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**TRANSCRIPT OF PROCEEDINGS**

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**SUPREME COURT OF QUEENSLAND**

**CIVIL JURISDICTION**

**HOLMES CJ**

**No 8866 of 2019**

**EMPEROR INVESTMENT GROUP PTY LTD  
and ANOTHER**

**Applicants**

**and**

**QUINTIN GEORGE ROZARIO and OTHERS**

**Respondents**

**BRISBANE**

**10.01 AM, THURSDAY, 14 NOVEMBER 2019**

**DAY 1**

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

THE CHIEF JUSTICE: Right. Appearances, please.

5 MR F.M. DOUGLAS QC: May it please the court. F.M. Douglas QC, with MR STEWART WEBSTER, instructed by JCL Lawyers for the applicants in this matter. Yes. And MR CARR.

THE CHIEF JUSTICE: Thank you.

10 MR J.W. PEDEN QC: May it please the court. My name is Peden, P-e-d-e-n, initials J.W., counsel. I appear for Mr Rozario in each of the applications. I think he's the first in one and the second in the other, but – with MR BRUCE WACKER of counsel, instructed by Lillas & Loel Lawyers.

15 THE CHIEF JUSTICE: Thank you. Yes.

MR M.A. EADE: May it please the court. Eade, spelled E-a-d-e, initials M.A., counsel, instructed by Rose Litigation Lawyers. I appear on behalf of Delta Law Proprietary Limited, administrator appointed, which is the third respondent in 8866  
20 of '19 and the first respondent in 8867 of '19.

THE CHIEF JUSTICE: Thank you. I think you will have been advised that I am going to have to adjourn at 10.20, and I'm afraid I'll be away for a period and I'll have to say not before midday. So I hope you've scheduled your days accordingly.  
25 All right. Mr Douglas.

MR DOUGLAS: If it please the court, could I just hand up a list of material we wish to rely upon. And could I also hand up to the court an outline of our submissions in 8867.  
30

THE CHIEF JUSTICE: Okay. You've got a couple of copies. I'll make - - -

MR DOUGLAS: I've given your Honour two copies there.

35 THE CHIEF JUSTICE: Yes. Just to keep them on the file, I'll make them an identification exhibit, which will be A.

40 **MFI #A MARKED FOR IDENTIFICATION**

MR DOUGLAS: If it please the court.

45 THE CHIEF JUSTICE: I'll do that with all the submissions. Thanks. Thank you.

MR DOUGLAS: Your Honour, then there are four documents in respect of which I think we need leave. Firstly, there's an amended points of claim, which we say just

catches up with the evidence which has been filed by the parties. I understand my learned friends may have some objection to it. It may be that it would be more appropriate for your Honour to consider that at some later stage rather than now, because you're firmly seized of the matter and - - -

5

THE CHIEF JUSTICE: All right.

MR DOUGLAS: - - - possibly know the extent to which one diverges from the other.

10

THE CHIEF JUSTICE: All right. Well, I'll receive that and think about it later. Yes. Thank you.

MR DOUGLAS: Then there are three additional affidavits. Could I hand up the originals of those affidavits to the court.

15

THE CHIEF JUSTICE: These are ones you're seeking leave - - -

MR DOUGLAS: I better read them onto the transcript. One is of Peter Ross Clapin of the 14<sup>th</sup> of November 2019; the other one is of Edmund Albert Galea of the 14<sup>th</sup> of November 2019; the other one is of Richard William Spencer of the 13<sup>th</sup> of November 2019. I understand each of those have been circulated to my learned friends.

20

THE CHIEF JUSTICE: And is there any issue about them being received?

25

MR PEDEN: There's no issue on our part. I mean, I've got to say, your Honour, we're treating this as a trial - - -

THE CHIEF JUSTICE: Yes.

30

MR PEDEN: - - - not as an application. So the witnesses are all going to be called, and I understand that they'll just give evidence in accordance with their affidavits and there'll be cross-examination in the usual course.

35

THE CHIEF JUSTICE: Sure. Mr Eade?

MR EADE: No objection, your Honour.

THE CHIEF JUSTICE: All right. Thank you.

40

MR DOUGLAS: Your Honour, then there's a certificate of explanation of duty of disclosure by my instructing solicitor, Mr Conomos, in each matter.

THE CHIEF JUSTICE: I'll make that exhibit 1.

45

**EXHIBIT #1 ADMITTED AND MARKED**

5 MR DOUGLAS: And I'd ask for leave to file those. And I think that's it.

THE CHIEF JUSTICE: Thank you. All right. So shall I get all the evidence in now or – a list of what everybody's relying on now, rather than as we go? What's the best course?

10 MR DOUGLAS: I tend to think it's probably better to get a list of – get it all in now, your Honour.

THE CHIEF JUSTICE: Yes. All right. Well, let's do that.

15 MR DOUGLAS: That's the old equity practice and it's - - -

THE CHIEF JUSTICE: Okay.

MR DOUGLAS: Yeah.

20

THE CHIEF JUSTICE: Mr Peden, can you tell me - - -

MR PEDEN: Your Honour, we – I've got to say, we're embarrassed a little by that. We were taken a little bit by surprise. We - - -

25

THE CHIEF JUSTICE: Look, it doesn't matter. If you want to assemble your thoughts on it, we can just proceed by getting Mr Douglas to go ahead with his case and you can let me know as we go. It doesn't matter.

30 MR PEDEN: We can prepare a list, your Honour, while the break is on.

THE CHIEF JUSTICE: All right.

35 MR PEDEN: But it's no surprise we're relying on the material which has been filed in both applications. There is a crossover between the two applications, and it seems that some affidavits have been filed in one but not the other. So perhaps we will need a direction that the evidence in both be - - -

THE CHIEF JUSTICE: Yes.

40

MR PEDEN: In each be evidence in both.

THE CHIEF JUSTICE: Okay. What would really help me is a working copy of the affidavits that you're all relying on. Has anybody happened to have produced that?

45

Mr Eade?

MR EADE: I have a working copy of our affidavit for your Honour.

THE CHIEF JUSTICE: All right. You get three stars right away. Thank you.

MR EADE: Thank you, your Honour.

5 THE CHIEF JUSTICE: Thank you.

MR EADE: Your Honour, if it's convenient whilst I'm on my feet for me to read our list of material and outline of submissions. Could I hand up two copies of the list of material to be read and outline of submissions on behalf of Delta Law Proprietary  
10 Limited in administration.

THE CHIEF JUSTICE: And I'll make your submissions exhibit B for identification.

15

**MFI #B MARKED FOR IDENTIFICATION**

MR EADE: Thank you, your Honour. And, your Honour, I also have a certificate of explanation of duty of disclosure signed by my instructing solicitor this morning.  
20

THE CHIEF JUSTICE: Exhibit 2.

25 **EXHIBIT #2 ADMITTED AND MARKED**

MR EADE: Thank you, your Honour.

30 THE CHIEF JUSTICE: Did you have a certificate of duty of disclosure, Mr Peden?

MR PEDEN: I do, your Honour.

THE CHIEF JUSTICE: Thank you. Exhibit 3.  
35

**EXHIBIT #3 ADMITTED AND MARKED**

40 THE CHIEF JUSTICE: Thank you. Now, I'll have to get hold of all your affidavits, Mr Douglas.

MR DOUGLAS: Your Honour, can I just hand up to your Honour three volumes which consist - - -  
45

THE CHIEF JUSTICE: Good.

MR DOUGLAS: - - - of all of the affidavit material filed, apart from the three affidavits which I sought leave to file this morning.

THE CHIEF JUSTICE: Okay. Thank you.

5

MR DOUGLAS: So this is a working copy, your Honour. And could I – I haven't actually got copies for my learned friends, but I assume they can compile one for themselves. And it was entitled 1 of 2, 2 of 2 and 1 of 1, but I thought we should amend the backing note to say "3" so that it doesn't become inherently confusing.

10

And 3 are the later affidavits, your Honour.

THE CHIEF JUSTICE: I'm already confused. But Mr Peden made the point that there are two applications. How should I receive the material? Does it need to be kept strictly in the relevant application - - -

15

MR DOUGLAS: No, your Honour.

THE CHIEF JUSTICE: - - - or are you happy for me just to proceed to receive it all and consider it on both applications?

20

MR DOUGLAS: What's evidence in one should be evidence in the other, I think, your Honour.

THE CHIEF JUSTICE: Is that the - - -

25

MR DOUGLAS: To the extent that it's irrelevant to the other application, it doesn't matter.

THE CHIEF JUSTICE: Yes. All right.

30

MR DOUGLAS: Otherwise it becomes inherently very complicated.

THE CHIEF JUSTICE: You'd be surprised what I'm capable of if I have to compartmentalise, but Mr Peden - - -

35

MR PEDEN: We agree with that course, your Honour.

THE CHIEF JUSTICE: All right. Mr Eade?

40

MR EADE: Yes. Thank you, your Honour.

THE CHIEF JUSTICE: All right. Well, that's the approach I'll take. Thank you. I think we can get underway, Mr Douglas, with - - -

45

MR DOUGLAS: There was some – I think there was some discussion – we need to deal with my learned friend's application.

THE CHIEF JUSTICE: Yes.

MR PEDEN: There is a subpoena, your Honour, returnable. Could I hand up a copy of the – actually, sorry, the subpoena should've been filed. I'll just get the  
5 court document number. It's court document number 27, and it's addressed to the proper officer of James Conomos Lawyers Pty Ltd.

THE CHIEF JUSTICE: Right.

10 MR PEDEN: Can I hand up a working copy of the subpoena, your Honour.

THE CHIEF JUSTICE: Thank you.

MR PEDEN: We understand it's been foreshadowed to us that there'll be an  
15 application to set aside the subpoena.

THE CHIEF JUSTICE: Right.

MR PEDEN: So perhaps - - -  
20

THE CHIEF JUSTICE: Okay. Whose application is that? Mr Douglas?

MR DOUGLAS: That's mine.

25 THE CHIEF JUSTICE: All right.

MR DOUGLAS: Or Mr Conomos', really, and I'm appearing for him.

THE CHIEF JUSTICE: All right. Well, do you want to argue this point, the setting  
30 aside of the subpoena?

MR DOUGLAS: Yes, your Honour. Well, the subpoena seeks, in the first category, an agreement between Mio Art and Mr Whitton, Traditional Values Management and Earnings Proprietary Limited, leading to the distribution of 20-odd million  
35 dollars that has been deposited into the James Conomos Lawyers Pty Limited trust account on or around 3<sup>rd</sup> of September 2018, the settlement sum. Now, your Honour, that was a sum which was paid after the resolution of part of the disputes which have taken place between what I may call the BMD parties and Mio Art in some  
40 proceedings which have been occupying this court's time for a while. We don't understand there to be any dispute that that's the amount that was paid, and we don't understand there to be any dispute to the million dollars that was paid into the Delta Law trust account, and we don't understand there to be any dispute that most of that money was taken out by Mr Rozario.

45 Now, those are the subject matters of the dispute, but we don't see that the actual agreement itself is relevant. It's a document which was entered into as a result of the mediation and so, therefore, we're bound by obligations of confidentiality. And it

would need to be made relevant, in our respectful submission, for that to be produced. Then again, all directions to pay are already part of the settlement sum out of the James Conomos Lawyers trust account. That, again, is part of the part and parcel. We can't see the relevance of that to these proceedings.

5

And then the statutory declarations sworn by Mr Conomos in response to a letter sent – a letter to him from the Queensland Law Society, including any attachments to that statutory declaration or documents referred to in it. Now, it's not in dispute, as I understand it, that the law society has been investigating the conduct of Mr Rozario in withdrawing in the order of \$800,000 from the trust account – sorry, from the account of Delta Law, being the proceeds of that settlement sum. But on the other hand, we're not sure what relevance the statutory declaration made by Mr Conomos has to these proceedings, bearing in mind it's a confidential document which was provided to the law society under an obligation of confidence. Those are our - - -

10

15

THE CHIEF JUSTICE: So that's his account of the complaint against Mr Rozario, is it? There's - - -

MR DOUGLAS: I didn't get that, your Honour.

20

THE CHIEF JUSTICE: That statutory declaration is said to contain his account of Mr Rozario's actions.

MR DOUGLAS: It does, yes.

25

THE CHIEF JUSTICE: All right. And he is a witness in these proceedings, Mr Conomos?

MR DOUGLAS: He is a witness in these – he's a very important witness, as I understand it.

30

THE CHIEF JUSTICE: Yes. All right. Look, I can tell you that I read the points of claim in each matter and the points of defence. I obviously haven't read the amended ones. So I've got some grasp of it, but I wouldn't say I was – you know, I haven't committed it to memory by any stretch of the imagination. All right. I might go to Mr Peden.

35

MR PEDEN: Could I hand up - - -

THE CHIEF JUSTICE: Mr Peden, what has this money got to do with it? I did grasp that there had been a million dollars deposited and issues about its withdrawal, but - - -

40

MR PEDEN: Can I just hand up a brief outline of submissions, your Honour.

45

THE CHIEF JUSTICE: Okay. Thanks.



MR PEDEN: But I can tell your Honour about it. So there's – at the core of the dispute, your Honour, is who should control the company Delta Law Pty Ltd. The current status quo is that it's controlled by an administrator. My client's position is that that should remain the status quo and that the company should proceed to a  
5 second meeting of creditors at which the creditors can determine what steps to take. My learned friend's position is that they seek to upset that apple cart and put the company back into the control of the current director, Mr Rozario, and they've foreshadowed that they wish to have a meeting of members at which they indicate, or at least one person who is a shareholder – or represents a shareholder, who Mr Galea,  
10 represents Emperor. He's the only shareholder apart from my client – indicates that they wish to call a member – meeting of members and install a new director.

Now, the application requires leave under section 440D of the Corporations Act, so my learned friend has to demonstrate why the relief that they seek in both  
15 applications is in the best interests of the company. That's a broad test. The second main relief sought in 8867 concerns an attempt by my learned friend's clients to remove the administrator under section 447A of the Act, which has a number of limbs.

20 One limb is the – I should say there's several limbs to their argument. The first is that Mr Rozario, when he signed the minute appointing the administrator – that he did so without reasonable grounds that the company was insolvent. And so the – there's a few elements, then, to that. Firstly, was the company, in fact, insolvent, which delves down into a question of what were the assets and liabilities of the  
25 company and, more pertinently for the Act, where the company was able to pay these debts as an when they were due. I'll come back to that. There's – a second part of that language is whether or not, in fact, Mr Rozario genuinely held that view. And so the company, for example, may well have been solvent, but if he genuinely on reasonable grounds held a view that it was not solvent then that limb falls away.

30 There's a separate challenge which is made, which is that the appointment was done for some improper purpose. Now, can I return – that's the overview of the case, your Honour, that your Honour will have to determine.

35 THE CHIEF JUSTICE: Sure.

MR PEDEN: There's a second application, 8866, which seeks relief to rectify the shareholders register. That application would only be relevant if my learned friend succeeds on the other, that is, on 8867. And perhaps I'm getting ahead of myself  
40 here, your Honour, but if - - -

THE CHIEF JUSTICE: All right. Now, that's to do with Mr Glatton and his entitlement under his – the state of his [indistinct]

45 MR PEDEN: Quite. If it's going to remain in administration, then there's no point in changing the shareholders.

THE CHIEF JUSTICE: Sure.

MR PEDEN: So coming back to the question of solvency, we're looking at what the assets and liabilities are for the company and also on the question of what's in the best interest of the company. So in respect of both of those questions, the assets of the company include, relevantly, its rights to recover sums which are rightfully assets of the company, and your Honour will hear about, during the course of the trial, in some detail no doubt, the concept of the fruits of litigation lien.

10 THE CHIEF JUSTICE: I'm sorry, the concept of?

MR PEDEN: The fruits of litigation lien. Your Honour's probably aware of that, the type of lien. It's a special type of lien.

15 THE CHIEF JUSTICE: Yes.

MR PEDEN: It's not possessory. It's well described by the decision of Justice Muir in the case of De Groot. I'll get the citation for you. I think it's about 1990. It'd be the court – the Queensland courts, where there's an extensive – I'm sorry, I'll hand up your Honour this copy because your Honour will be brought back to this various times in the proceeding. It's a case that's familiar, I think – very familiar to the – certainly Mr Douglas' client because they've made extensive reliance upon it in the past. But what happened, returning to the chronology, was \$20,000,000 odd – a little more than that – was paid into court and then ultimately out to – pursuant to an order of Justice Jackson out to the trust account of James Conomos Lawyers, and that happened in about September 2018.

Then there had been a mediation of sorts before Mr Finklestein QC AO in Melbourne, attended by Mr Conomos, my learned friend, Mr Douglas QC, Mr Keene, Mr Perovich – sorry, Ms Perovich, Mr Spencer and some others, at which – at – Mr Rozario also attended as solicitor for Mio Art. The evidence of Mr Rozario is that he was, in effect, sidelined during the course of that mediation and was vaguely aware of a deal that had been done between the other parties as to the distribution of the \$20,000,000.

35 THE CHIEF JUSTICE: When you say the other parties, whom are you describing? Are you including Mr Conomos in this or are you talking about Ms Perovich, Mr Spencer?

40 MR PEDEN: Mr Conomos at that time acted for a different party who was the trustee in bankruptcy of Ms Perovich. And then something happened, so there was a settlement deed entered into. It was never given to Mr Rozario, but pursuant to that settlement agreement moneys were dispersed from Mr Conomos' trust account, including – and there was a trust account authority that had been signed authorising the payment of a bit over \$8,000,000 to Mio Art. Now, of course, Mr Rozario acted for Mio Art, but he'd been excluded from any dealings after the mediation. What

then happened is, unbeknown to him, \$1,000,000 popped up into his trust account, that is, the trust account at Delta Law, without any notification.

THE CHIEF JUSTICE: So this million is part of the 20,000,000? Is that - - -

5

MR PEDEN: Well, presumably it was. We now know it was – it came out of the 20,000,000. It wasn't the subject of any trust account authority. The only – and we'll take your Honour to these in due course. So \$1,000,000 just arrived in Mr Rozario's general account.

10

THE CHIEF JUSTICE: Right.

MR PEDEN: And there is an issue between the parties here as to whether or not Delta Law has a broader claim to the \$8,000,000 – or \$8.4 million and whether those moneys were distributed by Conomos in contravention of the trust account authority, because the trust account authority require him to pay \$8,000,000 to Mio Art, but only five-and-a-bit million dollars was paid to Mio Art. One million dollars was deposited directly in the Delta Law trust – general account, and \$2,000,000 went to a company called Award Litigation Funding.

15

20

THE CHIEF JUSTICE: Okay. When you say there's an issue whether Delta Law has a claim to the \$8,000,000, where do I actually find that in the pleadings?

MR PEDEN: Well, it's a question of whether it's – firstly, whether [indistinct] assets of the company, and that goes to the question of solvency, and secondly it's the question of whether it's in the interest of the company, Delta Law, that the person who should continue to operate the company should be an independent consultancy accountant or at least operate its control – the company should be the independent insolvency accountant or whether it should be, as my learned friends would wish, that the control be returned somehow to someone else to prevent, for example, those claims can be even pursued. And that's ultimately what this case is about, your Honour.

25

30

Now, Mr – in early January this year, Mr Rozario wrote to Mr Conomos and asked for the details of these trust account disbursements, and Mr Conomos refused, and we'll take your Honour through the correspondence about that in due course. So what the subpoena seeks is the disbursement authorities, if there are any in relation to this money that was in the trust account – we've got the trust account. That will become – that'll get into evidence – the trust account ledger, I should say. But what we don't have is how the money was paid out in contravention of the trust account authority.

35

40

THE CHIEF JUSTICE: Look, I have to ask you something much more basic. What's Delta Law's entitlement? Why would it have any entitlement to the 8,000,000? Where's that come from?

45

MR PEDEN: Because it has this fruits of litigation lien.

THE CHIEF JUSTICE: And that's where that fits in.

MR PEDEN: Yes. And that's been a constant refrain from my learned friend's side, as your Honour will see during the course of the trial, for at least a couple of years, and it's only since Mr Rozario's been no longer cooperating with Mr Spencer and Ms Perovic that there's been a resistance, all of a sudden, by Mio Art to the existence of a lien. But, your Honour, I can – I've given your Honour a potted version of the case. I can see how – though there is some complexity in this, it will become apparent during the cross-examination of Mr Conomos how directly – in fact, directly relevant [indistinct] case is actually only apparent for – principle's only apparent relevance that these documents will become directly relevant to the consideration by your Honour.

THE CHIEF JUSTICE: Mr Eade, you didn't have any application concerning this subpoena?

MR EADE: Not at all, your Honour.

THE CHIEF JUSTICE: Thank you.

MR EADE: We neither consent or oppose.

MR PEDEN: Yeah. And - - -

THE CHIEF JUSTICE: All right.

MR PEDEN: Sorry, your Honour. Just the third - - -

THE CHIEF JUSTICE: Yes.

MR PEDEN: The third document is a statutory declaration. So Mr Conomos has been the subject of a Law Society investigation in relation to this million dollars, and the - - -

THE CHIEF JUSTICE: Mr Conomos has been?

MR PEDEN: Yes.

THE CHIEF JUSTICE: Okay.

MR PEDEN: So the Law Society have started the investigation and required Mr Conomos to swear a statutory declaration in response.

THE CHIEF JUSTICE: I'm sorry. I must have misunderstood what Mr Douglas said. Okay. So it's – yes.

MR PEDEN: Yeah.

THE CHIEF JUSTICE: It's about - - -

MR PEDEN: And so - - -

5 THE CHIEF JUSTICE: - - - an investigation into Mr Conomos.

MR PEDEN: So the Law Society have said, "We want to see a statutory declaration in response," and that was due, I think, by the end of July, and that's resisted as well. So - and, presumably - I mean, it may be that the statutory declaration includes the  
10 material required under (a) and (b), but it's not as though this is a surprise to anybody.

THE CHIEF JUSTICE: All right.

15 MR PEDEN: And we've set out in the outline, your Honour, the principles, but - - -

THE CHIEF JUSTICE: Yes. I'll just have a look at - - -

MR PEDEN: Thank you, your Honour.

20

THE CHIEF JUSTICE: - - - that now, and I'll come back to you, Mr Douglas - - -

MR DOUGLAS: Thank you, your Honour.

25 THE CHIEF JUSTICE: - - - for a reply in a minute. I'll just look at this, though, and I'll make the submissions exhibit C, by the way, on the - yeah - for identification.

30 **MFI #C MARKED FOR IDENTIFICATION**

THE CHIEF JUSTICE: What would be useful to me, perhaps - well, actually, you might do this, Mr Peden. Take me to Mr Conomos' role as set out in the points of  
35 claim and the defence, and I'll have a clearer idea of this, I think.

MR PEDEN: So it starts at paragraph 5 of the points of defence. Did your Honour want to go to the points of claim at the same time?

40 THE CHIEF JUSTICE: Okay. And that's in 8867 of '19?

MR PEDEN: Yes. That's paragraph - this is in 8867. Correct.

THE CHIEF JUSTICE: Yes.

45

MR PEDEN: So it's paragraph 9.

THE CHIEF JUSTICE: This is about the million dollars?

MR PEDEN: Yes. So it's pleaded – or asserted in the points of claim that, in November 2018, Delta Law received the sum of 1 million from Mio Art. Your Honour will notice it's expressed in the passive voice, so it doesn't say how it was done, and in paragraph 5 of the points of defence - - -

THE CHIEF JUSTICE: Yes. Yes. Okay.

10 MR PEDEN: And then the allegation of solvency [indistinct] in 46 of the points of claim – so in 47(b)(A).

THE CHIEF JUSTICE: Sorry. Forty-seven little B - - -

15 MR PEDEN: Little B, capital A. It's at the top of page 9.

THE CHIEF JUSTICE: Got you. Okay.

MR PEDEN: Points of claim.  
20

THE CHIEF JUSTICE: I think there's a Roman numeral in between, isn't there? Anyway.

MR PEDEN: Now, question of solvency is included, then, in the points of defence from paragraph 16, but it picks up matters from Mr Cotter's report, and then there's a series of matters in paragraph 18 which set out the allegations of insolvency, and so the question of assets and liabilities falls under that rubric of whether the company's solvent or not.  
25

30 THE CHIEF JUSTICE: Okay. But is your position that Delta Law had some lien over all of these funds, more of these funds? What is it you're telling me?

MR PEDEN: It certainly had a lien over all of the funds, but it was clear to all the parties, at the time, that it had a claimed lien over the moneys payable to Mio Art, and, in fact, it received only \$1 million instead of its full claim.  
35

THE CHIEF JUSTICE: Yes.

MR PEDEN: And the evidence that your Honour will see from Mr Cotter, the administrator, who's done a – well, sworn an affidavit in this proceeding with extensive material, says that he's identified invoices that have been issued by Delta Law to its client Mio Art for some, I think, \$12 million. In fact, the lien was asserted to be more at one stage, but certainly the 12 million, and of that about four point something – I'll have to check the exact figure – was payable to Delta Law in respect of its fees, not including disbursements which were - - -  
40  
45

THE CHIEF JUSTICE: All right. So, if anything, this would point more to solvency than insolvency, wouldn't it, if it has this entitlement?

5 MR PEDEN: Well, yes, but the question is it's an asset which is contingently available upon it being pursued. And - - -

10 THE CHIEF JUSTICE: And then you come in to say, well, that's why you need an independent liquidator not putting it back into the hands of the people who prevented getting it in the first place.

MR PEDEN: Quite.

THE CHIEF JUSTICE: Is that the gist of it?

15 MR PEDEN: Quite. And that point moves across into the other one, too, whether it's in the interests of the company that these assets and these investigations be carried out. And, your Honour, we can't say that there is a - and we don't have to say in these proceedings and your Honour doesn't have to find - or make any findings about the payments that are made, other than to say that there are - it's in  
20 the interests of the company that the matter be investigated by someone independent.

THE CHIEF JUSTICE: All right. Okay. I think I've grasped that. Mr Douglas, what do you say to all that?

25 MR DOUGLAS: Your Honour, could I just say that the actual agreement, which is in paragraph 1 of the schedule, is document 40 in the bundle of documents discovered by my learned friend. So we would say that was in breach of their obligation of discovery. We don't - sorry, of confidentiality. We don't wish to be similarly in breach, but could I hand up a copy of the document which was  
30 discovered to us - - -

MR PEDEN: If it's being produced and that's it, then - - -

35 MR DOUGLAS: - - - by Mr Rozario.

MR PEDEN: - - - we don't need to press the subpoena.

MR DOUGLAS: Secondly - - -

40 THE CHIEF JUSTICE: Why are you handing it up? I'm just - why are you giving it to me? Are you - - -

45 MR DOUGLAS: Well, I think it does clarify a few things about what my learned friend just said to you, and I can do it very quickly.

THE CHIEF JUSTICE: Okay.

MR DOUGLAS: Your Honour, the proposed disbursement of the settlement sum is set out on page 7 of the document, and you'll see in point (d) the sum which goes to Mio Art.

5 THE CHIEF JUSTICE: Yes.

MR DOUGLAS: The other amounts go to alleged – or what were alleged to be secured creditors at the time, and in point (c) a certain amount went to Mr Whitton, for whom Mr Conomos acted at the time, who was a secured creditor. Now, your  
10 Honour, that document was signed by Mr Rozario on page 15 as the legal representative of Mio Art. So I just don't see what the point of the subpoena is. I don't see how – they've got the document. If they want to use it, they can. There's no need to get it from us. What is then the relevance of the next two documents? My learned friend hasn't spelt out anything which would be relevant about them.  
15 The assumption seems to be that directions to pay were in accordance with the agreement. So far as the question of lien is concerned, there was never an asserted lien at the time. A lien has to be asserted. It may have been that all of the legal representatives at the time, including Mr Rozario, could've opposed that direction and then insisted that a lien be imposed upon the funds, but they didn't. Then the  
20 statutory declaration, no case has been made out for its relevance. It's just Mr Conomos telling the law society how he disbursed the funds.

THE CHIEF JUSTICE: Okay. Back to you, Mr Peden. Is there an actual issue about disbursement of the funds? Mr Douglas says you got this document. It shows  
25 where it was going. Three secured creditors, plus eight million-odd to Mio Art, which got it. And then the issue is about what happens next, isn't it?

MR PEDEN: I'm just not sure which document my learned friend is referring to.

30 THE CHIEF JUSTICE: You better have a look at this. Could you just give that to Mr Peden, please, to have a look at.

MR PEDEN: It shows the - - -

35 MR DOUGLAS: Your Honour, I've got another copy of it.

THE CHIEF JUSTICE: Thanks. I'll have it back. Thank you.

MR PEDEN: Would your Honour just bear with me for a moment. Well, the trust  
40 account ledger records the money having been paid out in accordance with clause 3.3 of the settlement agreement, and there's no clause 3.3 in the settlement agreement. There's clause 3.1 and then it stops.

THE CHIEF JUSTICE: Well, okay. Why do we assume it's not a typo?

45 MR PEDEN: Well, it - - -



THE CHIEF JUSTICE: Look, is there an issue as to whether the money actually – we’re really only worried about the money to Mio Art, aren’t we, or are you worried about these other three creditors? Is that of any interest?

5 MR PEDEN: Well, it’s not the other three creditors, no. It’s the question of whether the trust account authority, which was an authority to pay a cheque to Mio Art for \$8.4 million, in fact didn’t go to Mio Art for 8.4; it was split into three ways. And the trust account statement records that the split was done in accordance with clause 3.3 of the settlement deed. Now, this document - - -

10

THE CHIEF JUSTICE: Okay. So Mio Art didn’t get its 8 million - - -

MR PEDEN: No.

15 THE CHIEF JUSTICE: - - - is what you’re saying.

MR PEDEN: No. Mio Art got 5.467066.61, and that was said to be in accordance with clause 3.3 of the deed of settlement. But if that’s a typographical error and that’s the deed of settlement pursuant to which it was paid, then that’s the answer to it.

20

THE CHIEF JUSTICE: Okay. So you think you may find your answer in Mr Conomos’ declaration. We have this document, don’t we, one way or another? So – okay. All right. We seem to have refined it, Mr Douglas, to, “Okay. 8 million to Mio Art, but they only got 5. Where’s the other money? How did this happen?” So is that not a basis for saying that the directions to pay and the declaration about disbursement are relevant?

25

MR DOUGLAS: Your Honour, I’ve not heard it articulated that way before, but if my learned friend - - -

30

THE CHIEF JUSTICE: I’m learning as I go.

MR DOUGLAS: I’ve not heard it articulated - - -

35

THE CHIEF JUSTICE: Yes.

MR DOUGLAS: - - - that way before, either in the pleadings or elsewhere, but if my learned friend wants to pursue that line, then – I’m anxious about taking up too much time of the court - - -

40

THE CHIEF JUSTICE: Yes.

MR DOUGLAS: - - - on what is really just a procedural application.

45

THE CHIEF JUSTICE: All right. Can - - -

MR DOUGLAS: It may be that he should have those documents but confidential to legal representatives only at this stage until we found out what is - - -

5 THE CHIEF JUSTICE: All right. Well, if they're produced to the court, I can give a direction that Mr Peden and those instructing him look at it and no one else, if that's what you're concerned about.

MR DOUGLAS: Yeah. It's not necessary to produce the agreement, your Honour, bearing in mind they've already got a copy of it, in our respectful submission.

10 THE CHIEF JUSTICE: All right. Is Mr Conomos here to produce the documents?

MR CONOMOS: Yes.

15 MR DOUGLAS: Yes, he's here.

THE CHIEF JUSTICE: Now, you're Mr James Conomos?

20 MR CONOMOS: I am. James Nicholas Conomos.

THE CHIEF JUSTICE: And you are here in response to this subpoena - - -

MR CONOMOS: I am.

25 THE CHIEF JUSTICE: - - - to produce documents, and you do so produce - - -

MR CONOMOS: Yeah. I'm producing the - in two envelopes, categories 2 and 3.

30 THE CHIEF JUSTICE: Okay. Thank you. You're content with that, Mr Peden?

MR PEDEN: Yes. Thank you, your Honour.

35 THE CHIEF JUSTICE: My Associate will have the documents. And, as you know, we'll be taking a long-ish break at 11.20. So I'll direct that she give access to the documents to you and any other of the lawyers involved at that time. You can - - -

MR PEDEN: Might that include copies as necessary?

40 THE CHIEF JUSTICE: You want to take copies?

MR PEDEN: Well, just in case I need to use them for cross-examining, for example.

45 THE CHIEF JUSTICE: Yes. Is there likely to be any more argument about this or is it a safe - all right. Copies, then.

MR PEDEN: If - - -

THE CHIEF JUSTICE: Thank you.

MR PEDEN: Thank you.

5 THE CHIEF JUSTICE: Where does – and I have got this document that somebody gave me, which I think I’m not going to pay very much attention to unless it actually arises in the case. I’ll return it to you, Mr Douglas – I think I got it from – for the time being.

10 MR DOUGLAS: Please the court.

THE CHIEF JUSTICE: Now, is there anything else, before we get into the substance of the case?

15 MR EADE: There was just the question about the amended points of claim. That was all, but I’m content if – once your Honour knows a little bit more about the case, to deal with it at that stage.

20 THE CHIEF JUSTICE: Probably wouldn’t hurt if I - - -

MR PEDEN: I mean, we haven’t done a defence. We got it about 6 o’clock last night, and it might surprise your Honour to know that we’re not all just sitting around twiddling our thumbs waiting for amended pleadings to come in – that haven’t been foreshadowed, I should say.

25 THE CHIEF JUSTICE: Well, look, if you’re saying that it’s problematic to you and you need more time for your defence or something, maybe I should deal with this now.

30 MR PEDEN: Yeah.

THE CHIEF JUSTICE: What have you changed, Mr Douglas? What – did you – is this something you handed up to me? You did, didn’t you?

35 MR DOUGLAS: Your Honour, I’ll - - -

THE CHIEF JUSTICE: Right.

40 MR DOUGLAS: - - - get my learned junior to explain it to your Honour because he’s the one responsible.

MR S.J. WEBSTER: It’s probably most convenient, your Honour, to take your Honour by it – through it – the changes seriatim. I think the first change of substance appears at the bottom of page 4, paragraph 20.

45 THE CHIEF JUSTICE: Yes.

MR PEDEN: We have no objection to that amendment, your Honour.

THE CHIEF JUSTICE: Okay. So that's okay.

5 MR WEBSTER: I see. Paragraph 27, page 5.

MR PEDEN: There's no objection to that, your Honour.

MR WEBSTER: Paragraph 8 – sorry. Page 8, paragraph 44(b) and (c).

10 THE CHIEF JUSTICE: All right.

MR PEDEN: No objection, your Honour.

15 THE CHIEF JUSTICE: I don't think there'll be a fuss about that.

MR WEBSTER: Page 9, subparagraph (3), about .6 of the page.

THE CHIEF JUSTICE: Okay. Little hazy, but, anyway, what's your position on it?

20 MR PEDEN: The difficulty there, your Honour, is we don't know what they say is a lesser sum.

THE CHIEF JUSTICE: Sum.

25 MR PEDEN: What we do have is a proof of debt that will be put before your Honour, in that sum, by the ATO. Now - - -

30 THE CHIEF JUSTICE: Okay. Do you want to give some quick particulars of that? What's the lesser sum?

MR WEBSTER: I – yes. Yes. The basis for it is that in Mr Cotter's affidavit received yesterday there is exhibited an investigative report from the Queensland Law Society, which concludes on an interim basis that Mr – that Delta Law was - - -

35 MR PEDEN: I object to that. It's not at all true.

MR WEBSTER: Well, let me finish the explanation.

40 THE CHIEF JUSTICE: Well - - -

MR WEBSTER: If you - - -

45 THE CHIEF JUSTICE: - - - you say from some new material you draw a different figure, which is what?

MR WEBSTER: I can give – if your Honour will bear with me, I’ll give you the exact figure. It’s about half of the amount, though.

5 THE CHIEF JUSTICE: Do you know what he’s talking about, Mr Peden?

MR PEDEN: I do know. The Law Society, in their processes, issue a draft of their – what their investigation report would be back to the practitioner - - -

10 THE CHIEF JUSTICE: Yes.

MR PEDEN: - - - to give the practitioner an opportunity to comment, and that’s what my learned friend - - -

15 THE CHIEF JUSTICE: I’m just more interested in if you understand where this figure’s coming from and whether that puts you in a position to - - -

MR PEDEN: Well, if - - -

20 THE CHIEF JUSTICE: - - - deal with it.

MR PEDEN: If they – we haven’t had the opportunity to investigate why it is that the ATO have formed the view. I mean, that’s ultimately not a matter for Mr Rozario to do. All we know is that the ATO have lodged a proof of debt. Now, we - - -

25 THE CHIEF JUSTICE: Is much going to turn on this \$45,000 here or there?

MR PEDEN: Well, we say it’s grossly insolvent, so maybe it won’t.

30 THE CHIEF JUSTICE: All right. Well, maybe we can move on from that one, then.

MR PEDEN: Yes.

35 MR WEBSTER: Bottom of that pa - - -

MR PEDEN: Sorry. Perhaps – if we could just get some particulars in due course, that would be - - -

40 THE CHIEF JUSTICE: Yes. Would you let Mr Peden say what the sum is of – I gather it’s something around 45, but if you can point it out.

MR WEBSTER: Yes.

45 THE CHIEF JUSTICE: The bottom of that page, you – oh, you assert Mr Rozario’s a debtor to Delta Law.

MR WEBSTER: Yes.

THE CHIEF JUSTICE: Mr Peden.

5 MR PEDEN: Again, we've got no idea on what basis they say that, for how much. It's brand new allegation.

THE CHIEF JUSTICE: Is this your million dollars, or - - -

10 MR WEBSTER: No. This is - - -

THE CHIEF JUSTICE: - - - what are you talking about?

15 MR WEBSTER: This – again, in Mr Cotter's affidavit, which was served yesterday, it annexes some financial reports provided by Delta Law's independent accountants, which have a running balance of a director's loan account, which shows, as at the last date of that account, a balance owing from Mr Rozario to Delta Law in the sum of approximately \$20,000.

20 MR PEDEN: Well - - -

MR WEBSTER: That's – I can give the – to assist my friend, I can - - -

25 MR PEDEN: - - - once - - -

MR WEBSTER: - - - identify it's on page - - -

30 MR PEDEN: Once again, if they can give us the particulars of what they say the debt is, how it arose, how much it is, then we can consider what the defences to it - - -

THE CHIEF JUSTICE: Okay. Well, I think they're saying it's in the books of Delta Law as a loan account, \$20,000.

35 MR WEBSTER: Page 561 of Mr Cotter's exhibit bundle.

MR PEDEN: Well, that's not actually, unfortunately, very helpful to us because - - -

40 THE CHIEF JUSTICE: Sorry. It's not - - -

MR PEDEN: It's not very helpful to us because the books of account were maintained by my learned friend's client. Well, Ms Perovich was the one who maintained the books of account. Now, how she put an amount into the financial statements we've got no idea.

45 THE CHIEF JUSTICE: Yes. All right. But, I mean, those are arguments you can make: that this is a figure plucked from the air and it's not accepted.

MR PEDEN: Well - - -

THE CHIEF JUSTICE: You're in a position to take instructions from Mr Rozario about it, presumably.

5

MR PEDEN: We are. The accountant's not being called, though, so I'm not sure how they're going – how this issue is going to be ventilated. I mean, if they were going to call the accountant and have the accountant come along and say this is where the – this is how he – this is the basis upon which he put the items into the financial statements, then that would give us the opportunity, at least, to challenge him, but they're not doing that. So, at the moment, we don't know what the basis of the claim is. We're told there's a piece of evidence that – currently, at the moment, I can't see how it's admissible, and they won't tell us how much it's for or the basis of it. So, as I say, once again, if they can plead it out and say the basis upon which he's a debtor and the amount in respect of which he's a debtor, then we can take instructions and put on a defence and go from there.

10  
15

THE CHIEF JUSTICE: I did think I'd heard the sum of \$20,000, but, in any event, I'll just reserve any ruling about that paragraph - - -

20

MR WEBSTER: Thank you, your Honour.

THE CHIEF JUSTICE: - - - subject to what I hear further once you've particularised and identified what you're talking about to Mr Peden.

25

MR WEBSTER: Thank you, your Honour.

MR PEDEN: Thank you, your Honour.

THE CHIEF JUSTICE: I might say everything else, thus far, leave's granted to make those amendments.

30

MR WEBSTER: Thank you, your Honour.

THE CHIEF JUSTICE: Where are we up to, then?

35

MR WEBSTER: Page 10, your Honour, in subparagraph (d)(A).

THE CHIEF JUSTICE: All right. What do you say about that, Mr Peden?

40

MR PEDEN: This is the allegation that causes us the most difficulty, your Honour, because the evidence that we've seen so far certainly doesn't support these allegations. It would involve, from our point of view – and your Honour will see they're quite bold allegations, to say that counsel engaged by a firm of solicitors aren't – don't have claims against the firm of solicitors because of some unspecified arrangements between counsel and somebody, and we don't know. So - - -

45

THE CHIEF JUSTICE: Mr Douglas, where does this leave you? It starts to bring you in as a - - -

MR DOUGLAS: Well, your Honour, I'm not a witness - - -

5

THE CHIEF JUSTICE: - - - possible witness, doesn't it?

MR DOUGLAS: - - - and I don't have a conflict of interest. My learned friend has sought, at various stages in the correspondence, to exclude both myself and Mr Conomos, but - - -

10

MR PEDEN: I've never said that.

MR DOUGLAS: - - - at the present time, I don't see that I am in a position where I can't be a - if that situation arises, then my junior, who has no involvement in these matters, will take over the conduct of the matter.

15

THE CHIEF JUSTICE: It's just there seems to be an issue of fact about whether you have obligingly agreed to deferred payment terms.

20

MR DOUGLAS: Well, that may mean I'm a material witness but not a necessary witness, your Honour. There is an email in evidence, which is long ago, which confirms my position. I'm conscious of it, your Honour.

25

THE CHIEF JUSTICE: All right. Thank you. Mr Webster, can you just tell me how it's proposed to prove this?

MR WEBSTER: Yes. One of the affidavits on our list of material - I think it's document 18, which should be the last tab in your Honour's - in volume 2 that we gave your Honour, affidavit of Mr Spencer filed yesterday - filed the 12<sup>th</sup> of November. Is that right? Just excuse me. I think so. Deals with this topic. Do you - it should be behind tab 18 in volume 2. Does your Honour have that?

30

THE CHIEF JUSTICE: Yes, I've got it.

35

MR WEBSTER: This is dealt with, then, from paragraph 6 in this affidavit. Can I ask your Honour to read those paragraphs.

THE CHIEF JUSTICE: Sorry. When was this sworn, and how long has Mr Peden had it?

40

MR WEBSTER: Two days ago, your Honour.

THE CHIEF JUSTICE: And the letter referred to at paragraph 18, what's that got to do with this issue? Anything?

45

MR WEBSTER: Just excuse me, your Honour.



THE CHIEF JUSTICE: I can't find it in the bundle.

MR WEBSTER: No. No. I – that looks to be a typographical ref – error in the cross-reference.

5

THE CHIEF JUSTICE: What I'm just wondering is - - -

MR WEBSTER: I think - - -

10 THE CHIEF JUSTICE: - - - was it broken to Mr Rozario at some stage that this was the arrangement with counsel, in which case there wouldn't be very much surprise in this, or is it something else altogether?

15 MR WEBSTER: I think it begins at page 56, your Honour. Would your Honour just bear with me for a moment.

THE CHIEF JUSTICE: Doesn't look like it.

20 MR WEBSTER: Doesn't really deal with - - -

THE CHIEF JUSTICE: No.

MR WEBSTER: - - - counsel's fees directly, your Honour.

25 THE CHIEF JUSTICE: Okay. Mr Peden, though, if these are the arrangements, there's not a lot you could do about it by way of getting other evidence, presumably.

30 MR PEDEN: Well, there is, your Honour, because we'd certainly – can I just take your Honour – I mean, there's three counsel who are affected here: Mr Douglas QC, Mr Keane, Mr Colditz. And there's another barrister whose debt was assigned to Emperor, and it's that basis upon which Emperor appears today: as an assignee of the other barrister's debt. So - - -

35 THE CHIEF JUSTICE: Okay.

MR PEDEN: But turning - - -

THE CHIEF JUSTICE: How does that even happen? Do - - -

40 MR PEDEN: Sorry?

THE CHIEF JUSTICE: - - - barristers assign their debts to people?

45 MR PEDEN: Well, that's what – Emperor Investments, the applicant here, purchased the barrister's debt for \$1650 and turns up here claiming to be a creditor. So in respect of that barrister's debt they're happy to say that counsel were creditors, but there are three who are left, being Mr Keane, Mr Douglas and Mr Colditz. Can I

just take your Honour to the document at page 55 to identify the difficulty that we have. So the bundle, page 55 of that affidavit of Mr Spencer that your Honour was just taken to. And you can see the second half of the email starts on 26 July 2019, at 8.16, that Mr Lavercombe wrote, and you will see that there's a deal being offered.

5

Now, the thing about that, your Honour, is you will see that deal that is offered is, in the third line, on the basis that "both Francis and Stephen agree to release and forgive Delta Law Pty Ltd from all liability in respect of the payment of those fees". Now, Mr Douglas responds that he agrees to those terms above it, but, of course, it's a joint offer made to both Mr Douglas and Mr Colditz. Mr Colditz entered into a deed, which appears at pages 52 to 54. I will just take your Honour back to that at page 52. You will see the recitals about Mr Colditz having rendered barrister's fees. You see them in recital (d), that those unpaid fee notes are – constitute an itemised bill. There's no challenge to them or basis for challenging them. Over in recital (h), he recites that - - -

10

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THE CHIEF JUSTICE: When did you appoint your administrator?

MR PEDEN: On the 30<sup>th</sup> – sorry – 29<sup>th</sup>.

20

THE CHIEF JUSTICE: Of?

MR PEDEN: July. Now, we don't know when this document was signed.

25

THE CHIEF JUSTICE: Okay.

MR PEDEN: But just to tell your Honour, in where it says "the parties agree" what it says in paragraph 1 is LACP – and in the evidence your Honour will see that Law and Commerce Partners Pty Ltd is the company of which Mr Richard Spencer is the sole director and shareholder. So that company and its client – it doesn't say who the clients are – have assumed and must perform Delta's obligation to paying Mr Colditz's unpaid fee notes. Now, there's no release of Delta there. So the joint offer which was made by Mr Lavercombe's email on the basis that there be a release hasn't been performed by Mr Colditz, and we don't know when this - - -

35

THE CHIEF JUSTICE: Okay. So that's a great argument for you to make, but how does it bear on whether they should get to amend their - - -

MR PEDEN: Because we don't know when this document was entered into. We would be entitled to issue a subpoena and Mr Colditz and try to find out what happened, whether his fees are in fact still payable by Delta. We say they are. It's alleged by my learned friend, it seems, that they're going to say that this document in fact is a release and then it turns directly back to saying, well, what's the arrangement then with Mr Douglas QC. Are his fees in fact released? Has he waived the benefit of the joint – well, I mean, it's difficult to see how he could waive it because it's a joint offer on behalf of this other company. But the point is, your

40

45

Honour, this: there are matters here for investigation that we can't deal with literally on the run.

5 THE CHIEF JUSTICE: Mr Webster, these – well, the email at any rate was from July. Why would it take till today to amend to say, well, actually, this is the arrangement?

10 MR WEBSTER: The significance of this arrangement, speaking for myself, at least, has only become apparent recently, to me at least, and that is the result of Mr Spencer's affidavit. Your Honour appreciates Mr Spencer's affidavit was only filed a couple of days ago. I can't go much beyond that in terms of why this wasn't done sooner, but can I do make a couple of points in terms of what seems to be asserted as prejudice. First, it's not – the new paragraph doesn't assert, and it's not the  
15 applicant's case that there are to positively show there are no debts owing to barristers. The case that is advanced by the applicant is there is a commercial arrangement which means that when one is assessing the solvency of Delta Law, one doesn't conclude that just because there are these outstanding invoices that Delta Law – and if Delta isn't immediately paying them that Delta Law is to be judged  
20 insolvent.

That's a different question to whether, as a matter of strict legal principle, the debts still exist or there's been a waiver or how one construes the deed in light of the joint offer which may or may not be joint. We're not asking the court, with respect, to determine that question. All we wish to place before the court is evidence which  
25 shows that arrangements had been made – I accept different kinds for each barrister. But arrangements have been made and the evidence has been identified which had the effect, we say, that in assessing the solvency as relevant to the question of whether Delta Law is revived back out of administration, one doesn't look just at the bare fact of these barristers' fees and say, look, there's barristers' fees haven't been  
30 paid, therefore, it's insolvent, that there's more - - -

THE CHIEF JUSTICE: But when you say, you know, "all we're saying is" - - -

35 MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - it's a pretty critical thing to be saying that there is this other consideration in relation to the insolvency question which has just emerged.

40 MR WEBSTER: Well, I understand what your Honour is saying. Again, this is – the way – your Honour hasn't yet been taken through this, but the basis on which Delta Law was originally placed into administration, as we apprehend it, was not as a result of any concern about paying barristers' fees, but about a concern about a debt from a person named Mr Winkler. He was the one who filed a statutory demand. And that debt is now gone. So the assertion that barristers' fees lead to insolvency is  
45 something that has only developed in the course – we understand, in the course of the administration itself, which has only been going since July. Now, it is a couple of – a few months down the track now.

But this is not – it is something which has developed since the administration commenced. We didn't apprehend it to be the trigger for the insolvency. And we would respectfully submit that the extent of any prejudice is minimal. My learned friend pointed to the deed with Mr Colditz and said, "How are we supposed to know  
5 what date it was signed?" Well, one of the parties to the deed is Mr Spencer who's going to be cross-examined. So it shouldn't be very difficult to try and elicit something if they wish to about the circumstances in which this deed was entered into if they should think it relevant.

10 THE CHIEF JUSTICE: They might have preferred to hear from Mr Colditz, though.

MR WEBSTER: Well, they might, but if we haven't – if we don't sufficiently prove some of these things, then your Honour won't make findings in our favour.  
15 But, in my respectful submission, that's as far as it goes in terms of prejudice. There's not a sufficient prejudice arising from this to exclude it and, as a consequence, probably exclude relevant evidence to your Honour's ultimate assessment, which is should this company be left in administration or removed from administration and the solvency question. And if I can just, on that, make this point:  
20 in the course of hearing the subpoena submissions this morning, your Honour was taken to some paragraphs in my learned friend's [indistinct] defence which said nothing about Mr Conomos, which extremely generally talked about solvency and insolvency.

25 And it was on that basis of a general paragraph about solvency that it was said, by a chain of reasoning, specific things that Mr Conomos has done are relevant as a basis for admitting the document. Now, if all we've done here really is state more clearly something which is already inherent in the issue of solvency or insolvency. We shouldn't be penalised for doing expressly what my learned friend, Mr Peden,  
30 effectively had sought to do by implication in establishing the relevance of Mr Conomos's subpoenaed documents. The questions of solvency or insolvency is directly relevant and this, in my respectful submission, is an articulation – I accept later than it should have been – but an articulation of a specific aspect of that which does not cause such great prejudice that we should be held out from making these  
35 points in the case.

THE CHIEF JUSTICE: All right. Mr Peden, anything in response yet?

40 MR PEDEN: Yes, the complaint, your Honour, is not about the reception of those documents that your Honour's been taken to. The complaint is actually about the way it's pleaded in DA(ii). It said:

45 *There's a consistent practice that has occurred in that the barristers did not and will not look to have their fees paid by the first respondent but rather by Mio Art.*

Now, if that is something that is said to be consisted only of, for example, in relation to Mr Douglas by his email of the 26<sup>th</sup> of July, then the only relevance of that could be, given that it's not further alleged that that was ever communicated to Mr Rozario.

5 THE CHIEF JUSTICE: Okay.

MR PEDEN: And – but what it does is consistent practice – and the same with (iii) “consistently assumed responsibility”. I mean, how far back does that go? Are they saying that goes back for 10 years, five years? I mean, that's the difficulty for us.  
10 We just don't know. And, as I say, it's not a question of trying to exclude the evidence such as it is that's been exhibited to Mr Spencer's affidavit. It's just this broad allegation leaves us in a very difficult position as to how to respond to it without, for example, a subpoena against Mr Douglas and his practice manager as to what funds he has received over time from Mio Art.

15 THE CHIEF JUSTICE: Does it – I don't know that the consistent practice matters all that much when I'm just worried about the current state of play.

MR WEBSTER: If it assists your Honour, we don't intend in this – by pleading this  
20 to go beyond what's in the evidence. So - - -

THE CHIEF JUSTICE: All right. Well, then - - -

MR WEBSTER: - - - if the concern is that this is opening up something beyond the  
25 evidence, I can say that that's not the intention.

THE CHIEF JUSTICE: Okay. What do you need (2) and (3) for, or even (5)(a) if all you're saying is, well, these particular debts, there was an arrangement about.

30 MR WEBSTER: The reason it's been pleaded that way is because in terms of the test for solvency or insolvency, when one looks at the commercial realities, it was thought relevant to say that what is asserted in the present has some basis in past practice. And Mr Spencer's affidavit, in paragraph 12, says:

35 *Notwithstanding the formal contractual arrangements between Delta Law and the barristers retained from time to time, the consistent practice which occurred was different. The consistent practice was –*

40 and so in terms of – it is a pleading that's just consistent with the evidence of Mr Spencer, which I just understood was not something that was sought to be excluded. And so it goes no further than saying when one's looking at the question of solvency today, one takes into account commercial realities, one of the commercial realities is practice. I agree with your Honour, with respect, that it doesn't – it's probably not relevant exactly what happened five years ago. The point is simply that at the  
45 relevant time this year, if I can put it in those terms, there was a practice. Whether it started two years ago or six years ago doesn't much matter. The focus is on the

present. The evidence is really about what's in the present, and the pleading is not intended to go beyond that evidence.

5 THE CHIEF JUSTICE: All right. Look, I'll have to make a decision about this, and I will permit the amendments to be made. I understand that there is some level of prejudice, Mr Peden, but on the whole I don't think it is so substantial as to remove that part of the case from accessibility to the applicants. You don't sort of propose any adjournment to deal with or anything of that kind, I take it?

10 MR PEDEN: Your Honour, an adjournment would be very difficult because this is a company that's under administration.

THE CHIEF JUSTICE: I understand that.

15 MR PEDEN: And if it was an adjournment for a day or two then we could deal with that because we would put on a defence, and we can at least say, well, there's our defence to it, but as things currently stand - -

THE CHIEF JUSTICE: Yes.

20 MR PEDEN: : - - - at quarter past 11, I'm not in a position to do that.

THE CHIEF JUSTICE: Yes, yes, I understand that, and it makes it very difficult because really the options are it either goes or stays, I think, as far as my decision-making goes, and in this case I decide it stays.

MR PEDEN: Yes, thank you, your Honour.

THE CHIEF JUSTICE: All right. What else?

30 MR WEBSTER: Page 11, your Honour, subparagraph A of paragraph 50.

THE CHIEF JUSTICE: Is that problematic, Mr Peden?

35 MR PEDEN: Sorry.

THE CHIEF JUSTICE: Without making provision for GST liability?

40 MR PEDEN: Unclear, really, what it means. I mean, what does that allegation mean? "Without making any provision for potential GST -" what?

THE CHIEF JUSTICE: I suppose the - this is a bad thing he did because that money may have been subject to GST if it were received for services or something. I don't know.

45 MR PEDEN: That's the difficulty. What does it actually mean? What do they say is either the legal obligation to make provision for potential GST liability - if that's

what they're going to say they should say, well, Mr Rozario was under an obligation to do this and this, and then he breached that by not doing something, and therefore it has a certain consequence. The difficulty is just the broad, general nature in which it's put.

5

THE CHIEF JUSTICE: Yes. Look, you know, I think I am just going to strike out that amendment because I can't see – if there was something impermissible in the transfer of cash whether he made provision for GST liabilities is going to be the least of my worries, so that's going.

10

MR WEBSTER: I accept that, your Honour.

THE CHIEF JUSTICE: All right.

15

MR WEBSTER: Page 12, paragraph 52A. I think that's the last one, your Honour.

THE CHIEF JUSTICE: Okay. That's really more in the nature of argument, isn't it?

20

MR WEBSTER: It – yeah, I accept that.

THE CHIEF JUSTICE: Have you got any problem about that, Mr Peden?

25

MR PEDEN: On the basis of its argument, your Honour.

THE CHIEF JUSTICE: So there was one thing that was still outstanding. I'll just have to find it again, where – and this was about the director's loan account. They were going to give you a bit more information and particulars in relation to that, and I said I'd revisit it when you were better informed.

30

MR WEBSTER: It's bottom of page 9, your Honour, subparagraph C (iii).

THE CHIEF JUSTICE: That's it. That's the one.

35

MR WEBSTER: Did your Honour want me to provide that information orally now? I'm happy to do so.

THE CHIEF JUSTICE: No, no. I thought you and Mr Peden might deal with it - - -

40

MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - and come back to me about whether it's still an issue at some later point. That's all.

45

MR WEBSTER: Yes, if the court pleases.

THE CHIEF JUSTICE: Thanks.

MR PEDEN: In terms of a defence to this, then, your Honour, I mean, these are just points of claim and points of defence. Just in terms of practicalities of the pleading and amended defence - - -

5 MR WEBSTER: If it helps your Honour, we wouldn't take any point that - - -

THE CHIEF JUSTICE: Yes.

10 MR WEBSTER: - - - something wasn't open in response because it hadn't been pleaded. If it's fairly a response to these matters, we're not going to take any point of deemed admissions to these because there's no direct pleading, so I'm not sure that - - -

15 THE CHIEF JUSTICE: Yes, yes, yes.

MR PEDEN: Thank you.

20 THE CHIEF JUSTICE: Yes, so that's fine. You don't have to put one in. All right. Okay. Got anything you need to do in four minutes, Mr Douglas?

MR DOUGLAS: Well, your Honour, we have that written outline of submissions, but I suspect rather than me reading that out to you in open court your Honour may - - -

25 THE CHIEF JUSTICE: Shall I go away and use the four minutes I've got spare to read that?

MR DOUGLAS: Shall I just take you through it and give you a bit of an overview?

30 THE CHIEF JUSTICE: Sure.

35 MR DOUGLAS: So it's – the proceeding's 88767. There's – the other proceedings, 66, are really shareholders [indistinct] Emperor Investment Group is not any accreditator, as my learned friend said, but a shareholder at Delta, and up until this year it operated as an incorporated legal practice, and the court – we say the court has a broad and flexible power to make orders to the effect sought in section 447A of the Corporations Act ending the administration. So the court's going to be asked to choose between the continuation of the administration of Delta Law, which we say will inevitably lead to its liquidation and no material return for creditors and bringing  
40 the company out of administration.

45 We say that when all the circumstances are considered, there is a compelling justification to bring Delta Law out of administration, in particular, the circumstances in which it was placed into administration. In particular, it involved improper conduct on the part of Mr Rozario inappropriating substantially all of Delta Law's cash for himself and having done so knowing that shareholders were seeking to remove him as director. So that \$1,000,000 has then ended up in the account.



There had, in fact, been a meeting of shareholders. It had voted to appoint another person other than Mr Rozario as the director of the company. He challenged that in front of Justice Dalton. He was successful in front of Justice Dalton. He became the director again. A second meeting was convened because he was successful on,  
5 essentially, procedural grounds, and when the second meeting was to take place he really took all of the available money out of the account of the company, and it hasn't yet been returned to the company.

10 So then – what then happened was that he cooperated with Mr Winkler, who was alleged to be a creditor of a company, who was represented by a firm, Lillis & Loel. There does seem to be some doubt as to whether, in fact, Mr Winkler was indeed the real creditor of the company because, from evidence which we received on discovery, it seems that he was – his debt had been assigned and someone else owned it, but they're not prepared to tell us who that other person was.

15 But in any event, you have this shareholders fight. He became the director. When it became apparent that in the next – we would say the next meeting of the shareholders was to be called. Rather than attending that meeting he [indistinct] the remaining funds of the company and has kept custody of them ever since and has cooperated  
20 with attempts by Mr Winkler to wind up Delta Law. When he was thwarted in relation to that by us turning up at a – what was – effectively became a consent application for winding up because he had agreed to set – with Mr Winkler's representatives to set aside the – to withdraw the summon seeking to set aside the statutory demand. It was only the appearance of one of the shareholders, Emperor, at  
25 the winding up proceeding, we would say, which prevented Justice Lyons from being essentially asked to wind up the company on a consent basis.

30 So since that time, there's been correspondence with the – Mr Cotter. He's – he was appointed the administrator immediately after they were thwarted in their attempt to liquidate it. And, of course, these allegations of solvency or insolvency are seen, in my learned friend's submission, against the context that Mr Rozario has taken all the money from the company, but, on the other hand, the company does have very significant assets. Now, I'm conscious that your Honour has to go at 11.20.

35 THE CHIEF JUSTICE: I do.

MR DOUGLAS: But where it's – what our essential case will be at the end of the day is that Mr Rozario can no longer remain the director of this company. Quite  
40 apart from anything else, he's no longer a practicing solicitor. We're not seeking to practice as a firm of solicitors. It's a company which has got a right to recover moneys from Mio Art, which in turn has got a right to recover those moneys from the other protagonists in the litigation, BMD. It's only if it's under the control of the majority of the shareholders that's likely to occur. If the administrator remains in power, he won't have the funds to be able to do what's necessary in order to enable  
45 there to be a recovery by Delta Law against Mio Art and Mio Art against BMD, and so there's really only one alternative, and that's get rid of Mr Rozario and get rid of Mr Cotter and let the majority of the shareholders of the company have their way. It

doesn't represent a threat to the general public because they don't propose to trade generally; they just propose to use the company for the purposes of claiming the remaining costs which are owed by BMD. There is other litigation against BMD which is continuing which is substantial, and that litigation can be conducted by another firm, and that's already in play. So I'll develop those themes as we go through to questions of cross-examination and the evidence, but I don't think it would be necessary for me, bearing in mind the time, to actually go through all of the remainder of the material.

10 THE CHIEF JUSTICE: All right. Thank you. I'll make it not before midday. Thank you.

15 **ADJOURNED** [11.21 am]

**RESUMED** [12.11 pm]

20 THE CHIEF JUSTICE: Thank you. I'm sorry about that necessary break. If it helps, we could come back at 2.15 and sit till 5 to make up the time, but I'll leave it up to you to tell me.

25 MR DOUGLAS: Shall we just see how we're going, your Honour?

THE CHIEF JUSTICE: Sure. Okay.

30 MR DOUGLAS: I take it your Honour will have had the opportunity, possibly now or at some later stage, to read what we've written. Better to get on with witnesses rather than go through the opening, or would you prefer - - -

THE CHIEF JUSTICE: No. I'd rather get on with the witnesses.

35 MR DOUGLAS: Yes, your Honour.

THE CHIEF JUSTICE: I think we're going to be quite pushed, so - - -

MR DOUGLAS: I call Mr Conomos, your Honour.

40 **JAMES NICHOLAS CONOMOS, SWORN** [12.11 pm]

45 **EXAMINATION-IN-CHIEF BY MR DOUGLAS**

MR DOUGLAS: Could you state your full name, please, Mr Conomos?---James Nicholas Conomos.

And your business address?---Level 12, 179 Turbot Street, Brisbane.

5

And have you sworn affidavits in these proceedings which are numbered 10, 11, 13, 14 and 15 in the applicant's list of materials which have been handed up this morning?---Yes, I – I just checked the – I just checked them. I've got copies of four of them, but the first one I haven't. But that's fine.

10

Well, I'll leave that to my learned friends?---But I have sworn them, yes, and they're true and correct.

If it please the court.

15

THE CHIEF JUSTICE: I'm sorry. I wasn't paying attention. What?

MR DOUGLAS: That's all right. Does your Honour want me to take – I think in the interests of time, it's probably best that we just go straight to the cross-examination. I think - - -

20

THE CHIEF JUSTICE: Yes, of course.

MR DOUGLAS: - - - the evidence which we'd wish is there. It's in writing. It's in the nature of an application.

25

THE CHIEF JUSTICE: Yes. Thank you. Mr Peden.

MR PEDEN: Yes. Thank you, your Honour. Your Honour, just before we start, for your Honour's assistance and for the assistance of the witnesses, rather than going to the multiple affidavits, we've compiled a chronology of the relevant documents with the documents themselves as extracted from the various affidavits.

30

THE CHIEF JUSTICE: Good.

35

MR PEDEN: There is a chronology at the front that refers to each of the documents. They're paginated 1 through to 229.

THE CHIEF JUSTICE: All right.

40

MR PEDEN: Could I hand up a copy for your Honour. In the – and I'll just explain it to you briefly.

THE CHIEF JUSTICE: Thank you. Yes.

45

MR PEDEN: So the date and the event is self-explanatory. The source – your Honour will see there’s references, for example, to Rozario 11. That would be a paragraph reference to Mr Rozario’s affidavit. The first row.

5 THE CHIEF JUSTICE: Okay. I think I can grasp these things.

MR PEDEN: Sorry?

THE CHIEF JUSTICE: I think I can grasp these things.

10

MR PEDEN: Yeah. So - - -

THE CHIEF JUSTICE: Is there much more explaining needed?

15 MR PEDEN: Where it says “to be tendered”, that’s to be tendered through the various witnesses as – during the course of the cross-examinations. So those documents are not obviously in evidence yet - - -

THE CHIEF JUSTICE: Okay.

20

MR PEDEN: - - - but everything that’s – and, for example, where it says “QLS docs”, that’s not in evidence yet either. So they’ll be tendered as well.

THE CHIEF JUSTICE: All right.

25

MR PEDEN: But otherwise where there are references to the affidavits, that’s where your Honour will find those. What I propose, your Honour, is we will use this bundle for the course of the cross-examinations today. If at the end of the – or once we get to the end of the trial and there are matters or items that haven’t been

30

THE CHIEF JUSTICE: Okay. Now, are you intending this as an aid or should I be making it part of the record as well?

35 MR PEDEN: Well, it’s an aid in the first instance, but this just identifies the documents that will be tendered as well. So we will – I think we’ve got separate copies of the documents themselves to tender - - -

THE CHIEF JUSTICE: Okay.

40

MR PEDEN: - - - to form part of the official record.

THE CHIEF JUSTICE: All right. So I can scribble all over this, you’re telling me?

45 MR PEDEN: You can scribble all over that one.

THE CHIEF JUSTICE: Thank you.

MR PEDEN: We do have a witness bundle, which is the same, so that we're all looking at the same page numbers.

THE CHIEF JUSTICE: Thank you. Sounds good.

5

MR PEDEN: All right. Thank you. And so if I can just ask for that to be provided to the witness. And then the other administrative matter, your Honour, is Mr Galea is the director and shareholder of Emperor Funding, which is the applicant. He's in court. My learned friend says that he wishes to assert his right to be here. He can do that, but I do want the record noted for that - - -

10

THE CHIEF JUSTICE: All right.

MR PEDEN: - - - because we will be making comments about his credit in due course.

15

THE CHIEF JUSTICE: Okay. It's on the record.

MR PEDEN: Thank you, your Honour.

20

THE CHIEF JUSTICE: Thank you.

**CROSS-EXAMINATION BY MR PEDEN**

**[12.15 pm]**

25

MR PEDEN: Thank you.

Now, Mr Conomos, you're a solicitor of this court, obviously?---I am.

30

And you'd regard yourself as being a careful and thorough solicitor?---I try to be, yes.

Yes. And you've been involved in the various aspects of the – if I can colloquially call it the Mio Art v Mango Boulevard litigation for some years?---Well, it's hard to say – I have been involved in a sense, but answering in a general way is – is fraught with danger. I have had some involvement, yes.

35

From time to time, you've acted for different parties?---Yes.

40

All right. Now, for example, I think you acted, didn't you, for the third defendant in the main proceedings. And if I can assist you - - -?---Yes, I – I act for Mr Whitton - - -

45

Mr Whitton?--- - - - who is the trustee in bankruptcy of Ms Perovich, who's now discharged.

All right?---And - - -

So - - -?---Yes.

5 Yes?---I've acted in that proceeding, and I continue to.

Yeah. Now, Mr Whitton, was he a substantive party to the proceedings?---He is, yes.

10 He was?---He was. He made a counter-claim in respect of the – the \$20 million that we – you were talking about before.

Yes. All right. And in the course of your acting for Mr Whitton, then, it was obviously relevant for you to know what the positions were that were being taken by the other parties in the litigation?---Not so much, no.

15 You didn't take any notice of what other claims or defences were being either prosecuted or defended?---Not – not in any great degree, for this reason – are you happy for me to explain?

20 Yeah, sure?---So the \$20 million was received as an award sum from a dispute between Mio Art and Mr Whitton on the one hand and Mango Boulevard on the other. That was determined by the Honourable Justice – Honourable Mr Callinan QC. The moneys were ultimately paid by bank guarantee into this court, and there was a dispute as to the ownership. Mr Whitton as trustee in bankruptcy was entitled to half the money and Mio Art was entitled to half the money, but two other parties, Traditional Values Management on the one hand and Earning Proprietary Limited, who were both in liquidation, and some related companies of Earning, claimed to have secured interests in the Mio Art and Whitton claims. And so Mr Whitton was asserting his right to his half and – so Mr Whitton was keenly interested in the positions being taken by TVM and Earning.

30 Yes. All right. So, for example, can I just take you to page 40 of the bundle there in front of you?---Yep.

35 And you'll see this is, under page 40, a plaintiff's defence to the counter-claim of the sixth, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants?---Yep.

40 So you just referred a moment ago, I think, to the – you were keenly interested in the counter-claim of the sixth defendant?---Well, it wasn't my keen interest, but – yes. Mr – Mr Whitton's position was for – he was interested in the positions of the fifth defendant, the sixth defendant, the – let me get this right. The 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants. Yes, those.

45 Yes. All right. So – well, just looking at this document here, do you recognise this, for example, as one of the pleadings that you would've read in those proceedings - - -?---Yes.

- - - as being the plaintiff's defence to that counter-claim?---Yes.

All right. Can I just ask you to go over, if you could, to page 49 of the bundle and paragraph 21?---Page 49?

5

Page 49, in the centre of the bottom of the pagination?---Yep.

And at paragraph 21?---Yep.

10 Can I invite you just to read that to yourself?---Yes.

So you were aware, were you not, as at 23<sup>rd</sup> of June 2017 or shortly thereafter that Mio Art was defending the counter-claim on the basis that it had – that it and its solicitors, that is, Mio Art – now, who were its solicitors?---Delta Law.

15

Yes, so you're aware that Mio Art and Delta Law were claiming salvage and litigation liens over any monies payable to it, being Mio Art, under the various agreements?---Yeah. I'd read those. I'd read the pleading, yes.

20 Yes, but you were aware of that claim being asserted?---Yeah, well, I'd read the pleading. Of course.

Yes?---Yes.

25 And that – I'll just ask you to go over – it wasn't just the sixth defendant, but it was the fifth defendant as well - - -?---The fifth.

30 - - - which was also pursuing the counter claim?---Yeah. I – as I mentioned before, the two parties that were seeking secure interests over the funded money of each half share of Mr Whitton on the one hand and Mio Art on the other were the fifth defendants, Traditional Values Management, TVM for a better expression, and the sixth, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants, Fareze Turning, who was claiming a secured interest over the whole sum.

35 All right, so if you could – if I could ask you again just to turn over to the next defence to the counter claim of the fifth defendant at page 51 and just ask you to identify that as the counter claim or the defence to the counter claim that you say you were aware of?---This is the – yes. I've read the pleadings in this case, yes.

40 Yes, and if I could ask you to go over to paragraph 15 on page 58 of the bundle?---Paragraph 15. Yes.

45 So, once again, you were aware at this stage, and if you turn over the page, you'll see this one was 23<sup>rd</sup> of June 2017, so a little earlier. You were aware that Mio Art was asserting that it and its solicitors, Delta, had salvage and litigation liens over any monies payable to Mio Art?---Well, I'd read that.

Yes?---Yep.

But you were aware that that claim was being made by Mio Art and its solicitors?---Yes. I'd read those parts of the pleading, yes.

5

Yes. Yes, so did you ever turn your mind to the quantum of those claims?---No. Not in any – not in any significant way. I heard what was said at the mediation in – on the 14<sup>th</sup> of June 2018, but, for me, it wasn't an issue, but for us, our issue was we had – we were entitled to 50 per cent of the sum and we had claims against it by two parties.

10

All right. Well, just turn your mind, though, back to 2017. In the middle of 2017, were you aware of the quantum of the claim that was the subject of the lien?---No. Not from my recollection, sitting here now, but - - -

15

All right. Well, let's see if I can - - -?---My recollection was that there was a request made by the lawyers representing TVM for particulars of the claim.

20

Yes?---And they're – I'm not sure when that was provided, but my recollection was it might have only been provided, just sitting here, prior to the mediation, but I'm not sure.

All right. Well, just - - -?---It wasn't something that I took any particular note of.

25

Have a look at this document - - -?---Yep.

- - - please. Your Honour, I don't think this document is in the bundle, so can I hand up a copy of it, and I'm going to tender these pleadings in due course shortly.

30

But just – could you just look at that document. Is that – are they the particulars or the answers to the particulars that you were just referring to?---I'm not sure. That's not what I was referring to, but, look, I – as I indicated previously, I did read the pleadings in this case in preparation for the mediation, but I haven't got any specific recollection of having read those things, but if it's on the court file, I would've read it. Of course, it's a commercial list matter, and they're all for the public to see in accordance with the practice.

35

MR DOUGLAS: Your Honour, could I - - -

40

MR BEDEN: Yes, so paragraph 3 - - -

45

MR DOUGLAS: Could I just raise a general objection to this line of questioning. The questioning really is whether, at the time the company was put into administration or they attempted to put it into liquidation, whether it, in actual fact, had a lien over any funds, not whether it was asserted in pleadings that there was a right to a lien which wasn't subsequently pursued. This – this is not really going to assist things very much.



THE CHIEF JUSTICE: Well, I'm not sure.

MR DOUGLAS: If it please the court.

5 THE CHIEF JUSTICE: There is this issue about disbursement of funds, and the context in which that occurred may be relevant, so you can go ahead - - -

MR BEDEN: Thank you, your Honour.

10 THE CHIEF JUSTICE: - - - Mr Beden.

MR BEDEN: So just ask you to go to the paragraph 3 of the document that I've just handed up. You say you can't remember this specifically, the answers to the particulars, but if I could just ask you to look at paragraph 3 and see if that assists  
15 you to remember what your understanding was of the nature and extent of the lien claimed at that time?---It doesn't.

This was a couple of years ago?---It doesn't, but if it's - as I say, if it's on the court file, I read all the documents that are - - -

20 Yep?--- - - - relevant to the mediation, and this probably would've been one of them, but I can't be sure.

But just turning your attention to paragraph 3, you can see that the words there that  
25 appear - this is the particulars provided by the plaintiff, Delta Law - - -?---Yep.

- - - on behalf - so Delta Law on behalf of the plaintiff, Mio Art, that:

30 *The best particulars of the amount of the lien claimed by the plaintiff that can presently be provided are that the total amount of the lien is \$20,873,031 exclusive of interest.*

?---Yep.

35 So would you agree that was your state of mind back in 26 September 2017 on the basis that you say you would've read these pleadings?---Well, I read them prior to the mediation. Can I explain, the reason this - these things weren't of such interest at that time was my recollection was that Mio Art made claims to the - 50 per cent of the arbitration money, and, as against the claims made by TVM and Earning, it  
40 asserted these claims. It wasn't asserting these claims against Mr Whitton, so, for the purposes of the mediation, I read these things. I may not have read them at the time when these things were produced, because I'm trying to think when our counter claim was in fact filed in the proceeding, but, prior to the mediation, I would have read these documents.

45

All right, but you've got no doubt that these are the pleadings that were filed in the proceedings in which you acted for the third defendant?---If you're telling me they were filed, then I'm happy to accept that.

5 Your Honour, I tender each of the three pleadings that I've taken the witness to, which is, for the record, from bundle pages 40 through to 67.

THE CHIEF JUSTICE: Okay. Can you just identify them in each case by reference to whether they're a statement of claim - - -

10

MR BEDEN: All right, so I'll - - -

THE CHIEF JUSTICE: - - - or defence or - - -

15 MR BEDEN: I'll be - - -

THE CHIEF JUSTICE: And the date.

MR BEDEN: I'll be more particular – more precise, your Honour. So at bundle  
20 page 40 through to 49, there is – sorry, 50, there is a court document described as:

*Plaintiff's defence to the counter claim of the sixth, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants filed in proceedings number QS1714 of 2011 and dated 23 June 2017.*

25

THE CHIEF JUSTICE: Okay. That will be exhibit 4.

**EXHIBIT #4 ADMITTED AND MARKED**

30

MR BEDEN: Thank you, your Honour.

THE CHIEF JUSTICE: Next?

35

MR BEDEN: And the next, your Honour, follows on from that - - -

WITNESS: Does somebody want me to mark this in this bundle?

40 THE CHIEF JUSTICE: No, my – no, you don't need to do that. That's all right. Okay, well - - -

MR BEDEN: I just - - -

45 THE CHIEF JUSTICE: - - - we might actually get them out of the bundle at the moment so that my Associate can mark them straightaway, because I gather that's the copy that's going in, is it?

MR BEDEN: I was actually going to give your Honour – I planned to give up a separate copy.

THE CHIEF JUSTICE: Okay, if we're getting a separate set.

5

WITNESS: I can mark them, your Honour, if you'd like.

THE CHIEF JUSTICE: No, it's all right. You don't have to do the Associate's job, thanks?---No worries. We've all been there.

10

And then the next documents, the defence and counter claim in 714 of 2011, dated 30<sup>th</sup> of June.

MR BEDEN: Yes. Sorry, documents at bundle pages 51 through to 59.

15

THE CHIEF JUSTICE: Sorry, I must have the - - -

MR BEDEN: And it's described, I think - - -

20

THE CHIEF JUSTICE: Yes. Okay.

MR BEDEN: - - - as the plaintiff's defence to the counter claim of the fifth defendant, and it's dated on - - -

25

THE CHIEF JUSTICE: Twenty-third of June.

MR BEDEN: - - - bundle page 59 as 23 June 2017.

THE CHIEF JUSTICE: All right. Thanks. That'll be exhibit 5.

30

**EXHIBIT #5 ADMITTED AND MARKED**

35

MR BEDEN: Sorry, Mr Bailiff.

THE CHIEF JUSTICE: And then the last one – it was particulars. Now, where were they?

40

MR PEDEN: Yes. Your Honour, I'm happy to extract particulars. That's the separate document that I handed up to your Honour. And I'll hand up to your Honour - - -

THE CHIEF JUSTICE: That's right.

45

MR PEDEN: - - - a clean copy - - -

THE CHIEF JUSTICE: Yes.

MR PEDEN: - - - to be the exhibit.

5 THE CHIEF JUSTICE: Thank you. And that will be exhibit 6.

**EXHIBIT #6 ADMITTED AND MARKED**

10

MR PEDEN: Thank you, your Honour.

Now, Mr Conomos, were you involved, or at least a part of applications that would have been, or that were filed or heard on the 11<sup>th</sup> of July 2017 and 21 July 2017 in these proceedings?---Not to my recollection, but what were they for?

All right. Do you recall that there was – there had been some discussion before Justice Daubney about the nature of the litigation – sorry, the salvage and litigation liens claimed by Mio Art and its solicitors. And as a result of that hearing, Justice Daubney asked for supplementary written submissions to be provided as to the nature of that lien. Do you recall that?---No. Whilst you've been talking, I've been thinking about when I – this is to answer your question – whether I knew. And my recollection is that up until when Mr Whitton instructed me to file a counter-claim in the proceedings, whilst we'd been named as a party, we hadn't taken any active role. And sitting here right now, my recollection is that Mr Whitton filed his counter-claim, which was unusual because he was a defendant, claiming an interest in the 10 million, I think in March of 2018. And so prior to that time – prior to March 2018, I'd had no involvement in what had happened in the proceedings. But I don't shy away from having read the documents that we talked about before prior to the mediation which was three months later. But I can check that over lunch by checking the court file, if that will assist.

But you would have read into the matter, even if you hadn't been directly involved?---I hadn't read any of these – the documents that you're talking about. I can recollect that, from my recollection, that there's a – there was an application made for security for costs by a number of the parties against – against, I think, Mio Art, and that Justice Daubney heard and determined that, but I had no involvement with that and had no interest in that because it didn't affect us. I was only interested, in a sense, once I became involved, which is – the court file will reveal, but I'll check it over lunch – when we filed – when we got leave to file our counter-claim. So I think I attended a review before Justice Jackson in February, I think, 2018, got leave to file his counter-claim, and I think in March, but I'll check that, we filed the counter-claim.

45 All right. Well, can I just ask you to go over to bundle page 69 - - -?---Sixty.

- - - and look at this document?---Yep.

In fact, it starts at 68. The substantive text is in pages 69 through to 84. If you could just briefly look at that document and tell me whether that's a document that recognise as one that you read into in preparation for the mediation?---No. I've never seen that document – never seen it or read it.

5

All right. So you don't think it was something that you would – you don't recall seeing it or do you definitely say that you didn't read it?---As anybody – as far as anybody can be certain of what happened a year ago, that's not a document that I recollect reading. I read the pleadings. And as I indicated, our focus was in respect of Mr Whitton's claims, but I did take an interest in the claims of all the parties, Mio Art on the one hand to some degree, but each of us, Mio Art and Whitton each had proper claims to half the money. The issue was, and the important issue for Mr Whitton was whether TVM and Earning could take away his entire claim. So I hope that answered the question.

15

All right. No, that's all right. But my – well, I can ask it this way: are you aware of the concept of a solicitor's lien or a fruits of litigation lien?---I'm aware of a solicitor's lien.

20

Yes. But a fruits of litigation lien, are you aware of that?---As it turns out I only first heard of this concept of a fruits of litigation lien in the course of this matter and had done some research about it some months ago, but it wasn't something that I knew extensively about prior to recent times.

25

All right. So - - -?---Even though I've been a solicitor for 32 years.

30

All right. But you weren't – you were saying that at the date of the mediation, then, you weren't aware of the nature of the lien that was being claimed by Mio Art and its lawyers?---I knew that – at the mediation I knew that Mio Art – Mr Douglas gave an opening statement, as did I, but I knew that they were claiming what they called “the salvage lien”, but from our purposes, we were more focused upon the claims of TVM and Earning. So it wasn't something that was a focus for us.

35

Well, were you aware, though, that the Mio Art's response to TVMs claim was to assert the existence of this lien?---It was asserting – my recollection was Mio Art was asserting a salvage lien. That's what I understood. I didn't take a great interest in that because we were both fighting over 50 per cent. We were entitled to our 50 per cent. Mio Art was entitled to its 50 per cent. And two other parties were each claiming they could take away that whole amount. So our focus in preparing and doing the mediation was on our respective positions which is not uncommon.

40

All right?---It was never going to take away money from us, so we weren't so keen.

45

Yes. All right. Now, turning to this mediation in Melbourne, you've read Mr Rozario's affidavit of earlier this week?---Is the one of the 12<sup>th</sup> of November?

Yes, his second affidavit?---Yes.

Yes. Are you aware of the things that he says in that affidavit about the conduct of the mediation in Melbourne?---I do remember reading it. I'd like to see it just so that I don't say anything that's inappropriate, but - - -

5 All right. Might the witness be shown Mr Rozario's second affidavit filed the 12<sup>th</sup> of November. It might be best if the – I'm happy if the witness looks at the original affidavit, your Honour.

THE CHIEF JUSTICE: Okay. Have you got a court document number?

10

MR PEDEN: Sorry?

THE CHIEF JUSTICE: Court document number?

15 MR PEDEN: It's court document 28, your Honour. We do have a spare copy we can hand up to Mr - - -

THE CHIEF JUSTICE: And if you've got a spare, it'll save my Associate taking it off the file then, if there's no issue. Now, I don't have copies of your material do I, Mr Peden?

20

MR PEDEN: I think they're in the bundle, your Honour. I think that's what my learned friend said.

25 THE CHIEF JUSTICE: In the trial bundle?

MR PEDEN: They're not in – they're at tab 17 - - -

MR DOUGLAS: They're in the folders that I handed up to your Honour.

30

MR PEDEN: - - - in the folder, your Honour.

THE CHIEF JUSTICE: Okay.

35 MR PEDEN: Volume 17, thank you.

THE CHIEF JUSTICE: Thank you.

MR PEDEN: Sorry, I don't have an index of the volume, so - - -

40

THE CHIEF JUSTICE: Okay. So, Mr Douglas, the material you gave me was everybody's?

MR DOUGLAS: Yes, your Honour.

45

THE CHIEF JUSTICE: Good. Thanks, I didn't realise that. Thanks.

WITNESS: So which parts of it do you want me to look at?

MR PEDEN: So paragraph 20?---Twenty. Yep, I've read that.

5 All right. Well, would you agree with that – with the proposition that:

10 *There was a general topic of conversation during the course of the mediation about the existence of Delta Law's lien meant that other creditors of Mio Art would not receive their full claimed debts and would need to accept reduced amounts.*

?---No. That's not what I recall. What I recall was that the mediation was conducted routinely, like most mediations. There were four parties, Mr Douglas for Mio Art, me for Mr Whitton, Mark – Mr Mark Martin QC for TVM and a solicitor from  
15 Ashurst for Earning and the parties, and all the rest of the parties were there. There was a – an opening by each party. My recollection was that the opening by Mr – by the Mio Art party – by Mr Douglas was that it had a salvage lien, and it was asserting its salvage lien to defeat TVM and Earning. That's the way that I recollect.

20 Well, I suggest to you, Mr Conomos, that, in fact, what was discussed was Delta's litigation lien by Mr Douglas, among others?---Okay. You – well, that's – I understand what you're saying, but that's not my recollection.

25 Fine. And because Mio Art, in the context of this mediation, was entitled to half, wasn't it?---Mio Art was entitled to – Mio Art – the claim arises because Mio Art and Perovich, Mr Whitton being her trustee, had sold their shares – half of their shares in Mango Boulevard to half of their shares in Kinsella Heights Developments to Mango Boulevard, and the award was to award them for the values of their shares under a share sale agreement, and half of the money was owing to Mio Art, and half  
30 of it was owing to Mr Whitton. So these two parties were claiming an interest in the whole of the amount of the award. Does that answer your question?

Well, I'm specifically putting it to you, though, Mr Conomos, that what was discussed was the solicitor's lien being a fruits of litigation lien because it didn't, of  
35 course – a solicitor's lien generally, in terms of documents and so on, is a possessory lien, isn't it, you know?---Yes, I know that, yes.

All right. So, of course, in relation to the dollars that might be coming in we can't be talking about possessory lien over dollars, can we?---No.

40 No. Right. So it can't be a solicitor's normal possessory lien, so it must be something else, and I'm suggesting to you that what was, in fact, discussed was that this was this fruits of litigation lien – solicitor's lien?---Honestly, I – from my recollection, I'd not heard the term fruits of litigation lien in relation to this matter  
45 until quite recently.

All right. Just turn forward to Mr Rozario's affidavit, if you could - - -?---Yep.

- - - to paragraph 38?---Yes.

And you've read this obviously for now?---I have, yes.

5 If you can – to the extent you need to refresh your memory, please do so. Did you  
say those words to Mr Rozario?---No. I read this the other day. I didn't have that  
discussion with Mr Rozario. My recollection is I didn't, in fact, speak to Mr Rozario  
on the telephone, and Mr Rozario came to my office, and I encouraged – I can't  
10 remember the discussion we had. I'm not sure if I took notes. I may have. I may  
not have. I'm not sure. I don't think either of us did, but I encouraged him to talk to  
Ms Perovich and Mr Spencer to explore their differences, but I certainly didn't say  
these things.

15 This is after you became aware that Mr Rosario ceased to act for Delta – for Mio  
Art?---My recollection was that the discussions that I had with Mr Rozario occurred  
prior to him terminating the services in writing towards the end of January of 2019.

20 All right. Well, had you become aware that he was intending to terminate his  
services? Is that how it came about?---He – he – when I spoke to him, he was  
unhappy, and I was encouraging him to talk to them, and if he wanted I could talk to  
them.

25 Well, he'd written to you, hadn't he, asking you for certain information?---Look, he  
could've, yes. I can't recall, but he could've, yes.

But you deny, then, that you said those words there in paragraph 38?---Yes. I do.

Now, I want to turn attention back, if I could, to the distribution of funds - - -?---Yep.

30 - - - in – on the 21<sup>st</sup> or 22<sup>nd</sup>?---Can I hand this back, this one? This is the – the  
affidavit of Mr Rozario.

35 Thank you. Now, the trust account was set up by you in relation to moneys that your  
firm received in – on or around the 20 – sorry, the 4<sup>th</sup> of September – 3<sup>rd</sup> of 4<sup>th</sup> of  
September?---I think that's right. There'd be an order made. I'd attended before  
Justice Jackson. A consent order was made by the parties, and the moneys were to  
be paid into my trust account. They were received on about the 3<sup>rd</sup> or 4<sup>th</sup> of  
September by, I think – by direct deposit, and we opened up a separate file then for  
40 all the parties and - - -

All right. Well, just to assist that, if you go to bundle page 98, please?---Yep. Yes,  
this is the order that I just mentioned.

45 And just confirm to me – that's the order. Right. Thank you very much. And so the  
particular provision you were referring to was paragraph 1?---Let me think. Yes.  
There were two orders, actually. Is this order – I think there might be another one,  
but yes, there was this order, yes.



All right. And then if I could just take you over to paragraph – sorry, page 101 of the bundle?---Yes. Yes, that’s the - - -

5 Is this the email that you sent them on the 4<sup>th</sup> of September to various parties, including Mr Rozario?---It appears to be, yes.

All right. And you said that you’d opened a new account in the name of the parties there listed on the middle of the page?---Yes. We – as I indicated, we had opened a new file because at the time I was acting for Mr Whitton, but I opened a new file, as 10 it indicates in there, to act as stakeholder for the – the parties in the litigation for whom I was holding the money, yes.

Well, where’s Mio Art listed there?---I should’ve said Mio Art. That’s an error. But it was held – the money was being held for Mio Art as well.

15 All right. Well, and at this time in September 2018, you knew that Delta Law acted for Mio Art?---Yes.

And Mr Rozario was the solicitor?---At Delta Law? Yes.

20 Yes. And - - -?---I was writing to, as the email says:

*Dear Quintin.*

25 Sorry?---The email’s addressed to him. The email’s – I was writing to the – to the lawyers for the parties.

Yes?---

30 *Dear Quintin, Ross, Ariel.*

They’re the three lawyers for the parties, yes.

35 Yes, exactly. So – and that’s the way you’d normally communicate. When you know that there are solicitors on the other side of the matter, you communicate with the lawyer?---Well, I communicated not only in this case. I also communicated with other parties as well who were parties to the – this particular part of the dispute.

40 Yes, but if a party’s represented by a solicitor - - -?---Of course.

- - - you deal with the solicitor, don’t you?---Of course, of course, yes.

45 Yes. You wouldn’t deal with the party themselves, would you?---No, of course. But in this case, during the course of these emails, as we’ll come to, most of these emails were also sent as an example to Ms Perovich as well because she was a main party in the litigation, party to the settlement deed and whatnot.

Well, was she someone for whom the money was held?---No, she wasn't.

5 So the money wasn't held for her? So what was her interest, then, if the money wasn't held on her behalf?---She was a party to the settlement deed. She attended the mediation in a capacity as a party to the litigation.

10 But the order of Justice Jackson didn't require any communication with her, did it?---Didn't require communication with anybody, but I'm just explaining that I wrote to – in answer to your question I wrote to Mr – it's hard to tell from this email because it doesn't have the whole email. It doesn't say who it's been – because it's – this email looks like it's been cut off.

15 Mr Conomos, if you'd just listen to the question, please. Are you saying that you – that Justice Jackson's order didn't require you to communicate with any party; is that right?---Justice Jackson's order says what it says. I then communicated with parties. The orders doesn't talk to me about communicating with anybody, but I required - - -

20 Why do you - - -?--- - - - to – do you want me to answer your question?

Please finish your answer?---Yeah, I mean, my understanding is the order of Justice Jackson required, as it was a consent order probably prepared by me – was that certain moneys were to go into my trust account, and then, of course, I dealt with the parties as I saw appropriate.

25 And, well, Justice Jackson's order requires in paragraph 1, doesn't it, that the funds are not to be dispersed without the consent of the plaintiff, the third, fifth, sixth, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants?---That's true.

30 So in order to disburse the funds, you'd have to contact and get the consent of each of those parties?---Yes.

All right. So Justice Jackson's order does require you to contact the - - -?---That's - - -

35 - - - parties?---That's true.

All right?---Yes.

40 But it doesn't require you to deal with the second defendant, which was Ms Perovich?---It doesn't explicitly say that, but most of my emails – in fact, all of them are copied to her. She is a party to the litigation and a party to the settlement deed.

45 But she had no interest in the funds?---Well, she was a party to the litigation.

But she had – Mr Conomos, please just answer – she had no interest in the funds, did she?---I suppose not. I'm – I'm not sure. I – from my perspective, whether she had

an interest in the fund or not – I was – I was copying all things to her because she was a party to the litigation and a party to the settlement deed. Whether she had an interest in the fund, probably not. Probably not.

5 Well – all right. So to your understanding, who was the representative of Mio Art around this time in September 2018? Who was the instructing force? Did you know?---I didn't know. I had no idea. Presumably the director or Mr Spencer. I'm not sure.

10 Mr Michael Spencer?---Mr Michael Spencer is the director.

Yeah?---Mr Richard Spencer – either of those two.

15 Well, did Mr Michael Spencer attend the mediation, for example, in Melbourne?---No. Mr Richard Spencer attended the mediation, though.

20 Well, what's his interest, then, on behalf of Mio Art, as you understood it?---Prior to the involvement of Mio Art as – Mio Art is the trustee of a family trust known as the Spencer Family Trust. That was a family trust, I understood, that was set up for the benefit of Richard Spencer and his family.

25 Well, would it be fair to say that you, around this time in September 2018 onwards, regarded Mr Richard Spencer and Ms Perovich as being the representatives of Mio Art?---My understanding was they were both doing work for Mio Art, but - - -

Sorry?---They were both doing work for Mio Art, yes. They were - - -

Well, let's just - - -?---They were - - -

30 You could just answer my question, if you could. You understood, didn't you, that the representatives of Mio Art, so far as you were concerned, were Mr Richard Spencer and Ms Perovich?---No.

35 You didn't understand that?---No. I understood that they were assisting Mio Art, but Mio Art was being represented by lawyers, who was Mr Rozario.

40 All right. So you wouldn't, for example, have expected, then, to correspond with Ms Perovich in relation to Mio Art's entitlement, or would you?---I – I wouldn't have been communicating – I communicated, I think as I explained before, to the parties to the litigation - - -

All right?--- - - - which included Ms Perovich.

45 All right. Could I ask you to go to page 117 of the bundle?---One-one-seven, yes. Yes.

Now, there's two emails on that page. The bottom email at about halfway down is – would you agree that that – you sent an email - - -?---Yes.

- - - on the 22<sup>nd</sup> of November 2018 to Ms Perovich?---Yes.

5

And you sent that to her in own capacity as the third defendant in the proceedings, did you?---I sent this in response to the – I received the – the authority signed by Michael Spencer on behalf of – this is – this is in response to earlier emails, but I – I received a – an authority signed by Michael Spencer on behalf of Delta Law from Ms Perovich, and I responded and said, “Attached is the deposit, made today, as directed.”

10

But, Mr Conomos, my question of you, if you just listen to it again, please, is that on this date, the 22<sup>nd</sup> of November 2018, at 11.12 am - - -?---Yes.

15

- - - you wrote to Ms Perovich about the deposit receipt?---Yes. I think I just explained that - - -

Yeah?--- - - - this was in response - - -

20

And what moneys were going to Ms Perovich?---Obviously none, because the – I – I – if you listen to my answers, it would help as well. This email was in response to an email I received from Ms Perovich, which isn't here, and that email attached to it an authority signed on behalf of Mio Art by its director. And I responded to the email that I received, copied to the parties who were copied, who are all the parties interested in that specific – as far as I was aware, that specific issue, and attached the deposit receipts.

25

All right. But Ms Perovich wasn't in any way in her own right entitled to any money, was she, and she wasn't receiving any, was she?---Well, let's accept that. Yes. Okay. I'm happy - - -

30

You accept that?---I'm happy to accept that, because the moneys that I – we'd – we paid weren't paid to her.

35

And so I'm just inviting you to reconsider, then, the question you gave a moment ago about whether you dealt with Ms Perovich as being the representative of Mio Art?---I didn't, no. But - - -

40

All right. Now, just go to the top email, then, the - - -?---I just responded to an email. I thought I explained that.

We'll go to a few more emails, Mr Conomos - - -?---Of course.

45

- - - but I want to take you to the one at the top of the page, then?---Yep.

Do you recall receiving that email from Ms Perovich on the 22<sup>nd</sup> of November?---I didn't, but now that I see it, yes, I remember seeing that now.

Well, it's a little remarkable, isn't it, when it says:

5

*Dear Jim,*

*Thank you. See you in the Bahamas.*

10 ?---Yes.

Continuing:

*Regards, Silvana.*

15

?---Yes.

Now, she's also said:

20

*Alternatively, can we have some more, please.*

So did you have any arrangement to go and see Ms Perovich in the Bahamas?---No.

So you thought she was joking?---Is – is that a serious question?

25

Well, did you think this was something in jest that she was saying to you?---Yes.

All right. Now – so why would you be corresponding with Ms Perovich about the amount of money that was being paid to Mio Art?---I'm – I'm happy to answer again. I received an email from Ms Perovich, attaching to it a – an authority signed by the sole director of Mio Art directing as to how moneys were to be disbursed, and this email provides the deposit receipts in accordance with that authority and sends them back to the person who sent it to me.

30

35

All right. And so you were taking instructions directly from a client who was represented by a solicitor, Mr Rozario, to your knowledge?---Mr – Mr Rozario was copied to this email.

40

That wasn't my question, Mr Conomos. You accepted instructions from a director of Mio Art – or someone who purported to be representing Mio Art to the exclusion – sorry, without receiving – without communicating and receiving any such instructions from the solicitor?---I'm not sure what you're saying. I – I responded to an email from Ms Perovich, copied to her lawyers, attaching a deposit receipt. What arrangements exist between Ms Perovich and Delta Law about how I was to receive the authority and – are really matters for them, not me.

45

All right. Well, just in relation to that, then – I note the time, your Honour. I'm still going on this topic.

5 THE CHIEF JUSTICE: Okay. So you'll be a while or - - -

MR PEDEN: I probably still will be a few minutes on this.

10 THE CHIEF JUSTICE: Well, we can either push on and you can finish, or we can adjourn. What do you prefer?

MR PEDEN: Can I just push on for five minutes, your Honour?

THE CHIEF JUSTICE: Yes, sure.

15 MR PEDEN: Might Mr Conomos be shown the subpoenaed documents that have been provided.

THE CHIEF JUSTICE: Yes.

20 MR PEDEN: If they can just be handed to me, I'll go to a particular page. Thank you. If I could just hand all those documents back.

Now, in the bundle of the third envelope - - -?---Yep.

25 That's the statutory declaration that you gave to the law society?---It is.

Plus the annexures that you provided to the law society?---It is.

30 And I notice now they're actually paginated on the bottom right corner?---They are.

All right. Could you go to page 49 of the paginated bundle, please?---Yep.

Now, you sent that email that appears at the bottom of bundle page 49?---Yep.

35 All right. And that was sent for what purpose?---So there was – the moneys that were received into the trust account were invested for a month whilst the – the two companies in liquidation, TVM and Earning obtained approval from the Federal Court in Victoria to the compromise – and whilst Mr Whitton decided whether he intended to seek compromise, and this was the interest that was earned on that  
40 money.

All right. So the – you received – did you not – the email that appears at the top of the bundle, page 49 - - -?---I did.

45 - - - from Ms Perovich?---I did.

Now - - -

THE CHIEF JUSTICE: What's the bundle to which you're referring – sorry?

MR PEDEN: Sorry.

5 THE CHIEF JUSTICE: I'm - - -

WITNESS: This is the - - -

MR PEDEN: This is the subpoenaed documents - - -

10

THE CHIEF JUSTICE: Okay. That are contained - - -

MR PEDEN: Sorry – we only made one copy - - -

15

WITNESS: It's - - -

MR PEDEN: - - - your Honour - - -

WITNESS: - - - a stat dec – I've got a copy - - -

20

MR PEDEN: - - - and - - -

WITNESS: - - - your Honour. Mr – Mr Webster can get it; it's directly behind where he's sitting. But – yeah, the – with the bottom there, there should be – the – the very bottom there will be a copy of the stat dec. There's a few copies for the judge.

25

THE CHIEF JUSTICE: Thank you. That will be a help.

30

MR PEDEN: Now - - -

WITNESS: Page 49.

35

MR PEDEN: Now, this, again, was an instruction directly from Ms Perovich; not from Delta Law?---Yes.

So you were prepared to act – were you – on the instruction of the – somebody who you thought was representing the client or not?---Well, it – it attached a – an authority signed by one of the parties for whom I was holding the - - -

40

But - - -?--- - - - money.

- - - you knew that that company was represented by lawyers, didn't you?---I did, but I was holding the money for the company. So - - -

45

Just coming back to this again, Mr – Mr Conomos. I thought you said that your practice was – and it would be proper – for you only to deal with the solicitor for a

party when you know that that party is represented by solicitors?---That's what I – I generally do that. But in this case, what I got was, I sent an email on the 20<sup>th</sup> of November to all parties, including to Delta Law; and then I received on the 21<sup>st</sup> of November from Ms Perovich an authority signed by one of the parties for whom I was holding the money.

5 Well - - -?---So I'm obliged by the Trust Account Act to deal with that under section 249 of the Legal Profession - - -

10 So you - - -?--- - - - Act.

- - - didn't – it didn't cross your mind then that you were receiving instruction directly from a client on the opposing side of a matter without the involvement of the solicitor?---No.

15 You knew about the claimed lien that Delta Law had at this stage?---I knew that there'd been a mediation at which Mio Art was claiming a lien, yes.

20 And Delta Law was also claiming a lien?---Well, it may well have been. But it wasn't something that was of concern to Mr Whitton - - -

No?--- - - - at the mediation.

25 You were quite happy to distribute the funds and act on the instructions of somebody – Ms Perovich - - -?---No - - -

- - - forwarded you instructions on behalf of Mio Art?--- - - - I didn't act on the instructions of Ms Perovich. The authority – I dealt with – I acted on the instructions of Mio Art for whom I held the money.

30 All right. And that – if I could just ask you then to go over, please, to page 58 of the bundle?---Is it the tag page – yes.

35 I should check – did you receive the – that authority back on the 21<sup>st</sup> of November at 7.46 am?---I must have, yes, because the money's all been - - -

All - - -?--- - - - disbursed - - -

40 - - - right?--- - - - yes.

So then at 12.38 did – you received another – sorry – you – your accounts clerk sent another email - - -?---Yes.

45 - - - copied to you - - -?---Yes.

- - - and that's what appears at the bottom of page 58?---And that's – yeah, that's copied to admin@deltalaw, Mr Spencer and Ms Perovich – yes.



Yeah. Now, the text there refer – says:

*I refer to Silvana’s conversation with Jim earlier.*

5 ?---Yes.

Had you had a conversation with Silvana – Ms Perovich – earlier that day?---Well, the email says I did, yes. So I would have.

10 So you did have a conversation?---Well, the email says so. So I would have had, yes. I – I’m - - -

And when you - - -?--- - - - prepared to accept that.

15 - - - say, you would have had, do you recall having any conversation with Ms Perovich?---I had lots of discussions, but I’m prepared – I – I may well have, yes.

And you would have taken a telephone attendance note of that?---I may have, I may have not have – I’m not sure. But - - -

20 Well – but - - -?--- - - - I could have.

- - - Mr Conomos, you’re dealing here with somebody – Ms Perovich – who you know is not a director of Mio Art - - -?---Yes.

25 - - - you know that Mio Art is represented by solicitors, Delta Law - - -?---I do know that, yes.

- - - and you’re speaking by telephone with Ms Perovich?---Yes. I’m - - -

30 All right. Well, what did you talk about?---I don’t know.

Well, would it – would the topics or the content of your discussion be recorded in any file note?---I’d have to check; but – but it could be.

35 You wouldn’t have any difficulty in producing that file note over lunch, would you?---If I have it, I will produce it. I’m happy - - -

Yeah?--- - - - to.

40 This is quite a serious matter – isn’t it – Mr Conomos. You’re dealing with a s – a – a person who you know is not a director of the company who you know is represented by a firm of solicitors and yet you’re freely having a conversation with her?---In this matter it was a common occurrence for Ms Perovich, Mr Spencer, Mr Rozario – all of those parties – to communicate interchangeably with me. But I only  
45 dealt with – in terms of dealing with the money in my trust account we would only act on the written instructions of the party for whom the moneys were held.

All right. Well, let – this conversation wa – was sometime in the morning, but – and you’ll be able to produce the diary note over – over - - -?---Ye – yeah - - -

- - - lunch - - -?--- - - - I’ll – I’ll look and if there is one, I’ll produce it.

5

All right. Now, this was after you’d received the instruction at 7.46 in the morning?---Sorry – this is - - -

10 We really just talked about this a moment ago. You received an – an authority at 7.46 in the morning. We’ve just been through that?---There were a few authorities in this matter for different reasons. So there was the – the original authori – anyway, you go ahead with your – with your question.

15 And then you had a conversation with Ms Perovich - - -?---Yes.

- - - and then you – did you talk to Ms Claudia Errol about sending this email?---Yes, I would have. I – I don’t have a independent recollection, but, yes.

20 And then you – and then Ms Perovich wrote back – and it was copied to you – with another authority for disbursement?---Yes.

So a second one?---Yes.

25 And what was the difference between the two?---I don’t know. I think – but, look, I – I don’t want to – I don’t want to sp – unless you want me to speculate - - -

I don’t want you to speculate. I’m just asking you if you – if you know?---I don’t know. My – my - - -

30 All right. Thank - - -?--- - - - recollection - - -

- - - you. Now - - -?--- - - - is that the original authority had some error in it. But I – I – look, I can’t – I’d just be speculating. So I don’t know.

35 Well, you haven’t exhibited or annexed the authorities to your statutory declaration, have you?---No.

40 All right. But you knew the – as at this stage that there was a single trust account authority that authorised the payment of 8.467 million, approximately, to cheque – to – by way of a cheque to Mio Art?---There was an earlier authority – there was an authority to – for money to go to Mio Art, and then there was a subsequent one from – for Mio Art to disburse it to the parties in the authority, yes.

45 All right. And if you could just have a look at volume – sorry – the oth – the other envelope - - -?---Yes. This is envelope 2.

- - - number 2. The last document of that appears to be a trust account authority?---The last one – the very last page, is it? Yes, this is the – yes, I – I’m not sure. Wait on – is this is the – here we go. There’s a – this is one from – this is – this is an email from Jennifer O’Farrell and Mills Oakley to – to all of the parties enclosing the signed authority signed by their liquidator, yes. Yes – is that what you’re asking me?

It wasn’t actually. But - - -?---That’s the last document.

10 Your Honour, it might be – it might be best if – I’ll – I’m still going to be a little while – to finish after lunch.

THE CHIEF JUSTICE: Okay. All right then. We’ll come back at 2.30, I think. Thanks.

15

**ADJOURNED** [1.09 pm]

20 **RESUMED** [2.28 pm]

**JAMES NICHOLAS CONOMOS, CONTINUING**

25

**CROSS-EXAMINATION BY MR PEDEN**

THE CHIEF JUSTICE: Mr Peden.

30

MR PEDEN: Thank you, your Honour.

Mr Conomos, do you have in front of you there the statutory declaration that you swore still?---I do.

35

All right. I’ll try and get through this as - - -?---Should I – should I indicate that over lunch I – I addressed the two issues that I raised with you this morning, one being when my client Mr Whitton’s counter-claim was – was filed, and I did a search of the court file and I found the counter-claim. I can hand you it – hand it to you and the court, and it was filed on the 7<sup>th</sup> of June 2018. So I did some copies for you in case you want them. That – I’m happy - - -

40

Mr Conomos, I think your counsel can deal with matters in re-examination, if necessary?---I indicated to you this morning that I would do that, so I thought – and then, secondly, you asked me this morning whether or not I could find a diary note, and I – I went back and checked and I can’t find a diary note, but I found a couple of emails before the conversation, which I can’t recall and don’t have a diary note, and

45

a couple of emails, which I've copied for you and – simply to answer the homework that I was given.

5 And are they emails that are not in your statutory declaration?---I'm not sure. I didn't check that.

All right. Well, let's just go through it and see if we can just get this picture clear?---Yep.

10 And if there's any more emails, then we can pick them up at that stage. So if you could just go to bundle page 43?---Yep.

15 And this is an email that – and I should just clarify. The statutory declaration that you swore was true and correct and made in accordance with - - -?---Yes.

Yes. So at bundle page 43, there's an email from you to a number of people on the 20<sup>th</sup> of November at 11.03 am, enclosing a draft trust account authority?---Yes.

20 Now, if you just go over the page to bundle page 44 - - -?---Yes.

- - - you'll see the amount to be distributed to Mio Art in subparagraph (a) at the middle of the page is one cheque in the sum of \$8,467,066.61?---Yes.

25 All right. So that was the position as at Tuesday, the 20<sup>th</sup> of November, at 11.03?---Yes.

30 All right. So we know that things changed after that – so this is where I just want to follow it through with you. On page 49, first thing the next morning at 7.46 - - -?---Yes.

- - - you'll see, in response to your email, you got an email from Ms Perovich attaching an authority signed by Mr Spencer. Now, if you go over to pages 50 and 51, is that the authority that was attached to that email?---I believe so.

35 All right. Well, there's no – I mean - - -?---That's what – when I prepared the declaration - - -

Yeah?---Yeah, I prepared it on that basis.

40 Yeah?---There was another email that I found when I went back to do homework and – that was sent at 11.54 on the 21<sup>st</sup> of November to Mr Rozario - - -

All right. Well, we're just taking one at a time?---Okay, okay, okay.

45 So as at 7.46 am - - -?---Yes.

- - - according to the authority at bundle page 50 - - -?---Yes.

- - - there was still one cheque to be drawn to Mio Art in the sum of 8.45 million plus some interest?---Yes.

5 And you'll see on page 51, that was signed by Mr Spencer?---Yes.

Or on behalf of Mr Spencer. So that was the position as at 7.46 in the morning - - -?---Yes.

10 - - - on the 21<sup>st</sup> of November?---Yep.

Yes. All right. So if we move forward later that day. If you go to bundle page 57?---Yes.

15 At 11.54 there's an email from you to an email address called admin@deltalaw.com.au?---Yes.

r.spencer@spas.net.au and s.perovich@spas.net.au?---Yes. That's the one I was just mentioning, yes.

20 All right. Okay. So it refers to there:

*We need to draw the cheques today but need revised authority.*

25 Now, what was the revised authority because you already had one from - - -?---No, but – look, I don't have a recollection of this. I did speak to Claudia over lunch, but – she helped me to recollect, but I don't have an independent recollection. But - - -

All right. So you can't recall and you don't have any file note of any conversation that you had that would lead to a need to a revised authority?---No.

30 All right. So if you - - -

35 THE CHIEF JUSTICE: Can I just ask you: that email of the 21<sup>st</sup> at 12.38 pm - - -?---Yes.

- - - was about needing an authority if you were to draw cheques in favour of another party than Mio Art Pty Ltd as trustee of the Spencer Family Trust. Was it just simply a question about whether they were described as trustee or – I'm just looking at page 58?---Yes. So this is from Claudia. My understanding is that if there was going to be – that the – the reason for that email was the cheques were to be made payable to other parties, we'd need an authority that said that.

So it wasn't just a description of Mio Art that was at issue?---No.

45 It was somebody else was getting a cheque?---Yes.

Okay?---That's what – that's what I've understood.

All right. Thank you.

MR PEDEN: Well, perhaps I hadn't made the previous email clear. If you go back to bundle page 57, the first paragraph is:

5

*We need to draw the cheques today but we need the revised authority. Please send through urgently today with the split of the total payable.*

THE CHIEF JUSTICE: Okay.

10

WITNESS: "Please - - -"

MR PEDEN: So what was the split that you were referring to there?---I'm not sure. I don't know. I don't know.

15

Well, you know in these proceedings now, don't you, that there was a split?---Yes. Could I - - -

There's nothing in writing. No telephone note?---No.

20

Nothing that record what the split is?---There's an authority.

Yes, that came through, but the authority came through afterwards, didn't it?---Of course.

25

Let's keep it going minute by minute. So at 12.38 - - -?---But to be clear to answer your - - -

Just a minute, Mr Conomos, can you leave me ask the question, please?---Okay, sorry.

30

At 12.38, on bundle page 58, there's a reference there to a conversation that you had with Silvana?---Yes.

35 Are you saying to the court that you have no record of that conversation?---Yes.

All right. Do you have any recollection of what was said?---Only vaguely.

All right. What did you - - -?---And only after speaking to Claudia at lunch time.

40

Well, we don't want to know what - - -?---No.

- - - Claudia says - - -?---No, she helped - - -

45 But - - -?--- - - - to assist.

- - - if you can recall what was said to you and the conversation that you had between yourself and Ms Perovich, and by all means tell the court, please, if you could refrain from leading some other witnesses' versions of events - - -?---Of course.

5 - - - rather than your own?---I understand.

Because you had the conversation, not her?---Of course. That's what the email says. Yes, I understand. Look, I don't have an independent recollection. Because of that, when I went back to my office, I contacted Claudia to find the file, check to see  
10 where it could possibly be, couldn't find an authority, and asked her about this conversation or this email. She didn't have a recollection of much help, but she helped me to recollect that it must have been – but, look, I don't want to speculate.

You're speculating, right?---I'm just speculating, sorry.

15

I understand. All right. So at thirteen - - -?---So sorry, if I was speculating to you, your Honour, but that's my understanding, but it's - - -

So at 1335 – now, you may get, presumably - - -?---One, yep.

20

One-thirty-five?---One-thirty-five, yes.

There's an authority for disbursement to the accounts nominated sent through by Silvana Perovich?---Yes.

25

Yes. And if you go over to page 59 - - -?---Yes.

- - - you see the authority there?---Yes.

30 Now, you see for the first time there's a split?---Yes.

This is the first reference we have to a split, isn't it?---Yes.

But there must have been a discussion that you had with Ms Perovich earlier about a split which led to your email at 11.54?---Not that I can recall.

35

No. Well, and so you can't recall any instructions to you about what the \$1 million to Delta Law was for?---Wouldn't – the answer is no.

40 No?---But there wouldn't have been a need because I – we can only act on written instructions.

Yes. All right. But there was certainly no purpose for that payment was given to you?---Sorry?

45

No purpose was expressed to you by the client for what that \$1 million - - -?---No.

- - - was to be used for?---No, there was none, certainly.

And what about Award Litigation Funding, do you know what that entity is?---No.

5 Right?---I had never seen that name, or I think I heard of it, but I don't really know – know anything about it.

You know now, though, don't you?---Of course. I'm in this – involved in the proceeding so - - -

10

Yes?--- - - - of course I know.

Yes. But at the time - - -?---Even then I still don't know a lot, but I know a bit.

15 All right. And so that led then to the Silvana's email we went through before?---Was that a question, or - - -

Sorry?---Is that a question? Do you want me to answer, or - - -

20 No, no?---Okay.

I'm just putting this in context as we go - - -?---Of course – of course.

- - - onto the next – so you then sent the details to the deposits that were made  
25 - - -?---Yes.

- - - to the various parties?---I did.

30 And we see that as deposits over the ensuing few pages?---Yes.

So, for example, at bundle page 63, you've sent to Ms Perovich the deposit receipts?---Which page was that?

35 Page 63?---Sixty-three. Sixty-three, yes, I've sent that to a number of parties, but, yes, she's the primary person I'm responding to, presumably, the earlier email, yes.

So just clarify this again for me. Ms Perovich is not your client?---No, none of these parties are for the purpose of this. I was the stakeholder.

40 Right. And Ms Perovich is not a party that is – you're required to liaise with under the order of Justice Jackson before making any payments out?---Yes, having looked at the order again, yes, that's the case.

45 And yet you were telling her and providing to her the copies of the disbursements?---She was – she sent me the authority copied to the other people involved and then I responded to that. I think I mentioned that before lunch.



Now, by this time you've stopped using – you see this last few emails – you've stopped using the q.rozario email address, haven't you?---Well, it's not that I stopped using it. All I did was I hit reply on the – so when I look at the email that I got from Ms Perovich, which is on page 58, when I responded to that after we'd made the deposits, I sent to the exact same recipients.

But, you see, earlier on, a few months earlier, you'd been using the q.rozario - - -?---Yes.

10 - - - @deltalaw - - -?---Yes.

- - - email address, hadn't you?---I hadn't picked that up until, I think, yesterday - - -

15 Yeah. And - - -?--- - - - after I read Mr Rozario's affidavit.

And you're aware now that Mr Rozario says that he had – hasn't had, for some nearly 10 years, access to the admin@deltalaw.com.au email [indistinct]?---I – I – I did see that he says that, yes.

20 Yeah. But you weren't aware of that?---Of course not.

No. And what about the deltalaw@deltalaw.com.au email address?---Didn't know anything about – I didn't know anything about what Mr Rozario contends until I read his affidavit.

25 You recall being told, at one stage, not to use that email address?---There's an email – yes, there is – in – in his affidavit, there's an email from some time in 2011, but I don't even recall receiving it. I've tried to look for that email, but I haven't found it.

30 All right. But, in any event, did you consider that you were – when you sent something to admin@deltalaw, did you consider that you were sending it to Mr Rozario?---Yes. admin@deltalaw, deltalaw@deltalaw. Anything @deltalaw, I presumed I was dealing with Mr Rozario. So I think the emails that I got over lunch are already in the – so I hadn't checked, but, sorry, those emails are the ones that are  
35 in the – in the stat dec.

All right. Just one final question. In the other envelope, number 3 - - -?---Yes.

40 - - - is a separate trust account authority in a different format. You - - -?---Yes.

You know that?---Yes. Claudia mentioned that to me over lunch. Which page – which – where do I – where do I find that?

45 I think it's the last page, Mr Conomos?---The last page?

Think it's the - - -?---Oh, it's - - -

The very last page?---Is it this one?

Yes?---Yes, that one. Yes.

5 Now, if you like, you can compare that to the one that's at bundle page 59 to your statutory declaration?---Yes.

10 Do you know why there are two different trust account authorities?---My – my understanding is – is that the second one was put into a form that was more acceptable for the way in which we're required to prepare – we're required to have trust account authorities. So this was the one that was provided by Mio Art, and this one is the one that is in a form that is more appropriately required as part of our trust account obligations.

15 Well, when did you receive the second one, then?---At the same time, not long – on the 21<sup>st</sup> of November. I can't und – I don't know how it was that this one isn't in my stat dec, but my understanding is that this one was the one that was, in fact, relied upon to draw the cheques.

20 Well, I mean, you've looked at this point, haven't you, in preparation for this case?---I have. I've looked at it in – subsequently, when the letter came - - -

And - - -?--- - - - the other day.

25 And what's – and is there any difference between it, substantively?---No, there's no - - -

All right?--- - - - substantive difference.

30 All right?---What the difference is is that this is in a form that is more in line with the types of trust account authorities, in terms of the form of a document, that we, as a firm, use.

35 All right. All right. So, just to be – if I could just ask you to go back to that trust account authority that you've got there you were looking at a moment ago?---This is the one on page 59 or - - -

At bundle page – sorry – fifty – yeah, no, the one that - - -?---Fifty-nine?

40 By which everybody distributed the funds, that's, for example, the one that you sent and received back from the other party. For example [indistinct] bundle page 52?---Yep.

A and 53?---Fifty-two, yep. A, yep.

45 You see, because you got a trust account authority in this format from each of the other parties?---Yes.

And then you got separate individual trust account authority for the sliver between – of the Mio Art amounts?---Yes.

5 All right, so if I could just ask you, then, to go to the back of the bundle at page 89?---Page eighty - - -

MR DOUGLAS: Which bundle is that?

10 WITNESS: The trust account ledger? Yep.

MR BEDEN: And about halfway down, you'll see the first of the Mio Art amounts going out, 5.467 million?---Yes.

15 And it says balance release of settlement fund, is it? SMT funds per clause 3.3 of the deed of – is it settlement?---I don't know what that:

*Clause 3.3 of deed of settlement.*

20 Yep. I see that.

All right, so which deed of settlement is that clause 3.3?---Let's have a look. I haven't got the settlement deed, I don't think. Have I got the settlement deed?

25 Well, the settlement deed was the document that you didn't want to produce under the subpoena, but it was handed up anyway. I'll show you a copy of it, or at least the copy that was given to us?---No, that's – no, that's the Lillas & Loel one. This is the Lillas & Loel settlement deed. There are two settlement deeds. There's a settlement deed with – between all of these parties and Lillas & Loel and Standard Builders, who were a party that claimed an interest over Mio Art, and there's another  
30 settlement deed.

Well, Mr Conomos, that was the settlement deed that was handed to us this morning, I think, from your counsel, having been given to her Honour and then given back to me to look at. That's – so you say there's another settlement deed, is there?---There  
35 are two settlement deeds, yes.

All right. Could we see the other settlement deed, then, that refers to clause 3.3. No, hang on. Your counsel said that 3.3 is an error, is it, or is 3.3 not an error? Is 3.3  
40 correct or not?

MR DOUGLAS: I didn't say it was an error.

45 WITNESS: Well, I haven't got the settlement deed, so I can't tell you, but I do – there are – I should have copies of the settlement deed.

THE CHIEF JUSTICE: This was produced under subpoena, I take it?---Yes.

Okay, so it's in the envelope - - -?---It's in the envelope.

5 - - - that didn't end up being received on the basis that it was being produced, but it turns out perhaps not?---Yeah, I'm happy to – can I leave the witness box and get it, your Honour, or - - -

If it's going to help you, do that, Mr Conomos?---Okay. Thank you.

10 Yes, I said do it. Do it. If it was going to help, go?---Thank you, your Honour. So in this – in this envelope, there are three documents. There's an order and the two settlement deeds that exist. The settlement deed that I'm referring to is one that doesn't include Standard Builders and Lillas & Loel, and clause 3.3 is the clause that identifies the parties who are to receive the money.

15 MR BEDEN: All right. Well, just – would your Honour just bear with me for a moment?

THE CHIEF JUSTICE: Yes. Of course.

20 MR BEDEN: My learned friend has just given me a copy of it. So this settlement deed provides in clause 3.3 to the sum of \$8.45 million to go to Mio Art?---Yes.

25 But clause 3.3 doesn't authorise, does it, the separation of that 8.45 million into three separate amounts, does it?---No.

MR DOUGLAS: Well, I object, your Honour.

MR PEDEN: So - - -

30 MR DOUGLAS: That's a question of proper construction of a deed.

35 THE CHIEF JUSTICE: Well, if it says on its face that it doesn't authorise it, Mr Conomos might be able to give an explanation of how it came to be separated. Notwithstanding what it says on its face, I think it's a reasonable question if that's the question.

MR PEDEN: I'll take it a bit more carefully.

40 Mr Conomos, in front of you, do you still have the trust ledger?---Yes.

Right. Do you see the third item down says "Payment" with description:

*Delta Law Pty Ltd, partial RLS of SNT funds per clause 3.3 of the deed SNT.*

45 ?---Yes.

Yeah. Now, where in clause 3.3 did you understand there to be any authority to distribute \$1,000,000 to Delta Law?---Well, in reference to clause 3.3, if that's the only -- is it -- to answer your question directly, it doesn't provide that. But to answer the question properly, the deed provided that a certain amount was payable to each party, and there was an amount for Mio Art. Subsequently, that amount was invested, and there were more moneys to distribute. And when it came to distribute, the parties agreed that they'd be distributed in accordance with percentages which reflected what was in clause 3.3 and then only with their written authority. And that was the mechanism by which this was done.

5

All right. Thank you?---And what's contained in the trust account -- the typewritten trust account authority which someone in my office prepares is a reflection of what was done, albeit it could be more accurate.

10

Thank you. Your Honour, I should tidy the exhibits up as we go through.

THE CHIEF JUSTICE: Yes, I was wondering when you were going to do that. What are you tendering?

15

MR PEDEN: The statutory declaration is -- I think I should tender it as one bundle as one document. I've only taken Mr Conomos to a number of pages of it, but I think conveniently because it's paginated - - -

THE CHIEF JUSTICE: Yes.

20

MR PEDEN: - - - can I give your Honour a clean copy of the exhibit.

THE CHIEF JUSTICE: Thank you. That'll be exhibit 7.

25

**EXHIBIT #7 ADMITTED AND MARKED**

THE CHIEF JUSTICE: Now, don't assume I'll have regard to anything in it that hasn't been referred to though.

30

MR PEDEN: No, absolutely, your Honour. The second document, I think, immediately follows from that -- from what I asked Mr Conomos -- is the settlement agreement, as he described it, the second one, that is, that doesn't involve the Lillas and Loel company, and that does include the clause 3.3.

35

WITNESS: Which does or doesn't?

MR PEDEN: Which -- it does include the clause 3.3. So just to make sure, there's one version of the settlement deed that doesn't have a clause 3.3. The one that I'm tendering does have a clause 3.3.

40

THE CHIEF JUSTICE: That'll be exhibit 8.

**EXHIBIT #8 ADMITTED AND MARKED**

5

MR DOUGLAS: Can I just see a copy of it? Your Honour, the document which is being tendered does not have an annexure A, which is the text of the consent order in proceedings 1714 of 2011, so I'd ask my friend to tender a complete copy, if he may.

10

MR PEDEN: Well, I can – I've just been handed this copy by my learned friend's junior.

MR DOUGLAS: Give him a complete copy – that - - -

15

MR PEDEN: If Mr Conomos is able to withdraw his objection to the subpoena, or alternatively would rule that the subpoena be returnable in respect of that document then we can tender the document that was to have been produced by Mr Conomos under subpoena.

20

WITNESS: I'm happy – I'm happy - - -

THE CHIEF JUSTICE: We seem to be well past arguments about that, so - - -

25

WITNESS: I think so. The only thing, your Honour, is I'm happy to produce to the court, of course, without any qualification. It's just that it's confidential to the party. So, of course, it can be used, but to the extent that somebody who's not – not here might say - - -

30

THE CHIEF JUSTICE: Well, I can always put it in an envelope marked Not To Be Served Without The Order of a Judge if it's really that delicate. Will that help?--Well, I don't want it to be said that I've done something that's inappropriate in producing – it's – I'm not a - - -

35

Got any problem with that?---I am a party to it, actually, but - - -

MR PEDEN: Well, your Honour, matters are conducted in open court. This is a document that is tendered in these proceedings. It's an exhibit in these proceedings. Unless there's some particular confidentiality other than the parties say "it's confidential", then it should just be tendered as an exhibit in the usual way.

40

THE CHIEF JUSTICE: Mr Douglas, do you have anything to say about it?

MR DOUGLAS: Your Honour, usually – as a matter of public interest – parties which to conduct their – their litigation and when they go to mediation and confidential settlements in a way that matters don't become publically available. All

45

that's really confidential about the settlement – I would have thought – were the amounts.

5 THE CHIEF JUSTICE: Sorry – were the - - -

MR DOUGLAS: Is - - -

THE CHIEF JUSTICE: - - - amounts?

10 MR DOUGLAS: - - - the – are - - -

THE CHIEF JUSTICE: Yes.

15 MR DOUGLAS: - - - the amounts, yeah. But the – I mean, that – that's the whole purpose of making these documents confidential. So - - -

THE CHIEF JUSTICE: Yes.

20 MR DOUGLAS: - - - it does tend to subvert that confidentiality if they can just be produced in open court - - -

THE CHIEF JUSTICE: Yes. But we - - -

25 MR DOUGLAS: - - - and not protected.

THE CHIEF JUSTICE: - - - all know the amounts and they're the subject of pretty extensive evidence already. So - - -

30 MR DOUGLAS: Yeah.

THE CHIEF JUSTICE: - - - is there anything else about it? I haven't - - -

MR DOUGLAS: No, there's - - -

35 THE CHIEF JUSTICE: - - - seen it. So - - -

MR DOUGLAS: - - - nothing else - - -

40 THE CHIEF JUSTICE: - - - I don't know.

MR DOUGLAS: - - - your Honour.

THE CHIEF JUSTICE: All right. Yes. Look, I think - - -

45 WITNESS: That's fine.

THE CHIEF JUSTICE: - - - it'll just go into evidence. Thanks. And that's it.

WITNESS: This is the document.

THE CHIEF JUSTICE: And so that will be part of exhibit 8.

5 WITNESS: Should I hand the stat dec back or - - -

MR PEDEN: Yes, if you - - -

10 THE CHIEF JUSTICE: There's a copy - - -

MR PEDEN: - - - could - - -

THE CHIEF JUSTICE: - - - that's an exhibit already, I think, isn't there? So - - -

15 MR PEDEN: Yes, I think you - - -

THE CHIEF JUSTICE: - - - if that - - -

20 MR PEDEN: - - - can - - -

THE CHIEF JUSTICE: - - - can go back to you, Mr Peden.

MR PEDEN: - - - safely hand that back.

25 THE CHIEF JUSTICE: And I'm losing track. Is that the one out of the envelope that Mr Conomos - - -

MR PEDEN: Yes.

30 WITNESS: Yeah, I - - -

THE CHIEF JUSTICE: - - - produced or is - then - well, he's probably entitled to hang on to it then - - -

35 MR PEDEN: It - I mean - - -

THE CHIEF JUSTICE: - - - if it's served its - - -

40 MR PEDEN: - - - it was produced to the - - -

THE CHIEF JUSTICE: - - - purpose.

45 MR PEDEN: It was produced the court. I think normally these things are held by the court until conclusion of the matters and then - - -

THE CHIEF JUSTICE: Well, it - - -



MR PEDEN: - - - released to the - - -

THE CHIEF JUSTICE: - - - can be. But if it's not going to be an exhibit, does it really matter much?

5

MR PEDEN: It can be returned - - -

THE CHIEF JUSTICE: Yes. I - - -

10 MR PEDEN: - - - to Mr Conomos.

THE CHIEF JUSTICE: - - - think you can hang on to it, Mr Conomos?---Okay.

MR PEDEN: Thank you. Okay. Thank you kindly.

15

WITNESS: I'm happy to – for the court to have that one. But - - -

THE CHIEF JUSTICE: It's just another thing - - -

20 WITNESS: - - - I'll – I'll leave - - -

THE CHIEF JUSTICE: - - - on a file for somebody to - - -

WITNESS: - - - it to you, your - - -

25

THE CHIEF JUSTICE: - - - dispose of eventually. But - - -

WITNESS: Yeah. No problem, your – or whatever's - - -

30 THE CHIEF JUSTICE: - - - if you're all keen for - - -

WITNESS: - - - convenient to the court is fine with me.

35 THE CHIEF JUSTICE: Unless – look, unless there's some forensic advantage to you in it being hung on to, Mr Peden, I just don't see why Mr Conomos wouldn't take his document home.

MR PEDEN: Absolutely. He should take - - -

40 THE CHIEF JUSTICE: Okay.

MR PEDEN: - - - it home.

THE CHIEF JUSTICE: That's where we are then.

45

MR PEDEN: Thank you. And then the final exhibit, your Honour, is of Mr Conomos to the Ba – “We'll see you in the Bahamas” email.

THE CHIEF JUSTICE: So that's exhibit 8. Yes. Okay. Have you given us 8, the thing that's - - -

MR PEDEN: No - - -

5

THE CHIEF JUSTICE: - - - an annexure?

MR PEDEN: - - - it came from my learned friend – I think – just then. That's the version that has the – or – or – actually, it might have come from Mr Conomos - - -

10

WITNESS: It came from me - - -

MR PEDEN: - - - I think - - -

15

WITNESS: - - - your Honour.

MR PEDEN: - - - out of – out of envelope 2.

20

THE CHIEF JUSTICE: Well, what we're looking at is the deed of settlement, but it doesn't have A on it. So - - -

WITNESS: No – I think that's the last – the second – last or second last page, your Honour. It's annexure - - -

25

THE CHIEF JUSTICE: Okay. All - - -

WITNESS: - - - to - - -

30

THE CHIEF JUSTICE: - - - right.

WITNESS: - - - it.

THE CHIEF JUSTICE: Let's have a look.

35

WITNESS: I think it's a reference to some terms in a – is that the right one?

THE CHIEF JUSTICE: Look, I can't see it. Mr Peden, have a look at that. You're supposed to be tendering something with an annexure - - -

40

WITNESS: Let me have a look - - -

MR PEDEN: The only - - -

45

WITNESS: I don't - - -

MR PEDEN: Your Honour - - -

WITNESS: - - - know – should I – can I have a look at them to make - - -

MR PEDEN: - - - I – can I - - -

5 WITNESS: - - - sure we're tendering - - -

MR PEDEN: - - - hand up the version that has annexure A on it?

THE CHIEF JUSTICE: All right. What did you want to do, Mr Conomos?

10

MR PEDEN: And I'm – I'm happy for Mr Conomos to check if that's the one that he's refer – referring to. It has annexure A - - -

WITNESS: Yes.

15

MR PEDEN: - - - on the back of it.

WITNESS: This is not the one that has clause 3.3 in it; it's the other one.

20

THE CHIEF JUSTICE: That's not 3.3?---Yeah – so 3.3 is the one that Mr Peden has, but we had – I think Mr Francis, I'm – without being rude – might be wrong in this instance. There is no – there is no annexure A to the deed that should be handed up by Mr Peden. It has clause 3.3 in it.

25

THE CHIEF JUSTICE: Okay.

MR DOUGLAS: Well, there's probably two deeds [indistinct]

30

MR PEDEN: So the deed that has the – has the clause 3.3 doesn't have an annexure A; is - - -

MR DOUGLAS: Yes.

35

MR PEDEN: - - - that right? All right. In that – in that case, we've gone around in a bit of a circle. But that's the version - - -

THE CHIEF JUSTICE: Mr Douglas, you haven't been a very good influence in all this, I have to tell you.

40

MR DOUGLAS: I think I've not been very unhelpful.

THE CHIEF JUSTICE: Yes.

MR PEDEN: Sorry.

45

THE CHIEF JUSTICE: All right. Well, we've finally - - -

MR PEDEN: The - - -

THE CHIEF JUSTICE: - - - got – and I’ll get it marked before anybody changes their mind, exhibit 8.

5

**EXHIBIT #8 ADMITTED AND MARKED**

10 MR PEDEN: All right. Thank you for that.

WITNESS: It’s probably my fault, your Honour.

15 THE CHIEF JUSTICE: I don’t see why the solicitors should always take the blame, Mr Conomos. It’s a fine instinct, but perhaps, not this time.

MR PEDEN: And, finally, your Honour, page 117 of the bundle is the email that has the reference “see you in the Bahamas”. That needs to be tendered through Mr Conomos.

20

WITNESS: That’s fine. I should say - - -

THE CHIEF JUSTICE: Yes. Thank you.

25 WITNESS: - - - your - - -

THE CHIEF JUSTICE: Yes, got you.

30 MR PEDEN: Under page one-one - - -

WITNESS: I should say, your Honour, I’ve never been to the Bahamas – just to make that clear.

35 THE CHIEF JUSTICE: All right. Now, do you have a spare copy of that or do you want me to - - -

MR PEDEN: Yes, we do.

40 THE CHIEF JUSTICE: Thank you. And that’s exhibit 9.

**EXHIBIT #9 ADMITTED AND MARKED**

45 MR PEDEN: All right. Now, Mr Conomos, I was asking you before about your dealings with Ms Perovich and I – I think you said, originally, you were copying her

into correspondence because you – she was a party to the proceedings?---Yeah, she's been copied in for a long time - - -

5 Yeah?--- - - - because she's a party and because she was a party to the settlement deed, turned up to the mediation - - -

And – and you're unable to help us at all about the – from your own knowledge about the content of the conversation that you had with her on the 21 – 21<sup>st</sup> of November that led to the split of the 8.4 million dollars approximately into the three  
10 different sums?---I think I've already said that. But - - -

Yeah?--- - - - yes – unfortunately, I - - -

15 Could I ask you to go to bundle – page 173, please. It's the bundle of the – it's the trial bundle, your Honour?---One-seven-three – yes.

Now, you'll see this is a – a document that's described as a letter from JML Rose dated the 22<sup>nd</sup> of August 2019. And if I could just ask you to go over to page 175  
20 - - -?---Yes.

- - - and you'll see there on the right-hand side, it says “cc, Jim Conomos”?---Yes.

Did you receive that letter?---Yes.

25 I tender that letter, your Honour.

THE CHIEF JUSTICE: That will be exhibit 10.

30 **EXHIBIT #10 ADMITTED AND MARKED**

MR PEDEN: I wonder – did you read that letter when received it?---Yes.

35 All right. And it's right – isn't it – that you knew when you received that letter Daniel Rose acted for Mio Art?---Yes.

40 Yeah. Now, if I could ask you to go over to page – sorry – paragraph 5 on page 2. If I could just invite you to read that paragraph and I'm going to ask you some questions about it?---Yes.

Now, this was a letter being sent to Mr Cotter, who was the administrator?---Yes.

45 Yeah. Now, in paragraph 5 it refers to some authority that you've been given. What authority had you been given that's referred to in paragraph 5 - - -?---I'd been - - -

- - - you - - -?--- - - - asked to speak to Mr Cotter.

Yeah. Who had asked you to speak to Mr Cotter?---Mr Spencer and Mr – Ms Perovich.

5 All right. You mean, Mr Michael - - -?---Richard – Mr Spencer.

Mr Richard Spencer. All right. And on what basis had you understood Mr Richard Spencer and Ms Perovich to give you authority to speak with Mr Cotter?---On behalf of Mio Art.

10 All right. Well, so you knew then, certainly, by August 2019 that Ms Perovich and Mr Richard Spencer were purporting to act for Mio Art?---They were – the – my understanding is that they're consultants for Mio Art, yes.

15 All right?---I think that – I think Mr – my under - - -

And so what - - -?---Sorry.

20 What did they – what did they authorise you to do?---They authorised me to have without-prejudice discussions with Mr Cotter, which I subsequently did.

All right. And was that authority that was given to you something that you made a diary note of or was it a written authority?---No, it was an oral discussion.

25 All right. But at this stage – 22<sup>nd</sup> of August – who were you acting for?---I was acting for – in this proceeding I was acting for Emperor.

Yeah. All right. Well – so is there a commonality of interest or something between Emperor and Mio Art?---Well, no – I'm not sure I understand the question.

30 Well, you are already acting in the proceedings - - -?---Emperor's - - -

- - - for Emperor - - -?---I am.

35 - - - and now you're being asked by Mio Art's solicitors to represent Mio Art in a telephone conversation with Mr Cotter?---I had some discussions with him, yes.

40 All right. And so what were you authorised to say to Mr Cotter?---To have without prejudice discussions with him to explore a resolution of the claims that relate to this letter which are claims that Mr Cotter, on behalf of Delta Law, was making with Mio Art.

All right. So we just get the framework right at this stage. You're acting for Emperor - - -?---Yes.

45 - - - which is a one-third shareholder in Delta Law?---Yes.

And it's also a creditor for \$1650 in Delta Law?---Yes, by way of assignment, as we  
---

By way of assignment?---Yes.

5

And you know that Mr Richard Spencer and Ms Perovich represent, or give instructions on behalf of Mio Art?---Yes.

10 You know that Mio Art is the subject of a claim for a significant amount of legal fees from Delta Law?---Well, this was a demand made by Mr Cotter - - -

Yes?--- - - - to Mio Art, responded to it by its solicitors, so, yes.

15 All right. And so did you give – were you given any parameters for settlement; is that right?---Yeah, we were – I had written discussions with – I had discussions with Mr Cotter that were on a without prejudice basis. And I think subsequently I sent a without prejudice letter to him which set out what those terms were.

20 All right. Well, were you then, as it were, co-instructed with JML Rose to act for Mio Art? Is that the same thing?---I suppose I – it's just the way you categorise it. I was asked by Mr Spencer and Ms Perovich to speak with Mr Cotter to explore a resolution of the claims that exist by Delta Law with Mio Art.

25 Right. Well, you refer in the first – sorry, there's a reference in the first sentence to separate internal issues that apply as between Delta Law and Mio Art regarding payments. Now, you're being asked to communicate with Mr Cotter about those matters. What were those matters?---I don't know. I don't know what he's talking about. I was asked to speak to Mr Cotter on a without prejudice basis about the demand.

30

Well, here you know what you were supposed to talk about. You received this letter. Did you make any inquiries of anybody about what you were supposed to say?---I was given a copy of the demand that Mr Cotter made dated the 15<sup>th</sup> of August. I was given – this is from memory now – a copy of this letter and an earlier letter. I think 35 there's another letter dated the day before. Yes, the 21<sup>st</sup> of August. And I was asked to talk to him to see if a resolution could be reached about those – the demand and the responses.

40 Well, were you trying on behalf of Mio Art to negotiate down or reduce the sum of money that might be claimable by Delta Law against Mio Art?

MR DOUGLAS: I object.

THE CHIEF JUSTICE: What's the objection?

45

MR DOUGLAS: The objection is it's without prejudice privilege, your Honour. My learned friend is seeking to intrude into the privilege. So far the questions have

been around the subject matter outside the discussions and, secondly, broadly outlining the circumstances in which the discussion occurred, but they have not intruded into the discussion. And those - - -

5 THE CHIEF JUSTICE: Whose privilege are we talking about?

MR DOUGLAS: Sorry, your Honour?

THE CHIEF JUSTICE: Whose privilege are we talking about?

10

MR DOUGLAS: Well, it's – I'm acting here on behalf of Mio Art. Yes, Mio Art's got that privilege, your Honour.

THE CHIEF JUSTICE: But Mr Conomos wasn't acting on behalf of Mio Art.

15

MR DOUGLAS: But I'm entitled to enforce Mio Art's privilege.

THE CHIEF JUSTICE: But what privilege is this? Are we talking about Mio Art being asked by people purporting to represent Mio Art or, I'm not quite sure what that relationship is.

20

MR DOUGLAS: Mr Conomos has been instructed by Mio Art to have without prejudice discussions with Mr Cotter to see if, in fact, some resolution of the issues between - - -

25

THE CHIEF JUSTICE: Was he instructed as a lawyer? I have not really picked that up from this so far.

MR DOUGLAS: I'm not sure that that would be necessary, your Honour, because it's not legal professional privilege. It's without prejudice privilege. It wouldn't matter who it was. It's a negotiation to settle an on-going dispute. It still remains without prejudice. And I'm entitled, as the privilege belongs to the person on whose behalf these negotiations are being carried by – on.

30

35 THE CHIEF JUSTICE: Yes, possibly. What do you say to that, Mr Peden?

MR BEDEN: I can certainly see the force of what my learned friend says, but could I – I think I can explore is to the extent that the – to the extent that Mr Conomos' instructions were to seek to resist the claim, I can certainly put that, if that's what – if that's what he was doing, but, once we go into the detail of it, I accept that the detail of it might be – and the distinction is this: the distinction is whether there's an objective fact, which is the subject of the discussions, or the content of the discussion themselves. Now, the objective fact is what I seek to prove, that is, that Mio Art, through Mr Conomos, on this occasion, was seeking to resist the claim by Mio Art – sorry, by Delta Law against Mio Art, and this is one of the reasons which lead directly to why we say that someone from Mio Art should not be put back in control of Delta Law.

40

45



THE CHIEF JUSTICE: Well, you – there might be limits even to doing that, though, but, Mr Douglas, did you just say you were representing Mio Art?

MR DOUGLAS: No, I'm - - -

5

THE CHIEF JUSTICE: I didn't even think Mio Art - - -

MR DOUGLAS: - - - enforcing their privilege. I'm appearing for Emperor Investments in these proceedings, but my instructions would include – because there is no conflict, I've got a right to claim that privilege – that privilege.

10

THE CHIEF JUSTICE: Okay. It's just the first I've heard of you representing Mio Art as well - - -

MR DOUGLAS: Well, I - - -

15

THE CHIEF JUSTICE: - - - so this case is - - -

MR DOUGLAS: Well, I think I just stood up to – your Honour, but perhaps – perhaps I can just try and clarify what's happening here.

20

THE CHIEF JUSTICE: Yes. Do, because it's all very odd.

MR DOUGLAS: Yes. Mio Art doesn't dispute that, if Delta Law were to provide it with appropriately itemised – appropriately itemised bills of costs, it would have a liability to Delta Law for that. Part of the reason why we're here is because Mr Rozario was not prepared to prepare such bills of costs, and so, until those bills of costs have been prepared, there is not an enforceable claim against Mio Art. We want to get back into, if I could put it that way, Delta Law, so that those bills can be prepared and so that we can then proceed to recover the costs against BMD so that Mio Art can pay Delta Law. That's the whole problem. The problem here is that Mr Rozario just wants to exit Delta Law without doing any of that work, and, effectively, he makes a claim for \$12 million. How it's calculated, we'll go into it a little bit later, but he's essentially saying, "Give me all that money now, or as much of it as you can get, and go hang the rest of you." That's what's happened.

25

30

35

THE CHIEF JUSTICE: All right, well, that was a - - -

MR DOUGLAS: So that's - - -

40

THE CHIEF JUSTICE: A gratuitous set of submissions I got there, but - - -

MR DOUGLAS: Yes.

THE CHIEF JUSTICE: - - - back to you, Mr Beden. The without prejudice privilege claim is made, so you're pretty constrained, then. You don't seem to be resisting it, so - - -

45

MR BEDEN: Well, I can't. If Mr Douglas stands here today and says he appears for Mio Art, it's not even his proceedings, he doesn't represent it, but one of the submissions that we'll be making, your Honour, is that Mio Art and Emperor are - - -

5 MR DOUGLAS: Well, they probably are.

MR BEDEN: - - - one and the same, so it actually suits our purposes if that's what it says.

10 THE CHIEF JUSTICE: All right. Let's just go on.

MR BEDEN: But we'll move on.

15 All right, so you've heard – so the privilege is claimed in respect of the communication. That's why you're not – you can't answer this question; is that right, Mr Conomos?---Well, it's not my privilege, so I'm not sure I can answer, but - - -

20 No. That's right. All right. Thank you?--- - - - Mr Douglas is appearing, so - - -

All right. Thank you. You've become aware, haven't you, in the course of these proceedings, of the affidavit of Mr Cotter?---The long one that came, the 700 page one from yesterday?

25 Yes?---I have. I haven't had – I haven't been through all the exhibits, but, yes, I read the - - -

30 But you've read the six-page handwritten notes of Mr Cotter's conversations with Mr Rozario, among other things?---I read in the disclosure that had been provided by Mr Rozario a series of diary notes that occurred before and after the date of the appointment of Mr Cotter, yes.

Well, you wrote - - -?---Is that what you're talking about?

35 You wrote – you wrote a specific letter about it - - -?---I did.

- - - about those diary notes, didn't you?---I did, yes.

40 Yes, and so - - -?---Yesterday or – recently.

Yeah?---Monday and yesterday.

45 So you'd considered those diary notes?---I considered that, the particular issue that I was writing about.

But you read the six pages of diary notes?---Not in detail. I focused on the part that I was writing about, which was - - -

I see. So you say you didn't read the six pages, but you focused immediately on one part without reading the rest. Is that right?---I haven't read in detail, no, not – but I – as soon as I saw this issue, then I sought instructions and wrote those letters.

5 Well, you saw the issue that was raised in Mr Cotter's notes about Mr Rozario having raised an allegation that Ms Perovich and Mr Spencer were shadow directors of Delta Law. You saw that allegation?---I did see that, but – yes, yes, I did see that, yes.

10 So you know that's a live issue, don't you?---Well, on the pleadings or in the – are we talking in a sense - - -

Well, in the interests of the company, whether the company should be put back in the control of someone against whom there might be a very large claim by Delta  
15 Law?---Are you asking me whether I'm – as a lawyer, a witness? I'm not sure what you're asking me. I'm a witness to provide witness's – I did see the diary note, I did scan it. I saw a particular part that related to some letters, but I'm not the liquidator administrator, but I can answer if you wish, provide some comments or – what is it that you want from me?

20 All right. Thank you. That answer will suffice, thank you. Now, you were asked earlier this year in January for – by Mr Rozario for the information about the distribution from the trust account?---I do recall receiving that and I do recall responding that if I'm right, that he should speak to his client.

25 Okay. And who were his clients?---He should speak to Mio Art. I can't recall precisely what it said, but - - -

30 Okay. Well, let's just make sure that we - - -?--- - - - speak to Richard and Silvana and they'll tell him.

Let's make sure we get this right. If you go to bundle page 141 - - -?---Yes.

35 - - - Mr Rozario wrote the email to you at the bottom left. It appears at the second half of page 141?---Yes.

And your response was that you were concerned by the implication?---Yes.

40 Yes. And that's because Mr Rozario was first expressing, wasn't he, your concern about the payment of this money out of the trust account?---Yes.

Yes. So you didn't go back to him and say, "Mr Rozario, you knew all about this?" did you?---Well, obviously my email says what it says.

45 Because you knew, didn't you, that Mr Rozario hadn't been told about any of these?---How could you say that? All my emails are copied to him.

No, they're not. They're copied to an email address called admin@daltonlaw.com.au?---Which he now says he didn't get access to, but I'm not to know that.

5 Well, why didn't you at the time then, immediately respond and say, "Quintin, that's unusual that you should raise these things, you were a party to this all the time." Why didn't you say that?---Well, I wrote what I wrote because I thought that was appropriate.

10 Well, all you said were you were concerned about the implications?---I was. And that's why I said what I said.

All right. And you knew at this time that Mr Rozario was acting for Mio Art?---At this time he was acting for Mio Art, yes.

15 Yes, yes. And then he wrote back to you, didn't he? And – at bundle page 144?---One-four-four.

20 If you need to check, the bottom of the – page 143 has the email header 24 January 2019, 3.28 pm. And then - - -?--- - - - Which email are we talking about? What page?

If you go to bundle page 143?---One-four-three, yes.

25 And at the bottom of the page there's an email header from Quintin Rozario, 24 January 2019, 3.28 pm, to James Conomos?---Yes.

30 Mr Conomos, I think you'll find it more helpful if you just take the pages as I tell you rather than skipping over to see what might lie behind them. So if you go to page 143 - - -?---I am. I'm looking at what you - - -

- - - at the bottom of page 143 - - -?---Yes.

35 - - - you'll see that email header?---Yes.

Now, go over to page 144 - - -?---Yes.

- - - and you'll see the text of an email from Mr Rozario to you?---Yes.

40 And he requested you, didn't he, that you give him the necessary consents, permissions and approvals to transfer the moneys?---Yes.

45 Now, that would be a reasonable request, wouldn't it, with the solicitor of Mio Art writing to you on the 24<sup>th</sup> of January? You, being the stakeholder from – of these moneys pursuant to a court order and he's asked you for the directions by which the money's been paid out?---Yes. And I responded to his email - - -

Yeah?--- - - - at page 146 and told you what I said previously a few minutes ago.

Yes. So let's go to page 146. Is that the email that you sent?---Yes, that's what I've just - - -

5

Did you provide to Mr Rozario, as the solicitor for Mio Art, the information which he had requested?---No.

Instead, what you said is – you asked him to speak to his client?---Yes.

10

And why would his – why would that – why would you say that - - -

MR DOUGLAS: I object.

15

MR PEDEN: - - - unless you knew something - - -

MR DOUGLAS: I - - -

MR PEDEN: - - - had been told – something to you directly by the client?

20

MR DOUGLAS: I object.

THE CHIEF JUSTICE: What's the objection?

25

MR DOUGLAS: It's a perfectly proper response to say to a solicitor that he should disclose something to someone else which is, in fact, a matter of confidentiality for the client. To say that it was improper of him to do anything other than do that is, with respect, frankly absurd.

30

THE CHIEF JUSTICE: Well, that doesn't make it impermissible, really, of itself, so I'll allow the question.

MR PEDEN: Sorry, do you want me to repeat it for you, Mr Conomos?---Please.

35

All right. So as at this time, you had – you knew that Mr Rozario was acting for Mio Art, yes?---Yes.

You knew that Mio Art was entitled under a trust account authority to receiving moneys?---Mio Art was, yes. Pursuant to the settlement deed, it was entitled to have received moneys and did.

40

And on the 21<sup>st</sup> and 22<sup>nd</sup> of November, you'd had separate emails with Ms Perovich on behalf of Mio Art about the distribution of the moneys, including a new split?---Copied to Mr Rozario, yes.

45

Well, when you say copies to Mr Rozario, it wasn't my question?---Well, you asked me about an email where I had communications without indicating that the emails

that I – that had been exchanged between me and Ms Perovich were also copied to Mr Spencer, Ms Hansen in my office and the address that I understood was for Mr Rozario. So I don't want there to be any misunderstanding between us, Mr – Mr Peden, that I'm doing something other than what I believe was appropriate in dealing with all the people who are required to be dealt with.

5  
THE CHIEF JUSTICE: Mr Conomos, that was a way longer answer that was – than was necessary. You were asked a pretty simple question?---I understand, your Honour, but - - -

10  
And if there's – as you know as a solicitor, if there's something that needs elaborating that's what re-examination's for?---My – my apologies, your Honour.

15  
So when Mr Rozario on behalf of Mio Art asked you for the disbursement authorities, why didn't you provide it to him?---Because at the time, I understood that he'd already been provided with that information as part of the emails which I had previously sent, and I thought the appropriate thing to do was for him to get those things from his client.

20  
But you didn't do that. What you did is you sent him an email and you copied in his clients?---So that – so - - -

Do you say – that's what did though, isn't it?---Yes.

25  
Yeah. And do you say it's a regular practice of a solicitor to – when they write to another firm of solicitors to also copy the other firm of solicitors' clients?---It's not – in this matter it hasn't been uncommon.

30  
Would you say that regular practice, do you?---In this matter, yes.

No, in general practice?---Well, I don't know. In general practice it does happen. Maybe it's unusual, but it has regularly happened in relation to these particular parties, yes.

35  
And that's the very point, isn't it, that Ms Perovich and Mr Spencer are going behind the back of Mr Rozario?---I'm not sure about that. That's what - - -

And you knew that?---I didn't know that.

40  
And that's why you sent this email, because you told Mr Rozario to go back and speak to his – the clients?---That's not - - -

45  
Because you knew you'd been having dealings with them behind his back?---That's not the case at all. I was having no dealings behind his back, as I indicate – anyway, I – I - - -

Is there any other rationale for this email, Mr Conomos?---Well, I think the email speaks for itself. I sent an email to Mr Rozario in response to it, and I copied his clients because I told him that he should talk to those people.

5 Okay. Thank you. Just a moment ago you heard my learned friend talk about the costs statements – sorry, the bills. Do you know when the bills were rendered?---What bills?

The bills that had been rendered by Delta Law to Mio Art.

10

MR DOUGLAS: I object, your Honour. They should be identified.

THE CHIEF JUSTICE: What’s wrong with the question, “Were any – do you know if any bills were rendered by Delta Law to Mio Art”? What do you mean identify?

15

MR DOUGLAS: Your Honour, I didn’t understand the question in that way. If that’s the only question it is, well, then it’s admissible.

THE CHIEF JUSTICE: That’s what I - - -

20

MR DOUGLAS: Do you know if any bills, yes.

THE CHIEF JUSTICE: Is that the question?

25 MR PEDEN: Yes.

Do you know if any bills have been rendered by Delta Law for Mio Art?---I don’t.

30 Do you know that?---I don’t know of any bills – been aware, no. I don’t know any bills being rendered by Delta Law.

Right. So you’ve seen Mr Cotter’s affidavit, though?---Yes.

35 And he refers to invoices running up to about 10 or \$12 million?---Yes. And the reason I don’t know is in the communications that you referred to earlier – the letters from Mr Rose, he refers to the fact that he asked for the bills that Mr Cotter has referred to. I’ve never been aware of them. They’d been asked for. My understanding is that they haven’t been produced by Mr Cotter. I have not got them. But as I haven’t checked every exhibit in Mr Cotter’s affidavit, but I’m unaware of  
40 any bills.

Your Honour, that’s the end of cross-examination of Mr Conomos.

THE CHIEF JUSTICE: Thanks. Mr Eade?

45

MR EADE: No examination, your Honour.

THE CHIEF JUSTICE: Right. Mr Douglas.

MR DOUGLAS: If it please the court.

5

**RE-EXAMINATION BY MR DOUGLAS**

**[3.26 pm]**

10 MR DOUGLAS: Firstly, Mr Conomos, when you came back after lunch you said  
you'd searched your files in relation to a couple of emails. Is there - - -?---I think  
- - -

15 - - - something which you wish to draw to the attention of the court relevant to the  
questions which you've been asked?---I don't think it's necessary now. Mr Peden  
took me to some emails which are those in fact emails, so my apologies.

If it please the court.

20 Now, secondly, there were two agreements in relation to disbursement of these funds  
which were referred to you in cross-examination. Can I just show you an agreement  
dated the 16<sup>th</sup> of August 2018. Do you have a copy of it there?---Yes, I think – is  
this the Lillas & Loel agreement?

25 Yes, it's the one which includes Lillas & Loel?---Yes.

And that has an annexure A to it?---It does.

Does your Honour have a copy of this document?

30 THE CHIEF JUSTICE: I don't think so.

WITNESS: I've got a spare one here, your Honour.

35 MR DOUGLAS: Could that – just give that to her Honour.

THE CHIEF JUSTICE: Thank you.

40 MR DOUGLAS: You'll see that annexure A refers to the text of a consent order in  
proceedings 1714 of 2011?---Yes.

And you'll also see, if you go to clause 2.1 of the agreement, there's a definition of  
that?---Is it 1.2 or 2.1? Which paragraph are you referring to, sorry?

45 I'm referring to clause 2.1 and I'm referring to a text to annexure A?---Yes. Yes,  
that's right.



Now, can you tell the court the circumstances in which that deed of settlement came into existence?---Yes, this deed includes two additional – two different parties to the other deed. They are Standard Builders and Lillas & Loel. Standard Builders had funded Mio Art in 2008 – 07 and 08 – in respect of some litigation against Mango Boulevard. And it claimed that it was owed money in respect of the share of – potential share of an arbitration award that – in effect for 20 million that would be one day recovered. And they claimed an amount of money. And this deed was to settle the claim made by Standard Builders and its lawyers, Lillas & Loel. And it was agreed by all the parties that from the share of Mio Art only – they didn't have a claim over the share of Mr Whitton because the interest was granted after Ms Perovich had gone bankrupt. And so this agreement was reached to compromise the claim over the share owned by Mio Art to the tune of \$550,000 so that the amount that would be received ultimately by the other deed with Mio Art was, reduced, I think, to 8.4 million.

15

Now, could I just direct your attention to clause 2 of the annexure A?---Yes.

Did that deal with the disbursements of the moneys paid into court - - -?---Yes.

20 - - - by Mango Boulevard?---Yes.

And is the statutory declaration which was, I think, exhibit 7, was that a statutory declaration you made for the purposes of the Law Society, in response to an inquiry from them, setting out how, in fact, you had disbursed the money?---Yes.

25

And, to the best of your recollection, does that include all of the instructions and mandates and emails which passed between you and the parties in relation to that matter?---Save for what I've indicated to Mr Peden, yes.

30 All right. Yes, and I think you wanted to clarify something in relation to when you filed the counter claim in 1714 of 2011 on behalf of Mr Whitton?---I think I indicated to the court when I arrived back, I downloaded at lunchtime from the court website the counter claim that was lodged, that I was given permission to lodge by Justice Jackson, or the defence in counter claim, and it was filed on the 7<sup>th</sup> of June. I have a copy if you wish.

35

Your Honour, I tender the agreement dated the 16<sup>th</sup> of August 2018.

40 THE CHIEF JUSTICE: That'll be exhibit 11.

**EXHIBIT #11 ADMITTED AND MARKED**

45 MR DOUGLAS: And I've got those [indistinct] your Honour.

THE CHIEF JUSTICE: Thank you. Just tidying up, Mr Peden. You didn't want to tender any of those emails you were referring to last?

5 MR PEDEN: I think they're already in the bundle. They're already in through Mr Rozario or through other witnesses.

THE CHIEF JUSTICE: They're already round. All right. Thank you. Okay. Now, Mr Conomos can be excused.

10 MR DOUGLAS: Yes, your Honour.

WITNESS: Your Honour, what do I do with these two envelopes that I produced this morning?

15 THE CHIEF JUSTICE: Again, unless anybody has any issue about it, you're welcome to take them away with you?---Thank you. I'll leave these things here, your Honour.

20 Thank you?---Thank you.

**WITNESS EXCUSED** **[3.31 pm]**

25 THE CHIEF JUSTICE: Right. Who's next, Mr Douglas?

MR DOUGLAS: Sit down. Mr Galea.

30 **EDMUND ALBERT GALEA, SWORN** **[3.32 pm]**

**EXAMINATION-IN-CHIEF BY MR DOUGLAS**

35 MR DOUGLAS: Mr Galea, is your full name Edmund Albert Galea?---It is.

What's your address?---65 Matthews Way, Wakerly, Queensland.

40 And have you sworn affidavits in these proceedings which are numbered 5, 6, 12 and 21 in the applicant's list of materials?---I believe so.

Yes. I have no further questions, your Honour.

45 THE CHIEF JUSTICE: Yes, Mr Peden.

**CROSS-EXAMINATION BY MR PEDEN**

**[3.33 pm]**

MR PEDEN: Thank you, your Honour.

5

Mr Galea, are you the sole director and shareholder of Emperor?---Yes, I am.

Your company, Emperor, purchased the debt of a Mr Hopkins, who was a barrister from Sydney?---That's correct.

10

All right. How did you find out about Mr Hopkins being owed \$1650?---Through counsel.

Sorry?---Through counsel.

15

Through council? Which? The Brisbane City Council or the Sydney Council? Which council?---No, legal counsel.

Sorry?---Legal counsel.

20

Okay. Which legal counsel?---That's privileged, isn't it?

MR DOUGLAS: No?---No? LA – Law & Commerce Partners.

25

MR PEDEN: So Law & Commerce Partners is a company. Who was the individual who told you about Mr Hopkins being owed a debt?---Richard Spencer.

So Mr Richard Spencer. Did he tell you how he knew that Richard – sorry, Anthony Hopkins was owed a debt?---No. He didn't.

30

All right, and so talk a little about your relationship with Mr Richard Spencer. Have you known him for long?---About 35, 40 years.

Do you do professional work together?---Yes, we did.

35

Are you friends?---Not really.

All right, so who negotiated the purchase of the debt with Mr Hopkins?---Richard.

40

All right. And did you engage his firm of lawyers, Law and Commerce Partners Pty Ltd, to do that?---I can't remember which firm did it. I've been involved with a few, so I can't remember which one.

Well, did you pay any legal fees for someone to carry out that transaction for you?---I would've.

45

Well, what were the legal fees that you paid to purchase a debt for \$1650?---I'd suggest that they're part of an ongoing arrangement.

5 And what's the ongoing arrangement?---Well, it incorporates Award Litigation and incorporates Emperor, and just – I pay bills as they come. It's not specific.

All right. When you say you pay bills - - -?---Well, the company.

10 Company. So - - -?---Yeah.

- - - Emperor pays bills, does it?---Sometimes it's Award Litigation.

All right. Well, just focusing on Emperor, then. So - - -?---Well, I'm – I'm - - -

15 - - - Emperor's interest - - -?---I'm the sole director of both.

Yes. All right?---Well, I was.

20 Just focusing on Emperor for a moment, though. Emperor has 40 shares in Delta Law?---Yep.

And it has – it's owed a debt of \$1650 by way of assignment?---Yes.

25 Now, as a shareholder of Delta Law, do you have any idea – what's your idea about the worth of Delta Law and, in particular, the worth of your shares in Delta Law?---Well, after Quintin took the money, not much.

Well, when you say “not much”, zero?---No. Depends. It's contingent upon results.

30 All right. Well, you're – are you aware that Mr Clapin would like to sell his 40 shares in Delta Law to Law and Commerce Partners Pty Ltd?---That's his business.

35 Are you aware of that?---I wasn't aware that he was going to sell. I was aware that he had signed them – assigned them – or the voting rights in them.

Well, you – are you aware that – sorry – that Law and Commerce Partners Pty Ltd has entered into an agreement to buy the shares – 40 shares for \$1?---I'm not aware, no.

40 This is the first you've ever head of that?---Correct.

45 All right. Okay. So you've brought two applications in the Supreme Court to protect Emperor's interests as a – of a shareholding in a company that's not worth very much, perhaps nothing, and a \$1650 debt in respect of which you might get a return if there's a return to creditors; is that right?---Is there a question there? Sorry?

Yes, there is. You – I'll set it up again for you. Emperor owns 40 shares in a company that you consider not to be worth very much. In fact - - -?---At the moment. That's correct.

5 In fact, nothing? All right?---At the moment.

At the moment. All right. And it also – you – Emperor also has a debt owed to it of \$1650, which might be paid, depending upon the payment of all other creditors as well. Is that right?---That's correct.

10

So the maximum that you could get out of your ownership of Emperor and Emperor could make is \$1650, as the debt, plus a shareholding in something in the future?---That's the way you see it. It's not the way I see it.

15 All right. What's the way you see it, then?---Well, there's two parts to it. The first part is that Delta Law has been party to a long-going litigation matter that we're getting close – hopefully getting close to reaching finality, and the amount owing could be substantial – or should be substantial. Secondly, as far as the \$1650, that was a strategic move to keep me involved in the VA, which I don't believe should  
20 have happened.

All right. Well, did someone persuade you that that was a – something that Emperor should do?---Are you suggesting someone persuaded me, or it's – it's a - - -

25 Did somebody persuade you that that acquisition of the debt is something that Emperor should do?---I believe it was a good strategic move.

All right. Now, tell me again what your understanding of this asset of Delta Law is that you're talking about that might make it valuable?---One day, hopefully, we'll  
30 come to a settlement with BMD or the parties related to BMD, and there will be an amount that will be given to Delta Law. Quintin, before all this happened, would've received his fair and equitable payment, and there would've been a surplus, and the surplus then is divided amongst the shareholders.

35 Well, but the claim for costs lies with Mio Art, doesn't it, not with Delta Law? Delta Law, well, is just a solicitor?---But they're – yes, that's correct.

Yeah. So down the track - - -?---Yeah.

40 - - - this successful recovery will be a recovery for Mio Art, not for Delta Law; isn't that right?---Well, that's now, but prior to January of this year Delta Law was a party to it.

45 Yeah. But not now. You know that Delta Law's been pushed out of the way, don't you?---Well, my shares started 10 years ago.

Yeah. But the position now is that Delta Law no longer acts for Mio Art?---Yes, that's correct.

5 So Delta Law's not going to be acting for Mio Art in some future claim, is it?---I don't know. I would think not, but I don't know.

10 And so your hope that Delta Law might be worth something would be dependent, would it not, on it recovering its – the money that it is owed by Mio Art?---And/or costs.

But the costs order is in favour of Mio Art. Do you not understand that?---Yes, but isn't there an arrangement – or was there an arrangement, and I believe there was, between Delta and Mio Art.

15 Yeah. But, well, yeah, I can take you to it if you want, but Delta Law was the solicitor for Mio Art?---That's correct.

20 Yeah. So Delta Law would get paid legal fees if Mio Art paid them?---That's correct.

And you know that Mio Art has refused to pay those fees.

MR DOUGLAS: I object, your Honour. That's - - -

25 MR PEDEN: Well, do you know?---Well, my understanding was that Quintin resigned in January without consulting any of his other shareholders, and they didn't have an opportunity to.

30 Would it be fair to say, Mr Galea, that you think that Mr Rozario's conduct needs to be investigated?---Yes.

35 And wouldn't it be best in the interest of Delta Law if that was carried out by someone independent?---When you say someone independent are you talking about an administrator.

Well, someone, for example, independent of Mr Richard Spencer and Ms Perovich?---That's correct. I agree with that.

40 And so the administrator currently is exactly that person, isn't it?---No. Well, I believe he has self-interest in what he's doing.

45 All right. Well, so you don't accept then the administrator is an independent insolvency practitioner who would carry out his duties as an officer of the court; is that what you're saying?---No. I am saying that there is self-interest in him charging fees to make this process longer and unnecessary because I don't believe Delta Law was insolvent at the time of him – of Quintin appointing the – the administrator.

All right. We'll come back to that, but just continuing with this idea of the investigations that Delta Law would have to carry out - - -?---Delta Law would have to carry out?

5 Do you know that Delta Law, at least in the – well, have you read Mr Cotter's affidavit. Do you ever read - - -?---I believe it came yesterday. I haven't seen it.

Did you read the report as to affairs?---In part, yes.

10 Well, it's the company of which you are a one – your company is a one-third shareholder?---Yes.

Did you not bother reading the report as to affairs, Mr Galea?---Yes, I did in part.

15 All right. So when you read it you would've noticed, wouldn't you, that Mr Cotter identified a number of transactions that, in his view as an independent insolvency practitioner, required investigation?---If you believe what he said.

Well, that's what he says, isn't it?---That's what he says, yes.

20

Yeah. And do you agree with that approach or not?---The approach about what, sorry?

25 That there should be some investigation into the affairs of Delta Law to ascertain whether there's been any wrongdoing on the – either on the part of a director or someone else?---I – I do, but it doesn't have to be done by an administrator is what I'm saying.

30 Who are you suggesting would do it then, Mr Galea?---There are plenty of other people out there that you could find that I would believe would be independent, professionally suited and probably less expensive.

Right. What, like Mr Spencer, for example?---No, not him. He's not independent.

35 So who – which are the type of independent or professional you're talking to apart from someone under the insolvency regime?---A Mr Alan Thompson.

Sorry?---A Mr Alan Thompson.

40 Mr Alan Thompson. And who's he?---Mr Alan Thompson, Mr Alan Thompson, that's who he is. He was a former director of Blackwoods. He's agreed to become a director of Delta Law and to conduct the proper due diligence.

45 How long have you known Mr Thompson for?---I have not known – I don't know him.

Have you ever meet him?---No.

Have you ever spoken to him?---No.

So what's the source of your information about Mr Thompson?---His CV is very credible.

5

All right. Who gave you his CV?---I'm not sure, but I'm going to say Richard Spencer – but I'm not sure.

Well, is it right to say that all of your knowledge and information about Delta Law comes from Mr Spencer?---No.

10

Mr Spencer and Ms Perovich?---And Quintin.

Quintin. All right. Have you spoken to Mr Rosario since January?---Since January? I spoke to him today.

15

Outside court, did you?---Yeah.

Did you talk about the wherewithal or prospects of the company Delta Law?---I – no. He's put it in the hands of an administrator. He has no control f it so what's the point.

20

Yes. So you haven't spoken to Mr Rozario for the past 10 months or so – 11 months?---No, that's incorrect, but anyway - - -

25

Well, apart from just outside in court today?---No, I spoke to him in January. That's 10 months ago.

All right. Now, you tried, didn't you, in May, to replace Mr Rozario as a director?---Yes.

30

All right. And you wanted in place of Mr Rozario, to appoint Mr Spencer?---Yes.

What had Mr Spencer told you about the prospective claims that Delta Law might have?---In what regard, sorry?

35

Well, you were replacing Mr Rozario, in your mind, with Mr Spencer as director?---Mmm.

Was there any purpose in that?---Yes.

40

Well, what was the purpose, in your mind?---To run Delta Law more efficiently and effectively.

Yes. But are you saying – did Mr Spencer say that he was going to run Delta Law as a law firm?---No.

45



All right. So in what way did he say to you that he was going to do it more effectively and efficiently?---Swell, for a start we were going to investigate, not him, but through the proper channels, what happened to the million-odd dollars that went missing.

5

That needs investigation, doesn't it, to your mind?---I think it needs replacing. He can put it back.

10 And Mio Art should also pay its debts to you – to Delta Law, shouldn't it?---I don't know what debts there are.

You never turned your mind to that?---I don't believe any bills have been issued.

15 Who told you that?---Richard Spencer.

I see, I see. Have a look at this bundle, please. So have you – take a moment to look through that. And also, have you ever seen these invoices before?---No.

20 So you've never seen them?---No.

All right. Well, I need you – if I ask you to accept that Delta Law had issued invoices to Mio Art, you would have expected Mio Art to pay them?---I would expect Quintin to tell me about them. As a shareholder, we've got significant amounts of money.

25

Do you say Mr Spencer told you that no bills had been issued; is that right?---No, well, I just said was I would have expected Quintin to tell me about them.

30 No, no, a moment ago you said that Mr Spencer told you that no bills had been issued?---That's correct.

35 MR DOUGLAS: No, to that – your Honour, I wish to object to this line of questioning because it's likely to confuse and take up time. The witness can go outside if you wish him to, but we don't dispute that these invoices were issued. The question between the parties is whether there are bills of costs in taxable form. That's the ultimate question. This answer is nothing and it doesn't really assist for my learned friend to ask this witness about these invoices. He can ask Mr Spencer if he likes.

40 THE CHIEF JUSTICE: Well, it's a shareholder who's been given a certain state of information. Look, I'm in the early stages of this trying to discern what all these relationships are and whose doing what with whom. So I'm certainly allowing this cross-examination.

45 MR DOUGLAS: If it please the court.

MR PEDEN: So this is the first time, as you sit in the witness box, Mr Galea, that you've seen any bill of costs issued by Delta Law to Mio Art; is that right?---Correct.

5 Right. So - - -?---There's one - - -

If I were to ask you – if I was to put this proposition to you – I know you've said you haven't read Mr Cotter's affidavit?---The 600-page one?

10 Yes?---No, I haven't.

Well, the affidavit itself is a lot shorter than that?---But I haven't read it.

15 You haven't read the affidavit. If I put to you the proposition that Mr Cotter provided a summary of the invoices as being a total owed by Mio Art to Delta Law in respect of Delta Law's fees of \$4,386,800.88, you wouldn't have any comment on that? You don't know?---As I said, it's the first time I've ever seen it, and it would be fantastic if it was true.

20 Yes. And, similarly, that Mr Cotter formed the view with the administrator that there had been counsel invoices issued which were unpaid in the sum of \$6,428,774.85. Again, that's news to you? You haven't been told about that?---Issued to Delta Law?

25 Yes. By Delta Law to Mio Art that are unpaid?---Again, I haven't – I don't know that.

30 So something in excess of 10 million, \$11 million, according to Mr Cotter, is owed by Mio Art to Delta Law. Did Mr Spencer tell you that?---No, and nor did Mr Rozario. And I would have expected as a director to tell his only two other shareholders, hey, guys, we've got 10 or 12 or whatever million owing. That would have been great news.

35 You see, because the entity that's the debtor, being Mio Art, is Mr Spencer's alter-ego, isn't it, to your knowledge?---It's his family's trust, yes.

Yes. And so if Delta Law gets that money from Mio Art, then Mr Spencer has to cough it up, doesn't he?---I presume that's how it works.

40 Yes. Has he told you that, that one of the reasons for him getting control of Delta Law is to prevent that very thing happening?---He hasn't told me that.

No?---And I wouldn't allow it if that was the case.

45 Yes. So isn't it better that if the company Delta Law be put under – be kept under the control of the administrator than allow the creditors to vote what happens to it?---Again, I don't believe to go into VA, in my opinion, is the right way to go. I'd rather go down another path that I was never consulted with by Quintin. He just

decided to one day – probably to stop us finding out why he took the money. I don't know. But one day he said, without consulting the two other shareholders, boys, we've got 12 million owing and I'm putting it into VA.

5 Yes?---He never said that.

Right. But he's the sole director that you elected?---That's correct.

10 And so you don't doubt that he had power to do that?---Legally he has the power. And legally we were trying to change that power, and that's why the day we were trying to change that power, he was late to the meeting because he was taking the money out of the bank.

15 Well, Mr Galea, I think we've established that, in your view, there should – as a shareholder and in the light of Emperor, you think there should some investigation into Delta Law?---Yes.

20 Yes. Right. Thank you. Now, but you would prefer it to be done by some unidentified professional as opposed to an insolvency practitioner; is that right?---That's correct, yes.

Right. Thank you. Right. Now, tell me about ALF. This is Award Litigation Funding?---Yes.

25 It's another company of which you're a sole shareholder and director?---I'm not a director now, but I was.

You were a director?---Yes.

30 That's right. Until January?---That's right.

35 Yeah. We'll come to that – come back to that. So what was the business of Award Litigation Funding? I mean, you – sorry. You're still the sole shareholder, aren't you?---That's correct.

40 Yeah. So what was the business of Award Litigation Funding?---Going back originally, when Richard and Silvana owned a property at Montague Road, which is now on the West End side of the – the bridge between Lang Park and West End – what's it called? The - - -

The Go Between Bridge?---That one.

Yeah?---They owned a parcel of land on the footprint on Montague Road side.

45 Yes?---The council reclaimed the land, paid them, from memory, about \$6 million, and Richard and Silvana thought that it was un – an unjust amount, and they

approached me to start Award Litigation Funding and find the resources so that they could challenge council for a – a – a greater payment.

5 All right. So when did they approach you to do this?---Two thousand and seven, maybe eight. Well, 2008 ALF was incorporated, so something around there.

About that time. All right. And so what was the source, at that time, of Award Litigation Funding's - - -?---I borrowed - - -

10 - - - funds?---I had people I borrowed from.

Right. So Award Litigation Funding didn't have its own capital, as it were. It had to borrow money from other people?---Yes.

15 All right. So did it borrow them from – borrow money from banks or from - - -?---No, no. From clients – people I knew.

Right. And you have a business, don't you, as a - - -?---I beg your pardon?

20 You have a business, some form of mortgage broking or something, do you?---My wife does, yes.

Yeah. But that's what you work as?---Yes.

25 And you've got an Australian Financial Services Licence?---Yes, I have. ACL.

All right. All right. Now – so that – so you funded the – Mio Art in respect of that parcel of land at Montague Street, West End?---Yeah.

30 All right. And did ALF get repaid the moneys that - - -?---Yes.

- - - it had advanced? Plus profits that it was – that it - - -?---Yeah.

- - - thought it - - -?---Yeah.

35

- - - was entitled to?---Yeah.

All right. All right. And so, at that stage, one – did ALF then repay the moneys that it had borrowed?---Yeah.

40

All right. When did that settlement happen with the Brisbane City Council?---There was two parts to it.

45 Yeah?---There was the first part, and then we went the second – the second time around. In total, ballpark, the original settlement to the estate was 6 million, and we got it up to 22 million. Again in rough numbers, Award finished up with about 2 million, and I then reinvested that money.

When you say reinvested it, reinvested it in litigation funding?---Yeah.

With Mio Art?---Yes.

5 Right. Does Award Litigation Funding fund any other litigation?---No.

Now, at around – when the money was received then, what – was Ms Perovich a bankrupt at that stage?---Yes.

10 Tell me about the acquisition by Award Litigation Funding of the property at 83 Cole Street, Alderley?---There was a house for sale and I bought it.

All right. So Award Litigation Funding – so did you identify that there was a house for sale, did you?---You're going back eight years, so I can't remember.

15

You can't remember?---It's not the first house we owned. We owned several.

All right. When you see we own, you mean Award Litigation Funding owns?---I'm talking about me and my wife and the various companies.

20

All right. Well, do you live in the property at 83 Cole Street, Alderley?---No, I don't.

Who lives there?---Silvana. She rents it.

25

She rents it, does she?---Yeah.

From what Award Litigation Funding?---Yeah.

30 And you've seen Mr Rozario's affidavit in these proceedings, haven't you, the second one?---Which one, the second one?

Yes?---Yeah.

35 Yeah. You've seen that he says that you admitted to him that you had used Award Litigation Funding as a front to buy that property at Cole Street, Alderley to keep it away from Ms Perovich's trustee in bankruptcy. Do you deny that proposition?---It's a total fabrication – total fabrication.

40 Award Litigation Funding did buy the property?---Absolutely.

And you can't remember who sourced it?---When you say sourced, are you talking about sourcing the funds or talking about - - -

45 Who found the property?---I don't know.

All right. You certainly didn't go out and find a property, did you?---I went to the property.

5 No, you didn't go out and find that property. Ms - - -?---Well, I've just told you I don't know. So I'm not saying I did. I'm not saying I didn't. I don't know, but I can certainly tell you I went and looked at it. I negotiated with the person that he split the property in half – and I negotiated with the then developer, and I did the deal.

10 Yeah?---I don't know if it was a real estate agent that told me about it. I don't know if I saw it on the Internet. I don't know how.

All right. But in any event, you say Ms Perovich rents the property from Award Litigation Funding; is that right?---Correct.

15 How much rent does she pay?---It varies, but it's about two-three, two-four plus outgoings.

Two-thousand-three-hundred, you mean?---Yeah.

20 That enough?---Yeah.

I see. All right. Now, is there any funding agreement between you and Mio Art for the provision of funds to it?---To Mio Art, no, the only agreement was that I now get paid a certain percentage of their award or their claim. But as far as me giving them money there's no set figure.

25 All right. Well, from the \$2 million of the Award Litigation Funding made out of the Montague - - -?---Yep.

30 - - - Street, West End property - - -?---Yep.

- - - was all that reinvested back into Mio Art into the Mango Boulevard litigation?---Correct

35 All right. But do you say – was there a written agreement under which that money was put back in or not?---There was a written agreement, yes. Sorry, now I understand the question. Yeah, there was, but it didn't specify an amount.

40 All right. But there's an agreement between Award Litigation Funding and Mango – sorry, Mio Art – that regulates how that money's paid in and how the recovery - - -?---No it doesn't regulate how it's paid in, it just says that Award Litigation will receive a percentage of what Mio Art earns or wins or claims or whatever is paid.

45 All right. So back in November 2018 - - -?---Yes.

- - - Award Litigation Funding received a sum of \$2 million?---If that's when it was, yes. It did receive a sum of \$2 million.

5 Yes. And that's quit separate from the Montague Street, West End property deal though, isn't it?---Yeah. Montague – the Go Between Bridge claim has finished, settled, gone.

10 Yes. All right. So that \$2 million was paid to Award Litigation Funding in November 2018. Was that to repay all litigation funding for moneys lent to it or something else?---In part. There was – there were other moneys, if you can appreciate from whenever that was, 2010 or '11 – I can't remember the dates – in between that there's been several and probably another couple of million that's been given to Mio Art and been repaid.

15 And the money's been paid directly to Mio Art or at the direction of Mio Art, that – what you were just talking about?---Both.

20 Well, apart from paying money directly to Mio Art, who else has Award Litigation Funding paid to prior to the November 2018 distribution?---We paid to solicitors. There were bills that had to be paid to the court, we put money into the court. I can't be specific, sorry.

Well, when you say solicitors, you mean Delta Law?---No, no, other solicitors.

25 Different solicitors altogether?---Yeah.

30 But Delta Law was acting for Mio Art, wasn't it?---Yeah, but there was third party solicitors that had to be paid for a claim of some description or there was a dispute that had to be resolved.

All right. So when did you find out? Turn your mind back to the November 2018 amount of two million coming in. When did you find out that there was a prospect of that money coming in?---The exact date, I don't know, but I'm going to say October, but – could have been September, could have been November, but October I'm guessing.

Who told you?---Who told me? Would have been Richard or Silvana.

40 By email or did they ring you up?---Probably a phone call, I would assume.

Do you commonly communicate with them via email or - - -?---Phone, email, whatever's appropriate.

45 All right. So having the – when they told you that there was two million available, did you – what was your response to that?---I said, good, and when's the rest coming?

Okay. And what was the rest that was then owed?---Well, I don't know because the quantum hasn't been determined yet for BMD.

5 Yes, but how much do you see that Award Litigation Funding is owed?---By whom?

Well, under this funding arrangement that you have with Mio Art?---It's a fairly unique relationship in that we work – we were working as a team. At the end of the day there's no point saying, "You owe me \$20 million, but there's only \$1 million to distribute". So we worked as a team. Myself, how I thought about it, there was the  
10 legal parameters, but then you come down to the commercial reality so there was no specific answer.

All right. But did you ask where the \$2 million was coming from?---No, I didn't. I mean, you mean as in from which bank account or you're talking about why it came  
15 about?

Yes, why it came about?---Yes, I did.

And you knew that it was a result of the award?---The mediation, yeah.  
20

Yes?---Yeah.

But the – it was the result of getting the money back from Mango Boulevard and BMD?---In part, yes. And there was still other things to come.  
25

All right. And when you say still other things to come, because there's legal fees that Mio Art can charge and recover from – that Mio Art can recover from BMD?---That's correct.

30 Yes. All right. And to your knowledge there's no reason why Delta Law needs to be involved in that because Mio Art can just instruct fresh solicitors and go about recovering then, can't it?---Well, as I said a moment ago, it was a team effort. This dispute with BMD goes back 15 years, maybe, 14 years, I'm not quite sure. Quintin, myself, Richard and Silvana had been acting as one for 10 years, maybe 11 years, I  
35 don't know. I don't know what changed in January of this year, but it did change. So up until January of this year I would have expected that Mio Art continue the relationship with Delta Law which would have been great for me as a shareholder because the moneys would have gone in, Quintin would have been paid, there would have been a balance and I get a third of it, but that's gone.  
40

Well - - ?---Not to say it's gone forever, but it's gone for now.

And you've been in court this morning and heard the evidence and you're aware that there's a – that Delta Law might have a large claim against Mio Art for unpaid legal fees?---I've heard that, yes.  
45

So there might still be some returned to Delta Law?---Yes, I would hope.



If it can get ahead and pursue Mio Art?---Being a mercenary I'm sitting on both sides of the fence, which is a lovely position – well, it was a lovely position, I should say.

5 But you know from the evidence this morning, don't you, that Mio Art received about \$5.4 million in November last year?---Yes.

Did they tell you that they were receiving that much money?---Yeah, yeah, it was – that's the figure I was aware of – or not aware of, but was told – indicated.

10 And were you told about the million dollars to Delta Law as well?---Yes. Yes, I knew about that.

Who told you about that?---Silvana.

15 Yes. Did you talk to Quintin about it?---I did – no, no, no, I didn't talk to Quintin about it because as far as I knew it was just sitting there. And in December I went on holidays, I came back middle of January. Quintin rings me up, he says, "Need to speak with you on a private, urgent matter." Yeah. Right. Next day or so I go down and see him. And then he starts telling me that basically, Richard and Silvana have  
20 acted in an inappropriate manner, criminal manner in his mind, and he wants to pull the plug on everything – and he also threatened Award Litigation. So, from that moment on, I was very distraught, upset. We'd worked for 10 years. The finish line's in sight, and for some inexplicable reason he pulls the plug.

25 Well, when you say "inexplicable reason", one reason might be that Mio Art or its [indistinct] Mr Spencer took out \$5.4 million without paying, for example, the creditors, including the barristers?---Well, I - - -

30 Did that – did Mr Spencer tell you that?---I wasn't aware the barristers were asking for money.

You knew they were owed money, though?---As it was discussed in court this morning, to say that they were owed money is true, but to say they were asking for it, I don't believe that was the case.

35 Okay, well, tell me about \$2 million that Award Litigation Funding got in?---Yeah.

40 Right. Now, let's – can I just ask you to have look at this bundle, please. All right. Now – so you have in front of you the document described as trial bundle?---Described as what, sorry?

Trial bundle?---Yep.

45 Yep. All right. Could I ask you to go – open that up, and the pagination appears in the middle of the bottom of the page. If I could ask you to go to page 118. Now, if I could just ask you identify for the court, pages 118 to 123 are pages of bank

statements of Award Litigation Funding that you provided to Mr Rozario  
- - -?---Yep.

- - - earlier this year?---That's correct.

5

All right. Now, the \$2 million that was received appears on page 119 at about  
halfway down the page?---Yep.

All right. Now, you'd been told that was coming in?---Yep.

10

All right. Had you been asked by anybody what you were going to do with that  
money?---Yep.

All right. Who had asked you to do something with the money?---I entered into a  
15 loan arrangement with Francis in the year before, in – year before now, I mean, not –  
in anticipation of, “We're going to win something.” Francis has helped us out. As I  
said, I'm a team player, and I said to Francis that I would loan him \$2 million.

All right, so my question was, who had asked you about what was to be done with  
20 the \$2 million, in advance of it arriving in this account?---Who had asked me - - -

Well, had you had any discussion with anybody, just prior to this \$2 million arriving,  
as to what was – what it was to be used for?---I knew exactly what it was to be used  
for. I'd entered into a loan arrangement with Francis a long time before.

25

All right.

THE CHIEF JUSTICE: That's Mr Douglas, just for the record.

30 WITNESS: Yes. Sorry. I beg your pardon.

MR PEDEN: So – and you say a long time before?---At least months. It could've  
been – it could've – the year 2018 rings true to me, but if you said to me November  
35 2017, I could be wrong.

35

But, as at – up to that date, you hadn't advanced any monies; is that right?---That's  
correct.

Right, so this was the first – so who – did anyone say to you, “\$2 million is going to  
40 come in.”?---Yeah.

40

“This is what I want you to do with it.”?---No.

No. You just decided for yourself?---The decision had already been made. I was  
45 just following through on a contract that – I'm honouring a contract that I'd – an  
agreement that I'd come to.

45

Well, did you have any discussion with Mr Spencer, for example, about that?---About what?

5 About \$2 million being paid to Award Litigation Funding for you to lend to Mr Douglas?---No. It was my decision.

Well, was it your decision to receive \$2 million; is that right?---It was my decision – it's part of the agreement, and Mio Art paid me \$2 million. It was my money. I could've – I could've gone to the Bahamas.

10 Which agreement are you talking about, about receiving \$2 million from Mio Art?---I have an agreement with Mio Art.

You have a separate one?---Yes. I've had one for 10 years or however long.

15 All right, and that's – is that a written agreement?---Yeah. For sure.

And that provides, does it, for you to be provided with \$2 million by Mio Art?---No, it's a percentage.

20 Percentage. Right. So – but I understand – that's what I thought we were before. So you knew that there was money coming in?---Yes.

Pursuant to the agreement with you and Mio Art?---Yes.

25 And what I'm focusing on now is trying to ask you when you then had a discussion with someone about the use to which those moneys would be put?---That was approximately a year or 10 months or eight months earlier. And that's when I made the commitment to lend to Francis \$2 million.

30 Right. I see. So you knew that there was going to be a prospect of the 2 million coming in - - -?---But I didn't - - -

- - - a year or more before?---I didn't know how much.

35 Yes?---But if I got 2 million, that was great. If I got 5, I probably would have given him more.

40 All right. But without going into all the details, you then advanced the money to Mr Douglas over a – by a series of loans?---It's – we've got one loan agreement. And it was a series of payments. The reason why it was a series of payments, Westpac issued me with a token.

45 Right?---I can only do so much without the token. If my token was working, I could have, on the computer, dial a number, the code would have come on my token and I could have done 2 million in one go.

All right. Well, you were able to do 1 million in one go, weren't you?---When?

On the 3<sup>rd</sup> of December?---It would have been – what date was that?

5 Third of December 2018, page 119, second-last item?---BPAY. I think the token was fixed by then.

Right. So that money had been advanced by you. Now, do you know if there's any arrangement in relation to moneys that are owing by Delta Law for Mio Art to Mr  
10 Douglas that tie into your agreement to lend money to Mr Douglas?---The way that I'm going to get paid back is when we – when the big – when it all finishes and there's a big picture.

All right. And so when – under your funding agreement with Mio Art, as and when  
15 more money comes in, then you will be repaid by Mr Douglas at that stage. Is that what you understand it to be?---That's correct.

Right. That really puts a spanner in the works, doesn't it, if Delta Law doesn't cooperate in deferring its claim against Mio Art?---How?  
20

Because if the money's already gone from Mio Art and it should have been paid to Delta Law?---Well, you want me to speculate? Make suppositions? What are you trying to ask me to say?

25 Well, I'm – I withdraw the question, actually, your Honour.

Just bear with me for a minute.

THE CHIEF JUSTICE: While you're doing that, I just want to check if I  
30 understood something. Are you saying you'll get paid by Mr Douglas when money comes it?---That's correct.

And where do you expect the money to come in from?---The settlement of the BMD matter.  
35

Right. Now, just explain to me. You will get a percentage from Mio. Is that the idea, or - - -?---That's correct.

Okay?---But obviously that's after counsel has been paid.  
40

All right. Thank you.

MR PEDEN: Right. So but in terms of Delta Law, that's not necessarily a part of any of this arrangement, is it?---It's not part of what arrangement, sorry?  
45

Well, this arrangement by which you'll get money from Mio Art?---No, Delta Law's not part of that.

No. And so if Delta Law is not, to your mind, necessary to continue in existence outside of any insolvency restructure?---You're missing a very important point. I'll go through it slowly so you might get it.

5 Delta Law is a – to this day, is now probably an 11 year project. It wasn't about getting money quickly, because that was never going to happen. It was always a long-term process. In January of this year, after about 10 years – it might be nine, but I'm saying 10. For some reason, whatever the reason is, the pin was pulled.  
10 Now, I hopefully will still make money out of the Mio Art relationship, but it was a pity, being totally commercial, that I'm not getting the cream on top of the cake. But if that's how it has to be, so be it. So when you say it's critical it's nice, but not critical.

15 THE CHIEF JUSTICE: What is it that you are hoping for from Delta Law? What are the funds you expect to come into Delta Law that you expect, as a shareholder, to benefit from?---Now?

20 Well, if everything went the way Emperor wants on this application what's in it for you?---There's some cost orders that are outstanding, and I believe those cost orders are to Delta. And I might have the numbers wrong, but they're in the millions. They're not in the tens of thousands.

And the cost orders against whom?---Well, BMD.

25 BMD?---Yeah. And that's already done and dusted. We're just now waiting.

All right. Anything arising?

30 MR PEDEN: Just one question arising out of that. Delta Law is just a solicitor though. It would be the client, Mio Art, which is entitled to enforce those cost orders; wouldn't it?---I stand corrected, but I was of the understanding that there was some moneys that were payable to Delta Law.

35 Yeah. By Mio Art?---I'm not sure.

Thank you.

THE CHIEF JUSTICE: Anything, Mr Eade?

40 MR EADE: No questions, your Honour. Thank you.

THE CHIEF JUSTICE: All right. Mr Douglas.

45 MR DOUGLAS: Nothing in re-examination.

THE CHIEF JUSTICE: All right. Thanks, Mr Galea. You can step down?---What do I with – just leave it there.

Now, what do you want to do now? I'm prepared to sit on if you need to?---Thank you. That's yours.

5 **WITNESS EXCUSED**

[4.22 pm]

MR DOUGLAS: It's probably preferable we go on tomorrow; is it not, your Honour?

10

THE CHIEF JUSTICE: All right. I'm just a bit concerned about time. That's all.

MR PEDEN: I'm in your Honour's - - -

15

THE CHIEF JUSTICE: But are you comfortable with the witnesses remaining being done tomorrow? Plus submissions?

MR PEDEN: I'm not, I've got to say. I've got – I've probably got not too long with Mr Clapin, but I've got a bit of time with Mr Spencer.

20

THE CHIEF JUSTICE: And are you cross-examining Mr Peden's witnesses?

MR DOUGLAS: [indistinct] that will take a bit of time. I'll try to be as economical as I can.

25

THE CHIEF JUSTICE: All right. Well, is there somebody else we should get a start on tonight or not?

MR DOUGLAS: Well, there is Mr Clapin. Yeah.

30

THE CHIEF JUSTICE: Yeah. Well - - -

MR DOUGLAS: I don't think he'd be long. I'm not sure.

35

THE CHIEF JUSTICE: All right. Well, let's see if we can get somewhere with Mr Clapin. We'll - - -

MR DOUGLAS: I call Mr Clapin.

40

THE CHIEF JUSTICE: Mr Bailiff, is that a problem for you stay on a bit, or not?

BAILIFF: [indistinct]

THE CHIEF JUSTICE: Okay. We'll be done by then. Yep. Thank you.

45

MR PEDEN: I unfortunately have a matter tomorrow morning, your Honour, at 9 – I think it's 9.15.

THE CHIEF JUSTICE: So no prospect of an early start, or – what time do you think you’ll be finished?

5 MR PEDEN: It’s just a review. I think it’s before Justice Brown. It could be 15, 20 minutes, but I wouldn’t want to - - -

THE CHIEF JUSTICE: I better check what I’m doing on – yes.

10 **PETER ROSS CLAPIN, SWORN** [4.24 pm]

**EXAMINATION-IN-CHIEF BY MR DOUGLAS** [4.24 pm]

15 WITNESS: Thank you.

THE CHIEF JUSTICE: Yes, Mr Douglas.

20 MR DOUGLAS: May it please the court.

Is your full name Peter Ross Clapin?---It is.

25 What’s your address?---I have two addresses.

Give an Australian address?---Well, the current one is 101 Murarrie Road, Murarrie.

30 And have you sworn several affidavits in these proceedings, which are numbered 16, 17, 20, in the applicant’s list of materials?---I have sworn three affidavits in these proceedings.

I have nothing further, your Honour.

35 THE CHIEF JUSTICE: Yes, Mr Peden.

**CROSS-EXAMINATION BY MR PEDEN** [4.25 pm]

40 MR PEDEN: Thank you, your Honour.

Mr Clapin, you have signed a transfer of shares in Delta Law to Law & Commerce Partners Pty Ltd for \$1?---Correct.

45 And yet you haven’t – you’re not yet in a position to complete that transfer, because you’re not the registered owner of the shares?---Correct.

And so part of the relief that you're seeking in proceedings 8866, one of the proceedings before the court, is you want to be registered as a shareholder in Delta Law of 40 shares, which would be a one-third interest, so that you can sell the shares to Law & Commerce Partners Pty Ltd?---That's one of the reasons, yes.

5

Yeah. All right. Well, you'll get – if you're successful in this application and you get to transfer the shares, you'll get a dollar?---Correct.

10 Yeah. So you're going through the process of instructing James Comonos Lawyers and Mr Douglas of Queen's Counsel, Mr Carter of counsel and Mr Webster of counsel for a two-day trial in order to get \$1?---Yes.

15 What are the other reasons for you wanting to do this, Mr Clapin?---Well, it commenced with my decision to assist in deposing the director, who was – the person who was the director of the company at the time, and then, as a result of me voting at the meeting by proxy that removed him as the director, he did certain things that have damaged my reputation amongst a number of people who were my friends, and I want to see it through, now.

20 So it's vengeance?---Not sure if that's the right word, but I was most upset with the way – with his behaviour, which I think was uncalled for.

And when you say the behaviour, you mean Mr Rozario's behaviour?---I do.

25 Yes, and you think that should be investigated?---I do.

30 And you think it should be given the full force of the law against that conduct?---Well, I don't know about that. I'm just prepared to do – to go through with trying to see him removed as a director.

35 All right, so you'd prefer that the force of law and the legal processes not be followed, but something else be done to Mr Rozario. Is that what you'd prefer?---No. I'm a little bit hamstrung, because I currently live in the Philippines. These matters are taking place here, and it's – when you say “the full force of the law”, I – I'm not sure what you mean by that. Do you mean I should be taking some other action?

40 Yeah, do you want me – do you want to go and get some bikie thugs to go and beat up Mr Rozario? Is that your preferred course of action?---No, and that's not the full force of the law, is it?

No, so you would accept that whatever remedies are available to you or to Delta Law have to be done in accordance with law?---Of course.

45 Of course. Right. So who better than an independent insolvency practitioner to be in charge of Delta Law, either as administrator or as liquidator, to give effect to the full force of the law against Mr Rozario's conduct?---Well, for a start, I don't know if



he's independent, and, also, I don't know whether he's interested in applying the law to – to addressing Mr Rozario's conduct.

5 Have you ever met - - -?---And especially as it affected me.

Have you ever met Mr Cotter?---No, I haven't.

And you're prepared to sit in the witness box, are you, and impugn Mr Cotter's reputation; is that right?  
10

MR DOUGLAS: I object. The witness has done nothing of the sort.

THE CHIEF JUSTICE: No, he hasn't quite done that. He's said that he's not aware.  
15

MR PEDEN: He said he's not independent.

THE CHIEF JUSTICE: Sorry?

20 MR PEDEN: He said he's - - -

THE CHIEF JUSTICE: No, he didn't say that. He said, "I don't know – for starters, I don't know - - -

25 MR DOUGLAS: Yeah.

THE CHIEF JUSTICE: - - - if he's independent." Is what he actually said.

MR PEDEN: So you've just got a concern he might not be independent, is that  
30 right?---Correct. That's correct.

And what's the concern based on?---Hearsay.

Hearsay. What someone else has told you that, has he? Has it?---They – someone  
35 else has had a similar concern.

Right. Who's that other person?---Silvana Perovich and Richard Spencer.

Yeah. All right. So Mr Spencer and Mr Perovich have thrown doubt, have they, to  
40 you, upon Mr Cotter's independence?---That's true.

Right. Did they tell you why?---Yes, they did.

All right. And did you say to them that Mr Cotter is an officer of the court?---No, I  
45 didn't.

And you'd be surprised if he was – he wouldn't do his duty according to law?---I didn't argue on his behalf, no.

5 No. Instead, you just harboured this concern without ever having spoken to Mr Cotter. Is that right?---That's correct.

Right. All right. Well, is there any financial incentive available to you by Mr Perovitch or Ms Spencer or any other entity associated with them for you pursuing this course of supporting them to try and prevent Delta Law from remaining under independent insolvency - - -?---No.

- - - practitioner protection? Are you paying the legal fees for your actions?---No.

15 All right. Who's paying those?---I don't know.

Somebody?---I presume so.

But you don't know who's paying them?---No, I don't.

20 But you're not paying anything yourself?---No. I haven't been asked to pay any legal fees.

And it hasn't occurred to you to ask whether this might cost you anything?---No. I – if I was going to be asked to be paid legal fees, I presume I would have been asked by now.

25 Yes. But you haven't been asked to - - -?---No.

- - - pay anything? And you don't expect to be asked to pay anything?---No. that's correct.

30 Now, assuming you get your dollar – and that's the only benefit that you're getting out of this – why do you care who is director of Delta Law?---That's a good question. It probably follows that - - -

35 MR DOUGLAS: Can I object to that question, your Honour? I have trouble with the relevance of it.

40 THE CHIEF JUSTICE: I don't think it's irrelevant. I think it's quite relevant. Why do you care who's the director?---Probably two reasons. When I was contacted to – I was told something about what had happened to some money that had been placed in Delta Law's account. And – which was leading up to a meeting about having to have the director removed. I hadn't had any contact with Delta Law for some eight years, or seven or eight years. But after Delta Law was set up, and I sold my practice, it came to my attention that you client, Mr Rozario, had been paid twice from funds out of my trust account. And when I approached Mr Rozario to put the funds back, he was obnoxious, and he told me to prove it, which was something I didn't expect him

to do. And he refused to take phone calls from me and from the practitioner who bought my practice, and we had to get the Law Society involved before he put the funds back. So when I was told that there was a problem with funds in Delta Law, I just felt morally obliged to help get rid of him as a director.

5

MR PEDEN: But he's gone as a director now?---That's good.

In the sense that – in the sense that the company is under administration, so it's safe from him. And yet the application you're bringing has the effect of putting him back as a director.

10

MR DOUGLAS: I object to that.

THE CHIEF JUSTICE: There might be a bit of an assumption in that.

15

MR DOUGLAS: It's – well, there's - - -

MR PEDEN: Well - - -

MR DOUGLAS: There's an assumption in the question which is wrong. It's hypothetical. There's any number of reasons I object. It's not permissible in those circumstances.

20

THE CHIEF JUSTICE: Mr Peden?

25

MR PEDEN: I'll clarify it.

If you succeed in the applications, you will – the company will come out administration, won't it?---Yes.

30

Yeah. And back under the control of its current director?---Yes.

MR DOUGLAS: Your Honour, can I – just – the reason I wish to object is this. There are two proceedings before your Honour, 66 and 67. Mr Clapin is a party to 66. By that he seeks to be recognised effectively a shareholder so that he can vote as a shareholder in the affairs of Delta Law. That's the first point. So he's not a party to 67, so he's got nothing to do with the proceedings which seek to set aside this administration. So what's being put to him is wrong. The third reason is that the effect of what should happen in any event is not that Mr Rozario would go back as a director, because he's not qualified to be a director because he's not a lawyer any more. Please the court.

35

40

MR PEDEN: Happy to debate with my learned friend, but all of that's just wrong, I'm afraid, because the company, if it comes out of administration, goes back under the control of its director. Now, that's what's going to happen. Now – and it's not a practicing law firm, so the director does not need to be a legal practitioner.

45

THE CHIEF JUSTICE: Okay. Never mind that. What about the fact that Mr Clapin's application is just to be registered as a shareholder?

5 MR PEDEN: Because he's seeking leave of the court to proceed against the company in administration to do that, on the basis that the company, once it gets out of administration – the company – the shares can then be transferred to Law and Commerce Partners, which is Mr Spencer.

10 That's what you understand, isn't it, Mr - - -?---Yes.

Yeah. And so the deal that you've got to sell the share is to try and give control of your shareholding to Mr Spencer?---Yes.

15 Yeah. Right.

THE CHIEF JUSTICE: Yes.

20 MR PEDEN: And with a view then to Mr Spencer being able to get rid of Mr Rozario as a director at some future point?---Mr Spencer can do what he likes once he's got my share.

Yeah?---With – with my share, I mean.

25 Yeah. So – and this is my point. So why does it matter to you?---Because to me, that's seeing it through. It's - - -

Seeing what through? All you're seeing control is giving the control of the company – of your shares to Mr Spencer?---It's seeing through the removal of the director.

30 But it's not seeing through the removal of the director. You see, that – this is why I'm just wondering why you say that, because all you're doing is transferring your shares to Mr Spencer.

35 THE CHIEF JUSTICE: I think, though, Mr Clapin's point is that ultimately the outcome will have that effect. That's his hope. So I think that's clear enough.

MR PEDEN: is that your hope, Mr Clapin?---Yes. I don't want to remain – I don't want to remain a shareholder of Delta Law in the long term.

40 Okay. So you don't want to remain a shareholder?---In the long term, yes.

No. That's right. And so you're getting out as quickly as you can, and you want Mr Spencer to control your – the shareholding - - -?---That's correct.

45 - - - so that – so that they can – to your mind, you want to replace Mr – ultimately, you would prefer to have Mr Blackstone or Mr Alan Thompson act as a

director?---Well, he's been the person that was – that was recommended to me as appropriate, and I've accepted that recommendation, yes.

5 Yes. But you're transferring your shares so that you won't have any say in that, aren't you?---Until the shares are transferred, I would have a say in it.

10 But the company's under administration, you see. This is the – this is just where we're all a bit confused, Mr Clapin?---If the administrator's removed and the shares are transferred to me, then I will have a say.

Yes. Right. Okay. So all of your entire application really is prefaced on the basis that the administration should end first?---Yes.

15 Yes. Wonderful. Thank you. So – and then you'll be able to enable Mr Thompson to become a director. That's what you would like to have happened?---Yes.

Except you've already transferred your shares, so you won't have any say in that?---Well, once I've transferred the shares, that's it. I don't have a say.

20 Yeah. So you swore an affidavit last night saying that you want Mr Thompson to be a director. What interest is it of yours?---That's the person who's being – who I've been told will be an ideal director if Mr Rozario wasn't the director, and I've agreed with it.

25 Who told you that?---In a conference last night with various people.

Who expressed that view? Who was it?---Mr Spencer.

30 Mr Spencer. All right. So have you ever met Mr Thompson?---I'm not sure.

Do you ever recall meeting him?---I think I may have, actually, but I'm not sure if it was him.

35 When did you meet him, to the best of your recollection?---Well, it would have been prior to 2009. Between 2005 and 2009 – I can't be any more precise than that.

40 All right. And in what circumstances? Was it social or workwise or what?---No, workwise. I didn't have a lot to do with cost assessors. That's why I can't – but I think it was Mr Thompson, but I'm not sure.

Well, your practice was where? Was it here in Brisbane?---Mmm.

So would you have engaged a Melbourne cost assessor?---I wouldn't have, no.

45 No. So perhaps we can clarify this that, on reflection, now you can recall – you can say that you haven't ever met Mr Thompson?---I can't say that with 100 per cent certainty, because I know it's not an uncommon name, Alan Thompson, but - - -

You don't know anything of Mr Thompson's quality, if you can't even remember having met him?---No. But we all get referred to people that other people recommend in various walks of life.

5 Yes. And so what matters would you have had in Melbourne where you would use a Melbourne cost assessor at the time?---I can't think of any.

No. So it's purely on Mr Spencer and Ms Perovich's say so, or just Mr Spencer's say so?---I think just Mr Spencer.

10

Right. And apart from what Mr Spencer says, you don't have any personal knowledge otherwise as to whether Mr Thompson would be an appropriate person to investigate the affairs of Delta Law?---No.

15 No further questions, your Honour.

THE CHIEF JUSTICE: Anything, Mr Eade?

MR EADE: No questions of this witness, your Honour.

20

THE CHIEF JUSTICE: Any re-examination?

MR DOUGLAS: Nothing in re-examination.

25 THE CHIEF JUSTICE: All right. Thanks Mr Clapin?---Thank you, your Honour.

You're excused.

30 **WITNESS EXCUSED**

**[4.42 pm]**

THE CHIEF JUSTICE: And I think that might be a convenient place to pull up stumps, do you think? All right. But – all right. Could we count on a 9.30 start or is that cutting it a bit fine for you?

35

MR PEDEN: I'm just not sure, your Honour. I'm happy to do it on the basis that as soon as I've finished before Justice Brown I'll come up here.

40 THE CHIEF JUSTICE: All right. What about - - -

MR DOUGLAS: Well, we could do it in the morning and I can examine Mr Cotter and my learned friend's junior could be [indistinct] if that's one way of doing it.

45 THE CHIEF JUSTICE: How do you feel about that?

MR DOUGLAS: I suppose, yes, that – I mean, we could interpose and use that time.

5 THE CHIEF JUSTICE: That's – look, we'll just leave it on the basis that you'll let my Associate know when you're ready. And are you happy to be on tap and not before, say, 9.30.

MR DOUGLAS: Not before?

10 THE CHIEF JUSTICE: Nine-thirty.

MR DOUGLAS: Yes, your Honour.

15 THE CHIEF JUSTICE: On the premise that we'll just start when Mr Peden's here.

MR DOUGLAS: Yes.

20 THE CHIEF JUSTICE: And if it turns out to be 10, I'm afraid we'll have to put up with it, but it's worth trying to take the opportunity. All right. Thank you. Not before 9.30 then.

**MATTER ADJOURNED at 4.43 pm UNTIL FRIDAY, 15 NOVEMBER 2019**