

# SUPREME COURT OF QUEENSLAND

CITATION: *Emperor Investment Group Pty Ltd v Delta Law Pty Ltd and Anor; Emperor Investment Group Pty Ltd & Anor v Rozario & Ors* [2019] QSC 307

PARTIES: **In BS 8867 of 2019:**  
**EMPEROR INVESTMENT GROUP PTY LTD**  
ACN 116 936 264  
(applicant)  
v  
**DELTA LAW PTY LTD (ADMINISTRATOR APPOINTED)**  
ACN 135 640 809  
(first respondent)  
**QUINTIN GEORGE ROZARIO**  
(second respondent)

**In BS 8866 of 2019:**  
**EMPEROR INVESTMENT GROUP PTY LTD**  
ACN 116 936 264  
(applicant)  
**PETER ROSS CLAPIN**  
(second applicant)  
v  
**QUINTIN GEORGE ROZARIO**  
(first respondent)  
**PORT KLANG PTY LTD**  
ACN 133 161 047  
(second respondent)  
**DELTA LAW PTY LTD (ADMINISTRATOR APPOINTED)**  
ACN 135 640 809  
(third respondent)

DIVISION: Trial Division

FILE NO/S: BS 8867 of 2019  
BS 8866 of 2019

PROCEEDING: Hearing

DELIVERED ON: 16 December 2019

DELIVERED AT: Brisbane

HEARING DATE: 14-18 November 2019

JUDGE: Holmes CJ

## ORDERS:

**In BS 8867 of 2019:**

1. Leave is granted to make the application;
2. The application is otherwise refused.

**In BS 8866 of 2019:**

**The application is adjourned to a date to be fixed after the holding of the second meeting of creditors.**

**In both applications:**

**The parties have leave to file and serve submissions as to costs, no more than three pages in length, by 4 pm on 17 January 2020.**

## CATCHWORDS:

CORPORATIONS – VOLUNTARY ADMINISTRATION – JURISDICTION AND POWERS OF COURT – GENERALLY – where the first respondent to the application is an incorporated legal practice in administration, and the second respondent its sole director – where notice of a meeting of members of the first respondent was delivered proposing a resolution to remove the second respondent as director – where the second respondent subsequently appointed an administrator to the first respondent two days before the meeting was scheduled to take place – where the applicant, as a creditor of the first respondent, brought an application pursuant to s 447A of the *Corporations Act* seeking an order to end the administration – whether leave should be granted to proceed under s 440D of the *Corporations Act* – whether the second respondent acted for an improper purpose in appointing the administrator, amounting to an abuse of the provisions contained in Part 5.3A of the *Corporations Act* – whether the Court is satisfied that the first respondent is insolvent – whether the Court should exercise its discretion to end the administration of the first respondent

*Corporations Act* 2001 (Cth), part 5.3A, s 95A, s 435A, s 440D, s 447A

*Legal Profession Act* (Qld) 2007

*Ashala Model Agency Pty Ltd (in liq) v Featherstone* [2016] QSC 121; [2017] 2 Qd R 1, applied

*Blacktown City Council v Macarthur Telephone Communications Pty Ltd* [2003] NSWSC 883; (2003) 47 ACSR 391, applied

*Briginshaw v Briginshaw* (1938) 60 CLR 336, applied

*Cawthorn v Keira Constructions* (1994) 33 NSWLR 607; 13 ACSR 337, cited

*Foti v P & S Investments Pty Ltd* [2009] FCA 1409,

considered  
*Re Condor Blanco Mines Ltd* [2016] NSWSC 1196,  
 considered  
*Rozario & Anor v Delta Law Pty Ltd & Ors* [2019] QSC 159,  
 cited  
*Smith v Boné* [2015] FCA 319; (2015) 104 ACSR 528,  
 considered  
*Williams v Spautz* (1992) 174 CLR 509, cited

COUNSEL: S J Webster and J K Carter for the applicant on both applications (F M Douglas QC having withdrawn on 15 November 2019)  
 M A Eade for the first respondent (BS 8867 of 2019) and third respondent (BS 8866 of 2019)  
 J W Peden QC and B W Wacker for the second respondent (BS 8867 of 2019) and first respondent (BS 8866 of 2019)

SOLICITORS: James Conomos Lawyers for the applicant  
 Rose Litigation for the first respondent  
 Lillas & Loel for the second respondent

- [1] I have before me two applications made under the *Corporations Act* 2001. They were heard together, with the evidence cross-admissible in each, pursuant to an earlier order of this Court.

*The applications*

- [2] In the first application, Emperor Investment Group Pty Ltd (“Emperor Investment”), as a creditor of Delta Law Pty Ltd (“Delta Law”), seeks an order ending the administration of the company, into which it was placed by its sole director, the second respondent, Mr Rozario.<sup>1</sup> Emperor Investment also holds 40 shares, a third of the issued shares, in the company.
- [3] The second application is contingent on the success of the first. In it, Emperor Investment and the second applicant, Mr Clapin, seek orders the effect of which would be registration in Mr Clapin’s name of 40 shares in Delta Law belonging to his deceased wife and the holding of a meeting of Delta Law’s members, which Mr Rozario would not be permitted to chair, for the purpose of taking a vote to remove him as director. The second respondent in that application, Port Klang Pty Ltd, a company controlled by Mr Rozario and his wife, is the remaining shareholder in Delta Law.
- [4] Section 447A of the *Corporations Act* confers the power relevant to the first application:

**“General power to make orders**

(1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.

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<sup>1</sup> Emperor Investment did not pursue an application for a declaration that the appointment of the administrator, Mr Cotter, was invalid. He is not a party to these proceedings and has, appropriately, remained neutral in them.

(2) For example, if the Court is satisfied that the administration of a company should end:

- (a) because the company is solvent; or
- (b) because provisions of this Part are being abused; or
- (c) for some other reason;

the Court may order under subsection (1) that the administration is to end.

(3) An order may be made subject to conditions.

...”

The application may be brought, inter alia, by a creditor of the company.<sup>2</sup>

[5] Section 447A appears in pt 5.3A of the Act, the object of which is set out in s 435A:

**“Object of Part**

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence — results in a better return for the company's creditors and members than would result from an immediate winding up of the company.”

[6] Emperor Investment contends that the Court should order the ending of the administration because, it says, Delta Law is solvent and Mr Rozario abused the power of appointment in appointing the administrator. It is argued that he, having transferred to himself most of Delta Law’s funds, used his powers as a director to frustrate shareholders’ attempts to remove him, and supported a creditor of the company in making an application for its winding up. The issues, then, for my decision are: whether Mr Rozario did act for an improper purpose in appointing the administrator; whether Delta Law is in any case solvent; and if I conclude in the affirmative as to either of those matters, whether I should exercise my discretion to end the administration. It is only in the event that the administration is ended that I am asked to make orders with respect to the registration of shares in Mr Clapin’s name.

[7] Because the administrator, Mr Cotter, has not consented to the proceedings’ being brought against the company, Emperor Investment and Mr Clapin require leave to make the applications, under s 440D of the *Corporations Act*. The purpose of s 440D is, consistent with the object set out in pt 5.3A, to freeze proceedings against a company under administration so as to enable the administration to proceed without hindrance, in an endeavour to avoid winding up, if possible. Given that the first application here concerns a larger issue, whether the administration should proceed at all, I consider it

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<sup>2</sup> *Corporations Act* 2001 (Cth), s 447A(4)(b).

appropriate to grant leave in respect of it. If the application to end the administration were granted, the second application could be made without leave.

*The parties and interested non-parties*

- [8] Delta Law is an incorporated legal practice, with Mr Rozario as its legal practitioner director. The company began operating as a legal practice under the name Delta Law in 2009 at the behest of Mr Richard Spencer and Ms Silvana Perovich. Mr Spencer is himself a solicitor, but both he and Ms Perovich were bankrupt at the time. The chief purpose of the practice was to undertake litigation (the “Mango Boulevard litigation”) for a company, Mio Art Pty Ltd (“Mio Art”), against Mango Boulevard Pty Ltd and its parent company BMD Holdings Pty Ltd in relation to a joint venture for a property development. Mr Spencer explained the arrangement with Delta Law: most of the work was done by him and Ms Perovich, with Mr Rozario taking a limited role. He agreed with the proposition that he and Ms Perovich ran the litigation in a joint arrangement with Mr Rozario and used Delta Law as the solicitor on the record. Ms Perovich assisted with the trust account.
- [9] Mr Spencer is now the legal practitioner director of another incorporated legal practice, Law and Commerce Partners Pty Ltd. That company has entered into an agreement with Mr Clapin to purchase, for the sum of \$1, the 40 shares in Delta Law in respect of which he seeks to be registered as owner.
- [10] Mio Art is a trustee of the Spencer Family Trust, the beneficiaries of which are members of the Spencer family, including Mr Richard Spencer. The company’s director is Mr Spencer’s son, Michael Spencer. (Hereafter, when I refer to “Mr Spencer”, I mean Richard Spencer; where Michael Spencer enters the narrative, I will identify him by his given name.) Mr Spencer describes himself and Ms Perovich as consultants to the company. Mio Art holds the entire beneficial interest in Emperor Investment through a trust arrangement, the details of which were not before the court. Both Emperor Investment’s and Mr Clapin’s costs of their applications are being met by Mio Art.
- [11] The sole director and shareholder of Emperor Investment is Mr Edmund Galea. In his evidence, he explained how Emperor Investment came to be a creditor of Delta Law. Mr Spencer had negotiated for the company to purchase a small debt, of \$1,650, owed to a barrister who had acted for Delta Law. Mr Galea was also a director until recently of another company, Award Litigation Funding, which he incorporated at the suggestion of Mr Spencer and Ms Perovich in about 2008 for the purpose of raising funds for litigation to be conducted by Mio Art. There was, he said, a written agreement between Mio Art and Award Litigation Funding which provided for the latter to receive a percentage of any amounts recovered by Mio Art.

*Distribution of arbitration award proceeds received by Mio Art*

- [12] As a result of an arbitration concerning a share sale agreement, between, on the one hand, Mio Art and Ms Perovich’s trustee in bankruptcy, and, on the other, Mango Boulevard Pty Ltd, an award of some \$20,000,000 was made against the latter. In consequence it deposited a bank guarantee for that amount with the court in August 2017. The entitlement of Mio Art and Ms Perovich’s trustee to the award proceeds was challenged by the liquidators of two companies, Traditional Values Management Ltd

and Earning Pty Ltd, which claimed to have rights to the funds. That litigation was resolved by a mediation in June 2018, at which it was agreed that the award proceeds would be paid into the account of the trustee's solicitor, James Conomos Lawyers Pty Ltd (which now represents Emperor Investment and Mr Clapin in these proceedings), with the sum of \$8,450,000 to be paid to Mio Art, and the balance of the \$20,000,000 shared between Ms Perovich's trustee and the two companies in liquidation.

- [13] James Conomos, the principal of the practice, duly received the funds and disbursed them. So far as those held on Mio Art's account were concerned, he acted on the authority of Michael Spencer, given on 21 November 2018, directing him to pay the monies as follows: \$5,467,066 to Mio Art; \$2,000,000 to Award Litigation Funding and the remaining \$1,000,000 to Delta Law; it is from the last sum that Mr Rozario is said to have taken funds without authority. The \$2,000,000 paid to Award Litigation Funding was advanced to senior counsel who had conducted the litigation for Mio Art, pursuant, Mr Galea said, to an agreement to lend him the monies pending payment of his fees. Mr Galea anticipated that the loan would be repaid when all monies outstanding to Mio Art pursuant to costs orders were received and counsel's fees paid. In his evidence, Mr Spencer said that the advance was, indirectly, the payment of counsel's fees because there had been a contest in the Federal Court as to the validity of his fee agreement.
- [14] Ms Perovich sent Mr Rozario a copy of Mr Spencer's authority on 11 January 2019 and set out a list of payments made by Mio Art. The list included \$2,400,000 said to have been paid to senior counsel, who was owed \$4,400,000, and smaller amounts to junior counsel; in each instance less than the balance shown as owed. In respect of Delta Law, \$1,000,000 was listed as paid, of an amount of \$1,650,000. Counsel for Mr Rozario suggested in written submissions that the list represented Delta Law's creditors, but I do not think that is correct, particularly given Delta Law's appearance on it. It seems clear that it lists Mio Art's creditors, as identified by Ms Perovich.

*Delta Law's fee claims against Mio Art*

- [15] In an affidavit, Mr Rozario deposed to having been sidelined during the June 2018 mediation, to having been left uncertain as to what had taken place and to having been unaware whether any document was signed on the day of the mediation. (That is difficult to accept, because he appears to have executed the Deed of Settlement on behalf of Mio Art as its solicitor on 14 June 2018, the day of the mediation.) He considered that Delta Law had a lien over the funds received by Mio Art and should be paid its "full claim". On 21 January 2019, he sent an email to Mr Conomos in which he acknowledged receipt of the \$1,000,000 "subject to Delta Law's lien over the funds". He suggested that the award monies had been paid out without authority and without regard to Delta Law's lien. In evidence, he conceded, however, that he was made aware by email on 20 November 2018 that Mr Conomos proposed to redistribute the funds on receipt of authorities from all parties, and he had taken no action at the time.
- [16] At any rate, Mr Rozario deposed that he formed a view that Ms Perovich and Mio Art had excluded him from communications about the distribution of the funds. In consequence, he requested payment of the fees he regarded as owed to Delta Law. He had calculated those at hourly rates of \$450 plus GST for the period between 2008 and 2012 and thereafter to 2018 at \$550 plus GST, on the basis of 40 hours work per week. The total was \$10,668,800, after taking into account the \$1,000,000 paid into Delta Law's account. Giving evidence, he said that on 23 January 2019, Ms Perovich and Mr

Spencer had offered to pay him personally a substantial sum, but they had maintained that Delta Law was not owed anything, although it might have a prospective claim. He decided, therefore, to end the relationship.

- [17] On 25 January Mr Rozario sent an email to Mio Art, Michael Spencer, and Ms Perovich and Mr Spencer, advising that the Queensland Law Society was investigating Delta Law and that on its advice he was required to cease acting for them and also to return the \$1,000,000 placed into the company's general account. On 29 January 2019, he gave formal notice of Delta Law's intention to apply for leave to withdraw from acting for Mio Art. Law and Commerce Partners Pty Ltd then became the solicitor on the record for Mio Art in the proceeding concerning the proceeds of the arbitration.
- [18] The basis on which Delta Law was to be paid its fees by Mio Art was the subject of contention. Mr Spencer identified a client agreement dated 20 September 2013 as the first costs agreement between Delta Law and Mio Art. It was related to Delta Law's acting in the arbitration and set out a rate of fees, but gave a range of options for when accounts might be submitted, and contained no prescription for when payment was to be made. Mr Rozario relied on a Deed of Agreement dated 26 April 2018, recording that Delta Law had issued cost agreements to Mio Art and providing that in consideration of its continuing to act, its costs and outlays would be payable

“... within a reasonable time of a successful outcome of each and every claim such that any monies recovered by any of the Clients from each and every claim in which that client is involved are to be paid to Delta Law in priority to the Clients ...”,

the “Clients” including Mio Art, Mr Richard Spencer and Ms Perovich. Where there was not a successful result in a particular claim, the liability to pay nonetheless existed in respect of monies from other successful outcomes. The Deed, expressed to operate retrospectively, was executed by Mr Rozario, Mio Art, Mr Spencer and Ms Perovich.

- [19] Remarkably, in light of those documents, Mr Spencer's evidence was that there was no agreement in writing for payment of Delta Law; the April 2018 Deed was, he said,

“...just put up as a without prejudice indicative ambit claim in a mediation”.

According to him, the parties to it did not consider it binding. Instead, he deposed in an affidavit, the agreement was that Delta Law would not bill for its services until Mio Art had recovered; when legal fees were recovered by Mio Art, those funds would be split equally between Mio Art and Delta Law; and any monies received by Delta Law from Mango Boulevard Pty Ltd or BMD Holdings Pty Ltd would not be disbursed without Mio Art's written authority. In evidence, Mr Spencer confirmed that the arrangement he and Ms Perovich had made with Mr Rozario was that once money was recovered, it would be shared.

- [20] However, as well as having executed a Deed which provided quite differently for priority and timing of payment, Mr Spencer had previously asserted in a letter dated 3 February 2017 to the liquidator of Traditional Values Management that Delta Law was entitled to a solicitor's lien in respect of the award proceeds. Mio Art had made similar statements. In defences dated 23 June 2017 to the counter-claims of Earning Pty Ltd and Traditional Values Management Pty Ltd, it pleaded that it and its solicitor (Delta

Law) held salvage and litigation liens over monies payable to Mio Art, the total amount being particularised as the amount of \$20,873,031, with the solicitor's fees being some \$10,000,000. Submissions were filed in support of the claim that the solicitor had a lien in respect of the funds recovered.

[21] Notwithstanding these assertions of Delta Law's entitlement to a lien over the proceeds of the arbitration award, Mr Spencer said in evidence that there was actually a different arrangement, arising from a course of conduct, between Mio Art and Mr Rozario, which was that Delta Law held a lien over the proceeds of costs orders in Mio Art's favour. That was the reason for his subsequent denial of the existence of any lien in a letter of 4 February 2019, written to Mr Rozario after the latter gave notice that Delta Law would no longer act for Mio Art.

[22] In that letter, Mr Spencer on behalf of Mio Art denied that Delta Law held any lien and maintained that the award proceeds had been dealt with in accordance with Mio Art's authority. Delta Law had a prospective entitlement to legal fees from the litigation subject to funds being received, but no bills of costs had been rendered, and Mr Rozario had no entitlement to funds. Mr Spencer asked that the "monies" (presumably the \$1,000,000) be refunded to Mr Conomos' trust account. He followed that with a letter dated 6 March 2019 to lawyers acting for Mr Rozario, in which he asserted that the \$1,000,000 paid to Delta Law was a "gratuitous advance on unrendered accounts" and expressed his awareness that counsel had claimed a lien over the money. In cross-examination, Mr Spencer said that Mio Art would continue to resist any lien contended for by Delta Law, unless it had the cooperation of a "functional shareholding" in the latter company.

[23] In giving evidence, Mr Spencer denied that there were any fees outstanding to Delta Law, because, he said, no bills had been prepared in accordance with the *Legal Profession Act 2007*. Prior to the time when Mr Rozario gave notice that Delta Law would no longer act, there had been no demand in any form for payment of Delta Law's fees. The administrator of Delta Law had sought to recover some \$7,700,000 in fees from Mio Art, relying on copies of invoices making up that amount. Mr Spencer had caused those invoices to be generated, together with Ms Perovich and Mr Rozario, who contributed some time records. Some of the invoices had already been paid. In re-examination, when it was pointed out to him that the invoices bore a notation to the effect that they were "an estimate only", he said that the invoices were in fact only produced for the purposes of the mediation. Indeed, faintly across the invoices appeared a watermark

"without prejudice Mio Art documents for mediation 13 June 2018".

Some of the invoices, Mr Spencer acknowledged, had been produced by Mio Art, with Mr Rozario's knowledge.

[24] Mr Rozario, in cross-examination, said that Ms Perovich had prepared itemised bills of costs throughout Delta Law's engagement by Mio Art. He had assisted with the process but not prepared them, and they were kept at Ms Perovich's and Mr Spencer's premises. No itemised bills of costs were produced in evidence.

*Mr Rozario's personal claim to remuneration*

- [25] According to Mr Rozario's affidavit, Ms Perovich had told him that the payment of \$1,000,000 was made to him for outstanding fees. Giving evidence, he said that he understood the sum to be a gratuitous payment, which he described at different points as made to him, as made to Delta Law, and as made to Delta Law for his personal benefit. He claimed that there was a written employee agreement, not alluded to in his affidavits, made in about 2008, by which he was entitled to receive \$450 per hour plus GST for 40 hours per week, increasing to \$550 in 2012; curiously, the same basis on which he had claimed Mio Art was to pay fees to Delta Law. He explained that this was because he "virtually was Delta Law". Mr Spencer, he said, had drafted the agreement and he and Mr Spencer had initialled it. (Why, when Mr Spencer held no office in Delta Law, was left a mystery.) For security reasons, the agreement was held in the possession of Mr Spencer and Ms Perovich, and he did not have a copy. Mr Rozario conceded, though, the possibility that he might be mistaken and that the written agreement had been made with an earlier practice of which he was principal, which was a different entity from Delta Law. However, he maintained there had been an informal arrangement by which accumulated wages would be paid to him whenever Mio Art received payment in any matter, while his ultimate payout would occur at the end of the share sale agreement proceeding.
- [26] On 10 May 2019, Mr Rozario transferred \$800,000 from Delta Law's general account into the trust account of his then lawyers. He deposed that he regarded himself as entitled to the money as representing his fees. In cross-examination he agreed that \$200,000 had already been used (for what purpose was not revealed) before the transfer. Of the \$800,000, Mr Rozario said, "well over" \$600,000 had been dissipated; something of the order of \$400,000 had been spent in defending the present proceedings. The Queensland Law Society had carried out an investigation into the funds transfer. He had provided it with a number of invoices (those which Mio Art had produced for the purposes of the mediation), but the Law Society had recently (at the beginning of 2019) requested that he repay some \$472,000 to Delta Law's trust account. He proposed to take legal advice as to what he should do, but he considered the Law Society's calculations to be incorrect.

*The Spencer interests' attempt to take control of Delta Law*

- [27] On 16 April 2019, Mr Galea signed a Notice of Shareholders Meeting to be held on 10 May 2019. The Notice identified "Management of the Company" as an agenda item and expressed shareholder concerns about Mr Rozario's conduct in various respects, including an allegation that he had made false statements concerning the transfer of the company's funds and had failed to comply with an undertaking as to their payment. On 18 April, Mr Clapin provided a proxy appointing Mr Spencer and Ms Perovich to vote on his behalf at the meeting. Subsequently, he wrote to Mr Galea advising that his deceased wife's shares had passed to him on her death.
- [28] The meeting of 10 May 2019 took place in the absence of Mr Rozario and was chaired by Mr Spencer. It was resolved that Mr Rozario be removed as director and Mr Spencer appointed in his place; that the shares of Mr Clapin's deceased wife be transmitted to him; and that those shares then be registered in the name of Law and Commerce Partners Pty Ltd. It was on the day of the meeting that Mr Rozario transferred the \$800,000 from Delta Law's account to his lawyers' trust account.

- [29] On 28 June 2019, a judge of this court found<sup>3</sup> that the notice of meeting was invalid, because it did not identify the resolution to remove Mr Rozario and replace him with Mr Spencer, and that proxies given by Mr Clapin to Mr Spencer and Ms Perovich and by Emperor Investment to Mr Galea were invalid, so that there was no quorum at the meeting. The resolutions purportedly passed were thus invalid. That decision is currently subject to appeal. Promptly after the decision was given, Mr Galea gave notice of another shareholders' meeting to be held on 30 July 2019, the agenda for which included dismissal of Mr Rozario as director.
- [30] In connection with that meeting, on 29 July 2019, Mr Clapin wrote to Mr Rozario through James Conomos Lawyers Pty Ltd, requesting that as executor of his deceased wife's estate he be registered as holder of her shares before the shareholders' meeting to be held on 30 July 2019. The basis of Mr Clapin's application here is Mr Rozario's refusal, in response, to recognise any entitlement in Mr Clapin to be registered as a shareholder. He has taken the position that he is not satisfied that Mr Clapin is his wife's executor because of "information received" and because Mr Clapin has no grant of probate. However, since the "information received" is apparently contained in Mr Rozario's affidavit affirmed on 29 May 2019, which is not among the material read in either application, the first asserted reason cannot be assessed. As will be seen, however, that matter has played no part in my decision.

*The attempt at winding up Delta Law*

- [31] During the period in which Mr Spencer was purporting to act as the sole director of Delta Law, a statutory demand was received from a Mr Winkler. It arose from a loan agreement made in 2016 between Mr Winkler and Mio Art, pursuant to which the former advanced the amount of \$150,000. The claim against Delta Law, for approximately \$178,000 once interest was added, was made on the basis that it had allegedly, by an email sent by Mr Rozario, assigned its fruits of litigation lien in respect of costs orders in three specified proceedings, in consideration of Winkler's not proceeding with an earlier statutory demand against Mio Art; and that, Delta Law now having been paid costs in respect of the proceedings (a reference to the \$1,000,000 paid by Mio Art) sufficient to discharge the debt, it was due and payable. Mr Spencer, on behalf of Delta Law, filed an application to set aside the statutory demand on the grounds that there were proceedings on foot in respect of the original loan; that no amount had been paid in respect of the costs orders which were the subject of the assignment; and that the \$1,000,000 was not paid to Delta Law on account of any invoiced costs, nor pursuant to any costs order in any proceeding.
- [32] However, once the resolution for his removal was declared invalid, Mr Rozario consented to the dismissal of the application to set aside the statutory demand, and an order for its dismissal was duly made on 9 July 2019. On 16 July 2019, Mr Rozario, together with Mr James Loel, telephoned Mr Cotter to arrange an appointment with him, to discuss the possibility of his appointment as an external administrator of the company. In the course of that conversation, according to Mr Cotter, the main concern raised was that shareholders were trying to take control of Delta Law; there was no discussion about creditors or imminent debts.

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<sup>3</sup> *Rozario & Anor v Delta Law Pty Ltd & Ors* [2019] QSC 159.

- [33] On the following day, the three men met. Mr Cotter was advised in the course of the meeting that the Winkler debt had been purchased by another entity, but that the relevant Deed of Assignment allowed the continued use of his name in proceedings. (In fact, according to Mr Rozario's evidence, the debt had been assigned to Mr Loel.) Mr Cotter accepted the correctness of that statement without seeing the Deed, because Mr Loel was formerly of the firm Lillas & Loel, which was acting on behalf of Mr Winkler. (Mr Loel also acted previously for Mio Art, an arrangement which ended in litigation.) Mr Cotter was asked to give a consent to act as liquidator on a winding up application to be brought by Winkler, and to submit that consent to Lillas & Loel, which he duly did. Lillas & Loel now represents Mr Rozario in these applications.
- [34] On 23 July 2019, Mr Winkler applied for orders that Delta Law be wound up in insolvency, on the basis that his statutory demand had not been met, and that Mr Cotter be appointed liquidator. The hearing date was set for two days later. Mr Rozario swore an affidavit deposing that Delta Law was unable to pay the claimed debt, and Delta Law appeared at the hearing to consent to the winding up. However, on Emperor Investment's cross-application to stay the winding up, the two applications were consolidated and adjourned.

*The appointment of Mr Cotter as administrator of Delta Law*

- [35] The next day Mr Rozario telephoned Mr Cotter, telling him words to the effect that "they didn't succeed". They then discussed the prospect of Mr Cotter's being appointed as voluntary administrator of Delta Law. That took place; Mr Rozario, as the company's sole director, passed a resolution for that purpose on 29 July 2019. He also recorded his opinion that the company was insolvent or likely to become insolvent at some future time; oddly, by resolving to that effect.
- [36] In evidence, Mr Cotter said that Mr Rozario's concern was to ensure his appointment as administrator before the shareholders' meeting on 30 July, which was likely to remove him as director. That caused Mr Cotter to consider the propriety of what was occurring, but he was aware that Delta Law had failed to comply with the statutory demand and he believed Mr Rozario to have concerns that the company was insolvent, having regard to the demands by barristers (two junior counsel and senior counsel who had acted for Mio Art on Delta Law's instructions) for payment.
- [37] On behalf of Delta Law, Mr Rozario provided the administrator with a Report on Company Activities and Property. In it, he listed as creditors: Mr Winkler for an amount of \$270,000; one of the junior counsel for an amount of \$95,000; the other junior counsel for an amount of \$520,000, which was noted as "disputed"; and senior counsel, the debt to whom was said to be

"... unknown because Mio Art were paying him significant sums direct."

He also claimed to be owed as an employee wages (at the rates in the alleged employment agreement, although the Report did not refer to it), holiday pay and superannuation, in amounts totalling about \$12,000,000; from which was to be subtracted the \$1,000,000 received from Mio Art. Delta Law was shown as having no assets other than a debt in excess of \$8,000,000 owed to it by Mio Art and secured by a "fruits of litigation lien".

- [38] The first meeting of creditors was held on 8 August 2019. Prior to that meeting, Mr Cotter had sought documents from Mr Rozario supporting his wages claim. None was produced; according to Mr Cotter's evidence, Mr Rozario made no mention to him of any written employment agreement. In the absence of any supporting documents for the wages claim, Mr Cotter admitted Mr Rozario's proof of debt in an amount of \$1 for voting purposes. The only other creditors represented at the meeting were Mr Winkler, whose claim was admitted in an amount of \$178,000, and Emperor Investment, whose claim was admitted in an amount of \$1, in the absence of any evidence of consideration for the assignment to it of the \$1,650 debt.
- [39] On 15 August 2019, relying on documents provided by Mr Rozario, Mr Cotter made a demand on Mio Art for the sum of \$7,700,000 as fees owed to Delta Law. Mio Art's solicitors responded by pointing out that the costs agreement was premised on Delta Law's continuing to act for it, but it had terminated its retainer; that over 60% of the amounts demanded were outlays which had either already been paid or recovery of which was not sought by third parties (presumably the barristers); and that no finalised and signed invoices had been sent, and in any event Mio Art would seek to have any invoices assessed. In cross-examination, Mr Cotter conceded that part at least of the amounts claimed – about \$650,000 – was mistakenly claimed, because it related to work done by Lillas & Loel, not Delta Law.
- [40] On 23 August, Mr Cotter reported to creditors. He was investigating Mr Rozario's purchase of a motor vehicle from the funds paid by Mio Art. No evidence of Mr Rozario's entitlement to wages, superannuation or holiday pay had been furnished. The appropriation by Mr Rozario of the \$1,000,000 would warrant investigation if the company were wound up. No proof of debt had been received from any of the barristers. The demand for Delta Law's fees had been made on Mio Art and resisted. Delta Law's financial accounts showed a director loan of some \$70,000 as at 30 June 2018. He had been able to identify a little over \$3,000 held in the company's trading account and about \$800 held in its trust account. The company had plant and equipment which Mr Cotter described as having "a book value of less than \$3,000". Mr Cotter had been advised by Mr Conomos, now acting for Emperor Investment and Mr Clapin, that a company named Stertoak Pty Ltd owed Delta Law about \$300,000, but according to Mr Rozario, that liability had been discharged and the relevant dealing in any event was unauthorised. This was, Mr Cotter said, a matter for investigation by any liquidator. The company's draft financial accounts also showed a loan in an amount of \$1,100 to a person or entity named Spenser Bloss, as to which he had no information.
- [41] On 29 August 2019, by way of interim relief in Emperor Investment's application for the termination of the administration, Mr Cotter was restrained from taking any further step in the administration without leave. In consequence, the second meeting of creditors, set for September 2019, did not take place. In October 2019, Mr Cotter received a proof of debt from the Australian Taxation Office for "BAS amounts", in an amount of \$90,000; apparently, unpaid GST on the \$1,000,000 received from Mio Art.
- [42] In cross-examination, Mr Cotter was asked about the director's loan of \$70,000 shown in Delta Law's accounts for the year ending 30 June 2018. He was taken to the company's director loan ledger for the year ending 30 June 2019, the entries in which appeared to reflect Mr Rozario's use of a company credit card to meet living expenses by way of running loan, and directed to a credit shown on 22 May 2019 for \$450,000, attributed to Mr Rozario's lawyers. (There is no evidence to support any such credit; if

anything, one would suspect it was a misplaced debit.) Mr Cotter acknowledged that if the \$450,000 were wrongly recorded, so that no such credit existed, the result would be a debit balance of some \$45,000 owed by Mr Rozario. Mr Cotter said that Delta Law's accountant had indicated that he did not think his firm was a creditor of Delta Law or if it were, it was only for a brief period; in fact it had not submitted any proof of debt.

- [43] Mr Cotter confirmed that no proof of debt had been received from any of the three barristers. (In fact, on 26 July 2019, senior counsel agreed by email to release Delta Law for all liability for his fees on the agreement of Ms Perovich and Mr Spencer to undertake personal liability for them. By an undated 2019 Deed, the junior counsel who was owed about \$95,000 agreed with Law & Commerce Partners Pty Ltd, Mr Spencer and Ms Perovich that they had assumed Delta Law's obligation to pay his fees, and would pay them on his demand with interest.) Mr Winkler had withdrawn his proof of debt, having reached a settlement with Mio Art, Mr Spencer, Ms Perovich and Emperor Investment, for the purposes of which he acknowledged that he was not a creditor of Delta Law. (Mr Loel, to whom, according to Mr Rozario, that debt was assigned, has not sought to make any claim.)

*Mr Rozario's evidence as to his motives for placing Delta Law into administration*

- [44] Mr Rozario deposed in his affidavit that on 29 July 2019, when he passed the resolution to place Delta Law into administration, it was his opinion that Delta Law was insolvent, or was likely to become insolvent. The basis of that opinion was, firstly, that he considered it unlikely that Mio Art would pay the fees he regarded as outstanding to Delta Law and, secondly, that the company's liabilities which consisted, in his view, of the debt to Mr Winkler, standing at about \$178,000, and liabilities to counsel of something in excess of \$2,600,000 dollars, could not be met.
- [45] Mr Rozario deposed that he believed the Winkler debt to be a genuine one. As to counsel's fees, he produced a letter dated 21 June 2019 from senior counsel to his (Mr Rozario's) solicitors, in which counsel asserted that he: was owed \$2,000,000; had been informed that Mr Rozario had appropriated \$1,000,000 paid into Delta Law's account by Mio Art in part payment of counsel's fees; and regarded the funds held by the solicitors as held on trust for his and junior counsel's benefit. Mr Rozario also relied on an email from one of the two junior counsel, dated 15 January 2019, identifying and annexing a number of unpaid invoices, amounting to some \$520,000; and a letter from the second junior counsel dated 21 May 2019, asserting that he was a creditor of Delta Law in respect of overdue professional fees in an amount of about \$95,000 and regarded himself as entitled to a lien on the funds held by Mr Rozario's lawyers if they were the proceeds of the litigation. He asked how Mr Rozario proposed to pay Delta Law's debt to him.
- [46] Questioned about why, if he thought counsel were entitled to payment, he had not used any part of the \$1,000,000 received from Mio Art to pay counsel's fees, Mr Rozario said that the arrangement was that Delta Law would pay counsel when the matter ended; which, he conceded, had not occurred, because there was still a large number of cost orders outstanding. At the time he put the company into administration, counsel had made demands for payment, so that it was clear to him that their invoices were now due and payable.

- [47] It was put to Mr Rozario in cross-examination that in the Report on Company Activities and Property he had indicated that the amount owed to senior counsel was unknown because Mio Art were paying him. Mr Rozario denied any knowledge of that information and expressed himself doubtful as to the document's provenance. The signature which appeared on the relevant page of the Report, he claimed, appeared to be an earlier form of his signature; he had not signed in that way in the last three or four years. That evidence was simply not credible.
- [48] In cross-examination, Mr Rozario maintained that he placed Delta Law into administration because it was faced with four immediately payable debts, the three sets of counsel's fees and the Winkler debt, and a prospective debt to the Australian Taxation Office, none of which the company had any prospect of paying as and when they became due or at any time in the near future. He was challenged on his claim to have believed at that time that there was a prospective GST liability, but insisted that he had given thought to it in July before appointing the administrator. It is noteworthy, in relation to that claim, that the Report on Company Activities and Property contains no mention of any such liability.
- [49] Mr Rozario acknowledged that he knew Mr Winkler's debt had been assigned to Mr Loel, and was the subject of District Court proceedings; but he maintained that, in his view, the conditions for its payment had arisen. He was concerned that he should not allow the company to trade while it was insolvent, although, as he conceded, it was not in fact trading. He claimed to have become aware of further loans which might have been procured by Ms Perovich and Mr Spencer on the strength of Delta Law's fruits of litigation lien, although he admitted he did not know whether the loans had actually been made. Again, reference to the supposed loans was notably absent from his affidavits. Mr Rozario said he believed the junior counsel who had emailed him invoices in January 2019 had sent him a further invoice in May 2019 for the total amount of \$520,000; but no document to support that claim was produced.

*Abuse of pt. 5.3A Provisions?*

- [50] The court's jurisdiction to end an administration arises on satisfaction that the company is solvent or that the provisions of pt 5.3A of the *Corporations Act* are being abused. I will deal with the latter aspect first. If the director's power to place the company into administration is used for a purpose which is foreign to the purposes of pt 5.3A, it will be an improper use of the procedure.<sup>4</sup> The purposes of the Part are to use the administration so as to give the company the best chance possible of returning to its previous business activities and avoid winding up or to permit a better outcome for creditors and shareholders than an immediate winding up would produce. The onus rests on the applicants to establish that Mr Rozario acted for an improper purpose; a matter which, as Jackson J observed in *Ashala Model Agency Pty Ltd (in liq) v Featherston*,<sup>5</sup> requires proof on the *Briginshaw*<sup>6</sup> standard.
- [51] There may be some slight difference in the authorities as to the degree of potency of the relevant improper purpose necessary in order to warrant the court's intervention. In *Re Condor Blanco Mines Ltd*,<sup>7</sup> Barrett AJA considered that the appointment of an

<sup>4</sup> *Blacktown City Council v Macarthur Telephone Communications Pty Ltd* (2003) 47 ACSR 391 at 396.

<sup>5</sup> [2017] 2 Qd R 1 at 29.

<sup>6</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>7</sup> [2016] NSWSC 1196.

administrator would be rendered voidable, and the occasion for an order under s 447A would arise, if the power of appointment would not have been exercised but for the existence of a purpose inconsistent with the statutory purposes.<sup>8</sup> In *Foti v P & S Investments Pty Ltd*,<sup>9</sup> Besanko J proceeded on the basis that the director's improper purpose must be shown to be the predominant purpose before the power under s 447A would be exercised, applying the test for abuse of process in *Williams v Spautz*.<sup>10</sup> One could imagine that while a predominant purpose must always be causative, a purpose might be causative without being predominant. For example, an improper purpose for seeking to place a company into administration is not necessarily inconsistent with, at the same time, a belief as to its insolvency, and they may combine to produce the relevant decision. But for the purposes of this case, I do not think anything turns on the distinction between a predominant and a merely causative purpose.

- [52] Emperor Investment contended that Mr Rozario's asserted belief in Delta Law's insolvency should not be accepted, because none of the three counsel had made any formal demand on Delta Law for immediate payment of his fee. The Winkler debt existed only because Mr Rozario had consented to the dismissal of the application to set aside the statutory demand, notwithstanding that he knew that the debt was disputed. His concern as communicated to Mr Cotter was not insolvency but that the Spencer interests were trying to take control of the company. He had placed Delta Law into administration for the improper purpose of avoiding his removal as director, in a context where he had unjustifiably refused to recognise Mr Clapin's entitlement to registration of his wife's shares and had already attempted to wind up Delta Law through the mechanism of consenting to the orders sought by Mr Winkler.

*Conclusions – abuse of pt. 5.3A*

- [53] There were a number of assertions by Mr Rozario in his evidence which I did not believe, including: his late claim of a written employment agreement; his claim that the Report on Company Activities and Property was somehow altered; and his claim to have taken the Australian Taxation Office liability into account when he put the company into administration. His conduct in not disclosing to Mr Cotter that the debt which was supposed to be the basis for Delta Law's winding up was actually owned by Mr Loel, his companion in seeking Mr Cotter's services, also seems to have been disingenuous, to say the least. Those matters reflected more generally on his credit as a witness. I would not, accordingly, accept at face value Mr Rozario's evidence as to his state of mind, including on the issue of Delta Law's solvency.
- [54] I do not accept that Mr Rozario had any real belief that the Winkler debt was presently enforceable and I think one can be confident that the prospect of the Australian Taxation Office claiming for a GST liability had not crossed his mind. But looking at communications from counsel, I accept that he had reason to consider Delta Law likely to become insolvent. While Mr Rozario accepted in cross-examination that there was an arrangement for Delta Law to pay counsel when the matter was at an end, the effect of his evidence was that the situation was altered by demands for payment made by counsel. Although counsel for Emperor Investment argued that none of the counsel had made any formal demand on Delta Law, senior counsel's letter of 21 June 2019

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<sup>8</sup> At [113] – [115].

<sup>9</sup> [2009] FCA 1409.

<sup>10</sup> (1992) 174 CLR 509 at 529.

made it clear that the latter regarded his fees of more than \$2,000,000 as outstanding and part at least of the \$1,000,000 paid by Mio Art as due to him. He may not have expressly demanded payment, but he made it quite clear that he regarded himself as presently entitled to recover the money.

- [55] One of the two junior counsel did no more than provide his unpaid invoices without expressing any expectation of payment. The other junior counsel, however, commenced his letter of 21 May 2019 by saying that he was

“... a creditor of Delta Law Pty Ltd on account of overdue professional fees payable ...”

to him as counsel, and complained of the length of time for which his fees had been left overdue. In light of those statements, the only rational inference was that he did not accept any arrangement for deferment of his fees, which amounted to about \$95,000. Meanwhile, Mio Art was taking the position that in the absence of bills of costs, Delta Law had no entitlement to payment. Although the situation was brought about by Mr Rozario’s transfer of funds in May 2019, as at the end of July, Delta Law had no assets of any substance.

- [56] However, I am satisfied on the evidence that while Mr Rozario may have held a genuine and reasonable belief in insolvency, or its likelihood, having regard to the attitude of the barrister creditors and the difficulty of procuring payment from Mio Art, that was not the primary reason why he sought to put Delta Law into administration. Instead, I find that Mr Rozario’s chief motive was to ensure that Mr Spencer did not gain control of the company, most probably because he believed that Mio Art was intending to avoid paying him what he regarded as due to him for his work through Delta Law, and possibly also because he feared that steps might be taken to recover the funds he had already transferred from Delta Law’s general account. His counsel submitted against the latter as a motive; it would not be in Mr Rozario’s interests to fund an administration (he provided some \$34,000 for that purpose and undertook to indemnify Mr Cotter against any costs order) which was likely to investigate his movement of funds from Delta Law’s account. I think it is entirely possible that he considered he had a better chance of convincing an administrator to set off that appropriation against his wages claim than of preventing Mr Spencer from pursuing the matter were he in control of Delta Law. It is not necessary, though, to reach any firm conclusion about that aspect.

- [57] That motivation of putting Delta Law beyond the reach of the Spencer interests was manifested by Mr Rozario’s conduct in a number of respects: firstly, his acquiescence in the setting aside of the Winkler statutory demand in circumstances where there were clearly good grounds to contest it; and, secondly, his actions in relation to the winding up on the basis of that statutory demand, which was more than acquiescence, and extended to the actual seeking of Mr Cotter’s agreement to act as liquidator and the filing of an affidavit in support of the application. It was significant that he made the approach to Mr Cotter jointly with Mr Loel who had acquired the debt, something undisclosed to Mr Cotter.

- [58] Thirdly, that Mr Rozario’s concern in dealing with Mr Cotter was the prospective shareholder takeover, rather than the company’s liabilities, is consistent with the desire to place the company into administration having come about because of the imminence

of the shareholders' meeting and the failure of the attempt at winding up which would have prevented it. And, fourthly, the timing is critical; if Mr Rozario genuinely had a concern based on Mio Art's disinclination to pay Delta Law's fees and the demands made by counsel, it should have arisen by the end of January 2019, by when Ms Perovich and Mr Spencer had denied that Delta Law was owed anything by Mio Art and one of the two junior counsel had been in correspondence about his unpaid invoices amounting to \$520,000; or at the very latest on receipt of the 21 June letter from senior counsel.

- [59] The preservation of a director's position is, self-evidently, not a purpose within the object of pt 5.3A of the *Corporations Act*. I am satisfied to a high level of probability that Mr Rozario's actions were driven by an improper purpose, to prevent a loss of control of Delta Law, and that the placing of the company into administration was an abuse of the Part.

### *Solvency*

- [60] That conclusion means that it is unnecessary to consider the company's solvency as a basis on which the discretion under s 447A(2) would fall to be exercised, but it is plainly relevant as a consideration in the exercise of that discretion.
- [61] Under s 95A of the *Corporations Act*, a company is solvent if, and only if, it is able to pay all its debts as and when they become due and payable. In *Smith v Boné*,<sup>11</sup> Gleeson J provided a useful summary of authority on the provision. (I will refer to the propositions her Honour set out, without adverting to the authorities from which they were drawn.) It focuses on available income sources and expenditure obligations, rather than imposing a balance sheet test focusing on the company's assets and liabilities. The latter, though, may provide context for the cash flow test, the focus of which is the liquidity and viability of the company's business. The question of solvency is to be considered with regard to the company's position as a whole, allowing for "commercial realities" and common sense. As to commercial reality, if the company has recourse to a source from which it can pay its debt, it does not matter if it is unsecured borrowing or a voluntary extension of credit by another party. The question is whether the company has an "endemic shortage of working capital"; so that a temporary lack of liquidity does not amount to insolvency. How far into the future one should look in considering whether the company can pay its debts as they become due depends on the circumstances, including the nature of the company's business, and what is known of its future liabilities.
- [62] Mr Cotter in his report to creditors of 23 August said that his present evaluation of Delta Laws' assets and liabilities suggested that it was insolvent. However, that was before settlement of the Winkler debt, and he was not aware of senior counsel's release of Delta Law from liability for his fees. There has, too, been another development since then. Towards the end of this hearing, Mio Art offered a written undertaking that on the termination of the administration of Delta Law, it would indemnify the latter for any of the barristers' claims for fees and any liability to the Commissioner of Taxation. It also undertook that it would use "its best reasonable endeavours" to pursue the enforcement of the costs orders made in its favour in the Mango Boulevard litigation and pay any amounts recovered (after deduction of costs incurred in assessment or taxation,

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<sup>11</sup> (2015) 104 ACSR 528 at [24] - [32].

documentation for which it would provide) into a trust account, not to be distributed without order of the court or the consent of Mio Art, Mr Rozario, and the shareholders of Delta Law.

- [63] Counsel for Mr Rozario identified Delta Law's assets as consisting of about \$3,000 in cash at bank, the disputed Mio Art debt which he put at about \$7,700,000, the Stertoak debt of about \$300,000 and the Spencer Bloss loan identified in Mr Cotter's report (about which there was no evidence at all) and plant and equipment at \$3,000 (although Mr Cotter described it as having a "book value of less than \$3,000"). The company had no real property. Pursuing any claim against Mio Art was likely to be a lengthy process and expensive and difficult. Against that, he said, the liabilities were Mr Rozario's employee entitlement at about \$11,000,000, his loan account at \$70,000, the fees of the two junior counsel at \$520,000 and \$95,000 respectively and the debt which had been assigned to Emperor Investment, of \$1,650. There was also a possible amount owed to the company's accountants. In addition, there was the amount of \$90,000 currently due and owing to the Australia Taxation Office.
- [64] In response, counsel for Emperor Investment pointed out that the bulk of the liabilities consisted of Mr Rozario's employee entitlement claim, which was entirely unsubstantiated. Against that, Delta Law was entitled to recover against Mio Art what must at least be a substantial amount of money, even if it were not the claimed \$7,700,000. There were no trade creditors. The evidence was that counsel were not looking to Delta Law for immediate payment of their fees; they had not made any demand or lodged any proof of debt, indicating their support for the company. In any event, responsibility for their fees and the Australian Taxation Office debt was being assumed by Mio Art under the proposed undertaking.

*Conclusions – solvency*

- [65] I am extremely dubious that Mr Rozario can make out any claim to unpaid wages or that there is any amount due to him by way of a director's loan. However, there is the debt to the Australian Taxation Office of \$90,000, and at least one of the two junior counsel was, in his last communication in May of this year, pressing for payment of his fees of \$95,000. He has accepted Law and Commerce Partners Pty Ltd's assumption of liability for the outstanding fees and has not so far lodged a proof of debt, but there is nothing to indicate that he has been paid or that his stance, that the payment of his fees by Delta Law is overdue, has changed. The position is less clear in relation to the other junior counsel who, although he forwarded invoices in January 2019, does not seem to have asked for payment.
- [66] Mio Art will plainly resist payment of Delta Law's fees at least until it recovers under its costs orders, and the timing and extent of that recovery is uncertain in the extreme. Certainly, on the evidence I have heard, Mango Boulevard Pty Ltd will be entitled to entertain some doubt about the authenticity of any documents put to it in support of Mio Art's costs and outlays. A more immediate source of funds for the liquidator may be the balance of the funds held in Mr Rozario's solicitors' account, which are subject to an undertaking that he will not deal with them pending the determination of these applications. But given Mr Rozario's evidence that "well over \$600,000" of the \$800,000 he withdrew had already been dissipated, whether sufficient remains to meet the debts to junior counsel and the Tax Office, putting to one side any costs of recovery, must be doubtful. The worth of Mio Art's undertaking to indemnify Delta Law for the

barristers' fee claims and the tax debt is simply unknown. The gaps in the evidence as to what might be recovered from Mr Rozario and the value of Mio Art's support lead me to the conclusion that Delta Law's solvency is at best uncertain, in or out of administration.

*Exercise of discretion*

- [67] In *Cawthorn v Keira Constructions*,<sup>12</sup> Young J observed that s 447A conferred on the court plenary powers to do whatever it considered just in the circumstances, bearing in mind the rights of those affected by the company's voluntary administration. Emperor Investment as both creditor and shareholder, Port Klang Pty Ltd as shareholder and Mr Clapin as potential shareholder, the barristers owed fees, the Australian Taxation Office and Delta Law itself are all in the category of those whose interests are affected.
- [68] Mr Galea on behalf of Emperor Investment and Mr Clapin expressed some concern that Mr Cotter might not be independent, without giving any basis for that concern. The latter agreed that Mr Spencer and Ms Perovich had cast some doubt in that regard. Both expressed enthusiasm for the appointment of a gentleman proposed by Mr Spencer, a cost assessor and lawyer, as director of Delta Law should the company's administration be ended. They acknowledged that they did so entirely on the recommendation of Mr Spencer. Asked about that person, Mr Spencer said that he had previously been engaged by Mio Art as a cost assessor and he had approached him about whether he would be prepared to become a director of Delta Law for the purpose of preparing bills of costs so that Mio Art could enforce its costs orders. Mr Spencer conceded that this gentleman was not entirely independent of him and that he could not "deny potential conflict".
- [69] Mr Spencer was not a person whose rights I would regard as affected by the voluntary administration, but in evidence, he confirmed that he wished to become a shareholder of Delta Law and to take control of it, so that it would prepare bills of costs in taxable form for the purposes of enforcing the Mio Art costs orders in the Mango Boulevard litigation. He was concerned about the costs of external administration and argued that a better course was for him, Ms Perovich and Mr Rozario to work together on the bills of costs to enable Mio Art to recover so that Delta Law could then take the benefit of its litigation lien over the proceeds of the costs orders. He contended that any investigations necessary could be carried out by the Queensland Law Society. Mr Spencer accepted the conflict inherent in his role as a consultant for Mio Art if he were also to control Delta Law and thus be on both sides of the debtor/creditor relationship between them. He also said, however, that he was well aware of issues of fraud on a minority shareholder and would not, therefore, contemplate forgiveness of Mio Art's debt to Delta Law.
- [70] In submissions, Emperor Investment contended that the preferable course of action in Delta Law's interests was to terminate the administration. The company's only asset of value was its claim for legal fees against Mio Art, and the best prospect of its recovering was through its co-operating with Mio Art in preparing bills of costs to enable the enforcement of the costs orders. Its position would be protected by the undertakings that Mio Art had given. There were disadvantages to Delta Law's seeking to recover its fees in administration and likely liquidation. Mr Cotter had said that a litigation funder

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<sup>12</sup> (1994) 33 NSWLR 607.

had expressed some interest in the claim, but he had acknowledged that a funder would require 20% to 30% of the proceeds and there would be, in addition, the legal fees of the lawyers retained and his own remuneration in pursuing the claim. The prospect of recovery was clouded by the uncertainty of whether the litigation funding could be obtained and the problems of delay and expense in the process.

- [71] Although counsel for Emperor Investment emphasised that it cast no aspersion on Mr Cotter's actual independence, he submitted that the circumstances of the latter's appointment, including the discussions held with him about the reasons for the administration (to counter the shareholder takeover) and his payment and indemnification by Mr Rozario, created a perception that he had a close association with Mr Rozario's point of view. If independent investigations were required, they could be undertaken by entities other than the liquidator, such as the Queensland Law Society and ASIC. If there were a concern about someone associated with Mr Spencer being appointed as director, an order could be made providing for a director to be nominated by a third party such as the Queensland Law Society. That person could compile bills of costs, with the process being cheaper than that involved in the engagement of an insolvency practitioner.
- [72] Counsel for Mr Rozario argued that there were significant doubts about Mr Spencer's motivation. He was clearly in a position of conflict. If he regained control of the company, he was likely to apply the arrangement of sharing receipts, rather than pay its debts. The company ought to be under independent control, with an independent insolvency practitioner pursuing investigations into its affairs. Mr Cotter was such a person: he had reported Mr Rozario's withdrawal of the funds paid by Mio Art into the Delta Law general account to ASIC. Delta Law could pursue the Mio Art fees owed to it in administration or in liquidation. A liquidator might be able to find a law firm willing to act on a speculative basis in the pursuit of the claim against Mr Rozario. It was possible that the creditors would vote to terminate the voluntary administration rather than that the company be wound up, but it was better that their wishes dictate the outcome.

*Conclusions – exercise of discretion*

- [73] The uncertainty as to whether Delta Law is actually solvent militates against exercising the discretion to terminate the administration. But there are other reasons not to do so.
- [74] It is quite clear that the s 447A application was brought at Mr Spencer's behest and funded by Mio Art in order to facilitate its recovery of costs in the Mango Boulevard litigation. Mr Spencer seems adept at recruiting others to his purpose, in this instance, Mr Clapin and Mr Galea, and, formerly, Mr Rozario. Mr Rozario, too, seems to be acting in conjunction with Mr Loel in attempting to see Delta Law through to liquidation, although having seen him give evidence, I would suspect that he was the recruited rather than the recruiter. Neither set of interests has any particular concern with the company's viability. Mio Art's concern with whether Delta Law's creditors are paid is only for the purpose of regaining control of the company for costs collection. There is no evidence as to what the Mio Art costs orders are worth and hence no evidence from which one can form a very clear view as to what the advantage of the course proposed by Emperor Investment would be for creditors, shareholders and Delta Law itself.

- [75] If the administration were terminated the company would return to the control of Mr Rozario; temporarily, one can assume, because the Spencer interests would act speedily to replace him as director. Although it was suggested that the court might fashion an order to enable the appointment of an independent director, the idea that there might be somewhere an independent individual prepared to take on the directorship of Delta Law who would then, economically, set about preparation of bills of costs seems to have been no more than an embryonic afterthought; certainly, there was no evidence as to its feasibility or cost. Importantly, if the April 2018 Deed is enforceable, Delta Law may be able to recover its fees from Mio Art regardless of whether recovery under the costs orders ever takes place. If the Spencer interests control the company, that seems a course very unlikely to be pursued. There are other possible assets which might be pursued for Delta Law: the funds appropriated by Mr Rozario, the Stertoak debt of \$300,000.
- [76] For those purposes, it seems to me imperative that the company's future remains firmly in the hands of independent persons. I am satisfied that Mr Cotter is independent (whatever Mr Rozario's hopes may have been) both from observing him giving evidence and from his actions in reporting Mr Rozario's appropriation of funds to ASIC and refusing to admit his claim for wages to proof without evidence. The better course is, as counsel for Mr Rozario submitted, to allow the administration to proceed. The creditors can then decide what course of action they wish to adopt.

#### *Orders*

- [77] I refuse the application to end the administration of Delta Law. The second application for declarations as to Mr Clapin's entitlement to be registered should be adjourned to a date to be fixed after the holding of the second meeting of creditors. It is conceivable that it might need to be revived if that meeting were to decide to end the administration. The parties have leave to file and serve submissions as to costs, no more than three pages in length, by 4 pm on 17 January 2020. In each instance a copy of the submissions should be emailed to my associate.