

3193

Our Ref: WPC:SEW:19-

Your Ref:

6 February 2020

Robson Cotter Insolvency Group
PO Box 8374
Woolloongabba Qld 4102

Attn: Mr Bill Cotter

By email to admin@rcinsol.com.au

Dear Mr Cotter,

**RE: DELTA LAW PTY LTD (ADMINISTRATOR APPOINTED)
ACN 116 936 264**

As you are aware, we act for Mr Quintin Rozario, the sole Director of Delta Law Pty Ltd (Administrator Appointed) (**Delta**).

We have been instructed by our client to write to you ahead of the forthcoming Second Meeting of Creditors of Delta which is scheduled for 10:30am tomorrow, Friday, 7 February 2020.

Our client's immediate concerns are:

1. Your position in response to his claim for employee entitlements in the amount of \$11,368,000.00 (**employee entitlement claim**);
2. The DOCA proposed by Mio Art Pty Ltd, Mr Richard Spencer and Ms Silvana Perovich (**the DOCA Proposal**);
3. The possibility Mr Francis Douglas QC, Mr David Keane and / or Mr Stephen Colditz of Counsel may now seek to submit proofs of debt (**Counsels' fees**).

Employee Entitlement Claim

To summarise, your concern is our client has not submitted proof in support of this claim. If we have misunderstood what your concern is or if you have other additional concerns about our client's employee entitlement claim then please advise us immediately.

On the basis our understanding of your concern is correct, we note the following relevant facts:

1. The primary reason for Delta coming into existence was to act for Mio Art Pty Ltd, Mr Spencer and Ms Perovich in the suite of litigation against BMD Holdings Pty Ltd (**BMD**) and Mango Boulevard Pty Ltd (**Mango**), and which was before the Supreme

Court of Queensland, the Queensland Court of Appeal and the Federal Court of Australia (**the Mio Art Litigation**);

2. No financial records were kept by Delta or by our client and which detail the hours he worked as an employee of Delta on the Mio Art Litigation;
3. The employment contract between our client and Delta cannot be produced although its existence by our client and Mr Spencer has been acknowledged;
4. There is currently no other evidence which could be relied upon in order to confirm the terms of this employment contract.

Whilst these difficulties exist, our client's position is his employee entitlement claim is not without considerable merit and can still be calculated with some certainty.

The Basis of our Client's Employee Entitlement Claim

There is a solid basis for this claim namely:

1. Our client was the sole Director of Delta;
2. Our client was the sole admitted Solicitor working for Delta. Whilst Mr Spencer was a Solicitor, he was an undischarged bankrupt when Delta was set up and he did not hold a practising certificate;
3. As we have said, Delta existed primarily to act for Mio Art Pty Ltd, Mr Spencer and Ms Perovich in the Mio Art Litigation;
4. It follows, our client as the sole admitted Solicitor working for Delta undertook the work required to be completed by an admitted Solicitor in so acting in the Mio Art Litigation;
5. It was clear, the expectation was the work our client undertook on behalf of Delta in the Mio Art Litigation and for other clients was for remuneration. It would be fanciful to suggest otherwise;
6. Our client was not entitled to receive a dividend from any profits made by Delta because he was not own any shares in Delta;
7. He therefore was only going to be remunerated for his work through the payment of a salary.

Evidence of the Existence of an Employment Contract

Our client's instructions are:

1. Mr Spencer was involved in and indeed guided our client in setting up Delta;
2. Mr Spencer's involvement included sourcing the company which became Delta;
3. Mr Spencer also drafted the employee entitlement contract;
4. Our client agreed to the terms contained in the employee entitlement contract;
5. Mr Spencer kept the employee entitlement contract because he was fearful the arrangements for the payment of legal fees may otherwise have to be disclosed to the solicitors acting for BMD and Mango;
6. The reason Mr Spencer was fearful was both he and Ms Perovich were, at that time, undischarged bankrupts and the solicitors acting for BMD and Mango had been making enquiries in an effort to establish how the Mio Art Litigation was being funded.

There is ample evidence corroborating these instructions. In particular, we refer you to the following evidence given by Mr Spencer, and which appears in the transcript for hearing in Supreme Court Proceeding 8867/19:

Page 17 Day 2:

And you'll see there the nature of the lien that was being asserted was not just a solicitor's lien in the possessory sense, which is analogous to a liquidator's lien, but rather there was a further lien which is a solicitor's rights to his costs against a fund brought into existence by his labours?---Yes.

Right. And – now, that solicitor's lien is a right of Delta Law, isn't it, not a right of Mio Art?---Yes.

*So you were aware certainly from as early as 26 July 2017 that there was in existence a claim for a litigation lien by Delta Law over the fruits of the Mango Hill or BMD litigation?---**Yes, but we – we had a separate arrangement with Mr Rozario as to how it would be dealt with.** (Emphasis added)*

I see. And this separate arrangement is one that you say is oral, is it – or by conduct, was it?---Yes.

And further on Page 18, Day 2:

So nothing - - -?---Ten year – 10 years of conduct.

*Ten years of con – nothing in writing about that?---**Well, the 10 years records have a lot of paper writing in them.** (Emphasis added)*

*Well, are you saying, then, that these submissions were put forward falsely to the court as being the nature of the lien that was being claimed, because **in fact Delta Law didn't have such a claim because there was some alternative arrangement? Is that what you're saying?---Yeah,** I – I thi – yes, we were – we were – we had this – the claim here was legitimate, but internally we would – intended to deal with it differently. We had a different ra – arrangement internally, which necessitated the collection of costs from BMD, because the firm was a special joint venture. **It was not a city-based firm. It was a special arrangement between ourselves, Mio Art on the one hand, and Mr Rozario on the other hand.** (Emphasis added)*

We also refer you to our client's own sworn evidence in the same Proceeding which we have quoted below. Our client's evidence is consistent with both his instructions and with Mr Spencer's evidence which have quoted above:

Page 54, Day 2:

When you became the director of Delta Law and commenced work on the Mango Hill litigation, did you draw up an employee agreement?---Mr Spencer drafted an employee agreement and he kept it – we initialled it and he kept it. (Emphasis added)

Are you telling me by that answer that you don't have a copy of it?---I do not have a copy of it.

And that was about 10 years ago?---That was in or around 2008.

I see. And have you ever asked in writing for a copy of that agreement?---I – we – within the practice we kept all internal matters to discussions between the clients and ourselves.

*By that answer you mean that you had an informal set of arrangements with Mio Art and Mr Spencer and Ms Perovich in relation to the nature of your work and your payment for it?---**It was formal insofar as there was a written agreement. It was informal until many other respects.*** " (Emphasis added)

Further on Page 55, Day 2 we note the following exchange involving our client:

*I'll speak up. Then accepting for the moment there is a formal agreement, which you say you don't have a copy of. In terms of the detail of when you would in fact be paid and what you would be paid and how you 10. would be paid, the arrangements were, in substance, informal?---**No, those arrangements were captured in that written document and there were security reasons for which Mr Spencer and Ms Perovich thought it better that they keep it in their possession.*** (Emphasis added)

*THE CHIEF JUSTICE: All right. I would like to know what security reasons to keep a written agreement for your employment in their possession? What would that be?---Your Honour, this matter was fairly controversial. **My former clients had become bankrupts and their adversaries wanted to know how they might be able to afford lawyers, and the rest.*** (Emphasis added)

Assessing Our Client's Employee Entitlement

There are alternate and acceptable ways in which our client's entitlement can be calculated with certainty.

The first is to rely upon our client's instructions as to the terms of the employee entitlement contract drafted by Mr Spencer, including the rate per hour he was to receive as a salary.

The second is to undertake an assessment of our client's income based upon historical data for salaries paid to solicitors of similar experience, working in comparable positions and in the same or similar areas of law on a fulltime basis.

Conclusion – Employee Entitlement Claim

We:

1. Have directed you to ample evidence to support the proposition our client was entitled to a salary and other employee benefits because he was an employee of Delta;
2. Have also proposed alternative methods of assessing our client's income;
3. Agree to seek instructions from our client as to any alternative methods of assessing his income, should you consider an alternative method more appropriate;
4. Look forward to receiving your written confirmation within 7 days that our client's employee entitlement claim has been accepted.

The DOCA Proposal

Our client has noted your comments regarding the DOCA proposal and agrees with your conclusions.

Our client urges you not to accept the DOCA Proposal due to its uncertainty and because it removes the opportunity to sue Delta's former clients (Mio Art Pty Ltd, Mr Spencer and Ms Perovich) where fees are not recovered.

Counsels' Fees

The authenticity of such debts is highly questionable when it was only in November 2019 and during the hearing in 8867/19 Counsel either withdrew their demands for payment or, in the case of Mr Colditz, unconditionally released Delta from that debt.

For Counsel to now attempt to submit proofs of debt would amount to an abuse of process because:

1. The reason(s) why those debts were withdrawn or forgiven during the hearing in 8867/19 were clearly not the actual reason(s) why that action was taken;
2. Had those debts remained then it would have been open to Her Honour to conclude Delta was in fact insolvent at the time our client decided to place that company in administration rather than conclude there were doubts about its solvency.

Furthermore, our client maintains he had not seen or approved Mr Douglas's tax invoices for payment.

Even further, Mr Douglas's tax invoices are tainted by the same fraud admitted to by Mr Spencer whilst he was giving evidence. In that regard, we refer you to the following extracts from the transcript:

Pages 10 and 12, Day 2:

Thank you. So that's the first of the costs agreement with – between Delta Law and Mio Art?---Yes.

All right. And then there have been certainly at least one more. If I could take you to the bundle page 92?---Yep. Yes.

Is this the current costs agreement between Mio Art and Delta Law?---Now, it's a – it's a – a deed that was prepared for the mediation before Finkelstein, and it should be – it should have "Confidential" marked on it.

So this deed doesn't represent, then, the true position of the costs agreement between Delta Law and Mio Art?---No, but it's a moot point. One might be able to argue in the alternative perhaps there's some residual content in it, but it – it was only prepared for the mediation for an indicative salvage lien to go down to the mediation at Melbourne.

Was this agreement put together for a purpose of representing something to a – at the mediation that wasn't in fact true?---I wouldn't put it that way. I'd say that it was put forward for the purposes of an ambit claim to be put to the mediation.

I see. But you say there's some other agreement, is there, that regulates the costs agreement between Mio Art and Delta Law?---Between Mio Art and Delta Law? Yes, that's right. Yes.

THE CHIEF JUSTICE: Just before you go on, can I get that clear? This is just a fake document that you presented at a mediation; is that right?---I wouldn't put it that way, your Honour. It was a – an ambit claim for a – a salvage lien by Mio Art. And - - -

But it purports to be an agreement between Delta Law and Mio Art, but it's not; is that right?---Arguably. Well, there's some difficulty with it. I mean, we were purported to contract out of statutory rights. It's retrospective. I don't know whether that's going to be operative, but it was – it was an ambit claim for – put before the mediation. Now, if we did have to prosecute it, we would go and review it. We might have done another one – I don't know – but I think - - -

The parties to it did not consider it binding on them. Is that accurate?---Yes, that's accurate.

And further on Page 12, Day 2:

So are you saying that that's a sham?---Well, our – our true arrangement was that we would collect money and then, on receipts, share it. That – that – that was the correct intention.

And yet further on Pages 12 to 14, Day 2:

Similarly, if you could just go back to page 85 to 91. There's another agreement there between Mr Douglas QC and Delta Law. Is that in the same category?---Mio – well, that's – that's a similar category, but it's been dealt with by Justice Rangiah in the Federal Court and he – he – he wasn't impressed with it. (Emphasis added)

When you say, "He wasn't impressed with it", what do you mean?---Well, I think he – he said that Mr Douglas' valiant attempts to apply the fees retrospectively must fail, or words to that effect, but it's in his judgment. (Emphasis added)

But you said you would put this agreement in the same category as the one between Delta Law and Mio Art that appears at page 92?---Well, similar category.

Yeah. So from – even though you weren't a party to either of the agreements, from your point of view you say that both agreements were just put forward – what was it – for the purpose of the without prejudice mediation?---An ambit claim.

As an ambit claim?---Yeah, just as the parties were putting forward ambit claims. They were claiming, you know, in total 35 to 40 million dollars. And we didn't – we didn't agree with their claims either. So they were put up for discussion.

THE CHIEF JUSTICE: Sorry, can I get it clear. Was this deed of agreement, 11th of April 2018, at page 85, used at the mediation also?---Yes.

...

MR DOUGLAS: Your Honour, could I just ask Mr Spencer to go out of the box and – I just wish to mention something, your Honour.

THE CHIEF JUSTICE: Yes. All right. Mr Spencer – you want him to leave the courtroom, I take it?

MR DOUGLAS: I just want to tell your Honour something.

THE CHIEF JUSTICE: Yes, with him out of the courtroom; is that right?

MR DOUGLAS: Yeah.

THE CHIEF JUSTICE: All right. Thank you.

Yes, Mr Spencer, if you wouldn't mind.

...

THE CHIEF JUSTICE: Mr Douglas.

MR DOUGLAS: Your Honour, my learned friend is going to make an application, but I'm going to make one of my own, because it directly relates to this deed of agreement of the 11th of 2018. Now, that's become a matter of contention. The evidence in relation to it could only be rebutted by me. I don't think I can remain in my brief because of that cross-examination. If I can say to your Honour that there was a challenge to the enforceability of my fees in this matter by the BMD parties because they were said – because of the uplift to be illegal under the provisions of the New South Wales Act, but not under the Queensland Act. And that is a subject which has been before Justice Rangiah, but my view recollection of that deed is that it was entered into to try and overcome BMD's objections to my earlier fee agreement. So I just can't, whilst I have that knowledge, sit here whilst the witness says that and I'm going to - - -

THE CHIEF JUSTICE: Yes. Look, what he seems to have said is, "Here's another sham agreement we used for the mediation." (Emphasis added)

MR DOUGLAS: Yeah, I know. I just can't remain senior counsel in this matter beyond that point. (Emphasis added)

THE CHIEF JUSTICE: I think that's absolutely right, Mr Douglas. So - - - (Emphasis added)

MR DOUGLAS: Up until now I hadn't thought that the situation was so acute, but it's clear to me that it is, particularly bearing in mind where my learned friend is going. So could I have leave to withdraw from the matter? (Emphasis Added)

THE CHIEF JUSTICE: Yes, Mr Douglas. (Emphasis added)

As you would be aware, Her Honour the Chief Justice requested Mr Spencer be present when she handed down Her judgment in 8867/19. At that time, Her Honour asked Mr Spencer to show cause why he should not be referred for investigation / disciplinary action.

There is then the issue of Mr Keane's tax invoices which we are in the same category as Mr Douglas's invoices. With respect to Mr Keane, we refer you to the following evidence from Mr Spencer, and which appears on Page 26, Day 2 of the transcript:

Mr Keane wasn't paid, though, was he?---I'm not sure. He's – he's been paid substantially money over the years. I'm not – I'm not sure of the arrangement there, but he's content – he's content with that position in relation to Mio Art. (Emphasis added)

Finally, our client instructs in relation to the tax invoice originally issued by Mr Anthony Hopkins of Counsel, and which Emperor relies upon as the assignee of that claimed debt:

1. He has not **seen** (approved) this invoice;
2. He does not accept it is a debt owed by Delta.

Conclusion

We look forward to your written responses to the following:

1. You agree there is a sound basis upon which our client can advance his employee entitlement claim;
2. Whether you accept one of the alternate methods we have proposed for assessing our client's employee entitlement claim;
3. Where you do not accept one of the two aforementioned methods, details as to what manner of assessment you would agree was appropriate;
4. You will not accept the proposed DOCA under any circumstances;
5. Any proofs of debts which may be submitted by Mr Douglas QC, Mr Keane and / or Mr Colditz will not be accepted.

Finally, we reserve our clients rights with respect to all matters discussed in this correspondence and his rights generally in pursuing his entitlements and / or in protecting his interests.

Your faithfully
LILLAS & LOEL LAWYERS

Scott Webb
Consultant

Direct Email: scott@lillasloel.com.au

PLEASE NOTE I WORK PART TIME

My hours are 8:30am to 5:00pm Monday, Tuesday and Wednesday.

Any correspondence received outside of these hours will not be read until I am next in the office.

If the matter is urgent and it is outside of my usual hours, then contact our Practice Manager, Kate Curry on 07 3844 6344 or by email to kate@lillasloel.com.au or to mail@lillasloel.com.au