunland to articulate the nature or content of the alleged representations, there are numerous other aspects of its case which it knew, or must be taken to have known, were not supported by and could not be supported by the evidence – being matters within its direct knowledge through Brown and Abedian, principally the former, or not supported by documentary evidence, on any reasonable reading of the relevant documents.

33 As I indicated at the outset, it is not necessary to repeat the extensive discussion of these matters set out in the Judgment,[66] so I will merely make reference, by way of example, to various matters which, in my view, made this position very clear.

34 First, Sunland knew that when it became aware of the possibility of acquiring Plot D17, that land was no more than a proposed lot on a proposed plan of subdivision of District D on land owned by DWF and so did not exist as land parcel capable of being dealt with or the subject of separate rights.[67] In any event, it was clear that unless and until the BUA authorisation and the price per square foot of BUA was resolved by the landowner, the master developer, a contract for the purchase of Plot D17, a SPA, could not be entered into to produce an obligation binding at law.[68]

35 Secondly, it is clear that Sunland had its own commercial agenda with respect to the acquisition of Plot D17, as submitted against it, with reference to my findings:[69]

> "4.4.5 The evidence revealed that Sunland positioned itself in joint venture negotiations with Reed in accord with its successful development model pursuant to which a party other than Sunland was required to fund the substantive part of the land acquisition costs by a jointly owned special purpose vehicle.[70] That is, Prudentia's position as a funding party of the upfront land acquisition costs was additionally valuable to Sunland which was spared that sunk cost at

the commencement of the JV Project and was able to draw down design and project delivery fees pursuant to the model for the life of the project.[71] Land purchase costs pursuant to the Sunland model were a matter arising at the end of the project in the context of final profit share distribution.[72] Sunland knew and understood each of these things when in negotiation with Prudentia as to joint venture and when it offered Prudentia and paid to Hanley the *walk-away* fee. His Honour concluded at [303] that:

> 'the evidence establishes, in my view, that the payment made to "walk away" was a payment which was effected to secure Prudentia's (and Reed's) non-competition for the site, plot D17, pursuant to the release given to Sunland to negotiate exclusively for plot D17 in the agreement SWB signed with Hanley on 26 September 2011. The execution of the Hanley agreement came about purely as a consequence of the unilateral decision of Abedian to offer a "walk away" fee to Prudentia. ... As appears from the evidence, Sunland was desperate to purchase plot D17 and all the more so because it sat immediately behind their beachfront plot, plot D5B. Brown had forecast extraordinary profits for Sunland in the feasibilities he had prepared, even taking the fee into account ...'.[73]

In cross-examination Abedian confirmed that in the context of the exclusivity clause 5 of the Implementation Agreement MOU, Sunland was 'paying to have Prudentia withdraw from any entitlement, anything to do with the development of D17 (T 347.42-43).[74] Such knowledge is wholly inconsistent with the oral representations, reliance and fraud case alleged.

4.4.6 Brown stated in oral evidence that Austin '*was the first person who told me about [D17]*'.[75] This submission contradicted statements and sworn testimony Brown had given to the Dubai authorities.[76] The Judgment revealed the significance of this admission and exposed for further examination the reliability of Brown's evidence as the only Sunland party to alleged conversations with Austin, Joyce and Reed,[77] and the unreliability of Brown's workbook/notebook record[78] and other inconsistencies in evidence, in particular evidence of Soheil Abedian upon the implications of the admission, see in particular Judgment [154]."

36 Thirdly, significant aspects of the evidence relied upon by Sunland were shown to be wrong, incomplete, inconsistent or misleading. For example, Brown's statement in his oral evidence that Austin "was the first person who told me about [D17]" was contrary to sworn testimony which he had given to the Dubai authorities.[79] Brown was also found to be an unreliable witness in relation to a number of other key issues;[80] as was Abedian.[81]

Brown's apparently contemporaneous notebook record of conversations which was relied upon by Sunland was shown to be unreliable[82] and significant inconsistencies were shown to exist between Brown's typed version of his notebook entries and the notebook itself.[83] Brown also prepared documents in support of Sunland's position which were found to be inaccurate in significant respects:[84]

> "319. Brown prepared a report for Eames dated 1 February 2009.[85] This report was set out in a file note of a meeting between Eames, Brown, Abedian and Ms Anne Jamieson, General Manager of the Dubai branch of the Sunland Group on 2 February 2009. Brown's report set out, so-called, stumbling blocks to the entering into of a joint venture arrangement with Reed with respect to Plot D17, which were described as follows:[86]
>
> > 'Soheil [Abedian] and I worked with Reed during this time to try and agree the terms of a JV, but there were 3 stumbling blocks-
>
> 1. Reed wanted us to show him a Design Concept for the site, but we were not prepared to show him our ideas until we had signed an Agreement on the site.
> 2. Reed wanted about AED 65m for a Consultancy Fee (presumably for his introduction and the good price and payment terms)
> 3. Reed wouldn't accept our fees saying they were too high (PM, Design and CM fees)"
>
> [Emphasis added in the submissions by Reed and the Prudentia parties]
>
> > In the context of the D17 transaction as already examined in detail, it is, I think, clear that both Brown (and Abedian) were attempting to use this report to disguise Sunland's unilateral decision and action to offer a payment to remove Reed and the Prudentia parties from the deal to acquire Plot D17. The report sought to provide some explanation or basis for Sunland's allegation that the reason for the breakdown of the joint venture negotiations lay in Reed and the Prudentia parties' intransigence in relation to reasonable negotiating requests raised by Sunland, rather than the latter's unilateral action of seeking to pay to remove Reed and the Prudentia parties from the deal to purchase Plot D17."

37 The consequences flowing from the deficiencies in Sunland's evidence were potentially of great significance, as is clear from the following assessment of part of Abedian's evidence:[87]

> "154. Abedian's evidence was that his belief that Reed, Prudentia and Hanley had control over Plot D17 was based on the fact that Reed was introduced to Sunland by Joyce.[88] In early cross-examination, Abedian would not admit that if the introduction of Sunland was through Austin, then "the whole base of [the] belief falls away"[89] and that, in light of sworn evidence by Brown to this effect, Abedian's witness statement in this respect[90] must be wrong.[91] However, when Abedian was asked questions in the context of Brown's formal interview with the Dubai prosecutor on 16 February

> 2009, he did eventually admit that "if the introduction was not by Mr Joyce, the sworn evidence" [in the transcript of the 16 February 2009 interview with the Dubai prosecutor] "that we see on the screen" [could be] wrong.[92]. Abedian added that he was not planning to say anything about that.[93]"

38 There are other inconsistencies in Sunland's evidence and aspects of its submissions which are also supportive of the position that Sunland commenced or continued the proceedings with wilful disregard for known facts and law. They include:

(1) Brown's file note of the conversation with Joyce on 15 August 2007 makes no reference to Joyce saying words to the effect that Reed was the contact for Plot D17 as alleged in paragraph 12.1 of the Second Further Amended Statement of Claim;[94]

(2) Contrary to the allegation contained in paragraph 13 of the Second Further Amended Statement of Claim and his witness statement in this proceeding, Brown admitted that he had told the Dubai Prosecutor that Sunland was initially contacted by Angus Reed in relation to Plot D17;[95]

(3) Brown's account of negotiations towards a joint venture were inaccurate and so pervasive is the departure from the facts as documented in the course of negotiations that the reasonable inference is that there was an exercise in reconstruction involved in his account;[96]

(4) The tortured attempts by Sunland to explain away the significance of the "put your foot on it" email and the 12 September 2007 conversation with Lee and Brearley.[97] I found that these attempts were fanciful - Abedian's more so than Brown's;[98]

(5) The claim by Sunland that Recital 1 to the draft Implementation Agreement, the MOU, constituted an unambiguous representation that Prudentia had reached a clear agreement with the seller of Plot D17 and that it was an agreement to acquire and develop the property.[99] I rejected these submissions, observing:[100]

> "100. ... The submissions of Reed and the Prudentia parties demonstrated that Brown knew that any agreement as had been reached between Prudentia or Reed and the master developer was limited. Brown was in fact entrusted to act on behalf of Prudentia and Sunland to negotiate the final terms of the SPA with DWF and also technical and planning issues. ...
>
> 101. ... [T]hese clauses demonstrate that all parties understood that Prudentia had not acquired Plot D17. The right to negotiate to which Clause 2 refers was not a 'right' brought into existence by an enforceable agreement between Prudentia and DWF. The Draft Implementation Agreements, the MOU Agreements, brought into existence the agreed disposition of responsibilities as between the proposed joint venturers whereby Sunland was to negotiate on behalf of the joint venturers. Contrary to Sunland's submissions, there was no transfer of a 'right' in the terms now contended for by Sunland when it was agreed that Sunland would exercise a 'right' of negotiation on behalf of the joint venturers. The source of Sunland's ability to negotiate was the

> agreement in principle of 20 August 2007 supported by the protection of an exclusive dealing clause."

Sunland's submissions advanced a position with respect to paragraph 1 of the Recitals which was inconsistent with the operative parts of the Implementation Agreement, the MOU, and at odds with facts which Brown and Abedian knew and understood as a result of the negotiations for the acquisition of Plot D17;[101] and

(6) The conflation of the terms "Consulting Fee" and "Premium" with respect to the Implementation Agreement or MOU on the basis of an email of 14 September 2007 from Sinn in spite of the position made clear in an earlier draft, as I observed in the Judgment:[102]

> "104. Clause 7(a) of the draft Implementation Agreement or MOU recognised that it was possible that Sunland might acquire Plot D17 on behalf of the joint venture; but also that Sunland and Prudentia might ultimately be unable to agree on joint venture terms. If this latter event were to happen, Prudentia would be entitled to receive the "Consultancy Fee" set out in clause 7(a) and, presumably, Sunland would retain the land. The Consultancy Fee set out in that clause was not a fee that Sunland would have to pay before commencing negotiations with DWF, but rather, as indicated by the plain words of the draft clause, it was a fee payable if joint venture terms could not be agreed and Sunland went on to purchase the land. Clearly, the joint venture was the principal object of this agreement."

The significance of this compounding in the present context is that it obscured the fact that the actual position was that if Sunland decided not to proceed with the joint venture with Prudentia or with the acquisition of Plot D17, it could do so without any payment to Prudentia as it was neither under any obligation to proceed with the joint venture or the acquisition, a position made clear in an email from Reed to Brown dated 4 September 2007.[103]

39 Additionally, against this background, in assessing Sunland's position it does not, in my view, lie in the mouth of Sunland to say that its legal advisers were entitled to take the principal Sunland written evidence, that is the evidence of Brown and Abedian, at face value in the framing and conduct of its case. Even if these witnesses were strangers to Sunland, one would expect that in the course of preparing its case and their evidence, that they would have been subject to rigorous questioning and examination in conference so that any deficiencies and inconsistencies could be substantially discovered at this stage so that Sunland could consider how best to pursue its case, if at all. There is no evidence before the Court, perhaps unsurprisingly having regard to legal professional privilege, in relation to this process and the advice which Sunland's legal advisers gave to it in relation to these matters. In my view, this highlights the importance of the point raised by the defendants, namely that the critical question in relation to Sunland's costs liability is its belief, not the belief of its legal advisers.[104]

40 On this basis, for the reasons indicated, it is simply not plausible that Sunland's senior officers, Brown and Abedian, whose evidence was relied upon as absolutely critical evidence in the conduct of its case, could have thought that there was any representation upon which Sunland relied as the foundation of its case, given their inability to state, either in general or

specific terms, the nature and content of the representation or representations alleged as the basis of its case . Even at the hearing of submissions in relation to costs, Sunland again sought to rely upon the, so-called, "rhetorical question" which, put in the most general terms, was simply that Sunland must have paid the money to the Prudentia parties in order to secure Plot D17 and, ergo, there must have been a representation and the other elements of its case established. I have indicated previously, and comprehensively, my views on the fallacy of this approach.[105]

41 Returning to the hindsight argument put by Sunland, I am of the opinion that this is not a factor that arises in this case in the context of the costs issue. As discussed in Sidemeneo (No 456) Pty Ltd v Ward,[106] many cases fail for reasons other than because they were not properly framed and argued or because the evidence anticipated does not establish the basis for the relief claimed. Rather, the exigencies of trial, cross-examination and the introduction of opposing evidence can often result in the failure of a case, sometimes quite comprehensively, though in circumstances where it is reasonable to say that this was unexpected. This case, Sunland's case, does not, in my view, fall into this category.

42 In this case, Sunland relied principally upon the evidence of two of its most senior officers, Brown and Abedian. They are senior officers of a public company, clearly with access to high level legal advice. Brown, and less so Abedian, were the prime participants in relation to the Plot D17 transaction on behalf of Sunland. They, particularly Brown, know exactly what happened, or did not happen, in the course of that transaction and they must have known that, in a case of the type which Sunland brought, it would be necessary to establish with a high degree of clarity and particularity the representations said to have been made, that Sunland relied upon the representations and that loss and damage followed. To the extent that elements of the case Sunland sought to pursue may not have been clear to intelligent and relevantly experienced non-lawyers such as Brown and Abedian, there can be no doubt that they have had the benefit of high level legal advice being available at all relevant times. Ms Julianne Stringer (Clyde-Smith) and Eames immediately come to mind in connection with events as they unfolded in the course of the Plot D17 transaction. In the preparation of its case in the Federal Court of Australia and this Court, Sunland has availed itself of the advice of Senior Counsel, junior counsel and a substantial law firm. Sunland was well experienced and, in my view, it is implausible to think that it did not fully avail itself of its experience in property development in Dubai and Australia and take advantage of the legal resources available to it.

43 In my opinion, it is clear from the reasons set out in the Judgment that it cannot be accepted that Sunland had any basis for believing that it could establish any of these critical elements of its case. Given the critical evidence it was relying upon, this must have been the position at the outset. It is not a position that emerged during the conduct of the trial or during preliminary, interlocutory, steps prior to trial. Consequently, there is no issue of hindsight of the type discussed in Sidemeneo (No 456) Pty Ltd v Ward[107] which is relevant to the issue of costs. This hindsight issue is also discussed further in the context of the reliance and loss and damage aspects of Sunland's case, below.[108] For these and subsequent reasons, no ex post facto assessment is involved in assessing the lack of strength in Sunland's case in all its critical aspects.

Reliance

44 As I observed, the telephone conversation between Brown, Lee and Brearley on 12 September 2007 was a "very significant" one.[109] This conversation was followed by an

email from Brown to Clyde-Smith in her capacity as General Counsel of Sunland's Dubai branch. In this email, which was referred to as the "put your foot on it" email, Brown observed, first, that Lee and Brearley were "now concerned that the Marketing people are likely to try and sell the Plot, and they will have no control over this", and, secondly, that they suggested "we immediately 'put our foot on the Plot' to secure it".[110]

45 As submitted against Sunland in relation to the costs question, there was, in my view, only one available interpretation of the "put your foot on it" email. It disclosed, in stark terms, Brown's belief that at that time neither Reed nor Prudentia held a contractual right or any other right to acquire Plot D17, as indicated in the judgment:[111]

> "133. As to the first matter, the construction which focuses on the words "secure the Plot at the terms and conditions you have already agreed", when read as a whole, the email plainly discloses Brown's belief that at that time neither Reed nor Prudentia held a contractual right to acquire Plot D17. The email records that the price is "*around* 130-135 AED/ft 2 over 36 months, with 5% deposit" (emphasis added). Although Brown may have believed that some terms and conditions had been informally "agreed", if the price had not then been settled, he could not have held the belief that a contractual right to acquire Plot D 17 had yet arisen. The further email from Brown to Lee dated 13 September 2007 upon which the plaintiffs' rely[112] draws attention to the misconceptions attending Sunland's case. The words "in anticipation of receiving his confirmation" which appear in the 13 September 2007 email refer to confirmation from Reed that Sunland may enter into a SPA with DWF. I accept that whilst this might support a belief by Brown that Reed or Prudentia had some kind of non-legal influence with respect to Plot D17, this falls far short of any basis for believing that Reed or Prudentia had any legal or other right with respect to the land; hence has nothing to do with Sunland's case in this proceeding.[113]"

46 As to Sunland's evidence in relation to the "put your foot on it email", I observed that:[114]

> "132. It was submitted against Sunland that its response to the 'put your foot on it' email advanced a contrived construction of that email that dictates that one consider only a fraction of its text, ignore the balance, and ignore the plain meaning of what the email was conveying to Reed and arguing that whatever the email says, Brown still held the belief that Reed or Prudentia had a contractual or other 'right' to acquire Plot D17.[115]"

47 I found this position well established[116] and in the present context Sunland's evidence and the position it argued for with respect to this email is a stark example of a party commencing and continuing a proceeding in wilful disregard of known facts and clearly established law – a position only compounded having regard to the other matters discussed in these reasons. Sunland's attempts to explain the document away only served to reinforce this position.[117] Additionally, and to emphasise the point, the "put your foot on it" email was not a document that emerged unexpectedly in the course of the proceedings. It was Sunland's

email which was authored by Brown. It was known to deal with significant matters critical to Sunland's position at that time - and now in these proceedings – as is clear both from its contents and the fact that it was sent in draft to Clyde-Smith in her capacity as General Counsel of Sunland's Dubai Branch.[118] No issues of hindsight arise in relation to the "put your foot on it" email.[119]

48 Sunland also sought to rely upon the Hanley transaction with respect to reliance but, as observed in submissions against it, this transaction was entered into after 12 September 2007, which means that Sunland's case must fail on reliance in the absence of further facts and circumstances which amounted to a further representation or representation or confirmation that the position recorded in the "put your foot on it" email was erroneous. As the comprehensive review of the evidence as set out in the judgment indicates, neither occurred and, more particularly, there was, in my view, no representation contained in the recitals to the drafts and final agreement upon which the Hanley transaction was based.[120] Moreover, efforts by Brown,[121] Abedian[122] and their legal representatives[123] to explain the conversation of 12 September 2007 and the "put your foot on it" email were, in my view, entirely implausible.

49 In terms of the representation case, I do observe, as submitted against Sunland, that the conversation between Brown, Lee and Brearley on 12 September 2007 was pleaded expressly in the statement of claim.[124] Clearly, Sunland recognised that this conversation and what flowed from it, particularly the "put your foot on it" email, was crucial to its case. This position is made very clear in my findings, as helpfully summarised in the Costs Submissions of the First to Third Defendants (24 July 2012):[125]

> "4.16.1 As found by His Honour at [134], on 12 September, Brown prepared a draft email for review by Sunland's in-house counsel as to steps Brown subsequently proposed might be taken following his conversation with Lee and Brearley on the same day to the effect that '*Hopefully this will secure the site*'. This was the '*put your foot on it*' email. To the extent that that email arose from the 12 September 2007 conversation between Brown and Lee and Brearley, His Honour found, at [136], that '*The position argued for by Sunland is ... simply implausible in all the circumstances*'. Abedian's evidence in respect of this chronology was found not to be credible [135]. At paragraph [273], page 190 of Judgment, His Honour stated plainly why the 12 September 2007 Brown email disproved foundational elements of the pleaded case against the Defendants:
>
> > 'In light of the evidence which has already been considered in detail, I accept the submissions against Sunland that the assertion of Brown and Abedian that after the 12 September 2007 email, Brown or Abedian still thought that Prudential or Reed controlled Plot D17 cannot be sustained. It is not credible in all the circumstances discussed against the plain English, Brown's own words, in the email of that date to Reed.'
>
> 4.16.2 His Honour expressed the following observations and findings:

> (a) "Neither Brown nor Abedian could give any credible explanation as to why they did not raise any concern at this time about the message from Nakheel through WDF that neither Reed nor Prudentia had any "control" or "right" in respect of Plot D17. In my opinion, the only rational and possible explanation for this failure to act or inquire is that Brown and Abedian well understood that neither Prudentia, nor Reed, had secured Plot D17 in any enforceable sense and, consequently, did not therefore control it; and nor did they enjoy an "right" with respect to the land on any other basis. In any event, it must also follow that, had they been labouring under any misapprehension in this respect, that this apprehension was clearly and decisively dispelled by this conversation with Lee and Brearley, as evidenced by Brown's 'put your foot on it' email."[126] [citations omitted]
>
> (b) "Brown's attempts to explain away the plain words of his "put your foot on it" email were, in my view, contrived to say the least. This is well illustrated by his evidence in response to some queries I raised in the course of his cross-examination, quoted above."[127]
>
> (c) "It is fair to say, as was put against Sunland [sic in respect of the "put your foot on it" email] that Abedian's evidence in this respect made little sense. My attempts to clarify his evidence and make sense of it, quoted above, yielded little fruit.'[128] [citations omitted]

50 Sunland, on the other hand, sought to play down the significance of the conversation with Lee and Brearley and the "put your foot on it" email:[129]

> "21. As to paragraphs 9 and 10 of the Fourth Defendant's costs submissions, the significance of the conversation on 12 September 2007 between Mr Brown, Mr Lee and Mr Brearley, and the email from Mr Brown stating 'they suggested "we immediately put our foot on the Plot" to secure it' was a matter developed in cross-examination and, in relation to its relevance to the issue of reliance, had to be weighed with the other evidence going to the question of reliance summarised in paragraphs 201-221 of the Plaintiffs' Address at Trial. It is not correct to say that the email of 12 September 2007 should have been seen before the trial as having the consequence that 'Sunland's case had to fail on reliance'. There was other evidence supporting the Plaintiffs' case on reliance, including the fact that it had paid AED 44,105,780 to Hanley apparently for no other sensible commercial reason."

These submissions do not, in my view, advance Sunland's position in relation to this email and the preceding conversation and the second aspect of these submissions is merely to re-agitate to, so called, "rhetorical question" which, for the reasons set out in the Judgment, does not

advance Sunland's case either.[130]

51 On this basis, and having regard to the 12 September 2007 events, the email and my findings, it was submitted that, properly advised, Sunland and its legal representatives should have known that the misrepresentation case had no prospects of success. In the absence of the any other facts or circumstances which might be thought to be relevant to the reliance aspect of Sunland's case, I accept that this is the position, at least as far as Sunland is concerned, in the absence of any evidence of the advice it actually received from its legal representatives.

52 Reference has already been made to other matters which Sunland's case encompassed, such as the argument with respect to the recital to the draft agreements and agreement which preceded the Hanley transaction and the agreement giving effect to that transaction. However, as indicated previously and also comprehensively in the judgment, I did not find any facts or circumstances, including the recital relied upon in these draft and final agreements, which could reasonably be thought to found a representation or provide any basis for Sunland's reliance case after the "put your foot on it" email.[131] Further, and of relevance with respect to the Hanley transaction, Sunland sought to defend its case on the basis that:[132]

> "40. Contrary to the submissions of the fourth defendant, the plaintiffs' case does not require the finding that the representation was to the effect that there existed a formally binding contract entitling Reid or Prudentia to the Plot. However, as will be seen, the representation was that there was an agreement which conferred upon Prudentia a 'right' which was capable of transfer to Sunland."

The problem with this argument is that the Hanley transaction demonstrates, quite clearly in my view, exactly the opposite because the introduction of the new contracting party, Hanley, would, had there been any "right" or "rights" capable of assignment, required their vesting in Hanley. Thus, I said:[133]

> "294. The agreement with Hanley was in the same form as the signed agreement with Prudentia, save for the replacement of Prudentia with Hanley as the contracting party.[134] The late introduction of Hanley and the failure of anyone at Sunland to raise any concern about this change in the contracting party is, as I have indicated, completely inconsistent with Sunland believing that Prudentia (or Reed) had any legally enforceable rights to Plot D17 (or, for that matter, any 'right' or 'control' with respect to that land). If Sunland had thought that Prudentia (or Reed) had any such rights, very different contractual documents would have been prepared, addressing that issue, and with Prudentia (and possibly Reed) as a necessary party (or parties) to convey its (or his or their) contractual, proprietary or other rights to Hanley so that they could, in turn, be dealt with by Hanley by way of transfer to Sunland. In other words, if any of Brown, Abedian or Clyde-Smith had believed that Prudentia (or Reed) had any right with respect to Plot D17, then one would also have expected them to have satisfied themselves that that the 'right' or 'rights' had been vested in Hanley at the time the agreement was entered into with Hanley. However, neither Brown nor Abedian gave any evidence that, or to

> the effect, that they did any such thing. [135] There are no contemporaneous documents that show that either Brown or Abedian, or Clyde-Smith, made any enquiries to ensure that Hanley held any 'right' which Brown and Abedian claim they thought Prudentia (or Reed) had with respect to Plot D17. Brown could not even recall the details of any conversation with Abedian or Clyde-Smith about the substitution of Hanley.[136] I accept that it follows that the reason why the substitution of Hanley did not trouble Sunland was because the fee was in fact paid in return for the Reed and the Prudentia parties walking away from Plot D17 and not for the purchase of any legally enforceable right, proprietary or contractual, or any other 'right'. In my view the steps that were taken (or, rather, not taken) in relation to the substitution of Hanley make this position absolutely clear."

53 It should also be observed that it was Abedian's unilateral decision to cut across the course of the joint venture negotiations by making a "walk away" offer.[137] Brown and Abedian well understood this position – which in itself makes Sunland's claims of reliance and loss fanciful. This is in stark contrast to Sunland's pleaded position where it was alleged in the Second Further Amended Statement of Claim that:[138]

> "27. On 16 September 2007, Brown telephoned Reed and in the course of that telephone conversation:
>
> 27.1 Brown said words to the effect that 'due to our inability to agree terms and the fact that Dubai Waterfront wants an agreement signed, Sunland offers to purchaser Prudentia's rights to Plot D17 for a flat fee of AED20 million;
>
> ..."

As I found there was, however, no such stumbling block, as is both clear from Reed's "go for it" response to the "put your foot on it" email[139] and other evidence considered in detail in the Judgment.[140]

54 In terms of hindsight issues, I refer to the discussion of this issue and the authorities set out above in relation to the misrepresentation element of Sunland's case. Having regard to the circumstances of the 12 September 2007 telephone conversation and the "put your foot on it" email on which Sunland's senior officer, Brown, was directly and closely involved, it is quite implausible to think that Sunland could have believed that there was any prospect of establishing reliance, even assuming that it could have established that any representations were made or that it believed that they were made.[141] This position is only further reinforced by the fact of Sunland's "walk away" offer from the joint venture negotiations.

Loss and damage

55 As I observed, Sunland could have advanced a "No Transaction" case, a "Transaction" case or a "Joint Venture" case.[142] Nevertheless, as a matter of pleading, it only ever advanced a "Transaction" case.[143] In the course of submissions in relation to costs, Sunland reaffirmed that this was its case in relation to loss and damage and the other possibilities were and have

not been advanced. In addition to the logical difficulties with this case, difficulties which are discussed further below and have, in any event, been discussed in the Judgment,[144] the internally contradictory evidence of both Brown[145] and Abedian[146] did make it impossible to follow the basis upon which Sunland put its case on loss and damage. In any event, I turn now to the logical difficulties with Sunland's "Transaction" case having regard to the evidence in relation to the Plot D17 transaction.

56 In order to advance a "Transaction" case, Sunland would have needed to establish that it would have been able to successfully negotiate with DWF to purchase Plot D17 in its own right and would not have paid the Fee to Hanley. This was, in my view, always a hopeless case, as there was no dispute between the parties that it was a matter for DWF to determine to whom Plot D17 would be sold.[147] Sunland's very case was contrary to this position, because its case was that it was being told by representatives of DWF that Prudentia had some kind of "hold" over Plot D17. On this case, it would follow that from that superior negotiating position, it would have been expected that Prudentia would have entered into a SPA with DWF and that DWF would have declined to sell Plot D17 to Sunland once the joint venture discussions between Sunland and Prudentia were over.[148]

57 Even if the other cases, the "No Transaction" case and the "Joint Venture" case had been pursued, it would, as observed in the Judgment, have made little difference in the ultimate result, because Sunland failed to establish loss and damage, however its case was made.[149] Sunland never sought to pursue these cases and, consequently, never sought to prove them. In the event that it had pursued a "No Transaction" case, Sunland would have had to establish that it would have withdrawn from the negotiations to acquire Plot D17 had it known of the true position. If one assumes this outcome, Sunland would then be obliged to lead evidence to enable the Court to determine its net financial position with respect to Plot D17. This was "something which it did not seriously attempt to do".[150]

58 In my view, the "Transaction" case, which was the only case in relation to loss and damage which Sunland chose to pursue, was, for the reasons indicated above and in the Judgment, a hopeless case and one which must have been quite evidently hopeless to Sunland itself. Such an assessment of its hopelessness did not require sophisticated legal knowledge or analysis, because the logical inconsistency as between that case on loss and damage and the case Sunland was seeking to pursue with respect to misrepresentation and reliance was readily apparent. Moreover, this must have been particularly apparent to Sunland's senior officers, Brown and Abedian, who were so closely involved with and who had direct knowledge, particularly in the case of Brown, of the Plot D17 transaction. Moreover, it follows that no issues of hindsight arise with respect to this element in the Sunland case as, for the reasons discussed previously, the flaw in the case in this respect must have been readily evident to Sunland at the outset.[151]

Ulterior purpose

59 As the authorities indicate,[152] where a hopeless action has been commenced or continued in certain circumstances a presumption arises with respect to ulterior motive or wilful disregard of known facts and law. The position in this respect is put concisely and helpfully, with reference to authorities, by Dal Pont:[153]

> "[16.51] A special costs order may ensue where it appears to the court 'that an action has been commenced or continued in circumstances

> where the applicant, properly advised, should have known that he had no chance of success', in which case the action 'must be *presumed* to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law'.[154] Despite this 'presumption', it is not a prerequisite to the power to award special costs that a collateral purpose or a species of fraud be established. It is sufficient to enliven the discretion that, *for whatever reason*, a litigant, whether as plaintiff or defendant,[155] persists in what on proper consideration should be seen to be a hopeless case.[156] As explained by BW Ambrose J in *Re SCA Properties Pty Ltd (in liq)*:[157]
>
> > 'In some cases it is appropriate to make an order for indemnity costs to make it known that the court will not readily accept that its time and the successful litigant's money can be wasted on totally frivolous and thoroughly unjustified proceeding. If it appears it is not for the *bona fide* purpose of protecting and enforcing a legal right but to achieve an ulterior or extraneous purpose that in itself is justification for the making of an indemnity order.'"

60 It was submitted against Sunland that the present case falls into the former category and that the presumption ought to be made accordingly. In this respect, it was submitted that the inherent weaknesses in the cause of action raised by Sunland were of no concern to it and that, rather, it commenced the proceeding to protect itself, and probably Brown, from being charged with criminal offences in Dubai and, in particular, to create a basis for requesting the return of Brown's Australian passport from the Dubai authorities. Further, it was submitted that in pursuing this strategy, Sunland had no qualms whatsoever about misleading the Dubai prosecutor on critical factual matters.[158]

61 It was submitted by the defendants that the alignment between the Australian proceeding and the Dubai criminal proceeding is demonstrated by the pleading in the Australian proceeding itself. This, it was submitted, is significant because this pleading in the Australian proceeding was maintained even though Brown and Abedian well knew that neither Reed nor Prudentia had a contractual right to acquire Plot D17 or any other right in spite of the allegation in this respect contained in the statement of claim.[159] Further, it was submitted that this claim was persisted in even in circumstances where the state of belief claimed to have been adduced by the alleged representations could not be maintained.[160]

62 In relation to the pleadings, it was said against Sunland to be telling that the "Particulars of basis for asserting the Representations to be false" provided in the Second Further Amended Statement of Claim,[161] referred to meetings between Brown and Dubai prosecution authorities, as well as the search of Sunland's Dubai office effected on 26 January 2009. These particulars contain references to assertions by those authorities to Brown as to the alleged falsity of the alleged representations, matters which were not proper particulars. On this basis, it was submitted against Sunland that the drafting of the pleading "bore the hallmarks of a litigant anxious to please the Dubai authorities and persuade them that it had been duped".[162]

63 In submissions on behalf of Joyce with respect to the allegation of Sunland's ulterior purpose, reference was made to extensive parts of Joyce's written closing submissions.[163] It is sufficient for present purposes to refer to and set out the summary provided by Joyce in support of the present application:[164]

> "16. ... Those paragraphs summarise the investigation undertaken by the Dubai authorities and the evolution – and invention by Abedian and Brown – of the story which falsely implicated Joyce in a non-existent fraud. The following matters may be highlighted:
>
> (a) When first interviewed (1 December 2008) Brown became aware of the concern of the Dubai authorities about the nature of the Plot D17 transaction and that the Dubai authorities considered that Sunland should not have paid any fee to Reed unless he showed he had ownership rights in Plot D17. It is instructive to note that, at this point, Sunland had made no complaint whatsoever about the nature of the Plot D17 transaction. Brown (and, it can be assumed, Abedian) thought it perfectly normal to pay a spotters fee to Prudentia.[165]
>
> (b) Brown fabricated his version of events from the outset in order to protect his own personal safety. In particular, at this first interview, he falsely said he was first approached by Angus Reed, that Reed had told him he had 'development rights' in relation to Plot D17 and that Sunland had 'offered to purchased the plot' from Reed's company. However, at this point he still described the fee as a fee to "go away".[166]
>
> (c) On 3 December 2008, Brown still described the fee paid by Sunland as 'effectively a premium' and on 10 December 2008 Brown maintained that 'no-one at Nakheel requested us to pay a premium or a commission at any time'. It was not until the interview on 21 January 2009 with Mr Khalifa of the Dubai Police that Brown came to the horrifying realisation that both he and Sunland may be in serious trouble with the Dubai authorities. At this interview, Brown for the first time sought to draw Joyce into focus for the Dubai prosecutors.[167]
>
> (d) The 22 January 2009 letter to Mr Khalifa of the Dubai Police from Brown was the turning point for Brown, Abedian and Sunland. Brown was now under house arrest, a matter of great concern for any individual and obviously particularly a concern for Sunland as a publicly listed company (which is why Sunland issued false press and ASX referrals about it). Brown knew the Dubai authorities regarded the introduction fee paid to Prudentia as a bribe. His letter to Mr Khalifa was deliberately prepared to place blame and responsibility on others, especially Joyce. It also crystallized Brown's new position in relation to the 'legal rights' he contended Reed had asserted he had over Plot D17.[168]

> (e) In his first seven communications with the Dubai prosecutors (up to 15 February 2009) Brown made no mention **whatsoever** of any fact incriminating Joyce. Brown deliberately changed his position when faced with the prospect of a further interrogation from the Dubai prosecutors on 16 February 2009. After probable consultation with his local lawyer and Abedian, a decision was made to falsely allege fraud and other serious matters against Joyce. This is despite Brown knowing that Joyce and Lee were then in jail and being detained without charge. Everything Sunland did thereafter, including starting and prosecuting this proceeding, was undertaken to shore up this false position.
>
> (f) The additional paragraph inserted by Brown into the 15 February 2009 brief[169] to the Dubai prosecutor directly implicated Joyce and must have been done to deliberately cause significant harm to Joyce and, more importantly for Brown and Abedian, to seek to distance Brown from the Plot D17 transaction.
>
> (g) Brown littered his 16 February 2009 interrogation by the Dubai public prosecution with ever wilder allegations. ...”

In my view, this summary is an accurate statement of factual matters and of inferences that may reasonably be drawn from those matters.

64 Clearly, and unsurprisingly in the circumstances, by January 2009, Sunland had become increasingly concerned about developments in Dubai. Mr Eames was present in Dubai on behalf of Sunland in February 2009. It was submitted against Sunland that from this point on, Sunland wanted to achieve the following:[170]

> “(a) get ‘on-side’ with the Dubai authorities;
>
> (b) get Brown’s passport returned;
>
> (c) shore up its commercial position in Dubai in the face of the ongoing investigation;
>
> (d) assist the Dubai authorities in prosecution of the criminal proceeding, the success of which would see Joyce in jail and unable to testify and other parties taking the blame for the problematic transaction; and
>
> (e) assuage a flagging share price and corporate reputation in Australia.”

More detailed submissions were made support of this position, matters to which I now turn.

65 The idea of commencing proceedings in Australia was first raised with the Dubai prosecutor at a meeting with Brown on 17 May 2009. Mr Zarooni, the Dubai prosecutor, greeted the suggestion favourably, while saying that this was a matter for Sunland; saying, nevertheless, that he would be grateful to receive copies of any documents obtained in the

Australian proceeding as it would assist the prosecution in Dubai.[171] In order to assist Sunland in the Dubai criminal proceedings, presumably for the purpose of securing a conviction against Joyce in Dubai, the DLA Phillips Fox memorandum was prepared by Eames. At all relevant times Eames was a director of the second plaintiff, Sunland Group Limited and, significantly, a partner in various law firms which were retained to advise Sunland in Australia in relation to the Plot D17 transaction and in relation to the commencement and prosecution of this proceeding. Eames was the author of this memorandum ("the Eames memorandum"). The Eames memorandum was, to a significant extent, the product of notes prepared by Eames dated 2 February 2009[172] which were compiled from a conversation with Brown[173] and containing a statement which had been prepared by Brown.[174] Eames prepared a memorandum dated 29 May 2009 which was sent to Abedian and Brown for review. Brown responded to Eames by email on 29 May 2009:[175]

> "Ron, some minor deletions in blue and additions are in red. There are many subtleties in the negotiations which would require further elaboration to enable Kelly to fully understand the course of events. I will work on this over the next couple of days. Soheil we are seeing the prosecutor without an appointment on Sunday and will take this document with us."[176]

66 The events which followed the Eames memorandum are helpfully and, in my view, accurately summarised as follows:[177]

> "5.1.4 The terms of this memorandum demonstrate that the Sunland strategy involving keeping the Dubai Prosecutor informed of Sunland's intention to launch proceedings in Australia[178] and agreement to exchange documents arising therefrom[179] was conceived after the analysis of documents brought into existence in the course of negotiation for joint venture, including documents which revealed, as the reasons for judgment makes plain, conclusions entirely inconsistent with Sunland claims that it was a victim of fraud. The position which has resulted is that Reed and Joyce were wrongly impugned with dishonesty by witnesses who were discredited, each of whom have misled public authorities in Dubai. As the findings in judgment make clear, the negotiation and transactional facts disclosed in the 29 May Memorandum as stated in that document, when tested against the realities of contemporaneous commercial documents of record, fall away and are revealed as falsely stated and misconceived.
>
> 5.1.5 Croft J made findings in relation to the Eames report to the board:[180]
>
> > 'In the context of the D17 transaction as already examined in detail, it is, I think, clear that both Brown (and Abedian) were attempting to use this report to disguise Sunland's unilateral decision and action to offer a payment to remove Reed and the Prudentia parties from the deal to acquire Plot D17. The report sought to provide some explanation or basis for Sunland's

> allegation that the reason for the breakdown of the joint venture negotiations lay in Reed and the Prudentia parties' intransigence in relation to reasonable negotiating requests raised by Sunland, rather than the latter's unilateral action of seeking to pay to remove Reed and the Prudentia parties from the deal to purchase Plot D17.

5.1.6 The strategy of commencing litigation in Australia against the defendants was the subject of a discussion between Brown and Mr Al Zarouni of the Dubai Prosecutor at the Dubai Court of Public Prosecutions 17 May 2009. It is important to note that Brown reported being told by Mohammed Mustafa Hussein of the Financial Audit Department of the Rulers Court, '*That without my cooperation they wouldn't have been able to prove charges against Matt'*.[181]

5.1.7 Brown prepared a file note of this meeting of 17 May 2009.[182] The file note records that Brown told Al Zarouni that Sunland was considering legal proceedings in Australia and *'wanted to check with KZ first to ensure he supported this action'*. Whilst Al Zarouni apparently told Brown that the decision whether to litigate was a question for Sunland, the note also records that '*he supported us starting proceedings and said he would appreciate a copy of any reports, notes or documents that we may have in Australia [...] as he could use them in his case in Dubai'*. Al Zarouni further '*recommended that we start the case in Australia as soon as possible*'. Sunland must be taken to have entered into this pact with the Dubai Prosecutor since as was made clear in the first anti-suit application, Sunland was intent upon "assisting" the Dubai prosecution,[183] Sunland gained forensic, procedural and substantive advantages from amalgamating Sunland resources with those of the prosecution.[184]

5.1.8 Brown's evidence is that Sunland told the prosecutor about the decision to commence the Australian proceedings '[*b*]*ecause we felt he should know what we were doing in Australia*'[185] and '[*b*]*ecause there was already a legal action on this transaction and we didn't want to do anything that he may not agree with, and so we wanted to inform him of the intention*.[186]' Relevantly, this discussion preceded a record in the file note that Al Zarouni told Brown that his passport might be released *"in 2 weeks"*. Brown admitted during the trial that the fact that his passport remained confiscated was *an issue* at this time.[187]

5.1.9 The evidence is that Brown sent a copy of his file note of the meeting on 17 May 2009 to Sahba Abedian the following day[188] suggesting that Eames prepare a report '*covering our strategy for starting proceedings'* which '*could then be given to the Prosecutor in*

> *Dubai'*. Brown gave evidence at the trial that he *'was always concerned about my passport'*[189] and subsequently, in response to whether the Australian proceedings were being used as a lever to get Brown out of Dubai and his passport returned, Brown said that '*[t]o travel, I would need my passport, yes'*[190].
>
> 5.1.10 The report of 29 May 2009 prepared by Eames took the form of a memorandum relating to potential proceedings under the TPA in Australia.[191] This memorandum (translated into Arabic) was lodged by Brown with the Dubai Criminal Court on 1 June 2009.[192] The memo refers to the retainer of Liam Kelly SC '*who we have retained to advise in relation to the civil action'*. Brown's evidence at trial was that the memo '*was prepared for assessment of a legal case in Australia and also to pass onto the Prosecutor because he said he would appreciate any documents'*.[193]

67 The Eames memorandum did not identify with any specificity the alleged misleading conduct engaged in by the defendants, particularly Joyce. It was submitted also that the Eames memorandum contained many untruths and that the transparent purpose of the document is shown by reference to the strategic importance of commencing the present proceeding and the need for Brown to travel to Australia to assist in that process.[194]

68 On 31 May 2009, Brown met with the Dubai prosecutor and made plain the purpose of his visit and the Eames memorandum, as follows:

(1) he wanted to deliver Eames' note on the legal strategy for Australia;

(2) for advice from the Dubai prosecutor with regard to Sunland taking action against Joyce in Dubai; and

(3) to obtain the return of his passport.[195]

Sunland made the point in its submissions that the chronology of events impugns the argument that these proceedings were commenced to secure the return of Brown's passport before the proceedings were filed.[196] It was put against Sunland that one reason why the taking of these proceedings was foreshadowed and discussed with the Dubai prosecutor was to provide a reason for return of Brown's passport on the basis that he would need to travel outside the UAE in order to enable Sunland to commence and pursue these proceedings. On this basis the chronology of events would support, or at least be consistent with, the defendants' submissions in this respect.

69 Moving to other matters relied upon in support of the position of the defendants, it was submitted that it is significant that the file notes discovered by Sunland at the meetings between its representatives and the Dubai prosecutor on 17 and 31 May 2009 were originally discovered in redacted form; in fact, in very heavily redacted form.[197] Production of those file notes in unredacted form was resisted by Sunland when the proceeding was managed in the Federal Court of Australia.[198] On 28 November 2011, I ordered discovery of those documents in unredacted form. It is, in my view, fair to say that the redactions were excessive and unwarranted, particularly when it is clear from reading the unredacted documents that the

redactions were significant in their references to discussions with the Dubai authorities. These discussions do, in my opinion, lend support to the view that these proceedings were commenced as part of Sunland's dealing with the Dubai prosecution authorities for the purpose of safeguarding its and Brown's position in Dubai. Other issues with respect to discovery and production of documents – particularly in unredacted form – also support this position:

(1) The claim of legal professional privilege under the "litigation limb" of a file note of a meeting between Brown, Abedian, Anne Jamieson and Eames at a time when Eames was a director of Sunland Group Limited and Chairman of the Audit Committee and also a partner of the law firm DLA Phillips Fox, then Sunland's solicitors;

(2) Sunland's minutes of its Board meeting of 9 February 2009 and accompanying Board papers (Exhibit D1); and

(3) Emails from Brown to Sahba Abedian and Sahba Abedian's reply – 29 April 2009 – following Brown's meeting with Mohammed Mustafa Hussein at the Financial Audit Department of the Dubai Ruler's Court.

70 The note of the meeting with the Dubai Prosecutor were only produced by Sunland as a result of my orders and are significant in the present purposes for the following reasons:[199]

> "5.4.4 It was not until during trial, on 30 November 2011, that the unredacted copy of the 31 May 2009 note was produced by the Sunland parties and only after His Honour's rulings of 28 November 2011220. As submitted by Prudentia and Reed in their Closing Submissions of 31 January 2012, the 31 May 2009 notes were relevant as they:
>
> '15.2.2 ...disclosed the ongoing relationship between Sunland and the Dubai prosecutor and the role which Sunland played in pointing the finger at Joyce and Lee and bringing about the laying of criminal charges against Joyce, Lee, Reed and Brearley.'
>
> 5.4.5 The unredacted version of the 31 May 2009 note was referred to in His Honour's reasons for Judgment, at [327-328]:
>
> 'Abedian also gave inconsistent and unreliable evidence in relation to the information given to the Dubai authorities and in relation to his role in that respect. His evidence was that he was not in contact with the Dubai prosecutor, but this evidence was completely inconsistent with Brown's file note of 31 May 2009, which recorded a meeting between Brown, Abedian and Mr Al Zarouni. Abedian then admitted that "Mr Brown gave a statement and we gave it to the Prosecutor". When Abedian was asked "[w]hy did you tell us you've had no contact with the Prosecutor if you actually attended at the Prosecutor?", he replied "[a]bout this contact, I didn't have contact with him. I only had one meeting, which I went and gave him a report". Additionally, it appears from Brown's evidence that this meeting with the prosecutor had some significance. When Brown was asked why he was contacting the prosecutor, rather than the other way

> around, he responded that "We wanted to keep the prosecutor informed of what we were doing in Australia". The purpose of this meeting is set out in Brown's notes as follows:

1. To deliver the DLA Phillips Fox briefing note on the legal proceedings strategy in Australia
2. To seek his advice with respect to Sunland taking action against Matt Joyce and ultimately Nakheel in Dubai
3. To understand the status of the case with respect to timing and the return of my passport.

> In relation to the second point, Brown explained that one of the reasons why Abedian attended this meeting was because he had some concerns about taking legal action against Joyce because, if Sunland sued Joyce, it might be seen or involve ultimately taking on Nakheel [327].
>
> On its own, Abedian's evidence in relation to the contact, or lack of it, with the Dubai prosecutor may not, perhaps, be of such significance, but it is, as indicated in many other places in these reasons, not an isolated instance of Abedian's approach to his evidence in these proceedings. Having regard to the seriousness of the bribery allegations and investigations in Dubai, which was abundantly clear from Brown's evidence, and having regard to Brown's evidence and his notes in relation to the purpose of this meeting with the Prosecutor, it is simply not believable that Abedian would not have remembered Brown's statement and the meeting with the Dubai prosecutor.'[citations omitted][328]'"

Moreover, I accept that these notes should have been discovered initially by Sunland and in unredacted form:[200]

> "5.4.6 The 31 May 2009 note ought to have been discovered by the Sunland parties in their first List of Documents and produced in unredacted form. The redaction was wholly unjustified. The redacted material was relevant and probative upon matters in dispute and was relevant as tending to undermine the Sunland parties' pleaded case. The redacted material revealed that the Sunland parties were willing to commence Australian proceedings alleging representational claims which in terms were a replica of the damaging, misleading and inaccurate statements made by Brown to Dubai public officials and affirmed by Soheil Abedian and lent credibility by the 29 May 2007 Eames' memorandum."

71 Similarly, the claim of privilege by Sunland over the file note was not justified, particularly as Sunland had produced the Eames memorandum to Mr Mustafa Hussein of the Dubai Financial Audit Department and to Mr Khalid El Zaroumi of the Dubai Prosecutor's Office.[201] The file note was highly relevant, particularly given the picture painted in that document. As I found, "[n]owhere in the Board Report [which commenced on the same page as the file note] did Brown refer to Reed or Prudentia as having any legal entitlement to Plot D17".[202]

72 The Board minutes of its meeting of 9 February 2009 and accompanying Board papers were not discovered until after I ordered their production on 28 November 2011. It is clear that these Board papers were brought into existence at a critical time during the course of the investigation of the Plot D17 transaction by the Dubai authorities. They do, as Abedian conceded in cross-examination, contain some "critical observations". As at 9 February 2009, Sunland had made no complaint nor lodged any claim that it had suffered loss and damage with respect to Plot D17 – and raised no such issue until it became enmeshed in the bribery investigation in Dubai, at which time it had six projects incomplete and under way in the Emirate.[203] These Board minutes and papers were highly probative to facts in issue[204] and clearly should have been discovered.

73 Finally, the emails of 29 April 2009 are significant documents and should have been discovered as they disclose further Sunland versions of its role in the commercial negotiations towards joint venture acquisition of Plot D17.

74 Additionally, in support of the submission of the defendants in relation to the alleged ulterior purpose of Sunland in commencing and continuing these proceedings, reference was also made to a number of other facts and circumstances:[205]

> "(a) Brown was told on 29 April 2009 that 'without my co-operation they wouldn't have been able to prove charges against Matt'.[206]
>
> (b) After Brown and Abedian had finished their various visits to the Dubai prosecutor, Joyce was charged. This occurred on 16 July 2009, five months after Joyce was detained and placed in jail (part of which was in solitary confinement).
>
> (c) After Joyce was charged, Brown had his passport returned.[207]
>
> (d) Letters of demand were sent by Sunland to Brearley, Reed and Prudentia on 4 June 2009 **but not** Joyce.[208]
>
> (e) This proceeding was then commenced on 10 August 2009 with Joyce as fourth respondent. Sunland knew Joyce remained in jail without at that time a prospect of bail.
>
> (f) Given Joyce's incarceration in a Dubai jail, Joyce's lawyers sought and obtained from Sunland's lawyers consent to a stay of this proceeding.[209] It was only after Joyce was granted bail in late October 2009 that his position altered and he actively sought to get this proceeding on for trial in the face of Sunland's active resistance (as set out below).
>
> (g) On 21 July 2009, Sunland issued an ASX release which stated, among other things, that Sunland were investigating civil remedies in respect of an alleged fraud in Dubai and that as a result of the authorities finalising their investigations, Brown had had his passport returned. It also said that Brown was a witness to the Dubai prosecutor's investigations and was never the subject of

investigations nor detained. As His Honour found,[210] Abedian never provided a satisfactory explanation of this announcement. The impact of the announcement was an immediate 17.2% rise in the share price for the second plaintiff on the Australian Stock Exchange. Abedian conceded in his evidence that there was no other explanation for the change in the share price other than the ASX announcement and media release in similar terms.[211]

(h) Over the unhappy history of the interlocutory steps in this proceeding,[212] Sunland resisted it being set down for hearing. In particular:

(i) on 7 September 2010 Sunland sought to vacate the October 2010 trial date;[213]

(ii) Sunland resisted Joyce's 19 July 2011 application for his evidence to be received by video link resulting in the adjournment of the August 2011 trial date;[214]

(iii) Sunland resisted Joyce's appeal to the Full Court of the Federal Court for his evidence to be heard via video link;[215]

(iv) Joyce's 3 November 2011 application to cross-vest this proceeding to the Supreme Court of Victoria was opposed by Sunland.[216]"

75 Putting matters in more general and conclusionary terms:[217]

"5.1.11 Prudentia and Reed submit that the steps taken by Sunland between December 2008 and August 2009 when this proceeding was filed in the Federal Court of Australia, steps taken in the context of a bribery investigation by the Dubai authorities involving Sunland's executive Brown, demonstrate that:

(a) The Sunland parties had advanced an analysis of the focus of the Dubai prosecution in respect of the D17 investigation and had sought to position and align Sunland as a victim with that investigation focus and had contrived by misstatement and falsehood an insulated position in the investigation as the main witness against Joyce and upon which the successful prosecution depended.[218]

(b) The need for Eames to enquire of Brown and Soheil Abedian as to the D17 transaction came about as a result of the investigation by the Dubai authorities particularly where Brown himself was the subject of an investigation into bribery;

(c) This was achieved before Brown regained his passport, the release of which was materially linked to Brown's return to Australia to instruct upon the commencement of a proceeding in Australia

> involving the same subject matter as was the investigation in Dubai and involving a replication of statements and alleged representations claimed to have been made to Brown by Joyce, Reed and Lee;
>
> (d) Sunland commenced a thinly pleaded case which contrived deceit allegations and allegations of joint purpose between Joyce and Reed which would expose the Defendants to discovery obligations in the Australian proceeding, so availing Sunland with information and documents of which it had undertaken to keep the Dubai authorities informed and whom Sunland were interested to assist for the reasons of forensic advantage including obtaining the benefits of *res judicata* findings in the criminal case in which Reed was an unrepresented Defendant in absentia.
>
> 5.1.12 It is submitted that the Sunland strategy, revealed in these terms evidences a collateral and ulterior purpose in maintaining specious and factually insubstantial claims based on false instructions given by Brown and Soheil Abedian each of whom were personally interested in maintaining a pretence that the Sunland Board was fully and accurately informed.[219]

76 In relation to these facts and circumstances, it was submitted against Sunland that its ulterior motive for commencing and continuing this proceeding is shown both by these events and the inherent flaws in its claim. Moreover, it was submitted that Sunland's goal or purpose would have been achieved if the proceeding had, in fact, been stayed or the trial date deferred. It was also said that it was the granting of bail to Joyce in Dubai and then his ability to defend the proceeding and his applications for trial dates, evidence to be taken by video and to cross-vest, among other applications and the then trial itself, that materially altered the circumstances and revealed Sunland's true purpose.

77 Sunland contended that the submission that it never wanted the Australian proceedings to come to trial and attempted to delay them in the hope that Joyce would be convicted and imprisoned in Dubai does not withstand analysis.[220] In particular, it submitted that it was Joyce, rather than Sunland, who sought a stay of the Australian proceeding pending the trial in Dubai, but subsequently changed his mind. It is clear from the interlocutory applications and judgments in these proceedings in the Federal Court of Australia that there were a variety of procedural and interlocutory issues to be resolved as the matter proceeded to trial, case managed by Logan J. Consequently, I see no basis for any finding adverse to Sunland in relation to the conduct of the proceedings in the Federal Court of Australia, particularly as such a finding would involve "second-guessing", to a greater or lesser extent, case management in that Court. In any event, a finding of this kind is not a necessary pre-requisite in support of the applications of the defendants having regard to the other findings and views set out in these reasons for judgment.

78 Any of the facts and circumstances relied upon by the defendants in support of Sunland's alleged ulterior purpose in commencing and continuing these proceedings would not, in themselves, necessarily lead to or provide a basis for drawing this inference. Nevertheless, I am of the view that all these facts and circumstances, including the way in which Sunland's case was pleaded, the extent to which it failed in respect of all essential elements and

Sunland's dealing with the Dubai authorities provides a strong basis for a finding of ulterior purpose on Sunland's part.

79 For the sake of completeness it should also be noted that Sunland's "joint purpose" case also failed, no fraudulent intent or knowledge having been established. The making of such an allegation is, in my view, consistent with Brown's, and Sunland's, willingness to implicate Joyce "unjustifiably".[221] In similar vein was the pleading by Sunland that the email from Joyce to Brown of 16 August 2007 supported Abedian's contention that the email expressed a condition that Brown needed to come to an arrangement to pay Reed or Prudentia a premium before he could enter into a government entity to purchase the land. I found, however, that the language of this email was clear and indicated a contrary position:[222]

> "80. ... A plain reading of the email does not support Abedian's contention in his evidence that this document is to be read as expressing such a condition. As a matter of plain English, the email message is simply that Reed and Brown, as representatives of a potential joint venture, must sort out between themselves who will negotiate with the vendor of Plot D17 before DWF will start dealing in respect of the site. Sunland's evidence at trial in relation to this email contorts its clear language and plain meaning and is inconsistent with the contemporaneous transactional evidence and also inconsistent with Sunland's interpretation of the document in communication with the Dubai prosecutors.[223] In view of all these factors and considerations, one would have to conclude that the evidence of Abedian in this respect is that of a person concerned only to advance his interests, and those of Sunland, as he perceived them to be."

In my view, these matters also enliven the discretion to make a special costs order[224] and having regard to the matters already discussed and the nature of these particular matters militate in favour of the making of such an order.

Failure to warn

80 A further consideration relied upon by Sunland was, as it was put, the failure by the defendants to warn that its case was hopeless and doomed to fail. In this respect, reference was made to Sidameneo (No 456) Pty Ltd v Ward.[225] In relation to the failure to warn as a matter to be taken into account in an application for indemnity costs, I said in that case:[226]

> "21. Further, it was submitted by the defendants that by commencing and in continuing the proceeding notwithstanding what it knew or should have known regarding these matters it was plain that the plaintiff should have known that its case was hopeless and had no chance of success.
>
> 22. The plaintiff responded on a number of bases. First it was submitted that it was obvious before the plaintiff commenced the proceeding "that it had an unassailable case against the Doctors on liability".[227] Secondly it submitted that if the defendants were of the view that the plaintiff's case was hopeless and doomed to fail this was never

communicated in any way to the plaintiff – either by way of letter warning the plaintiff to this effect or by way of a *Calderbank* letter. It was submitted that whether a defendant warns a plaintiff that its case is misconceived or cannot succeed is a matter that the Court should take into account when considering an application for indemnity costs against the plaintiff, referring to *Thomson Land Ltd v Lendlease Shopping Centre Development Pty Ltd*, where McDonald J said:[228]

> '[21] *In David S. Holdings Pty Ltd v Coles Myer Ltd* (1995) ATPR 41-383 Drummond J dismissed an application made by the defendant for indemnity costs in circumstances which involved the plaintiff unsuccessfully seeking interlocutory relief, thereafter filing numerous statements of claim after part of the initial statement of claim had been struck out and eventually discontinuing the proceedings. In his judgment, Drummond J stated at p.40-303 -
>
> > "If a respondent at an appropriate stage, which may be at the very outset or at some later stage, e.g., after it has received pleading or after discovery, puts an applicant on notice that it regards the action as misconceived and goes further and sets out its detailed reasons for so thinking then if the applicant nevertheless proceeds without indicating any justification for doing so and fails there may be good reason to consider whether indemnity costs should not be ordered".
>
> [22] *In UFH Holdings Pty Ltd v Ord Minnett Corporation Finance Ltd* (S.C. Vic - Chernov J, No. 2020/1998, 26 June 1998, unreported) at p.4, Chernov J, after referring to that said by Drummond J in *David Holdings*, said -
>
> > "... what his Honour was saying was that in circumstances where a plaintiff has been put on notice, proceeds and fails, that does not of itself dictate the imposition of indemnity costs. Nevertheless, in the circumstances such a conclusion is a powerful factor to take into account as to whether or not such costs should be ordered".'

23. In the present case the defendants did not put the plaintiff on notice in the relevant sense, by letter or, alternatively or additionally, by means of a *Calderbank* letter. In the present circumstances this is, in my view, 'a powerful factor to be taken into account', to use the words of Chernov J (as he then was), in relation to the claim for indemnity costs.[229]"

81 In the present case I do not regard any failure to warn as being of significance because although Sunland's case was, for the reasons indicated in the Judgment and these reasons, one that comprehensively failed this result was one that was or ought to have been clear to Sunland. The same does not apply to the defendants because the critical matters underpinning its potential and actual failure were peculiarly within the knowledge of Sunland – through its principal witnesses, Brown and Abedian. Their evidence did not support the Sunland pleadings or its witness statements in critical respects – a position which Sunland was in a position to anticipate pre-trial, whereas the defendants could not and would not see this until the trial unfolded and concluded.

Gross Sum Basis

Legal principles

82 Order 63.07 of the Rules provides:

> "(a) r.63.07 (2) Where the Court orders that costs be paid to a party, the Court may then or thereafter order that as to the whole or any part of the costs specified in the order, instead of taxed costs, that party shall be entitled to:
>
> (i) ...
>
> (ii) ...
>
> (iii) a gross sum specified in the order instead of taxed costs;
>
> (iv) a sum in respect of costs to be determined in such manner as the Court directs."

83 The provisions of rule 63.07 are cast in similar terms to former Federal Court Order 62, rule 4 of the Federal Court Rules, which relevantly provided:

> "(1) Subject to this order, whereby or under these Rules or any order of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.
>
> (2) Where the Court orders that costs be paid to any person, the Court may further order that as to the whole or part of any of the costs specified in the order, instead of taxed costs, that person shall be entitled to:
>
> (a) ...
>
> (b) ...
>
> (c) a gross sum specified in the order: or
>
> (d) ..."

84 The clear object of rule 63.07 of the Rules is, in my view, similar to the object of the corresponding Federal Court rule, as discussed by Sackville J in Seven Network Limited v

News Limited, as follows:[230]

> "(i) The purpose of the subrule is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation: *Beach Petroleum v Johnson (No 2)*, at 120, per von Doussa J, applying *Leary v Leary* [1987] 1 All ER 261; *Harrison v Schipp* [2002] NSWCA 213; (2002) 54 NSWLR 738, at 742 [21] per Giles JA.
>
> (ii) An order that costs be assessed as a gross sum does not envisage that any process similar to that involved in taxation should take place. On the contrary, the Court applies a much broader brush than would be used on a taxation of costs pursuant to O 62: *Beach Petroleum v Johnson (No 2)*, at 120, 124, per von Doussa J; *Harrison v Schipp*, at 743 [22], per Giles JA.
>
> (iii) The Court should be confident that the approach taken to the estimate of costs is logical, fair and reasonable. The Court should be astute to avoid both overestimating the recoverable costs and underestimating the appropriate amount, for example by applying an arbitrary discount to the amounts claimed: *Beach Petroleum v Johnson (No 2)*, at 123, per von Doussa J.
>
> (iv) Although the power to assess a gross sum for costs involves the exercise of a discretion, it is necessary to bear in mind fundamental principles applicable to an assessment of costs on a party and party basis. These include the principles contained in O 62 r 19 (embodying the 'necessary or proper' test) and those stated in *Stanley v Phillips* [1966] HCA 24; (1966) 115 CLR 470, at 478, per Barwick CJ (on a party and party taxation the emphasis is upon obtaining adequate representation to enable justice to be done, not upon the propriety of steps taken to ensure maximum success in the cause): *Auspine Ltd v Australian Newsprint Mills Ltd* [1999] FCA 673; (1999) 93 FCR 1, at 4–5 [12]–[15], per O'Loughlin J; *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629, at [6]–[8], per Mansfield J.
>
> (v) Although the methodology permitted by O 62 r 4(2)(c) initially involves a broader approach than on a normal taxation, the provisions of O 62 and Sch 2 provide assistance in fixing an appropriate gross sum: *Charlick Trading Pty Ltd v ANRC*, at [10], per Mansfield J."

85 It was submitted on behalf of the defendants that a gross sum award would be appropriate in these proceedings for the following reasons:[231]

> "(a) This proceeding was issued in August 2009 and there have been 15 interlocutory judgments in relation to the various applications brought by parties to the proceeding, many applications relating to complex matters of law such as the taking of evidence in foreign jurisdictions and anti-suit injunctions.

(b) The parties are represented by experienced litigation practitioners who will be quite familiar with the appropriate manner in which to obtain the necessary expert evidence in support of and opposition to the gross sum sought.

(c) The affidavit of Andrew McRobert's affirmed 24 July 2012 annexes as Exhibit ANM-09 the report of Elizabeth Harris of Harris Cost Lawyers dated 24 July 2012, which relevantly states:

(i) to draw a bill in taxable form (whether on a party/party basis or otherwise) will take approximately 2 - 5 months and may cost $100,000 to $140,000;

(ii) it is likely to take between 7 months and 12 months, starting from the time Ms Harris commences drawing a bill in taxable form, until a final order is made with respect to the amount at which taxed costs are allowed;

(iii) the costs to Mr Joyce from the commencement of preparation of the bill to the conclusion of a taxation are likely to be between $155,000 and $215,000;

(iv) preparation of an affidavit from Ms Harris in support of a gross sum costs order, whether on a party/party or indemnity basis, is likely to take between 4 to 6 weeks to prepare and is likely to cost approximately $45,000;

(v) the hearing of the gross sum costs application is likely to take one day; and

(vi) the cost to Mr Joyce of an affidavit from Ms Harris in support of a gross sum costs order plus her attendance at a 1-day costs hearing is likely to be approximately $71,550."

86 In my view, it is clear that there would be a significant costs saving to the parties and a reduction in Court allocated resources by adopting a gross sum process as indicated above. The process would be of benefit to the parties as delay would be avoided and, further, given that the parties are represented by experienced practitioners, the likelihood of any prejudice as a result of applying this process would, in my opinion, not arise. Additionally, the process gives effect to the objects in the purpose of the Civil Procedure Act and would appear to be the type of process contemplated by Parliament in the provisions of ss 1 and 8 of this Act.

87 For these reasons, I am of the opinion that a gross sum costs order should be sought, but on the basis that the parties are allowed a period of time within which to have prepared expert evidence in support of gross sum claims, with directions for a response from Sunland, together with the filing of any evidence in support of Sunland's position.

88 It would be desirable in my view to refer the whole gross sum costs order process to the Costs Court immediately to enable that Court to manage all aspects of this process, procedural and substantive. In order to facilitate this arrangement I propose to refer all matters with respect to this process to an Associate Justice in accordance with rule 77.05 of the Rules (to

the extent that such a reference may be necessary). It would, in my view, also be desirable that the process be managed, procedurally and substantively, by an Associate Justice familiar with the practice of costing in the Federal Court of Australia.

Summary and conclusions

89 For these reasons, I am satisfied that Sunland commenced and continued the present proceedings in wilful disregard of known facts and law and also for an ulterior purpose. Consequently, there is more than an ample basis or bases to warrant the making of a special costs order against Sunland in favour of the defendants.

90 Having regard to the extent of the failure of Sunland's case on all critical issues and the matters relied upon in support of the defendants' applications, I am of the opinion that it is appropriate in these circumstances to exercise the Court's discretion to make a special costs order in the form of an indemnity costs order against Sunland in favour of the defendants. This order will be applicable to the whole of the proceedings, save to the extent that costs orders have already been made by the Federal Court of Australia.

91 I will hear the parties in relation to the form of orders that should be made to give effect to these reasons and also whether costs orders should be made against the second plaintiff, Sunland Group Limited, exclusively.

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[1] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2012] VSC 239 ("Judgment" or "reasons for Judgment").

[2] Adopting a similar approach to that adopted by Holland J in *Degman Pty Ltd (in liq) v Wright (No 2)* [1983] 2 NSWLR 354, at 358 (Holland J).

[3] Judgment, at [2]-[5].

[4] Transcript (6 December 2011), p 300.33 - .35.

[5] Second Further Amended Statement of Claim, paragraph 26.

[6] Court Book, SUN.001.001.0280; cf Transcript (5 December 2011), p 190.39 - .40.

[7] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2010] FCA 312, at [39] (Logan J).

[8] Judgment, at [10]-[11], [13]-[14] and [16].

[9] Judgment, at [240] and [244].

[10] Judgment, at [239].

[11] Judgment, at [363].

[12] Judgment, at [415]-[424].

[13] Judgment, at [425]-[444].

[14] Judgment, at [373]-[414].

[15] *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72, at 97-8 [67]-[69] (McHugh J).

16. [16] [1993] FCA 536; (1993) 46 FCR 225, at 233-4; and see *Manderson M and F Consulting (A Firm) v Incitec Pivot Limited* [2011] VSC 441, at [9] (Croft J); *State of Victoria v Grawn Pty Ltd* [2012] VSC 157 (Croft J); *ACN 074 971 109 Pty Ltd (as trustee for the Argot Unit Trust and Pegela Pty Ltd v The National Mutual Life Association of Australasia Limited (No 2)* [2012] VSC 177 (Croft J); *Macedon Ranges Shire Council v Thomson* [2009] VSCA 209, at [15] (Redlich JA and Beach AJA); *Auswest Timbers Pty Ltd v The Secretary to the Department of Sustainability and Environment* [2010] VSC 389; (2010) 241 FLR 360, at 366-7 [9] (Croft J) (cases which have adopted these principles in Victoria).

[17] [1993] FCA 536; (1993) 46 FCR 225, at 231.

[18] [1993] FCA 42; (1993) 46 IR 301, at 303; an approach affirmed by the Court of Appeal in *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209, at [15] (Redlich JA and Beach AJA); cited in *Auswest Timbers Pty Ltd v The Secretary to the Department of Sustainability and Environment* [2010] VSC 389; (2010) 241 FLR 360, at 366-7 [9] (Croft J). Sunland, in its submissions, sought to rely upon Court of Appeal authority for a narrower proposition (*Plaintiffs' Outline of Submissions on Costs*, paragraph 7):

"In *PCRZ Investments Pty Ltd v National Golf Holdings* [2002] VSCA 24 Chernov JA held at [36] that the ordinary rule should only be departed from 'where the institution of the proceeding was plainly unreasonable', which the footnote elaborated: 'As, for example, where the claim is patently hopeless'."

However, viewing this reference in the context of the whole paragraph of the judgment of Chernov JA to which reference was made and the authorities to which reference is then made, it is clear that no different or stricter test was intended than that applied in its various aspects in the authorities to which I have referred. Chernov JA said (*PCRZ Investments Pty Ltd v National Golf Holdings* [2002] VSCA 24, [36]):

"36. Moreover, the circumstances which the authorities (see the authorities referred to in footnote 11 above and also *Australian Guarantee Corporation Ltd v De Jager; De Jager v. Registrar of Titles* [1984] VR 483 at 502 per Tadgell J; *Shepherd v. National Mutual Life Association of Australasia Ltd*., 15 November 1994, unreported, Hedigan J; *J-Corporation Pty Ltd v Australian Builders Labourers Federated Union of Workers (No.2)* [1993] FCA 42; (1993) 46 IR 301 at 303 per French J; *Packer v Meagher* [1984] 3 NSWLR 486 and *Wentworth v Rogers (No.5)* (1986) 6 NSWLR 534 at 542 per Kirby P) seem to suggest enliven the discretion to award solicitor and client costs, are not present here. It is true that the categories of such circumstances are not closed. Nevertheless, the authorities indicate that, generally, the ordinary cost rule should only be departed from where the losing party has misconducted itself in relation to the proceeding (such as unduly prolonging the case, or pleading fraud knowing it to be false, or making assertions of fact which are patently

groundless, or making wild and contumelious allegations) or where the institution of the proceeding was plainly unreasonable (as, for example, where the claim is patently hopeless), or where the proceeding was issued for an ulterior or collateral purpose. As I have said, it has not been suggested that any of the above circumstances apply here. On the contrary, it might be said that the appellant has formulated the issue with a degree of precision so that the dispute that had to be determined by the court was in short compass. There was no attempt, for example, to challenge the validity of the relevant Rules or articles. Had this been done, the proceeding would undoubtedly have been prolonged and the costs of all parties would have been correspondingly higher. It is true that the appellant indicated at one stage that it would amend the proceeding so as to enlarge its case, but this did not take place. Nevertheless, the foreshadowed amendment caused the respondents to undertake work which was wasted, since the appellant did not pursue its proposal to amend its case. Mr. Sher, who appeared with Mr. Batt for the respondents, submitted that his Honour may have made the solicitor and client costs order to take account of the wasted costs so incurred by the respondents. In my view, however, there is nothing in his Honour's judgment to indicate that he had regard to this matter for the purposes of the costs order."

[19] *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, at [7]-[8].

[20] [1996] VSC 51; [1997] 2 VR 127 at 147 per Winneke P and 163 per Callaway JA.

[21] (1994) 54 FCR 383 at 388 per Foster J.

[22] (1988) FCA 202; (1988) 81 ALR 397, at 401. This passage has been cited with approval in many subsequent decisions, including by French J (as he then was) in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers Western Australia* (unreported, Federal Court of Australia, 9 February 1993), and in the Supreme Court of Victoria in *Murdaca v Maisano* [2004] VSCA 123, at [40] (Nettle JA); *Aljade and MKIC v OCBC* [2004] VSC 351 (Redlich J); and *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209, at [15] (Redlich JA and Beach AJA); and see Dal Pont, *Law of Costs* (2nd ed, Lexis Nexis, 2009) at 539-40 [16.51].

[23] [2009] VSCA 209, at [15] (Redlich JA and Beach AJA); and see above, paragraph 12.

[24] Unreported, Federal Court of Australia, 9 February 1993, French J (as he then was).

[25] *Hurstville Municipal Council v Connor* (1991) 24 NSWLR 724 (Loveday J); *Monitronix Ltd v Michael* (1992) 7 WAR 195 (Murray J); *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189, at [18] (Harper J); *Clarke v Deputy Commissioner of Taxation* [2002] FCA 75; (2002) 50 ATR 173.

[26] *Aljade and MKIC v OCBC* [2004] VSC 351 (Redlich J).

[27] [2001] FCA 480; (2001) 187 ALR 654, at 668-9 [54]-[58]; and see *Ali v Hartley Poynton Pty Ltd (No 3)* [2002] VSC 292, at [9] and [10] (Smith J).

[28] And see *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209, at [15] (Redlich JA and Beach AJA); set out above, paragraph 16.

[29] See *Civil Procedure Act* 2010, s 1.

[30] See *Civil Procedure Act* 2010, s 8.

[31] See *Civil Procedure Act* 2010, ss 10, 17 and 18.

[32] See *Civil Procedure Act* 2010, s 26.

[33] See *Civil Procedure Act* 2010, s 28.

[34] *Jurisdictions of Courts (Cross Vesting) Act* 1987, sub-s 11(3) provides:

"(3) Where a proceeding is transferred or removed to a court (in this sub-section referred to as the transferee court) from another court (in this sub-section referred to as the transferor court), the transferee court shall deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court."

[35] *Jurisdictions of Courts (Cross Vesting) Act* 1987, s 12 provides:

"Where a proceeding is transferred or removed to a court, that court may make an order as to costs that relate to the conduct of the proceeding before the transfer or removal if those costs have not already been dealt with by another court."

[36] See *Colgate Palmolive Company v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 (Sheppard J); and above, paragraph 12.

37. [37] *Packer v Meagher* [1984] 3 NSWLR 486, at 492 (Hunt J); *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566, at 574-5 (Lord Denning MR); *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509, at 518-29 (Mason CJ, Dawson, Toohey and McHugh JJ).

[38] *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509, at 529 (Mason CJ, Dawson, Toohey and McHugh JJ)..

[39] *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509, at 522 (Mason CJ, Dawson, Toohey and McHugh JJ); and *Re Bond Corp Holdings Ltd* [1990] 1 WAR 465, at 476-7 (Ipp J).

[40] Judgment, at [45]-[326]; and see *Joyce Closing Submissions* (27 January 2012), at [295]-[407].

[41] Judgment, at [259].

[42] See, as to the nature of the right alleged, Judgment at [17], [23]-[27], [40], [50], [61]-[69], [199], [232]-[239], [243] and [294].

[43] *Costs Submissions of the First to Third Defendants* (24 July 2012), at 16-17, [4.2.1] [4.2.2].

[44] Judgment, at [54].

[45] Judgment, at [45].

[46] Second Further Amended Statement of Claim, paragraph 13.3.

[47] Judgment, at [241].

[48] Judgment, at [312].

[49] Judgment, at [62].

[50] Judgment, at [62].

[51] Judgment, at [241].

[52] *Costs Submissions of the First to Third Defendants* (24 July 2012), at 17-18, [4.3.1]-[4.3.3].

[53] Second Further Amended Statement of Claim, paragraph 21.1.

[54] Judgment, at [237].

[55] Second Further Amended Statement of Claim, paragraphs 21.5 and 21.6.

[56] Judgment, at [298] and [303].

[57] Judgment, at [250] to [265].

[58] Judgment, at [265].

59. [59] "He said [Mohammed Mustafa Hussein of the Financial Audit Department of the Rulers Court] that without my co-operation they wouldn't have been able to prove charges against Matt". Brown email to Sahba Abedian; Ron Eames; Soheil Abedian; Georgia Carter, Subject Waterfront Case dated 29 April 2009 (Exhibit D2).

[60] Judgment, at [231].

[61] See, for example, Judgment at [156], [157] (the suggestion of a reservation agreement).

[62] [2011] VSC 559, at [24] (Croft J); referring to *Thomson Land Ltd v Lendlease Shopping Centre Development Pty Ltd* [2000] VSC 140, at [26] (McDonald J) and *Aljade & MKIL v OCBC* [2004] VSC 351, at [36] and [37] (Redlich J).

[63] [1959] HCA 8; (1959) 101 CLR 298 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ).

[64] Judgment, at [345].

[65] Judgment, at [342]-[350].

[66] See above, paragraph 3.

[67] Judgment, at [50].

[68] Judgment, at [188]-[192]; and see the reference to Brown's cross-examination where it was conceded that determination of price is a precondition to the ability to enter into any binding contractual arrangement: Judgment, at [158]. See also Brown's email to Sinn of 14 September 2007 which is indicative of Sunland being well aware that neither Prudentia nor Reed had any enforceable right to Plot D17 at any relevant time, discussed in the Judgment, at [170].

[69] *Costs Submissions of the First to Third Defendants* (24 July 2012), 20-21, [4.4.5], [4.4.6].

[70] See in particular paragraph 10.1.12 of the *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* adopted in Judgment [211] and quoted in full at page 147.

[71] Court Book, SUN.009.003.4429.

72. [72] Judgment at [91], Transcript (29 November 2011) pp 54.40-.47, 55.01-.06 and 53.17-.27. See also paragraph 2.2.10 of the *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), quoted in Judgment at [243].
73. [73] Judgment, at [242] ("... It is clear, in my view that Sunland's commercial imperative was to obtain plot D17 exclusively so that Sunland, and Sunland alone, would enjoy the very significant returns it anticipated on the development of that land.")

[74] Judgment, at [203]-[204].

[75] Judgment, at [47].

[76] Judgment, at [47].

[77] Judgment, at [307].

[78] Judgment, at [49]-[55].

[79] Judgment, at [47].

[80] Judgment, at [304]-[306] and [307]-[320].

[81] Judgment, at [304]-[306] and [321]-[332].

[82] Judgment, at [49]-[55].

[83] Judgment, at [55], [195]-[191] and [196].

[84] Judgment, at [319].

[85] Court Book, SUN.004.002.0064. Eames, with input from Brown, prepared a memorandum on the letterhead of DLA Phillips Fox, dated 29 May 2009 [Court Book, SUN.002.002.0500], which was formally lodged with the Dubai Courts on 1 June 2009. The representations which this memorandum alleged had been made by Reed were quite different from those alleged in the Second Further Amended Statement of Claim.

[86] Court Book, SUN.004.002.0064 at .0065.

[87] Judgment, at [154]; and see [47] (as to Brown's oral evidence that Austin "was the first person who told me about [D17]").

[88] Witness statement of Soheil Abedian (6 August 2010), paragraph 114.

[89] Transcript (7 December 2011), p 355.14 - .18.

[90] Witness statement of Soheil Abedian (6 August 2010), paragraph 114.

[91] Transcript (7 December 2011), p 355.30 - .38.

[92] Transcript (7 December 2011), p 359.34 - .35. As to the status of this document, the authenticity of which is challenged by Sunland [see Judgement, at [65] footnote 189].

[93] Transcript (7 December 2011), p 359.39 (where his precise words were, in the context of the question: "So what are you going to do about it?---Nothing").

[94] Judgment, at [56].

[95] Judgment, at [65].

[96] Judgment, at [66], [73], [76], [301] and [309]-[310].

[97] Judgment, at [128], [309]-[312]; and see [127]-[137], [154]-[157]; and see below, paragraphs 46 and 47.

[98] Judgment, at [278] and [279]; and see [154]-[157] and see below, paragraphs 46 and 47.

[99] See Judgment, at [99].

[100] Judgment, at [100], [101].

[101] Detailed references with respect to this position are helpfully set out in *Costs Submissions of the First to Third Defendants* (24 July 2012) as follows:

"4.9.3 His Honour found that the Sunland parties' submissions with respect to paragraph 1 of

the Recitals was inconsistent with the operative parts of the MOU/Implementation Agreement, the terms of which Brown and Soheil Abedian well understood (Judgment at [108]-[110]) and was inconsistent with facts known and understood by Brown and Soheil Abedian within the evolving negotiation toward joint venture acquisition of D17 and otherwise (Judgment at [292]:

(a) When the MOU was first exchanged between the parties (Judgment at [96]-[100]; and

(b) On 30 August 2007 when Brown returned the Draft Implementation Agreement the MOU with marked-up changes to Reed (Judgment at [106]); and

(c) When following a conversation between Brown, Lee and Brearley on 12 September 2007 Sunland procured Prudentia's agreement to stand in the shoes of both Prudentia and Sunland to secure Plot D17 for their proposed joint venture through Sunland negotiating the terms of a SPA with DWF (Judgment at [106]); and

(d) In the particular circumstances leading to the offer and acceptance of a *"walk away"* fee which was proposed, unilaterally, by Soheil Abedian in terms which cut across entirely and unexpectedly the then agreed progress of the parties toward a joint venture (Judgment at [106]); and

(e) As of 16 September 2007 (Judgment at [180]); and

(f) When Hanley replaced Prudentia as the contracting party (Judgment at [105]; [214]–[216]; [219]–[220]; [287]–[295]).”

[102] Judgment, at [104]; and see also [209]-[211].

[103] Judgment, at [118] and [243]; and see [87].

[104] And see above, paragraph 17.

[105] Judgment, at [297]-[300].

[106] [2011] VSC 559 (Croft J).

[107] [2011] VSC 559 (Croft J).

[108] See paragraphs 53 and 57.

[109] Judgment, at [22].

[110] See Judgment, at [128] (where this email is set out and its description as the “put your foot on it” email referred to).

[111] Judgment, at [133]; and see above, paragraph 25 (and the footnote references in that paragraph to parts of the Judgment).

[112] Court Book, SUN.001.001.0202; and see *Plaintiffs' Address* (1 February 2012),

paragraphs 153 and 154.

[113] Cf *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 137.

[114] Judgment, at [132].

[115] See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 135.

[116] Judgment, at [133]-[145]; and see above paragraph 45.

[117] See above, paragraph 45; and see, particularly, Judgment, at [154]-[157].

[118] Judgment, at [128].

[119] See above, paragraphs 28 to 30.

[120] Judgment, at [99]-[110].

[121] Judgment, at [129]-[130].

[122] Judgment, at [135].

[123] Judgment, at [131]-[134].

[124] Second Further Amended Statement of Claim, paragraph 24.

[125] Paragraph 4.16.

[126] Judgment, at [275].

[127] Judgment, at [277].

[128] Judgment, at [279].

[129] *Plaintiffs' Outline of Submissions on Costs*, paragraph 21.

[130] Judgment, at [297]-[302].

[131] See, particularly, the discussion and rejection of Sunland's submissions that paragraph 1 of the recitals to the draft Implementation Agreement, the MOU, amounted to a representation: Judgment [96]-[110]; and see above, paragraph 38.

[132] See *Plaintiff's Outline of Submissions on Costs* paragraph 19, citing *Plaintiffs' Address* (1 February 2012), paragraph 40.

[133] Judgment, at [294].

[134] Court Book, SUN.001.003.0024.

[135] Witness Statement of Soheil Abedian (6 August 2010), paragraph 109.

[136] Witness Statement of David Scott Brown (6 August 2010), paragraph 258.

[137] Judgment, at [106]; and see [178], [179], [319] and [327].

[138] Paragraph 27.1.

[139] Judgment, at [158].

[140] Judgment, at [285] and [319]-[320].

[141] See above, paragraphs 41 to 43.

[142] Judgment, at [427].

[143] Judgment, at [428].

[144] Judgment, at [278].

[145] Judgment, at [430].

[146] Judgment, at [431].

[147] Judgment, at [439].

[148] Judgment, at [439].

[149] Judgment, at [428].

[150] Judgment [438].

[151] See above, paragraphs 41 to 43.

[152] See above, paragraphs 11 to 18.

[153] *Law of Costs* (2nd ed, LexisNexis Butterworths, 2009), at pp 539-40 [16.51].

[154] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) FCA 202; (1988) 81 ALR 397 at 401 (Woodward J) (FCA) (emphasis supplied).

[155] See, for example, *Sheahan v Northern Australia Land Agency Co Ltd* (SC(SA), 4 November 1993, unreported) at [13] (Perry J) (ruling that the defence, including the prosecution of the counterclaim, was so unmeritorious and lacking in credibility that the defendants should be ordered to pay costs on a solicitor and client basis); *Westpac Banking*

Corporation v Ollis [2007] NSWSC 1008 at [13], [14] (Einstein J).

[156] *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers, Western Australian Branch (No 2)* [1993] FCA 42; (1993) 46 IR 301 at 303 (French J (as he then was)) (FCA); *Blueseas Investments Pty Ltd v Mitchell and McGillivray* [1999] FamCA 745; (1999) FLC 92-856 at 86, 130 (FC) (Nicholson CJ, Lindenmayer and O'Ryan JJ); *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] CA 26; (2001) 179 ALR 406 at 415 (Callinan J); *Krix and Krix v Citrus Board of South Australia* [2003] SASC 387; (2003) 87 SASR 229 (FC) (Mullighan, Debelle and Gray JJ); *De Alwis v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 77 at [7]- [9] (Tamberlin, R D Nicholson and Emmett JJ)

[157] [1999] QSC 180; (1999) 17 ACLC 1611 at [70] (Ambrose J).

[158] See Judgment, at [327]-[328].

[159] See Second Further Amended Statement of Claim, paragraphs 12-19.

[160] See Second Further Amended Statement of Claim, paragraph 22; and see above, paragraphs 44 to 54.

[161] See Second Further Amended Statement of Claim, paragraph 31.

[162] *Costs Submissions of the Fourth Defendant* (24 July 2012), paragraph 15.

[163] See *Closing Submissions of the Fourth Defendant* (27 January 2012), pp 35-65 [132]-[261].

[164] *Costs Submissions of the Fourth Defendant* (24 July 2012), paragraph 16.

[165] Transcript (5 December 2011), p 206.42.

[166] Transcript (6 December 2011), p 270.27.

[167] Court Book, SUN.014.001.0045; and see Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 5, Ex ANM-01.

[168] Court Book, SUN.004.002.036; and see Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 5, Ex ANM-01.

[169] Court Book, SUN.004.002.0075; and see Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 5, Ex ANM-01.

[170] See *Costs Submissions of the Fourth Defendant* (24 July 2012), paragraph 17.

[171] Court Book, SUN.004.002.0093; and see Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 21, Ex ANM-02; Transcript p 129.43.

[172] Accompanying Board papers to Sunland's minutes of its Board Meeting of 9 February 2009, Exhibit D1.

[173] Exhibit D1, p 9.

[174] Exhibit D1, p 10 (entitled *Detailed Report – Summary of Events related to the Purchase of Plot D17*).

[175] Court Book, SUN.015.002.0421.

176. [176] Court Book, SUN.015.002.0421. This email was first provided to the defendants under cover of Thomsons Lawyer's letter dated 4 December 2011 and only discovered on 7 December 2011.

[177] *Costs Submissions of the First to Third Defendants* (24 July 2012), paragraphs 5.1.4 to 5.1.10.

[178] Transcript p 137.41.

[179] Transcript p 137.44-.47.

[180] Judgment, at [319].

181. [181] Brown email to Sahba Abedian, Ron Eames, Soheil Abedian, Georgia Carter: 29 April 2009: Subject: Waterfront case (SUN.015.002.0434); within the bundle of documents produced for the first time under cover of Thompsons letter dated 5 December 2011 and only discovered on 7 December 2011.
182. [182] Court Book, SUN.003.005.0014. The file note was discovered in this proceeding in redacted form, but an unredacted copy was made available prior to the trial after the matter was raised before his Honour.
183. [183] Submissions of the Applicant for the anti-suit application before Logan J heard on 14 and 15 December 2009, at [15]-[19].
184. [184] See Logan J in *Sunland Waterfront (BVI) Limited v. Prudentia Investments Pty. Ltd. (No. 2)* [2010] FCA 312 at [32-33] (Logan J).

[185] Transcript p 130.25-.26.

[186] Transcript p 130.28-.30; and see also Transcript p 131.27-.29.

[187] Transcript p 132.33-.34; and see also Transcript p 247.9-.11.

[188] Court Book, SUN.004.002.0093.

[189] Transcript p 138.46-.47.

[190] Transcript p 139.37-.38.

[191] Transcript p 136.8-.10; see also Transcript p 249.10-.12; Court Book, SUN.002.002.0500.

[192] Transcript p 276.21-.23; see also Exhibit D6 – Email from David Brown to Georgia Carter dated 1 June 2009); /6/09, 5.41 pm; see also Transcript p 276.21-.23.

[193] Transcript pp 142.27-.47 and 143.1-.6.

[194] Court Book, SUN.002.002.0500; Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 23, Ex ANM-02.

[195] Court Book, SUN.003.005.0013; Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 20, Ex ANM-02.

[196] *Plaintiffs' Outline of Submissions on Costs*, paragraphs 29, and also paragraph 35.

[197] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraphs 19-22, Ex ANM-02; Court Book SUN.003.0045.0014 (17 May 2009) and SUN.003.005.0013 (31 May 2009).

198. [198] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 20, Ex ANM-02; *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 6)* [2010] FCA 1009 (Logan J).

[199] *Costs Submissions of the First to Third Defendants* (24 July 2012), paragraphs 5.4.4 and 5.4.5.

[200] *Costs Submissions of the First to Third Defendants* (24 July 2012), paragraph 5.4.6.

[201] Transcript pp 135.26, 138.29 - .32 and 141.15 - .21.

[202] Judgment, at [283].

[203] Transcript p 248.35.

[204] Judgment, at [340], [341].

[205] *Costs Submissions of the Fourth Defendant* (24 July 2012), paragraph 20.

[206] Transcript p 290.26 – .39: Exhibit D2.

[207] Court Book, SUN.006.001.0082; Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraphs 28 to 30.

[208] Exhibit D8.

[209] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraphs 32 to 34.

[210] Judgment, at [337].

[211] Transcript pp 448.47–449.31.

[212] See generally, Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraphs 26 to 63.

[213] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraphs 42 and 43.

[214] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 54.

[215] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraph 56.

[216] Affidavit of Andrew Neil McRobert affirmed 24 July 2012, paragraphs 62 and 63.

[217] *Costs Submissions of the First to Third Defendants* (24 July 2012), paragraphs 5.1.11 and 5.1.12.

218. [218] See Brown email to Sahba Abedian, Ron Eames, Soheil Abedian, Georgia Carter: 29 April 2009: Subject: Waterfront case (SUN.015.002.0434); within the bundle of documents produced for the first time under cover of Thompsons letter dated 5 December 2011 and only discovered on 7 December 2011.
219. [219] See paragraphs [338] - [341] of Judgment. His Honour noted at paragraph [339]:

"First, Sunland produced no minutes or board papers in relation to or evidencing any board discussions about the proposed joint venture or the final purchase of plot D17. The first reference to a Sunland board report relating to plot D17 is Brown's evidence that he and Abedian drafted a report to the Sunland board members after the execution of the SPA. Although this report was not discovered by Sunland, there are, nevertheless, minutes of a meeting of SWB resolving to enter into the agreement with Prudentia and to execute a SPA for the purchase of plot D17."

[220] *Plaintiffs' Outline of Submissions on Costs*, paragraph 31.

[221] Judgment, at [129]; and see also [119] and [154].

[222] Judgment, at [80]; and in relation to Sunland's alleged reliance on this email, see Judgment [78] and [79].

[223] Court Book, SUN.004.002.0036.

[224] See *Yates Property Corporation v Boland & Ors (No 2)* [1997] FCA 760; (1997) 147 ALR 685, at 693 (Branson J).

[225] [2011] VSC 559 (Croft J).

[226] [2011] VSC 559, at [21]-[23] (Croft J).

[227] *Plaintiff's Outline of Submissions for the hearing on 25 October 2011*, paragraph 7.

[228] [2000] VSC 140, at [21]-[24] (McDonald J).

[229] *UFH Holdings Pty Ltd v Ord Minnett Corporation Finance Ltd* (SC Vic – Chernov J, No 2020/1998, 26 June 1998, unreported) referred to by McDonald J *in Thomson Land Ltd v Lendlease Shopping Centre Development Pty Ltd* [2000] VSC 140 at [22], set out above.

[230] [2007] FCA 1062, at [25].

[231] *Costs Submissions of the Fourth Defendant* (24 July 2012), paragraph 26.
