

SUPREME COURT OF QUEENSLAND

CITATION: *Rozario & Anor v Delta Law Pty Ltd & Ors* [2019] QSC 159

PARTIES: **QUINTIN ROZARIO**
(first applicant)
and
PORT KLANG PTY LTD ACN 133 161 074
(second applicant)

v

DELTA LAW PTY LTD ACN 116 936 264
(first respondent)
and
**EMPEROR INVESTMENT GROUP PTY LTD
ACN 135 640 809**
(second respondent)
and
**LAW & COMMERCE PARTNERS PTY LTD
ACN 623 726 769**
(third respondent)
and
**THE ESTATE OF NATIVIDAD CALLITEN,
DECEASED**
(fourth respondent)
and
RICHARD SPENCER
(fifth respondent)
and
PETER CLAPIN
(sixth respondent)

FILE NO/S: No 5403 of 2019

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 18 June 2019

JUDGE: Dalton J

ORDERS: **1. I declare that all the resolutions passed at a general meeting of Delta Law Pty Ltd on 10 May 2019 were invalid and of no effect.**

2. Otherwise adjourn the hearing of the further amended originating application.

COUNSEL: D Atkinson QC for the applicants
S C Russell for the first respondent
C A Johnstone for the second, fourth and sixth respondents

SOLICITORS: Hopgood Ganim Lawyers for the applicants
JML Rose for the first respondent
James Conomos Lawyers for the second, fourth and sixth respondents
R W Spencer, solicitor, appeared for himself as fifth respondent and third respondent

- [1] This proceeding was commenced by way of originating application and came on for hearing in the applications list on 18 June 2019. I gave leave to read and file a further amended originating application on that date. The amended originating application challenged the validity of a general meeting of Delta Law Pty Ltd purportedly held on 10 May 2019, and the resolutions purportedly passed at that meeting. The further amended originating application sought additional declaratory relief as to transfers of shares in Delta Law. The respondents to the application had not been given sufficient notice of this additional relief and, for that reason, the hearing before me proceeded only to determine the issues raised in the amended originating application.
- [2] Mr Quintin Rozario, the first applicant is a solicitor. Since the year 2008 he has practiced as a sole practitioner from his home at Wynnum as the principal lawyer, and sole director, of Delta Law Pty Ltd, the first respondent. Since 2008 Mr Rozario has provided legal services “almost exclusively” to Mio Art Pty Ltd and to Mr Richard William Spencer and Ms Silvana Perovich. Mr Rozario swears that because for most of the time he was acting for these people they had no money, Delta Law has considerable unpaid legal fees, in the vicinity of around \$7.5 million. His clients having had some success in their long-running litigation, Mr Rozario now wants to be paid. He swears to having told Mr Spencer and Ms Perovich as recently as 23 January 2019 that in his capacity as director of Delta Law he intended to pursue that debt.¹
- [3] Mr Rozario swears that Mr Richard Spencer’s son, Michael Spencer, is the sole director and shareholder of Mio Art and that Mr Richard Spencer has, to Mr Rozario’s observation, provided instructions on behalf of Mio Art since 2009 and “continues to direct the company through his son Michael, a solicitor who lives in Sydney”.²

Notice of Meeting

- [4] A notice calling a general meeting of Delta Law for 10 May 2019 at 10.00 am was signed by Edmund Albert Galea as the director of Emperor Investment Group Pty Ltd on 16 April 2019. It contains the following:

¹ Court Document 4, paragraph 34.

² Court Document 4, paragraph 50.

“Business/Agenda:

1. Appointment of Chairperson
2. Notice of any Proxies
3. Management of the Company

Background: Shareholders of the Company have concerns of present director Quintin George Rozario due to:

- his relationship with the Queensland Law Society;
- his relationship with the Company’s principal clients while in the course of continuing litigation;
- the collection of legal costs;
- the making of false and/or misleading statements regarding transfer of the Company’s funds;
- the failure to comply with undertaking as to payment of funds received;
- unsatisfactory professional conduct including breach of confidentiality *vis a vis* clients, counsel and creditors & associates of its principal clients; and
- failure to disclose disqualifying or potentially disqualifying personal records.

4. General Business”³

[5] As to proxies the notice provided:

“Voting by Proxy

A member who is entitled to attend and cast a vote at a meeting of the Company’s members may appoint a person as the member’s proxy to attend and vote for the member at the meeting, subject to the provisions of the Constitution of the Company which should be referred to.

For convenience, an instrument appointing a proxy may be in the form attached to this notice.

Any proxy must be deposited at Reception, Level 27, Santos Place, 32 Turbot Street, Brisbane QLD not less than forty-eight hours before the time for holding the meeting.”⁴

- [6] At the time the meeting of 10 May was called, and at the time of the meeting on 10 May 2019, Delta Law’s company register showed that the shareholders of Delta Law were:
- (a) as to 40 shares, Port Klang Pty Ltd;
 - (b) as to 40 shares, Emperor Investment Group Pty Ltd, and
 - (c) as to 40 shares, Natividad Calliten, although the material before me shows that she had died in 2016.⁵

³ Court Document 5, exhibit bundle p 16.

⁴ Court Document 5, exhibit bundle pp 16-17.

⁵ Affidavit Robert Harrison Dickfos sworn 13 June 2019, paragraph 12(4).

- [7] Port Klang had originally been owned and controlled by Mr Rozario and his wife, but had been deregistered on 30 January 2011 for failing to pay fees. Thus, ASIC was the owner of those 40 shares in Delta Law Pty Ltd but said it would not participate in the shareholder meeting.⁶
- [8] Mr Rozario explains only that Mr Galea is associated with a litigation funding group and is “a finance broker who has had dealings with my practice over the years”.⁷ There is no information as to the underlying history of Ms Calliten’s association with Delta Law, other than it is through her husband, a solicitor, Mr Peter Clapin.
- [9] Mr Rozario swears that a notice of the members’ meeting to be held on 10 May 2019 was never received by Delta Law, or him. He says that the first indication he had of the meeting was that he received a correction to some small detail in the notice of meeting on 25 April 2019 in the mail sent to the Wynnum address (Delta’s registered office).⁸
- [10] Mr Rozario swears that he was not provided with a copy of any proxy forms before the meeting of 10 May 2019.
- [11] Mr Rozario swears that he was never given any notice of a resolution to remove him as a director, or to appoint Mr Spencer director of Delta Law, before the meeting of 10 May 2019.
- [12] Mr Rozario denies the allegations made against him and listed in the notice of meeting.⁹
- [13] Mr Rozario swears that the address, “Reception, Level 27, Santos Place, 32 Turbot Street, Brisbane” has never been the registered office of Delta Law. He swears that as at 10 May 2019, the registered office of Delta Law had been the Wynnum address from which he practiced.

Proceedings at the Meeting on 10 May 2019

- [14] According to a document entitled Transcript of Members Meeting,¹⁰ Edmund Galea, Richard Spencer and Silvana Perovich attended the meeting at 10.00 am on 10 May 2019. Mr Galea nominated Mr Spencer as chairman; Ms Perovich seconded that motion and the motion was carried.
- [15] Mr Spencer noted that Mr Galea was sole director of Emperor Investment Group and said, “He is here in person so there is no proxy required. Secondly there is a proxy.” In fact a proxy was necessary; there had been no appointment under s 250D of the *Corporations Act 2001* (Cth).

⁶ Court Document 5, exhibit bundle p 21.

⁷ Court Document 4.

⁸ Court Document 4, paragraph 43.

⁹ Court Document 4, paragraph 46(f).

¹⁰ Court Document 5, exhibit bundle p 41.

[16] Mr Spencer then said that Mr Clapin had “put in a plethora of material explaining his status as the shareholder of the company”. Mr Spencer said that Mr Clapin’s proxy form appointed himself (ie Mr Spencer) and Ms Perovich proxies as to 20 shares each and then said, “I rule that that proxy is sufficient and valid”.

[17] Mr Spencer then said:

“We will now move to the business of the meeting. The first item of business is the management of the company and the agenda sets out some of the concerns that the convener has over the management of the company by its current director Quintin Rozario and items there are set out as to reflect those concerns. Without further, the need for further discussions, because we do have views on this, I am putting a resolution and the resolution is that Quintin George Rozario be dismissed and removed as a director and secretary of the company and I call a poll.” (my underlining)

[18] All three people present voted in favour of the resolution and Mr Spencer said:

“Yes, carried. Well it’s a general resolution with 80 of the 120 shares of the company. So it’s more than 50%, so it’s carried. That was a resolution that flowed from the agenda item, Management of the Company.

The next resolution is that myself, Richard Spencer be appointed as director and secretary of the company. Umm, and I’ll table a consent to act as director and secretary. That is a consent dated yesterday, 9th May, in anticipation of the meeting today. Umm so I put that resolution to the meeting.” (my underlining)

[19] Again, everyone present voted in favour of the motion.

[20] Then Ms Perovich on two occasions attempted to raise other matters. The transcript reads as follows:

“SP: What about the appointment of Noe Vicca as the registered agent?

RS: I think that’s a matter for the director.

SP: Right. Okay.

RS: I don’t umm ... ahh.

EG: I agree.

SP: Yep

EG: Let’s close meeting. Is there anything else?

SP: General business?

RS: Well general business, I think under general business we might just reflect on the fact that the management of the company hasn’t been adequate and we would hope that the new director, that’s myself, with the help of the shareholders, that’s yourselves, will attend to those items.

Meeting Closed

EG: Cheers” (my underlining)¹¹

- [21] That very swift disposal of business meant that at five minutes past 10, when a barrister on behalf of Mr Rozario arrived to say that Mr Rozario was running a little late but was on the way up, he was told that the meeting had been concluded.

Proxies

- [22] Mr Galea filled in the proxy form attached to the notice of meeting. It said that as sole director of Emperor Investment Group Pty Ltd, which company held 40 shares in Delta Law, he appointed himself a proxy for Emperor for the meeting to be held on 10 May 2019. That proxy form was dated 7 May 2019.
- [23] Mr Peter Ross Clapin also filled out the proxy form attached to the notice of meeting. It appointed Mr Richard William Spencer as to 20 shares and Ms Silvana Perovich as to 20 shares as proxies for the meeting to be held on 10 May 2019. This proxy form was signed on 18 April 2019. It does not state the capacity in which Mr Peter Ross Clapin sought to appoint proxies, but attached copies of a birth certificate of Ms Natividad Calliten; a marriage certificate showing her marriage to Peter Ross Clapin; a death certificate for Ms Calliten, and her will in which Mr Clapin was named executor, trustee and sole beneficiary.
- [24] A solicitor acting for the applicants swore that on 11 June 2019 he inspected the records of Delta Law at its solicitor’s office. The company records contained “no completed proxy forms relating to the purported meeting of shareholders of Delta Law Pty Ltd on 10 May 2019”.¹²
- [25] The next day lawyers acting on behalf of Delta Law sent an email to lawyers acting on behalf of the applicants giving them a copy of Mr Galea’s proxy form dated 7 May 2019 (described at [22] above) and the proxy form given by Peter Ross Clapin dated 18 April 2019 (as described at [23] above).
- [26] Also enclosed with this email of 12 June 2019 was a proxy ruling signed by Richard William Spencer on 13 May 2019. This ruling says that one proxy form was tabled at the meeting and that it was from Mr Clapin. The ruling says that this proxy form “was retrieved from the meeting reception prior to the meeting”.
- [27] The document goes on to say that Mr Spencer ruled the proxy to be valid and “I now publish my reasons for that ruling”. These reasons include the information that, “A deal of investigation of the proxy took place prior to the meeting. Mr Clapin was asked by the appointees to produce supporting evidence for his being a member of the company and/or entitled to the shares.” The ruling records that Mr Clapin produced the material I have described as paragraph [23] above. In the proxy ruling Mr Spencer said that he made internet searches in relation to the information contained in those documents and

¹¹ Court Document 5, exhibit bundle p 42.

¹² Affidavit of Robert Harrison Dickfos, sworn 13 June 2019, paragraph 13(a).

formed the view that they were genuine. He goes on to say that Mr Clapin informed the appointees (but not the company) that Ms Calliten held the shares in Delta Law beneficially (contrary to the company's records). He says that Mr Clapin put this statement in writing dated 10 May 2019 and gave it to Mr Spencer (but not the company) prior to the commencement of the meeting on that day.

[28] The proxy ruling also says:

“Prior to the meeting during the period 9.40 am to 10.00 am the attendees of the meeting were able to view and discuss the proxy and [the items I describe at paragraphs [23] and [28] above]. There were no advices or indications that the appointees were not entitled to be the proxies for the 40 shares at the meeting nor that there was any person other than Mr Clapin who could grant such proxy. The appointees had received additional written and verbal advices from Mr Clapin to the effect that he wished the appointees to be his proxies for the meeting.”

[29] Further, the ruling on proxies states:

“The proxy form followed the formalities set out in the pro forma version supplied with the notice of shareholders meeting – it was properly executed, delivered by verifiable electronic means, and supported by the additional material requested by the appointees as well as other communications making clear the appointor's intention.” (my underlining)¹³

[30] As part of the material sent by lawyers acting for Delta Law on 12 June 2019 was Mr Clapin's “Instructions to my Proxy”. This document read as follows:

“RE: DELTA LAW PTY LTD SHAREHOLDERS' MEETING FRIDAY,
10TH MAY, 2019

I instruct my Proxy to vote in the following manner in regard to the following matters which are to be determined at the meeting of Delta Law Pty Ltd shareholders to be held in Brisbane tomorrow 10th May, 2019:

1. Appointment of Chairman

Vote for Richard Spencer to be appointed chairman of the meeting or such other person as Richard Spencer suggests

2. Removal of Quintin Rosario as director of the company, Delta Law Pty Ltd

Vote in favour of this motion

3. Appointment of Replacement Director

After the removal of Quintin Rosario as director of the company vote for Richard Spencer or such other person as Richard Spencer suggest to be appointed as director of the company.

4. General Powers

¹³ Affidavit of Robert Harrison Dickfos, sworn 13 June 2019, exhibit bundle p 41.

In all other matters which may arise for consideration at the meeting I authorise my proxy to vote in accordance with the advice or opinions suggested by Richard Spencer.

This letter of authority is signed by me this 9th day of May, 2019:” (my underlining)

Validity of Notice of Meeting

- [31] Delta Law did not have a Constitution, therefore the replaceable rules governed its internal management – ss 134 and 135 *Corporations Act*. Accordingly the notice of meeting ought to have stated “the general nature of the meeting’s business” – s 249L(1)(b) *Corporations Act*.
- [32] In my view, the notice of meeting did not state the general nature of the meeting’s business. It ought to have stated that a resolution to remove Mr Rozario was to be put, and that if that resolution succeeded, a resolution that Mr Spencer be appointed sole director of Delta Law was to be put. It can be seen from Mr Clapin’s “Instructions to my Proxies” that he (at least)¹⁴ knew what the real business of the meeting was. The notice of meeting did not fairly state what the real business of the meeting was.
- [33] In any case it will be a question of fact whether or not business transacted at a company meeting was fairly within the notice of meeting, and to that extent a precedent is not going to be entirely definitive of any particular question which arises. However, I do think the case of *Stanham v The National Trust of Australia (New South Wales)*¹⁵ is of general assistance. In that case Young J stated:
- “In any event there would be difficulty in giving the plaintiffs the declarations and orders which they seek. A meeting has been convened by notice and accordingly the meeting can only consider that which is fairly within the notice convening it. The notice ... points only to matters of discussion. As a person who receives such a notice for a meeting at 9 am on a Sunday morning many kilometres away from where he or she may live might think that if there was only to be discussion they would not go, though if some substantive motion was to be passed they might go, then there would not be able to be any motions passed at the meeting. In my view that is the situation in this instant case. In my view under the current notice of meeting, no motions may be passed.”
- [34] In my view, having regard to the limited business foreshadowed in the notice of meeting the resolutions to remove Mr Rozario and to appoint Mr Spencer were both invalid.

¹⁴ See the underlined part of the quotation at paragraph [17] above.

¹⁵ (1989) 15 ACLR 87, 92.

Proxies

- [35] Secondly, the provisions of s 250B of the *Corporations Act* were not complied with so far as the proxy documents in favour of Mr Galea, Mr Spencer and Ms Perovich were concerned.
- [36] Section 250B(1) provides that a proxy form is to be received by the company at least 48 hours before the meeting. Section 250B(3) provides that a company will receive a document in accordance with subsection (1) if the document is received at the company's registered office, either physically or by facsimile – s 250B(3)(a)(i) and (ii). This did not happen. All the evidence is that the proxy forms were not sent to the company's registered office at Wynnum.
- [37] The third alternative given by s 250B(3)(a)(iii) is that a company will receive a document for the purposes of s 250B(1) when that document is received at a place, fax number or electronic address specified for the purpose in the notice of meeting. The notice of meeting specified that proxy forms were to be left at reception, Level 27, Santos Place. There is no evidence that Mr Galea's proxy form was left there. The evidence as to whether or not Mr Clapin's proxy form was left at Level 27 reception is ambivalent in that the proxy ruling states at one point that this proxy form was retrieved from the level 27 reception prior to the meeting, but at another point that it was "delivered by verifiable electronic means".
- [38] In this matter I did not understand that the respondents argued that the leaving of proxy forms at reception on Level 27, Santos Place was delivery to the company within the meaning of s 250B(3)(a)(iii). In my view, even if it could be established that documents were left at reception, Level 27, Santos Place, in accordance with the notice of meeting, that would not satisfy s 250B(3)(a)(iii). Reception on Level 27, Santos Place was an address unrelated to Delta Law and not an address at which it might reasonably be supposed that the documents would come to the attention of the company before the meeting. It may be that immediately prior to the meeting documents could be collected from reception and taken into the meeting. There might then be an argument that at that point the proxy forms were received by the company. However, the point of s 250B(1) of the *Corporations Act* is that the company receives the proxy documents before the meeting, not at the meeting.
- [39] In this case there was no compliance with s 250B(1) for the proxy documents were not received by the company before the meeting.
- [40] Furthermore, the company was never given the information to establish Mr Clapin's entitlement to exercise the rights of the deceased shareholder, Ms Calliten, to use the words of s 1072A(2)(b), before the meeting. Further information as to the beneficial entitlement of Ms Calliten was provided to Mr Spencer and Ms Perovich, but not the company, see [28] above.

[41] In my view then, the proxies given to Mr Spencer, Ms Perovich and Mr Galea were invalid.¹⁶ Consequently there was no quorum at the meeting on 10 May 2019 – s 249T(1), and all the resolutions purportedly passed at that meeting were invalid.

[42] I would comment that on the evidence here, failure to give the proxy forms to the company meant that Mr Rozario, the sole director, and the person entitled to chair the meeting,¹⁷ did not see the proxies before the meeting. He had no chance to make the investigations Mr Spencer made, [28] above. Probably more importantly, he had no warning that the company’s debtors held proxies. This lack of information potentiated the defect in the notice of meeting which I have discussed above. That is, not only did Mr Rozario not know the true business of the meeting, but he did not know that Mr Spencer and Ms Perovich had been appointed as proxies for Ms Calliten.

Chairman

[43] An interesting point was raised as to whether or not Mr Spencer could have been elected chairman of the meeting, having regard to the provisions of s 249U and s 249Y of the *Corporations Act*. Because of the view I take as to other matters, I need not decide this point.

Section 1322 *Corporations Act* – Procedural Irregularities

[44] I accept that the calling and conduct of the general meeting was a proceeding within the meaning of s 1322(1)(a) of the *Corporations Act*.

[45] I note and endorse the comments of Palmer J in *Cordiant Communications Australia Pty Ltd v The Communications Group Holdings Pty Ltd*, which comments were adopted by Dowsett J in *City Pacific Limited v Bacon (No 2)*,¹⁸ that it is difficult to “draw the line between procedural irregularity and substantial irregularity for the purposes of the section”. Like Justice Palmer, I agree that, “... it is fair to say that in some cases irregularity has been regarded as procedural rather than substantial primarily according to the degree of injustice or inconvenience caused rather than according to the nature of the irregularity”.¹⁹

[46] In my view, the irregularities I have found at paragraphs [35] and [41] above, are not procedural but are substantive. If I were wrong about that I would declare the proceedings at the meeting invalid pursuant to s 1322(2) of the *Corporations Act*. The substantial injustice here was that Mr Rozario, the sole director of Delta Law, did not know that the meeting was to be asked to remove him as director and appoint Mr Spencer as director; he did not even know that Mr Spencer and Ms Perovich had been appointed proxies.

[47] I will hear the parties as to costs.

¹⁶ *Bisan Ltd v Cellante & Ors* (2002) 43 ACSR 322, [44]-[47] and *CellOs Software Ltd v Wong* [2017] FCA 95, [25].

¹⁷ Section 249U of the *Corporations Act*.

¹⁸ [2009] FCA 772, [50].

¹⁹ (2005) 55 ACSR 185 at [87].