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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.

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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
30 submissions in 8867.

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 - - -

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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 14th of November 2019; the other one is of Edmund Albert Galea of the 14th of November 2019; the other one is of Richard William Spencer of the 13th 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

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

5

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.

45 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? 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
20 of explanation of duty of disclosure signed by my instructing solicitor this morning.

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.
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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. And 3 are the later affidavits, your Honour.

10

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 3rd 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 proceedings which have been occupying this court’s time for a while. We don’t
40 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.

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.

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.

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?

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 - - -

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 - - -

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.

10

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 - - -

MR DOUGLAS: - - - by Mr Rozario.

35

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 - - -

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.

45

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 25 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 30 my learned friend - - -

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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 40 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?

MR CONOMOS: I am. James Nicholas Conomos.

20 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.

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

30 MR PEDEN: Yes. Thank you, your Honour.

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.

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

5

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 - - -

THE CHIEF JUSTICE: Yes.

10

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

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 - - -

15

MR PEDEN: Well, if - - -

THE CHIEF JUSTICE: - - - deal with it.

20

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.

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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.

30

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

MR WEBSTER: Thank you, your Honour.

35

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

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 12th 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.

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

20

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

15

THE CHIEF JUSTICE: When did you appoint your administrator?

MR PEDEN: On the 30th – sorry – 29th.

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

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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 applicant's case that there are to positively show there are no debts owing to
15 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 insolvent.
20

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" - - -

MR WEBSTER: Yes.

35 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
20 administration and the solvency question. And if I can just, on that, make this point: 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:

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.
45

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 26th 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 to go beyond what's in the evidence. So - - -
20

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

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

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.

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:
30

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 –
35

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 relevant time this year, if I can put it in those terms, there was a practice. Whether it
40
45 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?

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

25

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 in appropriating 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, 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. (*RS is the majority shareholder. He approved the payment and even assisted me in my attempts to purchase a property with it for myself*)

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.

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 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 the winding up proceeding, we would say, which prevented Justice Lyons from being essentially asked to wind up the company on a consent basis.

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.

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 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 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

5 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 - - -

40 MR DOUGLAS: I call Mr Conomos, your Honour.

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, 10th, 11th and 12th 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 10th, 11th and 12th 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 23rd 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, 10th, 11th and 12th 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 23rd 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 14th 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.

20 MR BEDEN: I'll be more particular – more precise, your Honour. So at bundle 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, 10th, 11th and 12th 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 30th 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 11th of July 2017 and 21 July 2017 in these proceedings?---Not to my recollection, but what were they for?

15

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.

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25

30

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.

35

40

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.

10

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 12th 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 12th 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:

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.

10

?---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 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 15 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 of it was owing to Mr Whitton. So these two parties were claiming an interest in the 30 whole of the amount of the award. Does that answer your question?

35

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 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 until quite recently.

45

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 remember the discussion we had. I'm not sure if I took notes. I may have. I may
10 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.

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
20 unhappy, and I was encouraging him to talk to them, and if he wanted I could talk to them.

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.

25 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 21st or 22nd?---Can I hand this back, this one? This is the – the affidavit of Mr Rozario.

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 4th of September – 3rd of 4th of
35 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 3rd or 4th of September by, I think – by direct deposit, and we opened up a separate file then for all the parties and - - -

40 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 4th 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.

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

40

- - - 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, 10th, 11th and 12th 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 22nd 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 22nd 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 22nd 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

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.

35

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.

40

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 –
25 the very bottom there will be a copy of the stat dec. There's a few copies for the judge.

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 20th of November to all parties, including to Delta Law; and then I received on the 21st of November from Ms Perovich an authority signed by one of the parties for whom I was holding the money.

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 21st 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 7th 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 20th 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 20th 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 21st 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 21st 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 - - -

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

35 - - - 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.

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

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.

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

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 - - -

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

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

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

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.

35 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.

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.

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

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 - - -?---Yes.

25

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

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

30

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?

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

45 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 21st 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.

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
35 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 - - -

MR DOUGLAS: Yeah.

30 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 - - -

THE CHIEF JUSTICE: - - - right.

30

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 - - -

WITNESS: I don't - - -

45

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.

MR PEDEN: Under page one-one - - -

30

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.

THE CHIEF JUSTICE: Thank you. And that’s exhibit 9.

40

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 – 21st 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 22nd of August 2019. And if I could just ask you to go over to page
20 175 - - -?---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.

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
40 questions about it?---Yes.

Now, this was a letter being sent to Mr Cotter, who was the administrator?---Yes.

Yeah. Now, in paragraph 5 it refers to some authority that you've been given. What
45 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.

All right?---I think that – I think Mr – my under - - -

15 And so what - - -?---Sorry.

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.

20 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 – 22nd 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.

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 15th 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 21st 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.

45 THE CHIEF JUSTICE: What's the objection?

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.

- - - you'll see that email header?---Yes.

35

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 24th 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 21st and 22nd 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.

THE CHIEF JUSTICE: Mr Conomos, that was a way longer answer that was – than was necessary. You were asked a pretty simply question?---I understand, your Honour, but - - -

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.

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.

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.

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.

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.

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.

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 - - -

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 any bills.

40

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 16th 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 7th of June. I have a copy if you wish.

35

Your Honour, I tender the agreement dated the 16th of August 2018.

THE CHIEF JUSTICE: That'll be exhibit 11.

40

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.

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.

35 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.

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
45 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.

Yeah. So Delta Law would get paid legal fees if Mio Art paid them?---That's correct.

20 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.

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.

35 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 - - -

40 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.

25 Well, when you say solicitors, you mean Delta Law?---No, no, other solicitors. 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.

35 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.

Yes, but how much do you see that Award Litigation Funding is owed?---By whom?

5

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 legal parameters, but then you come down to the commercial reality so there was no specific answer.

10

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 about?

15

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 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.

35

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 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.

15

All right, so my question was, who had asked you about what was to be done with the \$2 million, in advance of it arriving in this account?---Who had asked me - - -

20

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 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.

40 Right, so this was the first – so who – did anyone say to you, “\$2 million is going to come in.”?---Yeah.

“This is what I want you to do with it.”?---No.

45 No. You just decided for yourself?---The decision had already been made. I was just following through on a contract that – I'm honouring a contract that I'd – an agreement that I'd come to.

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 3rd 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?

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
20 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.

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.

30

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?

35

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.

30 MR PEDEN: So you've just got a concern he might not be independent, is that right?---Correct. That's correct.

And what's the concern based on?---Hearsay.

35 Hearsay. What someone else has told you that, has he? Has it?---They – someone else has had a similar concern.

Right. Who's that other person?---Silvana Perovich and Richard Spencer.

40 Yeah. All right. So Mr Spencer and Mr Perovich have thrown doubt, have they, to you, upon Mr Cotter's independence?---That's true.

Right. Did they tell you why?---Yes, they did.

45 All right. And did you say to them that Mr Cotter is an officer of the court?---No, I 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 - - -

20

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.

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.

15 Yes. Right. Okay. So all of your entire application really is prefaced on the basis that the administration should end first?---Yes.

20 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.

25 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.

30 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.

35 Who told you that?---In a conference last night with various people.

Who expressed that view? Who was it?---Mr Spencer.

40 Mr Spencer. All right. So have you ever met Mr Thompson?---I'm not sure.

45 Do you ever recall meeting him?---I think I may have, actually, but I'm not sure if it was him.

50 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.

55 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.

60 Well, your practice was where? Was it here in Brisbane?---Mmm.

65 So would you have engaged a Melbourne cost assessor?---I wouldn't have, no.

70 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.

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?

THE CHIEF JUSTICE: Nine-thirty.

MR DOUGLAS: Yes, your Honour.

THE CHIEF JUSTICE: On the premise that we’ll just start when Mr Peden’s here.

MR DOUGLAS: Yes.

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

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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

and

QUINTIN GEORGE ROZARIO and OTHERS

Applicants

Respondents

No 8867 of 2019

**EMPEROR INVESTMENT GROUP PTY LTD
and
DELTA LAW PTY LTD and ANOTHER**

Applicant

Respondents

BRISBANE

10.05 AM, FRIDAY, 15 NOVEMBER 2019

Continued from 14.11.19

DAY 2

PARTIAL TRANSCRIPT OF PROCEEDINGS

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

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RESUMED

[10.05 am]

THE CHIEF JUSTICE: Yes, Mr Peden.

5

MR PEDEN: Your Honour, there's a preliminary matter which I have to raise with your Honour, and it concerns the position of my learned friend in this trial. As a result of our reconsideration of the transcript last night and the evidence of Mr Galea, whilst we were aware that there were a number of matters in respect of which Mr Douglas QC was the material witness – and I think that was conceded before your Honour yesterday – there is a further aspect which concerns us and which I'm in the process of taking some instructions about, and that is the more direct legal challenge which would result in my client applying for an injunction to restrain Mr Douglas from acting against Mr Rozario, but I'm not in a position yet to get – to finalise those instructions.

10

15

I've raised this with my learned friend. He would like to see the affidavit first from Mr Rozario before he makes a decision about whether or not he'll proceed in this action. So I'm in the difficult position, your Honour, of having to ask your Honour for some time to prepare that affidavit, to give it to Mr Douglas QC, so that he can determine whether or not he would agree to not cross-examining Mr Rozario or whether he intends to press ahead, in which case we'd have to press the application.

20

THE CHIEF JUSTICE: Okay. In the bigger picture, have we got any chance of finishing this today? (*she pays scant attention to the evidence or the merits of the case and appears to be driven by her time constraints*)

25

MR PEDEN: Well, just before your Honour came in, I just considered further – we could press ahead with the cross-examination of Mr Spencer. We can finish that, because that doesn't concern Mr Rozario.

30

THE CHIEF JUSTICE: Yes, but that doesn't really answer my question about can we get through all the witnesses today with this state of affairs having to - - -

35

MR PEDEN: It really depends on my learned friend's position about Mr Rozario, because if he takes the view that he – we want to have the fight about it, then I don't think we'll finish today. If, however, for example, he were to step aside and allow one of his two juniors to do the cross-examination of Mr Rozario, then there is a prospect as far as we could finish today.

40

THE CHIEF JUSTICE: Okay. All right. What's the preference? This obviously has to be sorted out one way or the other. Mr Douglas, would you rather go ahead with Mr Spencer or adjourn to - - -

45

MR DOUGLAS: Your Honour, I think we should go ahead with Mr Spencer. If I'd been told all of this last night, I could have spoken to one of my juniors and without any problem got them to do it, and it's a very embarrassing situation for everyone, but for my learned friend to raise it without actually having given me the affidavit

and told me at least the substance of what's alleged – because I've certainly been approaching this matter on the basis of such confidential information as I have in relation to this case relates to my clients and not to Mr Rozario.

5 THE CHIEF JUSTICE: Okay. All right. But let's not lose time complaining. Let's just get on - - -

MR DOUGLAS: No, I'm not going to complain.

10 THE CHIEF JUSTICE: - - - as fast as we can.

MR DOUGLAS: So, your Honour, I think we should get on with Mr Spencer.

THE CHIEF JUSTICE: All right. Let's do that.

15

MR DOUGLAS: I'll consider the affidavit and advise your Honour of my position.

THE CHIEF JUSTICE: Thank you. So you're calling - - -

20 MR PEDEN: Yes. Obviously, if I'm here with my learned junior and my instructing solicitor proceeding with the trial, then it will be difficult to do the affidavit at the same time.

25 THE CHIEF JUSTICE: Okay. So are you telling me we shouldn't proceed with Mr Spencer? You should have - - -

30 MR PEDEN: No, I think we should proceed with Mr Spencer. We can certainly finish – try and finish that, and if we – if we're – that might mean that we're finished before lunch, then we might, with your Honour's indulgence, take an early lunch break.

THE CHIEF JUSTICE: All right. Look, I'll be guided by you two. I'm just trying to get through this, but – all right. Mr Spencer it is, Mr Douglas.

35 MR PEDEN: And Mr Cotter as well, your Honour.

THE CHIEF JUSTICE: Okay. Mr Cotter as well. Fine. Let's go.

40 MR DOUGLAS: I call Richard Spencer. Your Honour, I just gather from what my learned friend says that he's expecting Mr Cotter, but our view – if he's running this as a trial, then it goes down the line. So he calls his witness before Mr Cotter's called. I mean, yesterday I was prepared to take a different approach, but so far we haven't even had an undertaking from my learned friend that he's actually going to call Mr Rozario. We haven't received material that – a list of material that he
45 intended to rely upon. Your Honour indicated at the beginning of the trial that it would be dealt with as an equity trial, in which we'd read our affidavits and get on with it and then call the witnesses.

THE CHIEF JUSTICE: All right.

MR DOUGLAS: At the moment I'm sitting here wondering, "Is he going to call him?"

5

THE CHIEF JUSTICE: Okay.

MR DOUGLAS: And I'm not going to consent to a course where Mr Cotter's called before Mr Rozario.

10

THE CHIEF JUSTICE: All right. Well, let's get Mr Spencer in anyway.

MR PEDEN: If my learned friend's concerned that I'll make a no case submission, I can assure him that that's not my intention.

15

THE CHIEF JUSTICE: Okay.

MR PEDEN: And - - -

20

THE CHIEF JUSTICE: But you may have to put up with Mr Cotter coming later.

MR PEDEN: Well, it's not – it's really Mr Cotter's convenience and the second respondent, not mine. I – we don't have any view either way, your Honour.

25

RICHARD WILLIAM SPENCER, SWORN

[10.11 am]

EXAMINATION-IN-CHIEF BY MR DOUGLAS

30

THE CHIEF JUSTICE: Mr Douglas, when you're ready.

MR DOUGLAS: Yes, I'm ready.

35

Mr Spencer, could you state your full name, please?---Richard William Spencer.

And your address?---One-ninety-nine Flockton Street, Everton Park, Brisbane.

40

And have you sworn five affidavits in these proceeds, numbered 7, 8, 9, 18 and 19?---Yes.

In the list of material to be relied upon?---Yes.

45

Thanks. If it please the court.

THE CHIEF JUSTICE: Yes, Mr Peden.

CROSS-EXAMINATION BY MR PEDEN

[10.12 am]

MR PEDEN: Thank you, your Honour.

5

Now, Mr Spencer, you're a – admitted as a solicitor of this court?---Yes.

And do you have a current practising certificate?---Yes.

10 And you are a director of Law and Commerce Partners Pty Ltd?---Yes.

Yes. Are you a solicitor/director of that firm?---Yes.

Now, you are not a shareholder in Emperor, are you?---No.

15

Do you have any beneficial interest in Emperor?---No.

Have you or any entity that you're aware of entered into any arrangement with Emperor in relation to the conduct of these proceedings?---Informally, yes. Yes.

20

And what are those arrangements informally?---Those arrangements are that we'll cover Emperor for its costs in the proceedings.

Yes. And similarly for Mr Clapin?---Yes.

25

Covering his costs?---Yes.

And when you say "we", who's "we"?---Mio Art.

30 Are you referring to Mio Art Pty Ltd?---None other.

All right. Now, that's a trustee, is it not?---It is.

35 Does it carry on business in its own right?---I don't think so. It's got a couple of hats. It's – there's another trust, the Eco Monitors Unit Trust, and it – it's basically a salvage outfit that's been working for some years in the Mango Hill litigation.

You're referring to Mio Art there?---Correct.

40 And are you a director of Mio Art?---No.

Who's the director of Mio Art?---Michael John Spencer. He – he is my oldest son.

Okay. But would it be fair to say you control Mio Art?---No.

45

All right. So on what basis do you say “we” - - -?---Well, I’m a consultant to Mio Art. So, too, is Silvana Perovich, and we work with my son Michael in the affairs of Mio Art.

5 I see. Do you liaise with your son Michael in relation to every decision that you make on behalf of Mio Art?---Not every decision, but in principle all decisions, yes.

When you say - - -?---I – I was speaking to him yesterday. I was in Sydney a week ago. I visit him regularly. He comes up here. We have a close interaction. He’s got
10 two children and we’ve been very close for his life - - -

No doubt?--- - - - and – and in these affairs.

No doubt you’ve been very close to your son, there’s no doubt about that. The
15 question, though, for you, Mr Spencer, though, is to what extent does Mr Michael Spencer control the day-to-day affairs of Mio Art and, in particular, I’m asking you this in the context of these proceedings?---Well, he’s – he’s fully informed and he trusts my judgment in many things and I – I keep him informed and he adds the benefit of – of his views and, where necessary, directions and decisions.

20 Well, yesterday, for example, you’re aware that Mio Art made a claim for privilege over some documents, over some information. Did you consult Mr Michael Spencer about that?---No.

25 Why not?---Well, that wasn’t brought to my attention.

Is that – is this the first you heard of it, is it?---Yes.

No one said anything to you overnight about Mr Douglas QC standing up and
30 representing Mio Art yesterday in court?---I’m aware of that, but I’m not aware of these specific points you’re making.

Who told you about Mr Douglas QC standing up and representing Mio Art yesterday
35 in court?---Mr Douglas - - -

So have you - - -?---Ms Perovich and myself, it’s – it’s – it’s something we knew.

So you’ve conferred, have you, with Mr Douglas and Ms Perovich overnight, have
40 you?---Yes.

Yeah. Have you discussed in any way the evidence that was adduced before the
court yesterday?---No.

45 Have you become aware that there’s a trial bundle in this matter?---Well, yes, I’m aware there’s a – there’s a trial bundle.

Have you looked at the trial bundle?---Not recent – not in the last couple of days.
No, I haven't looked at that closely. No. I'm aware of the material generally, yes.

5 Mr Spencer, are you aware that a trial bundle was produced to the court yesterday;
yes or no?

MR DOUGLAS: Your Honour, could I just ask if the witness could be shown what
the cross-examiner is talking about, in fairness to him?

10 MR PEDEN: Might the witness be shown - - -

THE CHIEF JUSTICE: Yes, all right. Although, I think it's a reasonable question
to ask are you aware that a trial bundle was produced to the court, but if it helps.

15 MR PEDEN: Have you ever seen that bundle before, Mr Spencer?---I've seen it in
the process of being compiled. There's many documents I've come across in this
proceed. Normally I'm more closely involved, but with – in this case we've got
solicitors so I'm not as intimately involved, but I'm – I do, I mean, I know all this
material. There's no – there doesn't appear to be any surprises here.

20 No?---Not that I'm – sorry.

Well, my question, Mr Spencer, was this: have you become aware of the existence
of that trial bundle since yesterday?---This particular trial bundle? This is the first
25 I've seen it in this form.

When you say this form, I accept that you wouldn't have seen that very copy of the
trial bundle because that very copy has been sitting on my side of the bar table, but
have you seen a copy of the trial bundle in that format; yes or no?---No.

30 All right. So, now you say that you are – actually, I withdraw that. Sorry, your
Honour.

Your company, Law and Commerce Partners Pty Ltd has agreed to buy Mr Clapin's
35 share in Delta Law; is that right?---Yes.

And the consideration for the purchase of 40 shares in Delta Law is \$1?---Yes.

40 How did you arrive at the figure of \$1 for the purchase price for the 40
shares?---There's no particular construction for that. It was just a nominal value.

So did you – well, explore that a little. Did you have any discussions with Mr Clapin
about the purchase price to be paid?---I don't recall having a discussion with him
about it. It may be as simple as having put it on the form and him agreeing to it. I
45 don't recall specifically, Mr Peden.

Did Mr Clapin approach you to sell his 40 shares?---No. No, I approached him.

All right. So when you approached him, when was that?---I'm not sure. It would have been March/April.

5 And what did you tell him that you wanted to achieve, if anything, by the purchase of his – of the shares in Delta Law?---I wanted to rationalise the company and get it in order because it was dysfunctional. We wanted to change directors so that we could have a functional company that could do bills of cost and collect costs from the BMD group of companies.

10 And so did you offer up the price of \$1 or did he say, "I only want a dollar"? How did that negotiation work?---Well, there wasn't a negotiation. He – he was prepared to come at that.

15 So you offered him a dollar; is that right? And he was prepared to come at that?---Yes.

All right. Well, that would value, Delta Law, then, wouldn't it, at a total of \$3?---Well, I don't know about that. I'm not a – an accountant who does company valuations.

20 Well, if you were prepared to offer \$1 for 40 shares, which is a third interest in the company, on its face, you thought the company might be worth about \$3; is that right?---No, I had a – I had a view that the company could be worth more because it had valuable costs orders that it can collect.

25 When you say "it" you mean Delta Law has valuable costs orders which it could collect; what do you mean by that, Mr Spencer?---It's probably – I withdraw that. I suppose it's – it's really Mio Art that has the – the costs orders, but Delta Law has a – a contingent asset of claiming those costs from Mio Art – claiming its costs from Mio Art.

30 Yes?---Yes.

35 And so there'd be value in Delta Law if it could recover money from Mio Art; is that right?---Yes. Yes. Or if and when, you know, and – and there needed to be a procedure followed to achieve that because we – BMD group of companies were not going to pay those moneys with a wave from afar.

40 Sorry, with a - - -?---Wave from afar. They weren't going to write a cheque to – notwithstanding that we had a costs orders.

But those costs orders were in favour of Mio Art, are they not?---Yes, they are.

45 So what's the relevance of Delta Law in respect of those costs order?---Well, Delta Law carried out certain other work to – under those costs orders, and is entitled to payment from Mio Art at some stage. The arrangement we had was, when they're collected in cash, they would be – they would be paid to – to Delta Law.

Yes?---Yes.

Is that your intention, is it?---Yes.

5 That when moneys are collected from Mio Art - - -?---No, the money's collected from BMD into – into Mio Art and paid to Delta Law.

You accepted a trust, then, of some sort, is there?---I don't understand.

10 Or is this just some contractual arrangement that you're making up as we speak?

MR DOUGLAS: Well, I object, your Honour.

WITNESS: I don't follow the question, Mr Peden.

15

MR PEDEN: Well, you said there's going to be some – there's going to be some payments coming to Mio Art?---Yes.

As a result of enforcing the costs orders in litigation?--- Yes.

20

And what's the arrangement, then, with Delta Law?---Well, Delta Law, once it issues proper bills and – and gets them – gets them through any objection that BMD has, we'll be able to receive those – or, rather, I support it's – sorry, I'm getting confused. It's – Mio Art has to do the bills of costs in taxable form and then Delta Law can charge against those and get paid.

25

But you're getting another firm, are you not, to act for Mio Art in doing that?---Well, the intention was to get Delta Law to do it and we'd prefer to go back to Delta Law because Delta Law is the party that carried out the work, and it's the – it's the receptacle of the earner of legal costs there.

30

But Delta Law, Mr Spencer, has a lot of creditors, doesn't it; do you know that?---Delta Law has a lot of creditors.

35 Yes?---And what – it has creditors and it's got assets and creditors, yes.

We'll come back to this. Anyway, Mr Spencer, you're a consultant of some sort, are you, to Mio Art?---Yes.

40 All right. Please tell the court briefly what the nature of that consultancy is?---It's wide-ranging. It's carrying out all sorts of administrative work and it extends to assisting Delta Law in having done its legal work for – for Mio Art.

All right. Just in terms of the beneficiaries of the Spencer Family Trust, yourself and Ms Perovich, you said?---No. The beneficiaries of the Spencer Family Trust are, essentially, my family members.

45

So, Ms Perovich, what interest does she have in Mio Art?---She – she has an interest as a consultant, having worked for it, but no other direct interest in – in Mio Art.

5 So she’s, effectively, an employee or a consultant, is she?---Yes. Yes, she is.

She has no shareholding?---No.

10 She has no interest in the Spencer Family Trust?---No. No. She may be added as a beneficiary at some stage later on, but we haven’t got to that.

No. But – so does Mio Art pay her a consultancy fee or something, does it?---Yes.

15 What’s that?---It varies. It depends on how much money we get in from time to time because there’s a – a – a – a sharing arrangement between Mio Art, on the one hand, and Delta on the other hand with respect to the legal costs that are earned through Delta Law.

20 And is this sharing arrangement in writing, Mr Spencer?---It’s evidenced by a course of conduct over about 10 years.

I see?---And it’s not in writing.

25 All right. You know there is a formal written retainer by Mio Art of Delta Law, don’t you?---There – there’s – there’s a couple of those around, yes.

Well, can we – I’ll show you, if you like. If I could just hand back to you the trial bundle. If I could just ask you to go to page 3 of the bundle at the bottom. All right. Mr Spencer, just wait a moment before you go through the rest of the bundle. At the beginning of the bundle, you’ll see there’s a page number in the middle of the page at the bottom. After – straight after the index?---I see. We’ve got 138.

30 Yes. So – well, in fact I think your 100 should be 1, it’s just upside down. But if you go to the page 3 - - -?---I see. I get it. Yep.

35 - - - of the bundle – now, so when I refer I refer to a page number of the trial bundle, you now understand that I’ll be referring to the pages in the middle of the bottom of the page?---Yes.

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

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

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

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

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

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

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

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

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

30 All right. Thank you.

MR PEDEN: Well, when you say "the parties to it", you can't speak for Delta Law, can you, as at April 2018?---Well, fair enough. I – I can to the extent that that's how it was discussed with Delta Law. That this is – "This is the ambit claim we'll put up
35 at the mediation. We'll see how it goes."

40 THE CHIEF JUSTICE: Somebody might describe it as just the faults claim. Is that fair?---I – I – I think that's – I think that's a little harsh, because it was – it was a without prejudice mediation and we were saying this is the sort of ambit claim we could make for a salvage lien. Now, it didn't go down that well at the mediation and Justice Finkelstein wasn't that impressed by it, and we ended up entering into a substantial compromise. We weren't able to pursue the salvage lien in its entirety. Now, to what extent it had an influence on the mediation I don't know.

45 MR PEDEN: Well, Mr Spencer, if you'd just turn over to clause 2(a). There's an obligation there on the part of Mio Art to pay Delta's:

...Delta Law's costs and outlays in full within a reasonable time of the successful outcome of each and every claim, such that any moneys recovered by any of the Clients –

5 with a capital C:

from each and every claim –

etcetera. Etcetera. And that's defined as a successful outcome?---Yeah.

10

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

15

Well, when you say "our true arrangement", who are you meaning as being "our"?---Perovich and myself in agreement with – with Mr Rozario.

I see. So are you saying you agreed with Mr Rozario prior to this document being signed that the document was, in fact, going to be a sham and not enforceable; is that right?---It – it was – it was just – it was just put up as a without prejudice indicative ambit claim in a mediation. That's all. Now, whether we're bound – you know, maybe we're bound by it.

20

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

25

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

30

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

35

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

40

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

45

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

MR PEDEN: All right. Your Honour, my learned junior helpfully reminds me the first costs agreement that I just took Mr Spencer to is not yet in evidence. So I tender that first costs agreement dated 20 September 2013, which in the bundle is bundle pages 3 through to 13.

5

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

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

10

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

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

15

MR DOUGLAS: Yeah.

THE CHIEF JUSTICE: All right. Thank you.

20

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

WITNESS LEAVES COURTROOM

[10.36 am]

25

THE CHIEF JUSTICE: And that document will be exhibit 12.

EXHIBIT #12 ADMITTED AND MARKED

30

MR PEDEN: Twelve, I think, your Honour.

THE CHIEF JUSTICE: Yes, that's what I just said.

35

MR PEDEN: Yeah, sorry. Thank you. Sorry.

THE CHIEF JUSTICE: Mr Douglas.

40

MR DOUGLAS: Your Honour, my learned friend is going to make an application, but I'm going to make one of my own, because it directly relates to this deed of agreement of the 11th of 2018. Now, that's become a matter of contention. The evidence in relation to it could only be rebutted by me. I don't think I can remain in my brief because of that cross-examination. If I can say to your Honour that there was a challenge to the enforceability of my fees in this matter by the BMD parties because they were said – because of the uplift to be illegal under the provisions of the New South Wales Act, but not under the Queensland Act. And that is a subject

45

which has been before Justice Rangiah, but my view recollection of that deed is that it was entered into to try and overcome BMD's objections to my earlier fee agreement. So I just can't, whilst I have that knowledge, sit here whilst the witness says that and I'm going to - - -

5

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

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

10

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

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

15

THE CHIEF JUSTICE: Yes, Mr Douglas.

MR DOUGLAS: Could I just have a chat to my juniors for - - -

20

THE CHIEF JUSTICE: Yes. Where is that going to leave your side of things? Mr Webster's suddenly flung into the limelight. Do you want an adjournment for 10 minutes or so? Would that suit?

25

MR DOUGLAS: I think 10 minutes would be useful, your Honour.

THE CHIEF JUSTICE: Yes, thank you.

30

ADJOURNED

[10.38 am]

35

RESUMED

[10.47 am]

THE CHIEF JUSTICE: Yes. Mr Webster.

MR WEBSTER: Your Honour, it's inconvenient, at least, to finish Mr Spencer's cross-examination and I'm comfortable in taking objections as necessary on behalf of the applicant while that occurs. Once that's finished, though, I will need some more time both to confer with my instructing solicitor and take instructions about whether I can be in a position properly for in – for the benefit of my client to cross-examine Mr Cotter and Mr Rozario today.

45

THE CHIEF JUSTICE: What sort of time are you talking about?

MR WEBSTER: Well, I'm still considering that, your Honour, to be frank. It may be that if we took an early lunch I could sufficiently get across the material to do it this afternoon and I would do my best to do that, but I need to consider that further.

5 THE CHIEF JUSTICE: Okay. I guess we'll just have to play all this by ear. All right. Thanks. We'll go back to Mr Spencer who, no doubt, will be surprised to see a smaller bench when he gets back. Look, just a housekeeping matter while we're waiting for him. There's an affidavit of Mr Rozario which is in the material I've got, it's 23rd of May 2019.

10

MR PEDEN: Yes.

THE CHIEF JUSTICE: Whoever copied it has only done every second page, so, and that's true - - -

15

MR WEBSTER: It's probably us.

THE CHIEF JUSTICE: - - - for the attachments too. Could you – somebody fix that for me?

20

MR WEBSTER: Yes. We'll attend to that, your Honour.

THE CHIEF JUSTICE: Thanks. Twenty-third of May. All right. Thank you.

25

RICHARD WILLIAM SPENCER, CONTINUING

[10.49 am]

CROSS-EXAMINATION BY MR PEDEN

30

MR PEDEN: Right. Thanks, Mr. Now, Mr Spencer, you referred a few moments ago to some rights of Delta Law and, forgive me if I'm wrong, but did you mention the word fruits of litigation lien?---No, I did not.

35

But you're aware of what a fruits of litigation lien is?---Yes.

And, in fact, Mio Art has asserted that, you're aware, aren't you, to the existence of a fruits of litigation lien?---Mio Art.

40

Yes?---Mio Art has asserted it you say?

Well, Mio Art's asserted that a fruits of litigation lien exists in respect of Delta Law, though, hasn't it?---I'm not – I'm not sure what you're referring to.

45

All right. Well, you've got the bundle there in front of you. If you just go to bundle page 34, and there's a letterhead: Spencer Family Trust?---Yeah.

That's the same Spencer Family Trust that - - -?---Yeah.

- - - you were referring to before, of which you're the beneficiary?---Yes.

5 And this is a letter dated 3rd of February 2017?---Yes.

You've seen this letter before?---Yes. I – I – I – I'd have to read it again to refresh myself.

10 All right. Well, have you not seen it recently?---No.

No. All right. Well, perhaps, just, if you take a moment, just, to read through it and tell me. I mean, were you the author of it?---Look, I – I can't be sure. I – I'm not sure. I think I would have participated in it.

15

Well, if you go to page 37 of the bundle you'll see it's actually signed by Michael John Spencer?---Yeah.

That's your son, isn't it?---Correct.

20

But all the matters in it are, really, matters that were within your knowledge and your instruction?---Yeah.

25 All right. So – now, this letter was written on the 3rd of February 2017. At this stage the arbitration award had come down, is it?---Yeah. Yes, it had. Yes. Yeah, but then it took considerable time to – to work through the courts to get paid.

Yes, but, certainly from this time, you anticipated that money would be coming through?---Yes.

30

All right. And over on the second page, bundle page 35, you'll see there's a reference about halfway down the page to a heading: The Solicitors and Claimants Link?---Yeah.

35 Now, just read that first paragraph, again, if you could?---Yes.

And so isn't it the position that as at February '17 you were aware that Mio Art was asserting on behalf of Delta Law a solicitor's lien with respect to the award fund in – by way of what's called a fruits of litigation lien?---Yes. Yes.

40

And you understood, I mean, you do understand what a fruits of litigation lien is?---Yeah.

Yeah. And if I could – so I tender that letter, your Honour.

45

THE CHIEF JUSTICE: That'll be exhibit 13.

EXHIBIT #13 ADMITTED AND MARKED

MR PEDEN: And in the proceedings themselves, Mr Spencer, with BMD and Mio
5 Art, you know that the existence of a solicitor's lien by way of both a salvage and a
litigation lien was asserted in response to the counter-claims?---Yeah. I – I
understand they're in the pleadings, yes.

All right. I can take you to it if you want, if you prefer to see where its pled, if you'd
10 like to see that?---No.

All right?---No, that's not necessary.

All right. Now, additionally, apart from the pleadings, submissions were prepared,
15 as you recall, correct, in response to some inquiries that Justice Daubney made about
the nature of the lien?---Yes.

All right. If I could just ask you to go to bundle page 68?---Yeah.

20 And there's a 17-page set of submissions there that runs through to page 84. Are
they – can you identify those as the submissions which were put forward on behalf of
Mio Art as being the response to Justice Daubney's request for further
submissions?---Yes.

25 All right. Now, if I could just ask you to go over to, please, paragraph 22?---Yeah.

Sorry, to paragraph 21. It's on bundle page 77. Take your time, if you could, and
read paragraphs 21 through twenty - - -?---Yeah. No, I've read that. Yes.

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

35 And then there's a reference there to the case of De Groot in paragraph 22?---Yeah.

And you understood that that was the type of lien being asserted by the solicitors,
being Delta Law, through Mio Art in this outline of submissions?---Yes.

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

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

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

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

5

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

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

10

15

THE CHIEF JUSTICE: Could I just ask something? Are you a solicitor yourself, Mr Spencer?---Yes.

20

Okay. Thank you.

MR PEDEN: All right.

25

THE CHIEF JUSTICE: And, sorry, holding a practising certificate or not?---Yes. Yeah.

MR PEDEN: And I think we – this was through the firm – you're a solicitor/director of the firm Law and Commerce Partners Pty Ltd?---Correct, yes.

30

Thank you. All right. Your Honour, I tender those submissions.

THE CHIEF JUSTICE: Yes. That will be exhibit 14.

35

EXHIBIT #14 ADMITTED AND MARKED

MR PEDEN: All right. Would your Honour just bear with me.

40

Now, just in relation to this fruits of litigation lien, this year you have, on behalf of Mio Art, resisted the existence of the fruits of litigation lien; is that right?---Yes.

All right. Can I just – I'll take you to the letter. It's the 4 February 2019 letter. It would be – do you remember that one?---Yeah.

45

Right?---Yeah.

Well, I'll take you to it in the bundle. At page 150. And did you write this letter?---Yes, I did.

5

All right. Now, this letter was written very shortly after you were told by Mr Rozario that he is going to cease acting?---Correct, yeah.

10 Because – I think just to put this in context, if you go back to bundle page 148, you'll see there's a letter from Mr Rozario on behalf of Delta Law listing the number of matters in which he was going to withdraw?---Yes.

15 Right. And you were upset by that prospect, that Delta Law was no longer going to act?---Yeah, there'd been a – it had worked very well. It had worked well for him and for us. It was a successful arrangement and we were able to do this massive amount of litigation at a – at a modest cost.

20 Yeah?---And at – most of the work was done myself and Ms Perovich, and Mr Rozario had a limited role in – in the arrangement.

25 Right. Well, was he just a front, as it were? Was Delta Law just a front for the work that you and Ms Perovich were doing?---Well, it was more complicated than that. He – he always attended court and made a great effort to involve him as much as we could, and it was an intense arrangement. And other commercial work was done as well. And he came to the profession later in life and he wasn't as experienced in – in law, and the idea was that we would – well, myself, in particular, would assist to develop his skills and he would do other commercial work and develop his own clients, which didn't occur to a great extent. However, there were other clients and we did assist him to do that work, and it was a – it was a – a deliberate and careful arrangement. I was never out front, but I worked very hard on the matter and kept – kept contact with – with Quintin closely.

35 Well, the – but, in essence, you and Ms Perovich ran the litigation and used Delta Law as the solicitor on the record, as it were?---Yeah, it was a – it was a – a true joint arrangement between the three of us. And, of course, there was an enormous amount of work done by counsel.

40 No doubt?---It was – it was – it was functional. It wasn't perfect, but it – it operated well and we were careful to try to keep to all ethical requirements, but there were – there were difficulties along the way, in the way Mr Rozario had difficulties with some of the, you know, bookkeeping and trust accounting and so forth.

Were you aware that he kept, for example, a manual trust account?---Yes. Yes.

45 Now, did you keep that or did Ms Perovich keep it?---Well, earl – I – I never kept it. She assisted for some time and I suggested to her and to Quintin that it wasn't working very well because neither of them were particularly well suited to the

intricacies of trust accounting, all the little minor requirements, and I suggested that he instead get a fully trust account proficient bookkeeper. And he went off and did that, but he still had difficulties with it.

5 All right. So this arrangement then worked well, up until Mr Rozario decided that he was going to withdraw; is that right?---Yes, correct. It – yeah. Yeah, well, it – it seemed to get a bit – yeah. Yeah, it – it seemed to get a bit odd prior to that, but, yes, it – it worked well up until then.

10 All right. So on the 4th of February you wrote this letter and you resisted this litigation – fruits of litigation lien?---Yes.

Yeah. And towards the bottom of the page it says the words:

15 *Any further agitation you continue with respect to your claimed lien will be strenuously resisted.*

?---Yes.

20 And that was Mio Art's position then?---Yes.

And this continues to be Mio's po – Mio Art's position now?---Yes. Yes, after the mediation we – I said to Quintin and Silvana, "Well, we won't – thank goodness we won't have to try and enforce this lien", because it was going to be – it was difficult and problematic and it – there was going to be intense scrutiny from our major
25 opponents, the BMD group, and that was already evident in the Federal Court. And everybody was calling for bills of costs in taxable form before anything could be paid, which we ended up doing ourselves. So BMD had actually even filed an application for costs to be assessed. So I was relieved post the mediation – at the
30 conclusion of the mediation that we wouldn't be pursuing the – either the – either of the liens, sort of. It was a Mio Art lien, essentially, with a – with an indicative solicitor's lien underneath that.

Well, when you say, "It was Mio Art's lien essentially," we've just been through all
35 the material, Mr Spencer, where it's very clear that the lien is actually in favour of Delta Law. Do you appreciate the distinction, do you, or not?---Well, I – I think it comes under the – under the salvage lien. Perhaps not separately, but I – I – I do concede that's a subtle point. That is a subtle point.

40 But anyway, from your point of view, Mio Art will be resisting the existence of any lien that might be able to be put forward or promulgated by Delta Law?---Well, unless we have the cooperation of, you know, a functional shareholding within the company, it's – and if we've got divergent views by the shareholders, it's not practical to do so.

45 Well, are you saying – when you say "functional shareholding", are you saying that the shareholders should be determining the future and the fate of Delta Law, as

opposed to the creditors?---Well, yes. Yes, because I don't believe it's – there's – the creditors are managed. It's not a matter for the creditors to determine.

5 And so in your – the way you would see these panning out in your ideal situation would be that you would take control of Delta Law; is that right?---Well, the – the sharehold – the majority shareholders should be heard and they should have control, and the minor shareholders should be heard also and – and its interests accommodated in – in – in entirety, but the minority shareholders shouldn't be running the company.

10

But in terms of the interests of the creditors, though, Mr Spencer, you'd accept that the creditors of Delta Law are – have to be paid?---Are you – you talking about the creditors of Delta Law?

15 I am talking about the creditors of Delta Law?---Delta Law, yes. Yes.

They have to be paid, don't they?---Yes.

20 Yeah. And the only way they're going to be paid is if they get money in, isn't that right?---Well, that's the very point. That's the very point. And we wanted to take control in order to prepare the bills of costs in taxable form and pursue the costs orders against BMD.

25 But you see, Mr Spencer, there's two sets of costs here, aren't there? Did you appreciate the dist – the fact that there are two sets of costs?---Yes. Yes.

There's the costs that Delta Law is entitled to claim against Mio Art under - - -?---Yeah.

30 - - - the costs agreements?---No, not under the costs agreements. The arrangement we had is that once cash is collected against the – the – against BMD, it's then divvied up.

35 Well, why was the money not divvied up back in November 2018 so that Delta Law could be – could pay its creditors?---Well, it was given money in excess. It was given \$1 million at that point.

You knew that Delta Law had engaged counsel?---Yes, but the arrangement was - - -

40 And - - -?--- - - - that they were paid by – direct by Mio Art.

45 But you knew that Delta Law had engaged - - -?---And so like a – it was almost like a direct brief, but it was done for convenience through the law firm. The law firm had the – received the fee notes.

Mr Spencer, I'm sorry, are you saying that you don't accept that the law firm engaged the solicitors to act for it – the barristers to act for it?---They did.

Yeah?---But the arrangement was that the – the barristers' fees were, by and large, paid by Mio Art.

5 Mr Spencer - - -?---And there's a – there is a course of conduct where that occurred. That is the fact. That's what happened.

10 Sorry, Mr Spencer, are you saying that – by virtue of this course of conduct you're talking about, you're saying that therefore the legal obligations ought to be ignored; is that right?---No.

15 Well, you accept, then, that Delta Law has an obligation to pay for the counsel – the barristers that it retained?---Only if they were wanting it at a particular point of time, and they were not – they didn't have their hands out in that way. It was being managed by Mio Art.

Mr Spencer, you're aware that Mr Keane of counsel has been asking for his money?---Quite so.

20 Yeah. And Mio Art – and Delta Law hasn't - - -?---And he's – he – he – he is – he's happy to take that from Mio Art. He's happy to make an arrangement with Mio Art, which he has done.

Mr Spencer, that's a complete lie, isn't it?---It is – it is not a complete lie.

25 Mr – all right. Well, we'll go to the document. But you know Mr Keane's been pressing Delta Law for payment; you know that?---Well - - -

30 Do you know that or not?---He – he – he did go that way at a particular time because he was unhappy with Mr Rozario's conduct, but he, at – at the same time, and since, is happy to have an arrangement with - - -

35 MR WEBSTER: Your Honour, I just object. The answer now is getting to a hearsay about Mr Keane's state of mind. If it's just limited to what Mr Spencer knows himself, no objection, but I detected that the answer was starting to purport to give evidence about what Mr Keane was thinking about things, and that seemed to stray beyond the bounds of relevance, in my respectful submission.

40 THE CHIEF JUSTICE: Well, I'm prepared to receive the answer on the basis that it's what Mr Spencer professes to understand to be the case. I wasn't for a moment going to accept it as evidence of what Mr Keane said.

MR WEBSTER: Thank you.

45 THE CHIEF JUSTICE: There is no risk of that.

MR PEDEN: Thank you, your Honour.

So, Mr Spencer, if you just go over to bundle page 137?---Yes.

Were you aware that Mr Keane was pressing for the payment of his amounts due of a bit over \$520,000?---Yes, he was at one point.

5

Yeah. Well, at this point?---No, I don't believe he is at this point, no.

No, I mean at the point of this email in January of this year?---I guess so.

10 Yeah. And, Mr Spencer, you're unable to point to any document from Mr Keane, are you, whereby he says that he's not owed the money by Delta Law, are you?---I think there may be a document where he's accepting an arrangement with Mio Art and - - -

I call for that - - -?--- - - - that's been the course of conduct, too [indistinct]

15

I call for that document.

THE CHIEF JUSTICE: Mr Webster?

20 MR WEBSTER: We'll make inquiries, your Honour.

THE CHIEF JUSTICE: Thank you.

25 MR PEDEN: Mr Spencer, where could that document be located, for the assistance of your instructing solicitors?---Well, there's been exchange of emails. There's been - that's the case, I think, with Mr Douglas and Mr - - -

I'm not asking you about Mr Douglas. I'm asking - - -?--- - - - and Mr - - -

30 - - - about Mr Keane, and I'm asking you the question - to identify for your inst - for Mr Conomos to be able to find the document that you've just referred to?---Yeah. Well, I'm not sure and I know that he's not made claim against Delta Law in the voluntary administration. He's not a - - -

35 No, no, no. No, no, no, Mr Spencer - - -?---He's not a - a creditor and that - that is an element of his position that that - that is emblematic of his position.

40 So are you now saying there is no document from Mr Keane by way he says that he's not pressing for payment, but rather your consideration that his silence is emblematic; is that right?---He's - he's paid various utterances to say that he's happy to run with - run with Mio Art on it, as far as I understand.

45 Mr Spencer, you're on oath. What utterances had Mr Keane made to your knowledge?---Well, look, I don't think I can take it further, because I'd be - it would be hearsay once again, but I do know - my understanding is that he's happy not to be pressing Delta Law now and he'll go along, as he's gone along for 10 years, with his

accounts being paid by Mio Art, and that he will forebear from time to time and be paid from time to time. That's my understanding.

5 So I know you keep - - -?---Now, I can't point to a particular document - - -
- - - you keep referring to understanding?--- - - - and I can't take it further than that.

10 So are you saying there is a document or there isn't a document from Mr Keane?---I'm un - I'm unsure.

So when you gave evidence a few moments ago about there being a document, that was a lie; is that correct?---No.

15 But you're now unsure about whether there's a document?---Yes.

So is there a document or not?---I'm unsure.

20 So when you gave evidence a few moments ago that there was a document, what was the basis for you to say that?---Well, I've already answered that.

No, you haven't. What was the basis for you to say that there was a document from Mr Keane?---Well, there are - there are documents from the barristers and I - I know there are from Mr Douglas and Mr Colditz. I'm not sure about Mr Keane, then. You may know more about it than me.

25 Now, Mr Hopkins was also owed money, wasn't he?---Yes.

30 And was the debt to him in a different category, that is, it wasn't really payable to Mr Hopkins in your view?---I don't quite understand your - the question?

35 Well, was the debt payable to Mr Hopkins in the same way that you've just referred to the barristers a moment ago?---Well, it was a smaller debt and he - it was a separate matter. It wasn't a Mango Hill matter. The Mango Hill litigation was a special category. There's a team of - we had a functional team that's been together for eight or 10 years. So they're a special category. Mr Hopkin was - was a barrister who was paid money for his fee notes and I think one - one further one was outstanding, as happens from time to time.

40 Mr Colditz hasn't released Delta Law, has he, Mr Spencer?---No, that's true.

No. You've assumed the liability to pay that?---Yes.

45 So Mr Colditz, to your knowledge, hasn't - is still a debtor - sorry, a creditor of Delta Law?---He may be, yes.

Yeah?---Yes. Yes.

As is Mr Keane?---Well, I – I think that they're – they – they may have more than one – one shot in the – in the bow.

5 Now, Mr Douglas is also a creditor of Delta Law; you'd accept that?---I'm not sure about that. I think he's quite happy to work with Mio Art and – and with Award Litigation Funding.

10 Right. Well, you've put forward to him an offer, haven't you, to accept payment on behalf of – and I'll take you to the moment. Just bear with me. If I can just ask you to go to page 166 of the bundle. This is the offer at page 166 that you put forward to – you've agreed to be personally liable for the payment of the legal fees?---Yeah. Yeah.

15 Yeah. To Mr Douglas?---Yes.

Right. And does that include Mio Art also being liable?---Well, I think we're – the – the idea would be that we'd be indemnified by Mio Art in that situation, I think. It's a bit of a – the email is a little vague. It's by another solicitor, James Lavercombe, who's not as familiar with the history of the Mango Hill litigation.

20 Well, you'll see there the offer that's made is jointly to Mr Colditz and Mr Douglas?---Yes.

25 On the basis that both Mr Douglas and Mr Colditz agree. Do you see that?---Yes.

Now, you know that Mr Colditz didn't agree to this?---Yes.

30 But from the point of view of yourself and Ms Perovich – or maybe you can only speak for yourself – you're happy to waive that joint acceptance?---Yes. Yes.

So from your point of view, then, once Mr Douglas agrees to these terms, he would no longer be a creditor of Delta Law?---Correct.

35 But you and Ms Perovich have assumed personal liability to pay him?---Yes.

All right. Now, the effect of that arrangement, Mr Spencer, is it not, is that you've been seeking to distance Mr Douglas from being a creditor of Delta Law?---Yes.

40 And that's - - -?---That's correct.

That's correct, yes. All right?---Because we don't want them get – to get caught up in the external – external administration of a company that's been sponsored by James Loel and – and Mr Rozario.

45 Well - - -?---In which case they'd – it would be a mess and they may get less.

Well, thank you for that. Now, Mr Spencer, though - - -?---We want to see counsel paid as fully as possible and treated as fairly as possible.

5 I'm sure you say as fully as possible and as fairly as possible. Why didn't Mio Art pay counsel when it got the five-and-a-bit million dollars in – in November?---When it got the?

10 Five-point-four million dollars in November 2018?---Well, it had to be managed. There's – there were many creditors to be paid, and some bills were paid. Some were paid fully, some partly.

Well, Mr - - -?---Junior – junior counsel usually get paid first and then it goes up the line from there.

15 Well, Mr Keane wasn't paid?---And it's also based on need.

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

And no money's been paid - - -?---And he's still on the team. He's still working in the Mango Hill litigation.

25 No moneys were paid by Mio Art to Mr Douglas at that time either?---I think they went through – there was some – there was a – an arrangement that went through Award Litigation Funding.

30 All right. Well, tell us what you know of that arrangement, please?---Well, I'm a little vague on it, but I – I think we – we loaned him money because his – when I say “we”, I should – I mean Award Litigation Funding agreed to loan him money because his fee agreement was being contested brutally by BMD group of companies in the Federal Court before Rangiah, and that was running hot, so he was – it was done on a loan basis.

35 Right. But, in effect, that was payment of his fees, was it - - -?---Yes.

- - - the \$2 million?---Yes. Yes. Yes, indirectly, yes.

40 But dressed up as a loan for what reason?---Because he – he – there was a potential in validation of his loan agreement – sorry – his fee note because it was, arguably, entered into in New South Wales at a point of time when there was a – a prohibition on fee agreements that had a mark-up and also involved a damages claim. We argued that there was no damages claim in this later one involving the Federal Court, but it's been hotly contested. It's – there's been a judgment given on the point by 45 Justice Rangiah. I won't go into it, but it's under current appeal and that appeal is going to be heard next week before the Full Court of the Federal Court, so it's in – it's in a chain at present.

All right. And but so far as you are concerned, on behalf of Mio Art, you are currently resisting payment of any money to Delta Law or its fees – for the legal fees?---No. Well, we – we – we want to collect the – we want – we want Mio Art to be able to collect its fees and then – and then pay them to Delta Law.

5

Yeah, but you want Mio Art to collect the money from BMD?---Yes.

Yeah. And then what are you going to – at that stage Mio Art will then pay them across to Delta Law, will it?---Correct.

10

All right?---And that's the – that's what we've done over the years.

All right. Well, that – on that basis it doesn't matter who's in control of Delta Law, does it?---Well, it does because Mr Rozario refused to assist in that process of the bills of cost in taxable form.

15

But the bills of cost in taxable form can be done by Mio Art, though?---It – it needs – it needs the – that practitioner to assist, as well, and produce diary notes and file notes and what have you.

20

But you know it's unlikely, in light of this litigation fee, to get Mr Rozario's cooperation?---And your point?

25

So how are you going to recover these moneys then?---Well, I'm sure he'll see the error of his ways and assist us. That was the arrangement. Why should he not?

Mr Spencer, you're not a shareholder of Delta are you?---No. No, I'm not. I'm not.

30

You'd like to be a shareholder of Delta?---Yes.

And you'd like to be able to control Delta?---Yes.

You're not a creditor of Delta, are you?---I'm – I'm not sure.

35

You're – you know that Mio Art is not a shareholder of Delta?---It's represented by – through Emperor.

40

What does that mean, Mr Spencer?---There's a – there's a sub-sub-trust that – where Mio Art comes in.

Are you saying that Mio Art does have a beneficial interest in Emperor via a sub-sub-trust?---Yes.

45

Does it own all of Emperor via the sub-sub-trust?---I'd have to consult the documents.

Well, to the best of your knowledge. Who else has a beneficial interest in Emperor?---Well, I guess it does, Mr Peden. Yeah, I guess it does, but it's been – it's been operated on the top level through Mr Galea.

5 THE CHIEF JUSTICE: Didn't you ask who else has a beneficial interest? Did I mishear that?

MR PEDEN: Yes.

10 I think – was your answer, Mr Spencer, that you accept that Mio Art has the entire beneficial interest in - - -?---Yes.

- - - in Delta – in Emperor?---Yeah. Yep. And – and that was – I think that was forgotten at one stage.

15

And the trust, is that something that's a trust's document in writing?---Yes.

I see. There's a trust deed is there?---Yes.

20 Between who?---Well, it's a normal trust structure. I – I think it's a two level trust structure, Emperor then another party and then units held by Mio Art. I'd have to consult the document again.

25 All right. All right. And you want to cause your company, Law and Commerce Partners Pty Ltd, to buy 40 shares in Delta for \$1?---Yeah, look, I – I believe it's already been done, frankly, Mr Peden. We did it back in April.

But it hasn't been registered; you know that?---I do know that.

30 So share transfers are not effective, are they, until they've been registered; you know that?---Correct. It's on appeal. It's on appeal and I appreciate that it's not been achieved, but - - -

35 THE CHIEF JUSTICE: Sorry. What's on appeal exactly?---The decision of Justice Dalton is on appeal.

That's about the shareholders meeting?---Yes.

All right.

40

MR PEDEN: But you know, as things currently stand, the register of Delta Law shareholders does not include Law and Commerce Partners as a shareholder?---Correct.

45 Correct. You'll have to part from nodding, Mr Spencer. You'll actually have to answer - - -?---No, I said, you know, I said correct before you finished. My apologies.

All right. Now, you know that Delta Law has a large claim against Mio Art for unpaid legal fees?---Well, I – I disagree with that. There are – that’s quite hazy because there’s not been bills prepared in accordance with the Legal Profession Act, Queensland, 2007.

5

Well, my - - -?---There’s a – there’s a contingent liability and contingent prospect there.

10 Well, just, perhaps just listen to the question precisely. You’re aware that there’s a claim by Delta Law against Mio Art for unpaid legal fees?---Yes – yes – yes – yes, and that’s been – that claim has been addressed.

And Mio Art resists that claim?---Yes.

15 Yes. All right. Now, could I just ask you to have a look at this document, please. If I could hand up one to the judge as well. Now, just before we try to ask these questions about this document.

20 Mr Spencer, are you aware who causes the invoices in Delta Law to be generated?---It’s – it’s all three of us sometimes, and when I say all three I mean Perovich, myself and Rozario. Rozario would contribute some time records and I would do up a [indistinct] and Perovich would compile it, just in – as a normal legal office would.

25 All right. So just, for example, just skip the first two pages and just turn over to the first invoice that appears in the bundle and – for clarity, they’re not paginated, but I’ll just describe it for you. It’s something headed Delta Law Pty Ltd Tax Invoice with the number underneath the words “tax invoice” #DL153/0815. Do you have that document in front of you?---Yeah.

30

Now, you’ll see there there’s a description of legal supply including an interim account for counsel’s fees?---Yeah.

35 And an amount of office services – sorry, I’ll withdraw that. I’ll start again. There’s an amount set out there as interim costs of \$429,545?---Yeah.

And then, separately, an amounts of counsel fees running to about six hundred thousand, such that the total bill is a bit over a million dollars?---Mmm.

40 Now, just tell your Honour, if you could, in light of what you’ve just said about the generation of this invoice, your involvement and, to your knowledge, the involvement of others who caused this invoice to be generated?---I – I’ll just – I’ll just read it and see what it is?---Yes, this – this one would have been mainly done by Ms Perovich.

45

When you say “would have been”, how do you know that?---That’s my understanding – my memory of the matter.

All right. Well, in terms of the subsequent invoices, were they also mainly done by Ms Perovich?---Yes. Yes.

5 All right. And just help us with this: does Delta Law maintain a time-recording system?---No, it does not.

Are there computer records that record in any way the amount of time that's been spent on particular matters?---No.

10 And is that the issue that's causing difficulty for you preparing bills of costs in taxable form to claim against BMD?---Yes, I – I guess so. That's – yes, that's an issue. And it – it – the main issue is getting the cooperation of Mr Rozario to work – work in the costs area, which is a different area. I've done a lot of costs work when
15 we did, years ago, the Montague Road land compensation claim before Carmel McDonnell and that went on and on and on, and we did massive bills of costs in taxable form for about a year or so and collected money there, and we split the – split the proceeds. And Mr Rozario did well out of that and we got something out of it, too. So we'd been through it before and I guess we – yeah, we must have got his cooperation then, but, you know, getting older and less interested in it, and having
20 distractions with other political and diverse undertakings, he's lost interest in doing the costing work. So that's been a – that's been an ongoing problem. Of course [indistinct] also been very interested in the – in maintaining and working in the litigation itself.

25 But if – to your knowledge, once Mr Rozario's cooperation is obtained, it's then just a matter of having his cooperation to prepare the bills of costs in taxable form and enforcing them against - - -?---Yes.

- - - BMD?---Yeah. Look, I mean – in fact, I remember specifically on the 15th of
30 January this year saying, “Look, Quintin, we're going to have to sit down and roll up our sleeves and really work hard on this – on the bill of costs.” It's – “We can make this happen and make the pie bigger, and I'm happy to help you.” Because I'd been pressing him to do so and he'd said, “Look, I was in the box once before Chief Justice de Jersey and he said, ‘Look, you don't need to’” – sorry, I think it was
35 before David – Justice Jackson, who said, “You don't need to do a diary note on that, because you're a busy practitioner.” And I explained to him, “That's not going to be permissible when the BMD group come there. They'll be examining your – the – the records very carefully. So we'll have to do it thoroughly.”

40 All right?---And - - -

But you'd accept it's in the best interests of Delta Law as a company to recover the costs against BM – for Mio Art to recover the costs against BMD?---Yes. Yes. And then – and then Delta Law can benefit from that.

45 Yes, because Delta Law would then have its fruits of litigation lien over those moneys?---Yes, that was the arrangement.

Yes?---So the arrangement was that it would take its benefit from the actual costs orders, not from the award.

5 Yes, and - - -?---And that was the same we did with Montague Road litigation for the land compensation claim for the Go Between Bridge.

10 And then the creditors of Delta Law can be paid, including counsel, for example?---Well, they would – they’d be paid by – I would expect they’d be paid by Mio Art prior to that, and maybe it would be a matter of reimbursing Mio Art at that point.

Yeah. So - - -

15 THE CHIEF JUSTICE: Can – sorry, can I just get something clear. You do accept that Delta Law has a fruits of litigation lien over the proceeds of the BMD costs audit?---Yes, but not over the – yes, but not over the award. Over the – the arrangement was that it would be over the costs orders.

20 But the proceeds thereof?---Yes. Yes, and – but there – it’s a hard row to hoe to collect them and we’re running – you know, we’re behind in doing that. And fur – and there’s a number of reasons for that, which I can outline.

I’ll leave - - -

25 MR PEDEN: I don’t think we need to go into that.

THE CHIEF JUSTICE: - - - it to Mr Peden.

30 MR PEDEN: But - - -?---Yeah.

So just looking at this from the position of Delta Law, because you want to be a shareholder of Delta Law, don’t you?---Yes.

35 Yeah. And, in fact, you - - -?---I don’t necessarily want to be the director, but I want to – I just want to see it – I don’t want to see it trade again. I want to see it do bills of costs in taxable form - - -

Yes?--- - - - and collect costs.

40 Because ultimately you’d be - - -?---That’s all.

Ultimately - - -?---And I made that clear when I was director.

45 Because ultimately, once all the creditors are paid, you’d be – you, through the various sub-trusts, would be entitled to two-thirds of the - - -?---Yes.

5 - - - any contribution as a – to the members of Delta Law?---Well, we were doing it half and half. We were generous to Quintin. We – it should have been one-third/two-thirds, but we – from the beginning – and that was actually – Ms Perovich is more generous than me. She said, “Look, we’ll give him half.” And that’s what we did over the years.

Okay. All right. But - - -?---But it – it should be two-thirds, yeah.

10 But that’s what – that’s what – you would like to see that happen so there was a return to members after all this process has been done?---Yes.

Yes. Right. Good. Well, that’s sensible, Mr Spencer, of course. So – but to get that – to get down to that path, Mr Rozario needs to provide his assistance?---Yes.

15 Yeah. And there’s two ways he could provide the assistance: he can provide the assistance to the company that you control out of the administration – that’s one way it could be done?---You mean the Law and Commerce Partners one?

20 No, he – you could try and persuade Mr Rozario in the future – if the control - - -?---Yeah.

- - - of the company is passed back to you, in effect - - -?---Yeah.

25 - - - you could persuade Mr Rozario to provide assistance to Delta Law to - - -?---Yes.

- - - prepare those. That’s one possibility?---Yes.

30 Right. Another possibility, you’d have to accept, is that Mr Rozario might provide assistance to an external insolvency administrator or liquidator of the company Delta Law?---Well, I see that as problematic. I’m well – I’m well experienced in the costs of external administration, plus there’s a problem with needing a legal practitioner who can certify the costs, which you – which is – an insolvency practitioner is not. So I don’t favour that course.

35 Yeah. All right. But Mio Art could get the assistance of, for example, another firm of lawyers and prepare up the bills of costs on the basis that Delta Law will receive the fruits - - -?---Yeah, that – that is true.

40 Yeah?---That is true.

And that - - -?---I mean, I’d like to do it with Quintin, because - - -

45 Yeah?--- - - - you know, there’s – we went through it together and we can articulate and set out the work that was done.

Yes?---And, you know, there's questions that are not yet answered, such as whether I personally would be subject to a Chorley exception and whether – whether I can charge as well. I don't know. The – so the costs that we recover may be circumscribed by that, for example, by the fact that work was done by myself and
5 Perovich, as well as Rozario, because that's a point that will certainly be taken by the other side. So there's issues like that. You know, we'll probably have to have a session with Mark Brabazon, and others who are smarter to us, when it comes to cost and – so that we can maximise what those costs are.

10 But on the scenario I just put forward to you a moment ago, it doesn't matter whether Delta Law is in – under insolvency administration or not because - - -?---I disagree.

Because – and why is that?---Well, I – I think the – the costs of external administration are enormous and there'd be lots of irrelevant investigations and – and
15 they burn money. And I'm not here to give you examples, but I – I'm aware of them, as you are and as I'm sure the court is.

If everybody abides their legal obligations, it shouldn't take very long for the insolvency administrators and the liquidators?---Theoretically, but that doesn't
20 happen that way, does it?

Yeah. No, it doesn't, do it? So, for example, Mio Art might resist the payment of the legal fees, mightn't it?---I don't follow you.

25 Well, Mio Art might resist the fact when – if a liquidator were appointed to Delta Law, Mio Art might resist the payment of legal fees, mightn't it?---Well, it can't if it's – if there's legitimate bills that have been assessed, and so forth.

Yeah. And then if a liquidator were appointed to Mio Art - - -?---And it would have
30 to be – it would have to comply with the arrangement we had - - -

So - - -?--- - - - with Mr Rozario.

Yeah. So if the liquidator - - -?---So would resist – there's – there's material on the –
35 in the affidavits where we've articulated what the resistance is – what the objection is.

So if a liquidator were appointed to Mio Art, Mr Spencer, and the liquidator on behalf of Mr Mio Art were to enforce the costs orders and ensure that the creditors of
40 Mio Art and the creditors of Delta Law were paid, that would be an ideal outcome, wouldn't it?---Well, as I – as I've said, the answer to that, from my view, is no.

Because you wouldn't control it; that's right, isn't it?---Well, we – we've got the knowledge of what it is and an insolvency practitioner is expensive and cumbersome.
45 It's a disastrous result for many parties.

But you would provide every assistance to an insolvency practitioner, wouldn't you, to ensure the value of your – through your sub-trust and yourself, your 80 shares in Delta Law, would be maximised, wouldn't you?---Well, I guess – I guess we've done that – in the case of this company called Neovest, we've made plenty of money
5 for it. So I suppose if you get the right insolvency practitioner it can happen, but by and large it – it's usually a – a disaster. As – as the business community is aware, they're very hard animals to manage.

And you'd accept, would you not, that there are matters of Delta Law that require
10 investigation in – certainly in relation to Mr Rozario's conduct?---Well, I don't see anything that can't be investigated by the Law Society. They're doing a good job. I guess, though, that there's that problem with him using the company money. So that – that arguably does require investigation.

And the best person to carry out investigations will be someone independent. Do
15 you agree with that?---Well, the Law Society's pretty good at that.

But the Law Society wouldn't be concerned with recovering - - -?---Well, I think
20 they've already - - -

- - - moneys for a company, would they?---The – I think they've already taken some
steps there.

I see. Well – all right. But, in any event, you agree that there's a need for some
25 investigation and – do you agree with that?---Well, I – not at – not at the expense of the company. Not at – not at – not at the expense of an unnecessary voluntary administration and wind-up which has been perpetrated by James Loel, who's assisting – who's a former lawyer of ours – and in conjunction with – with Quintin Rozario.

But you're not saying that Mr Cotter is in any way impugned, are you, Mr
30 Spencer?---Well, he's – he's taken instructions from James Loel and Quintin Rozario and I think he's seeing it from one side. The ambit claims that Quintin's put in for wages, and so forth, are without proper substance and he hasn't substantiated them,
35 although I – I concede that Mr Cotter has indicated that he has scepticism about that, but I would venture to say that the scepticism is – could be more – more vociferous.

You're aware, are you not, that Mr Cotter is considering a claim against you and/or
40 Ms Perovich as either a shadow director or a de facto director of Delta Law?---No, I'm not aware of that.

You're not aware of that at all?---No, nor am I concerned about it.

You wouldn't think that's a matter that needs investigation?---Well, no, not at all,
45 because I was totally in the background in – in – with respect to Delta Law and I was assiduous in – in assisting Mr Rozario and making sure that he had – he was the director and had all the assistance that he needed for that purpose.

Yes, but you caused the invoices to be prepared for Delta Law to send to Mio Art?---Yes, but – but that was within the ambit of the – of – of what we were doing within the firm.

5 Yeah?---And he was – he was – we did the work, but he wasn't unaware of this material.

You were the person on behalf of Delta Law who negotiated fee arrangements with the barristers?---Beg your pardon?

10

You, on behalf of Delta Law, were the person who negotiated fee arrangements with barristers?---No, that was mainly Ms Perovich, and because the – you know, there wasn't money in trust and they were being paid along the way, we – we didn't – what's the word – chisel them down. We accepted their fees. And Quintin was fully aware of that. He – he was happy with the calibre of counsel engaged.

15

All right. And Ms Perovich is the one who prepared up and kept the paperwork – did the paperwork for the company; the rendering of the invoices to Mio Art, for example?---Well, that – that was – that was all copied to Quintin Rozario and myself and approved by myself and – and Quintin when necessary. So there was a back and forth.

20

Yes, back and forth. Now, did - - -?---Like you'd have in a normal firm.

25 And you know there's an email address called admin@deltalaw.com.au? You're aware of that email address?---I am.

30

Yeah. And do you know who has control over that email address?---I – look, I don't know, but I think we all had access to it potentially. When I say “all of us”, Quintin and Silvana and myself.

35

Yeah. I suggest to you, Mr Spencer, that in fact since about 2010, or 2011 at the latest, Mr Rozario had no access to the email admin@deltalaw.com.au. Did you know that?---Well, I don't believe it to be true, in the sense that my understanding is that he always could get access had he wanted to.

All right. But otherwise you were generally aware that that was the email address that Ms Perovich used?---Yes.

40

Yeah. And so emails that were received by admin@deltalaw.com.au or sent from admin@deltalaw.com.au were received by or originated from Ms Perovich?---Yes, well, I – I – I used it sometimes as well.

45

And when you used it - - -?---But always copying the other two in.

Right. Well, the email address that Mr Rozario had was q.rozario@ - - -?---Correct.

- - - deltalaw.com.au?---Correct.

And you had another email address. Which one was that?---Yeah, my – my address was info@dentalaw.com.au.

5

Right. Who – and once again did Mr Spen – Mr Rozario have access to that?---I believe so, potentially.

Are you aware of any email that he ever sent from info@dentalaw.com.au?---No.

10

Right?---No. Well, he kept them – you know, they were – they were – there was an element of privacy, too. I mean, you don't want to get it mixed up. You want people to have – use a single email address, but you – where appropriate they copied the other in.

15

Where appropriate?---Yes.

Yes. All right. And what about the - - -?---And it was almost always appropriate, I guess.

20

And what about the email deltalaw@dentalaw.com.au? Who had that one?---Well, it was on the – I think we all had it, because it was set up for – for Dropbox facilities. I – I mentioned it in the affidavit – my – one of my last affidavits I explained – it's the secret cache, you know, being not a secret cache - - -

25

Right?--- - - - of emails.

Now – so having - - -?---There is no secret cache of emails, Mr Peden.

30 Mr Spencer, so your real interest in having Delta Law's administration end and the control returned to, in the first instance, Mr Rozario – you say that you can call a shareholders meeting and remove Mr Rozario as a director; is that right?---Yes.

35 And you do so because you want to control Delta Law?---Yes. It could be – well, through the shareholding, could be another director. I may be perceived as not independent. We've nominated a fellow called – sorry, I've got a mental block – Alan Thompson, who I know – I – I actually know him – who was the founder of Blackstone Legal Costing.

40 And you accept, don't you, that in your capacity as a consultant for Mio Art, if you also control Delta Law, you would control both the debtor and creditor relationship of the legal fees that are owing as between Delta Law and Mio Art?---Yes. But this is the myth. I mean, back in April, it was said that I was going to forgive the debt of Mio – of Mio Art to Delta, but I – I don't think I'd do very well screwing over a
45 minority shareholder. It's – I've been brought up not to do that because I think it doesn't work. There's oppression of the minority, fraud on the minority. I know that Mr Rozario looked at diluting shares, but I – I know that that can't be done either.

The minority shareholder has to be looked after, and we've been litigating in the Mango Hill litigation for 10 years as a minority shareholder, so I'm very sensitive to that. I'm not here to screw over a minority shareholder; I'm here to treat Mr Rozario fairly and ourselves.

5

And what about creditors of Delta Law?---Yes. Yes, those too. Yeah, and I – I don't – I don't believe they'll be treated fairly in an external administration sponsored by Mr Loel.

10 And just coming back to this, do you accept - - -?---James – James Beresford Loel, I should say.

Do you accept that you would be in a position of conflict if you controlled both Mio Art and Delta Law insofar as the recovery by Delta Law by the debt going to it?---I
15 guess so, yeah. It is – it is potential conflict, yes.

And it's also conflict in relation to the enforcements of any fruits of litigation lien?---Yes, it is, but, I mean, it would be a conflict in full – in full scrutiny and full
20 light.

20

And, now, just – you mentioned you mentioned a moment ago Mr Thompson. When did you first meet Mr Thompson?---I got to know a – a – a legal cost assessor called Therese Tonkin on the Sunshine Coast, and she – she did some costing for us. She had a – an outfit called Tonkin Legal Costing. And I think that was – I'm not
25 sure – three, four years ago, and she – she had – she found a couple of the matters that we were potentially looking at to be big and she – she – for whatever reason, she may've been on holidays or something, she referred us to Alan Thompson. So we did meet him in Melbourne and – and got to know him and he eventually did bill us a costs and taxable form for the – the five-year Federal Court that was before Rangiah,
30 VID 1183 of 2010, and we filed those about a year – a year or so ago.

So it would be fair to describe him as a client of yours?---Well, that's a single word. I – I just know him as a – a good costs assessor. Yeah, we – we paid him money, yes, to do the carry out, so, I guess – yeah, he's being paid by Mio Art to carry out
35 certain legal costs.

As a service provider - - -?---Yes.

- - - for legal costing services?---Yeah. But another – another suitable cost assessor
40 in Brisbane would be okay for – to be director, for example. I'm not – I'm not seeking to be director if I'm perceived as in conflict, as long as it's not somebody who – who's been one of the ones that's been struck off and can't practice or something. There's a couple around that aren't – aren't as reputable. So I'd want a good cost assessor. Be happy to see him as a director.
45

And why are you running? Well, you tell me. Do you have a view that the director should be a costs assessor; is that right?---Well, it's not going to carry on business as

a legal practice – a form 25's been lodged – but it needs somebody qualified to sign off the bills, so a legal costs assessor would be good.

5 But if – Mio Art can get any costs assessor to do its costing, can't it?---Yeah, yeah, no, that's right. We've discussed that. You're correct, yes.

Doesn't need Delta Law to be the provider of cost assessing services, does it?---No.

10 No. Of course not?---It doesn't. But as I've said before, I think Delta Law's the – the receptacle for all of the work that's been done.

And it could be any other costs assessing firm?---Yes. Yes, it could.

15 Right. And, so, tell me, when did you first approach Mr Thompson about being a director of Delta Law?---I think it was about a month ago, and it – we said there's a possibility it's been mooted as an idea, and then that – we went back to – well, I went back to him, I think, probably – I think it might've been – might've been Monday or last Friday, I'm not sure.

20 So are you saying you approached him about a month ago to be a director of Delta Law?---Yeah, and he – he said, "Look, I'd be happy to." Yeah.

So did he approach you?---No, no, no, I approached him, yeah.

25 And did – what did you tell him about Delta Law a month - - -?---I said we – we're in a dispute with Quintin Rozario – he'd met Quintin; he knew Quintin – and we need somebody who's suitable – suitably qualified, independent to do the job. I mean, he was – he was quite – I was surprised. He was positive and said, "Yeah, I could do that."

30 What did you describe to him the job being?---Get all the bills of costs done for – in the Supreme Court, because he's done the Federal Court one, and he did it for James Conomos Lawyers too for Robert Whitton, so he did theirs as well. So, you know, he's – he's suitable. I think he'd be great. But, I mean, you know, if – if he's seen as
35 non-independent because he knows me, well, well and good.

40 But there's no reason there – I mean, what you're – so what you described to him the job as being was just the job of preparing bills of costs on behalf of Mio Art for enforcing cost orders against BMD?---Yes. Yeah. And he's already done – he's already done it except for the – in the Federal Court for the Rangiah matter and that one didn't involve me, it involved myself and Perovich.

45 It wouldn't matter, would it, whether paying Mr Thompson was by Delta Law or by Mio Art or by any other entity, would it?---Well, as long as he was comfortable and felt he could get paid, yeah, there's possibilities. Yep.

Did you tell him, though, about the role of director of Delta Law was the one that you were wanting him to be?---Sorry, I don't – don't follow.

5 Did you tell him that the role that you were approaching him about was not necessarily just costing the files but being a director of Delta Law?---Yes, but I told him that it would be limited to – it wouldn't be otherwise trading, it would just be doing – collecting costs.

10 Did you tell him that there were very significant creditors of Delta Law?---I think I gave him a – a snapshot of the overall disputation and so forth.

15 Well, just looking at that bundle that you've got in front of you – sorry, have you still got that bundle there, Mr Spencer? One that we just had open with the invoices?---Look, I think I do. Yeah.

Yes. Now, if you just go to the front of that bundle, you'll see there's two pages, and the first one is headed 21 and the second one is headed 22?---Yeah.

20 Now can I ask you this, did you read – have you read Mr Cotter's affidavit in these proceedings?---I've seen it. I haven't read in detail. I – I – I – I read it in – I read it in a lack of detail because I think I read it on the – on the iPhone.

Right?---And it was hard to – hard to read, but I got the gist of it.

25 Yes. So - - -?---So I can't say I've read it closely.

30 All right. If you go down to paragraph 64 you'll see Mr Cotter – and I'd like to ask you to assume this is Mr Cotter's affidavit. In paragraph 64, there's a couple of tables which have lists of invoices; do you see that there?---Yeah.

Now, the total in (v) at halfway down page 22 of the invoices is just shy of \$11 million; do you see that table?---No. Where – where am – where am I looking?

35 There's a page that's headed 22 at the top?---Yeah.

And about halfway down there's a numeral (v) in brackets with the words:

A summary of all the above invoices.

40 ?---Right.

See that?---Yeah.

You see there's a table there?---Yeah.

45 See the table?---Yeah, I do.

Right. And you'll see the table actually has totals on the bottom row?---Yeah.

5 All right. Now, I'll take you to the invoices, because all, bar one – they appear behind this schedule. Were you aware that the quantum of the Delta Law invoices that had been issued to Mio Art claims a total of \$4.386 million and \$800 for Delta Law's fees?---Yes, there – there – I've – I've got a different analysis of that, and I think some of them have been paid and the true position has been discussed between Mr Conomos and Mr Cotter and I – this may not reflect the true position as I understand it, but I – it will take me some time to go through it. So my answer to
10 your question is – is no, and I don't necessarily accept this. It would need analysis. I mean, it may be that Mr Cotter's showing a maximum rather than a – the truer position, yeah.

15 Well, what Mr Cotter has done is he's added up the invoices that appear behind that tab?---Yeah, but some of them may have been paid and there's – a lot of counsel fees, for example, have been paid.

20 Right. Well - - -?---And some of the – some of the Delta Law ones, too, have been paid. So I – I'd have to analyse it myself. So I'm sceptical about what's here. It may be a genuine attempt to – based on what material he has, but whether it's the true position I don't know.

25 Well, you're aware, aren't you, that the Law Society have undertaken an investigation into Delta Law and the trust account in relation to - - -?---Yes.

Sorry, the general account in relation to the \$1 million that was provided to it in November?---Yes.

30 And you – have you seen that?---I've – I – I've heard something of it and I've not had a chance to read it yet.

Okay. So – well, are you aware that the Law Society, for example, has seen one of those invoices in that table that we've just looked at - - -?---Yeah.

35 - - - being the invoices for the arbitration in the sum of - - -

40 MR WEBSTER: I object, your Honour. The question is does – is he aware of whether the QLS has seen a document. In my respectful submission, this is getting too far from the ground – from relevance.

THE CHIEF JUSTICE: Well, it's just Mr Spencer's state of knowledge at the moment, which may – look, I can't really tell the relevance at this stage, because I don't know where it's going, but I'll let it go a bit further and see what I can - - -

45 MR PEDEN: I actually won't press this, your Honour. I don't need to.

THE CHIEF JUSTICE: Okay.

MR PEDEN: So - - -?---I've – it's on my list of things to do, reading that Law Society report. It's – I regard it as important, but I haven't got to it yet.

5 Yeah. All right. So – but if Mr Cotter's right, there's claims – and I'm not saying that they're all unpaid, but he's identified claims worth a bit over 10 – nearly \$11 million. Did you tell that fact, that there were claims against Delta Law – sorry, by Delta Law against Mio Art – did you – sorry, claims by Delta Law against Mio Art for nearly \$11 million – did you tell that fact to Mr Cotter?---Well, I've – I've told him there's – there's claims, but the costs have to be prepared and assessed and
10 collected.

But these are solicitor and client bills, aren't they?---I don't know. I haven't looked closely as to whether they're paid, unpaid, and so forth.

15 No, it's – but, Mr Spencer, these are invoices that have been issued to a client?---Well, Mr Peden, it's been discussed – it's been discussed between Mr Cotter and Mr Conomos and - - -

I'm not asking you about that?--- - - - and there's a – there's a very different position
20 which has been outlined from this.

I'm not asking you about that?---And this is a position which I'm unaware of and I'd have to analyse and study it and - - -

25 And do you say - - -?--- - - - I could – I could do you an affidavit on it, if you want.

30 So are you saying you weren't aware, then, of the invoices – is that your position now: you weren't aware that Delta Law was issuing invoices to Mio Art; is that right?---Well, I – I guess it was internal, wasn't it? And – there were invoices there and when the money was available they were paid. And some of them have been paid. For example, the – the arbitration costs which were awarded by Mr Callinan were paid, and they were paid through to barristers and some to Delta Law and some to Mr Rozario. And all – all consistent with the arrangement we had with Mr
35 Rozario.

So just going over to the invoice that we were looking at - - -?---So it was a – sorry to interrupt, but it was – it wasn't – we had – Delta Law had a normal solicitor/client relationship with external clients, which we can name and which generated income. Did not have a normal solicitor and client relationship with Mio Art. It had a
40 relationship whereby costs had to be collected from BMD and then the – the money was split. And in the meantime we were living off costs generated from other external clients.

45 You wouldn't say, though, would you, Mr Spencer, that Mr Thompson was independent from you, would you?---Not – not in – not entirely. I mean, I think he's an hon – a very honest broker. He established Blackstone Legal Costing. I think he's top of the tree. But, look, I – I – he certainly – I can't deny potential conflict.

But he's met Quintin Rozario, too, but, you know, I wouldn't insist on him. I just personally think he's suitable.

5 And when you say - - -?---And they're sometimes hard to find, a good cost assessor.
And when you say "suitable", you mean suitable as a cost assessor?---And a director.

And a director?---Yeah.

10 Even though you haven't told him about the details of the company that you - - -?---I believe I've given him sufficient detail.

Did you tell him about – that there were matters to investigate in relation to Mr Rozario's conduct and that you wanted that done?---I've only mentioned that briefly.

15 Did you tell him that the company was arguably insolvent?---I've told him there's an allegation to that effect.

You told him that the company was in administration?---Yes.

20 And did he ask you about whether it was insolvent or not?---No, we didn't have a detailed discussion. He – he was – maybe he was a little – maybe he was a little flippant in his positivity. I don't know. But he – he was ready and willing. He's – yeah, he's a very competent commercial litigator, as well as a costs assessor.

25 Your Honour, might those – that bundle be marked for identification, because technically I should tender it through Mr Cotter?

30 THE CHIEF JUSTICE: Yes, that will be exhibit D for identification.

MFI #D MARKED FOR IDENTIFICATION

35 MR PEDEN: That's the end of the cross-examination, thank you, your Honour.

THE CHIEF JUSTICE: Yes. Re-examination, Mr Webster?

40 **RE-EXAMINATION BY MR WEBSTER** **[12.13 pm]**

MR WEBSTER: Mr Spencer, you were asked some questions – a number of questions about the creditors of Delta Law. Who do you understand the creditors of Delta Law to be?---Well, I don't – I don't believe counsel are included. They're – they may be technically there, but they are not pressing for payment and they are – they are happy to be covered by Mio Art. I understand that there's been a – there's a

tax liability which has been pulled, so to speak, by vir – by inquiry and agitation with the tax office, and one that could be discharged by the money that was taken in April – or may, sorry. May. Other creditors - - -

5 THE CHIEF JUSTICE: I'm sorry, I just didn't hear that answer. Tax liability could be discharged by?---Well, Mr Rozario withdrew \$800,030 from the account in – on the 10th of May.

10 Okay. So you're saying it could be discharged from those funds. It - - -?---And that generated a – that generated a tax liability which, through agitation, they – the tax office put up, and I'm saying that that should have been provisioned for. In fact, over the years we – we counselled and encouraged Mr Rozario to make provision for tax, and – and a lot of people don't and when he had a tax liability we'd advance him more than the half that he might be entitled to from funds, and other times we'd had
15 more than half when we had a – a need.

Okay. So – but there is a tax liability at the moment - - -?---Yes.

20 - - - as a result, and what do you say about that, that, just that it's there?---Well, it – it – it should have been provisioned for. It should be paid by Mr Rozario. He's got the money and it's company money, not – not his money. Not his personal money.

All right?---In my view.

25 Okay?---I don't know if there's any other creditors because, you see, it was set up and managed on a flow through basis where, when money came through, it went – went to Quentin and to ourselves and we paid bills. We didn't use an accrual approach. We used a cash approach and we didn't have many creditors at any time, and in order – I mean, what we did, we'd pay experts directly by Mio Art because
30 then we could manage their payment rather than foisting or expecting Quentin to do that because Ms Perovich is quite competent at managing experts and other professionals. I don't think there's any other creditors, though, so - - -

35 MR WEBSTER: Thank you. At one stage you mentioned, in response to a question, a team that had been together for between eight to 10 years?---Yes.

40 Who do you understand to be part of that team?---That started with Francis Douglas, Dr Kevin Connor, but he dropped out, then David Keane, so it's basically been Francis, David Keane and Perovich and Rozario and myself and, more recently, there's been other juniors such as Stephen Colditz, who's been a great contributor, and on the Mango Hill matter we've even had Justin Carter, who's here today, and there may be one or two other juniors from time to time, but that – that's been the team.

45 You were shown MFI C – D – I'm sorry – which was this extract from Mr Cotter's affidavit with some invoices behind it. Do you still have that in front of you? You

were taken to some invoices and, I think, you said in response to a question that you had a role in assisting to prepare these; am I right on that?---Yeah.

5 Can I you about, in relation to that, about two-thirds of the way down if you go below “office services” there’s a thing in quote – it starts with quotation marks, which begins:

This account is an estimate only –

10 etcetera?---Which page?

Sorry. It’s three pages into the bundle. Just to the first tax invoice you were taken to?---Right.

15 DL153/0815, and if you just go down two-thirds down the page below the heading “office services” there’s some text and then there’s a block of text which begins with a quotation mark and it says:

This account is an estimate only –

20 etcetera. Have you found that passage?---This is an interim account only. Is that the one? MV?

25 THE CHIEF JUSTICE: Bit further down?---Further down. Yeah, I – I’ve got it. Yes. Yes.

MR WEBSTER: You’ve got that?---Yes.

30 Did that – does that passage have any significance to you in the answers you’ve given to the court about your understanding of Delta Law’s claims and Mio’s attitude – Mio Art’s attitude to those claims for costs at present?---Yeah, it does, because we were – one of the reasons we had – were slow in getting the costs done was because we were trying to second guess, firstly, MinterEllison and then, secondly, Carter Newell as to the attacks they were making on our costs. We were looking at the
35 possibility of short form costs orders and getting some costs made and that was – that was very aggressively resisted. So – and we were discovering that more and more niceties required in the bill, so we weren’t perfectly confident about the bills, as to whether they’d survive scrutiny from our – the protagonist on the other side, so I think that’s probably an explanation for the – for it being an estimate only. That also
40 goes in with, you see a few pages over we’ve got:

Without prejudice Mio Art documents to mediation 13 June.

45 See, so those accounts were – those accounts were estimates only that were put up for Mio Art’s salvage lien. Now - - -

You might, now, be strutting outside of my answer, Mr Spencer. I don't want to interrupt you if you - - -?---I'm trying to cross-examine myself. Am I allowed to or do you want me to - - -

5 THE CHIEF JUSTICE: Is the fact that these were, really, to be presented to the other side more than actually reflecting the arrangement you had Delta Law and Mio Art?---Sorry, your Honour, the – the fact that - - -

10 These invoices were more for presentation to those against whom you were claiming costs?---Well, they – they – they were, I think, at this stage they were for the mediation and the – probably to correct my testimony at the very beginning of the day. We – we were relying on this – on the, for example, that so-called retrospective agreement. We were relying on that as governing the arrangement, but after we
15 compromised and decided not to proceed we – we knew that we weren't going to be able to claim the whole of the award, that was unrealistic. We reverted back to the, you know, the sharing of the receipts arrangement, the sharing of cash receipts arrangement. Now, that's another way of looking at it. I'm just embarrassed about that because it looks like I'm making it up, whereas it's probably got – it's probably
20 – there's a legal position, which is moot, but I think, what I wanted to draw to the attention here, is that this was meant to be confidential, an estimate for that mediation.

MR WEBSTER: In relation to that, can I just ask you. I think you referred to some words that you found a bit further on. Were you referring to the watermark that's
25 across the pages?---Yeah. Correct.

Which is a bit clearer on some pages than others?---I think a lot of it had watermark on it, including that retrospective agreement was meant to have a watermark on it as well.
30

I'm not sure whether your Honour can see that on any of your Honour's pages.

THE CHIEF JUSTICE: I can't. So what are we talking about?

35 MR WEBSTER: Across, at least, on my copy, faintly across most of the pages of the bills, diagonally, there appeared the words:

Without prejudice – Mio Art documents for mediation – 13 June 2018.

40 THE CHIEF JUSTICE: Okay. Is that what that is. All right?---Yeah, that was meant to – they were all meant to have that and I think they did and it was stated on some of them, and its – its – it would support the idea that I was a shadow director in that this has been – this was actually prepared by Mio Art but, on the other hand, it was fully disclosed and understood by Quentin Rozario, so although Mio Art was
45 doing work under the auspices of Delta Law, it was Delta Law – its director was fully aware of it.

Sorry, I'm losing track. Are you saying these invoices were the work of Mio Art?---Yes. Well, perhaps some of them are. The ones that have been paid were delivered to Mio Art and were properly – well, they must have been because they were paid, but the ones that weren't – weren't – didn't have that – sorry. Some of
5 them, I think, and I'd have to go through the whole bundle. Some of them were, really, estimates and we weren't – and – and it – and as Mr Webster pointed out, it had that word estimate on it to show this is the sort of fee that we can charge if we choose to go down the track of enforcing our salvage lien and solicitor's lien, and you will – we will have that as a priority against the so-called secured creditors.
10 Now, we spent a – an intense day with the help of Mr Finkel – of Justice Finkelstein discussing that and we ended up compromising, and we ended up – I ended up saying, "Well, I'm glad we don't have to enforce the lien because I found that an onerous task."

15 MR WEBSTER: While you've got exhibit MFI D in front of you. You were taken to – back to the front of that paragraph 64, which begins halfway down page 21, you were taken to paragraph 64 and, particularly, the summary table on page 22 - - -?---Yeah.

20 - - - (v) and you were asked about claims of Delta Law of about that sum and whether you'd communicated the possible existence of such claims to other people. Do you - - -?---Yeah.

Do you recall those questions?---Yes.

25 My question was: up until, let's say, February or – February this year – the end of January, when Mr Rozario gave notice of ceasing to act – had Delta Law made any formal or informal demand that you're aware of for payment of the invoices which are said to add up to this total?---Oh, no. No. No. No, no, no. It was – we were of
30 one mind. We were a happy little family.

Yeah. You were asked some questions, Mr Spencer, about two options, I think it was put to you, for the future of Delta Law and recovering costs, one of which was, I think it was put to you, it being brought out of administration and a director, yourself
35 or somebody else, being appointed and - - -?---Yeah.

- - - things proceeding that way, and the alternative was external administration. You were asked about those options and your views about them. Could I ask you this: assuming that Delta Law remains in external administration, what, if any, ability or
40 difficulty would have you in accessing any necessary records to assist in the compilation of the costs statements which you referred to in a number of your answers?

MR PEDEN: Well, I object, your Honour. That's – I can't see what possible
45 relevance that is. It's – if not for the reason that it depends upon the response from the insolvency administrator – practitioner.

THE CHIEF JUSTICE: Well, perhaps so, but all of this is about motivations, isn't it, everybody's motivations. So I'll permit the question.

5 MR WEBSTER: Do you want me to repeat that, Mr Spencer, or are you - - -?---Yeah. Yes, thanks.

10 The question was: assuming my learned friend Mr Peden's option 2 – and I think that carried with it, as it was put to you, the idea that you could get another firm of solicitors to help Mio Art in preparing bills of costs and things like that. My question was: do you have a view about any ability or difficulty which there may be in accessing records of Delta Law, if it remains in external administration, necessary for Mio Art, with the assistance of a third party law firm, to put together its bills of costs?---Well, I guess it would be difficult. We – we run our own show quite successfully and – and working with an insolvency practitioner can be difficult, 15 though we've done it successfully with a company called Neovest and McLeod & Partners. So – but, you know, in terms of doing bills of costs in taxable form, it will – we really need to try to just work with Perovich, myself and – and Quintin. And if Quintin, you know, has an attitude about it, he could have – I'm sure he could have somebody to assist him – that we could work with that person assisting him and it 20 could be – it could be facilitated. I mean, we're prepared to roll up our sleeves and do that and we – and as I said earlier, we've done it in the case of the Montague Road Land Court and that was a – that was a massive job, that one. It went through - - -

25 Did - - -?--- - - - went to the Land Court, to the Land Appeal Court, to the Court of Appeal, back to the Land Appeal Court, back to the Land Court. And we ended up doing – doing okay.

30 Just excuse me for a moment. That's the re-examination, your Honour. May Mr Spencer be excused?

THE CHIEF JUSTICE: Yes.

35 You're excused, thanks, Mr Spencer?---Thank you, your Honour.

WITNESS EXCUSED

[12.29 pm]

40 THE CHIEF JUSTICE: Mr Webster.

MR WEBSTER: Would your Honour be prepared to adjourn – I think that's the applicants' case, I should say, in terms of its witnesses. So I understand the next witness would be Mr Rozario. I'm not in a position to cross-examine him right now. 45 I will do everything I can – and I think it's likely to I'll be in a position to be able to cross-examine him after lunch if we took a break.

THE CHIEF JUSTICE: Okay. So 2.30 you're thinking you might be able to - - -

MR WEBSTER: Two hours. I'll have something ready, your Honour.

5 THE CHIEF JUSTICE: Okay. And are we going to get through Mr Rozario and Mr Cotter? Are they remaining witnesses?

MR PEDEN: Mr Rozario is my only witness. Mr Cotter is - - -

10 THE CHIEF JUSTICE: Sorry, is Mr Cotter giving evidence or not? Did anybody want him?

MR WEBSTER: Your Honour, my understanding is Mr Cotter is required for cross-examination. Yeah, I want to ask him a few questions, your Honour. I don't think
15 I'll be overly long with Mr Cotter.

THE CHIEF JUSTICE: Okay. All right.

MR WEBSTER: I think we will certainly finish the evidence this afternoon.
20 Your Honour has the written submissions from us, so in – orally I will also attempt to be brief if - - -

THE CHIEF JUSTICE: All right.

25 MR WEBSTER: - - - if we're getting close to finishing.

THE CHIEF JUSTICE: Okay. Two-thirty.

MR PEDEN: Your Honour, sorry, might I just ask: was your Honour wishing for
30 us to do – go into address this afternoon? I just - - -

THE CHIEF JUSTICE: Well, when would you if not this afternoon? What are you - - -

35 MR PEDEN: We're happy to do so. It's just we – in terms of the – we'll get working on the written submissions to be finished by 2.30.

THE CHIEF JUSTICE: I – well, I would like to hear oral submissions. Do you
40 have an idea for when – I mean, assuming these witnesses take a while.

MR PEDEN: And that's really the concern. If – it depends on how long my learned friend's going to be, but if he's going to be – if the evidence is going to take us through to 4.30 – if your Honour wants to sit on, I'm happy to do that.

45 THE CHIEF JUSTICE: I've got other things I've got to do, unfortunately.

MR PEDEN: Well, the alternative is that - - -

THE CHIEF JUSTICE: Look, we'll worry about it later, I think, but I do want to hear oral submissions at some stage because I have a few questions.

5 MR PEDEN: Yes, and I suppose that's the point, your Honour, because if your Honour were to set aside, say, an hour or two next week, then we would have a chance to polish the written submissions.

10 THE CHIEF JUSTICE: Somewhere in the applications list. Look, we'll think about it later, I think, but I'll want both written and oral submissions. So you can go your hardest on written submissions as well. And it may be that if I can take away written submissions, we can refine the oral aspect of it and just find a spot somewhere.

MR PEDEN: Thank you, your Honour.

15 THE CHIEF JUSTICE: What's the general urgency of this?

MR PEDEN: There's a general urgency in the sense that it's a company under administration.

20 THE CHIEF JUSTICE: Sure.

MR PEDEN: Other than that, we – we're not able to identify any specific matter. I mean, obviously as time goes on, dates for antecedent transactions pass.

25 THE CHIEF JUSTICE: Okay.

30 MR WEBSTER: I – yeah. I think, your Honour, just to supplement that, that there's a requirement – consistent requirement under the Act for the second meeting of creditors to be held. It's been adjourned a few times. It's currently adjourned to the 30th of November, I think.

THE CHIEF JUSTICE: So that will just keep - - -

35 MR WEBSTER: That will just need to be pushed further into the future.

THE CHIEF JUSTICE: Okay. All right. Two-thirty.

40 **ADJOURNED** [12.32 pm]

RESUMED [2.30 pm]

45 THE CHIEF JUSTICE: Now, are you able to proceed, Mr Webster?

MR WEBSTER: Yeah, my instructions are to proceed, your Honour.

THE CHIEF JUSTICE: All right.

MR WEBSTER: So I will, with your Honour's permission.

5 THE CHIEF JUSTICE: Yes, of course. I don't know whether you want to talk about times for submissions now or whether you'd rather just get through this afternoon and worry about it at the end.

MR WEBSTER: For my part, I'd probably prefer to get through this afternoon,
10 your Honour, and see - - -

THE CHIEF JUSTICE: All right.

MR WEBSTER: - - - where we're placed - - -
15

THE CHIEF JUSTICE: Let's get through this afternoon.

MR WEBSTER: - - - if it please the court.

20 THE CHIEF JUSTICE: Yes, Mr Peden.

MR PEDEN: Does your Honour require an opening of the evidence?

THE CHIEF JUSTICE: Sorry?
25

MR PEDEN: Does your Honour require an opening of the evidence, or is your Honour happy to progress directly into evidence?

THE CHIEF JUSTICE: Mr Webster, it's probably more up to you.
30

MR WEBSTER: Yes. We had been proceeding on the basis, your Honour, consistent with the fact that this is a proceeding commenced by application and orders have been made for affidavits, that the full extent of the evidence-in-chief of Mr Rozario is that contained in his affidavits, and that's the way the applicant's
35 conducted its case, as your Honour's observed.

THE CHIEF JUSTICE: Yes.

MR WEBSTER: If that's the case, then there's no opening required. If it's the
40 intention of Mr Rozario to go beyond that, well, I do require an opening, and I'll have to consider my position after I hear it.

THE CHIEF JUSTICE: Okay. Mr Peden, is - - -

45 MR PEDEN: No. No, just the affidavits, your Honour.

THE CHIEF JUSTICE: All right. I think we'll just bow our head.

MR PEDEN: But I should say I'm amiss twice now in not providing your Honour with the list of the two affidavits, but we rely upon the two affidavits of Mr Rozario.

5 THE CHIEF JUSTICE: All right. Have I got more than two?

MR WEBSTER: No.

THE CHIEF JUSTICE: Good.

10 MR WEBSTER: Just the two.

THE CHIEF JUSTICE: Okay. Thank you.

15 MR WEBSTER: I call Mr Quintin Rozario, your Honour.

QUINTIN GEORGE ROZARIO, SWORN [2.32 pm]

20 **EXAMINATION-IN-CHIEF BY MR PEDEN**

THE CHIEF JUSTICE: Yes, Mr Peden.

25 MR PEDEN: Thank you.

Mr Rozario, could you tell the court your full name and address, please?---Quintin George Rozario of 249 Tingal Road, Wynnum, 4178.

30 And, Mr Rozario, you are a respondent to the two applications in court today?---Counsellor, I'm sorry, I - - -

I'm sorry. You are a respondent to the two applications in court today?---That is correct.

35 And you have sworn two affidavits in these proceedings?---That is correct.

Your Honour, might the witness be shown – I think it's court documents 8 and 9 in 8866.

40 THE CHIEF JUSTICE: You know, I seem to have three affidavits. Can I just identify to you what they are. I'm just not sure how that comes about. And there might be a simple explanation, but there's one, 23rd of May, which is the one that I had missing pages in; there's one, 12th of November; and there's one, 29th of
45 August.

MR PEDEN: The one that I've got on the file is the 20th of September. That may be the same.

THE CHIEF JUSTICE: Sorry, what date did you say?

5

MR PEDEN: It was sworn on 19 September 2019 and filed - - -

THE CHIEF JUSTICE: Look, I was giving you swearing dates, because I don't have filing dates here. So - - -

10

MR PEDEN: I'm sorry. So that's the first affidavit, sworn 19 September 2019 and filed 20 September '19, 2019.

THE CHIEF JUSTICE: Yes.

15

MR PEDEN: That's court documents 8 and 9 in BS8866 of '19. So that's what we'll call – well, I think it was actually – I'm not sure whether it was filed in both proceedings, but, certainly, the one I've got was in 8866. That's what I'll call the first affidavit, which is - - -

20

THE CHIEF JUSTICE: Okay.

MR PEDEN: - - - about a volume-full. And I think this has been put in front Mr Rozario, from what I can see.

25

THE CHIEF JUSTICE: Sure.

MR PEDEN: Then there is a second affidavit, which was sworn on the 4th of November 2019, and I think it was filed on the – I think it was filed on the same day. I'm instructed it was filed on the same day. They are the only two affidavits that are in these proceedings, although - - -

30

THE CHIEF JUSTICE: Okay.

35 MR PEDEN: - - - that second affidavit I think was filed in 8867 of 2019.

THE CHIEF JUSTICE: Well, can I safely discard anything else? Because the one that I was complaining about in the bundle that had the missing pages, as I said, was 23rd of May. It's filed in BS5403 of 2019. Maybe they're wanted for some other purpose by - - -

40

MR PEDEN: Well, I don't know – as I thought I'd made clear to your Honour, I've never seen that document. I don't know what's in it.

45 THE CHIEF JUSTICE: Okay. Sorry.

MR PEDEN: This is my learned friend's bundle that's handed up. They didn't give me a copy, and I've never seen the index.

THE CHIEF JUSTICE: Right.

5

MR PEDEN: So - - -

THE CHIEF JUSTICE: Okay. Well, look, I - - -

10 MR PEDEN: All I know is that these are the two affidavits that we rely upon, and - - -

THE CHIEF JUSTICE: All right.

15 MR PEDEN: - - - I don't know what else they've put into the bundle.

THE CHIEF JUSTICE: Okay. I've got that, and I won't take any notice of the others unless something emerges.

20 MR PEDEN: So has that second affidavit been given to you, Mr Rozario?---I have an affidavit here.

This is the one filed – sorry, sworn on the 4th of November?---This is sworn on the 19th of September 2019.

25

All right. Might I just ask, then, for the second affidavit, which is the one filed on the 12th of November in BS8867?---Thank you.

30 Mr Rozario, are they the two affidavits that you've sworn in these two proceedings?---I believe these are. Yes.

And are the contents of those affidavits true and correct?---They are.

That's the evidence-in-chief of this witness. Thank you, your Honour.

35

THE CHIEF JUSTICE: Thanks. Mr Webster.

CROSS-EXAMINATION BY MR WEBSTER

[2.37 pm]

40

MR WEBSTER: Thank you, your Honour.

45 Mr Rozario, you have, in your capacity as legal practice director of Delta Law, worked on the Mango Hill litigation now for a number of years; is that right? It's about 10 years?---Yes, a little over 10 years.

And over the course of those 10 years, is it right to say that it's been, by far and away, the most substantial matter which Delta Law has been involved in?---That would be correct.

5 And the time that you have devoted to work as a solicitor has predominantly been devoted to that matter?---That would be correct. Yeah.

Have you received any income over the last 10 years?---Little, very little.

10 Such income as you have received has come from Delta Law?---Yes, mainly from Delta Law.

And how have you accounted for that income in your tax returns? Has it been as a loan? Has it been as a distribution, or has it been as income?---They have been
15 recorded as income, and where it has gone to assisting the company, it's gone in as a director's loan.

Right. And you first became involved in the Mango Hill litigation when Mr Spencer and Ms Perovich brought it to your attention?---That is correct.

20 And it was subsequent to that that you became involved in Delta Law. You weren't involved in – I'm sorry, you weren't a director, or a shareholder or an employee of Delta Law prior to that time?---I was the director of my own practice, which, for a few months, went under the name of Quintin Rozario & Associates.

25 That was a separate company, though, or separate practice?---That was a separate practice.

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

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

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

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

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

In matters of substance in terms of who would actually be pursuing claims or be asking for payments when and on what basis, it was informal?---Sorry, counsellor, I've got a bit of sinus and I'm hard of hearing.

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

THE CHIEF JUSTICE: All right. I would like to know what security reasons to keep a written agreement for your employment in their possession? What would that be?---Your Honour, this matter was fairly controversial. My former clients had
15 become bankrupts and their adversaries wanted to know how they might be able to afford lawyers, and the rest. Now, the agreement was that I would work for them literally on call. Because this – this matter promised a huge payout at the end, I would be paid on the basis of \$440 an hour, plus GST, plus any out-of-pocket expenses I might have incurred, and it would be charged at the rate of eight hours a
20 day, five days of the week, but it also meant that I would be available weekends and the rest.

All right. Now you're giving me details of it which I assume are in your affidavits. I was more interested in why they had to be kept – held close for security reasons, and
25 I think you've answered that. Thanks.

MR WEBSTER: Mr Rozario, could you assist me and the court with where in your two affidavits you identify that you entered into a written agreement which you initialled?---I may have to look at that and seek some assistance. I – I'm afraid I
30 can't find it in any one of the two affidavits.

It's not referred to, is it?---No. There's a reference to the discussion I had, but it's not – the written part of it is not referred to here. I can't find it.

35 In paragraphs – if I can ask you to take up your – what's been called your first affidavit, the one that's court documents 8 and 9. I think it's the one you've been looking at. You commence at paragraph 3, don't you, to give some background and context to how it is that you came to be the legal practice director of Delta Law and to work with Mio Art. Paragraphs 3 through to - - -?---Is this the - - -

40 - - - 19?--- - - - affidavit of the 19th?

It's the affidavit which you swore on the 19th of September, yes. Do you have that one?---Oh, September. This one?

45 If you go to the back page and it's sworn on the 19th of September, it's the one that I'm talking about?---Yes, I've got it here.

You've got it. Can you go to page 2?---Yes.

And commencing at paragraph 3, I suggest to you - - -?---Yes.

5 - - - you go into some considerable detail - - -?---Yes.

- - - about the circumstances in which you became involved both with Delta Law and with Mio Art and Mrs – Mr Spencer and Ms Perovich?---That is correct. I've got it here, yes.

10

Yes. You have that?---Yes.

And you talk about, in paragraph 6, your initial meeting with Mr Spencer and Ms Perovich – an initial meeting, I should say?---Yes.

15

Yes. And paragraph 7 you talk about things said during the meeting?---Yes.

Paragraph 10: subsequently, in 2008, you started work as – under the name Quintin Rozario & Associates, as you told the court before?---Yes.

20

Over the page, paragraph 11. Delta Law – its genesis as a renaming of Clapins Property Investments is identified?---Correct.

25 Paragraph 13. You talk about how you commenced practice as solicitor and principal Delta Law?---Got that, yes.

Yes. And nowhere there do you mention that you had an employment agreement – written employment agreement with Delta Law?---No, there isn't any mention there.

30 And – just bear with me a moment, your Honour. Yes. In paragraph 30 of that affidavit, Mr Rozario – can I ask you to go to that?---That's 30, three zero?

Three zero?---Yes.

35 There you mention, I think, something like you've just mentioned to me about a cal – the basis of a calculation of \$450, plus GST, per hour, for 40 hours. And then going up to 550 in 2012 per hour?---That's correct.

Is that the same basis you say your employment agreement was on?---That is correct.

40

You don't mention any written agreement there, do you?---I don't.

No. And that's because there was no such agreement, was there?---I disagree with you.

45

You don't know that there's such an agreement?---I do know that there is such an agreement, counsel.

And the reason that you didn't mention it anywhere – although you knew – I'm sorry, I'll start that again. The reason you haven't mentioned it in either of your affidavits, although you've gone into great detail, is because the existence of such agreement is something that you've just thought of today?---That's not correct.

5

THE CHIEF JUSTICE: But can I get this clear, in any event: this paragraph refers to fees owed to Delta Law, paragraph 30?---Yes, that's correct, your Honour.

10 That's not the written agreement for what you're to be paid?---I was virtually Delta Law, though there is a separation between the company and myself, as the only solicitor in the firm.

So what do you say this written agreement related to, fees to be paid to Delta or your remuneration?---No.

15

Which is it?---Your Honour, if my memory serves me correctly, this was done during the time when – possibly done during the time when it – when it was Quintin Rozario & Associates, which later converted to Delta Law, but I'm not totally sure on that. But I did enter into a written agreement.

20

MR WEBSTER: Can I just clarify, Mr Rozario. Is your evidence now that you think the written agreement may have been between you and Quintin Rozario & Associates?---Well, that's – that's plausible.

25 And if it is, then there was no written agreement between you and Delta Law?---Delta - - -

Do you accept that?---Yes, Delta Law was effectively merged then with Quintin Rozario & Associates.

30

You say “effectively merged”. The shares weren't transferred?---No.

It's a separate corporate entity?---It's a separate corporate entity.

35 And your best recollection, sitting there now, is it's more likely than not that this written agreement you've referred to for the first time today was, in fact, between you and Quintin Rozario & Associates and not with Delta Law?---I haven't confirmed that that is the case, but I'm saying that it could've been that.

40 In any event, you can't help the court any further with who it was than what you've already told us; is that right?---The only thing I can do is to go to exhibit 2. That refers to previous agreements, and I can't take it beyond that.

45 Now, I want to suggest to you, Mr Rozario, that during the time that you were doing work on the Mango Hill litigation for Delta Law, you weren't and didn't consider yourself an employee of Delta Law?---I'd like – could you please - - -

Yes?---I know it's annoying, but could you - - -

No. No, I will. During the time that you were working as legal practice director of Delta Law on the Mango Hill litigation, you did not consider yourself to be an employee?---Well, I did – I was – I considered myself to be the solicitor discharging the duties, the only duties – the duties of the only solicitor in the firm. I wasn't – because I knew I wasn't getting paid on a daily basis or on a weekly basis, I had already entered into that understanding with the clients, and I simply got on with the job. I don't recall spending any time of the day, because there was no regular income, worrying about, at that time, whether I was an employee or whatever. There were times when we certainly had discussions over it, that agreement.

You had informal discussions about how and when you would ultimately be paid, how and when – I'm sorry, I'll start that again. You had informal discussions from time to time about how and when Delta Law and you, yourself, Mr Rozario, would be paid. Yes?---Yes, we had discussions over that.

And they were ongoing discussions at various times in the course of the litigation?---That is correct.

And you understood that it was those discussions which were the basis of when and how you would be paid?---There was a general understanding based on that which – upon which that agreement was drawn. It was that I would get paid every time there – there – there was a payment from out of any one of the several matters. I think it was something like 20-odd matters in the Mango Hill matter, but the ultimate payment would come out at the end of the matter known as BS1714 of 2011.

Yes. I'm sorry, I don't want to cut you off. I'm not, at the moment, asking about - - -?---Yes.

- - - the content of your discussions?---Yes.

I'm asking you whether it was those discussions, whatever their content, which was the basis - - -?---Yes.

- - - of your understanding of how and when you would be paid?---That is correct.

You've never, until the administration of Delta Law, asserted that you were entitled to wages or superannuation per se, have you?---Superannuation was not discussed, but, certainly, wages and the accumulation of those wages was discussed every time money came in and I didn't receive any.

I'm wanting to distinguish here not between income payments that you might've received as a director or in some other capacity and wages that an employee received, and I'm suggesting to you that until the administration of Delta Law, you never made or asserted a claim to wages as an employee of Delta Law?---Whenever I requested or made a demand for any money when money came down, it was on the

basis of that understanding I had with the clients that it would be an accumulation of my work and entitlements over the years.

5 Yes, based on the informal arrangements that had been discussed from time to time?---Based on the formal arrangement and the informal discussions.

10 When you say “formal arrangement”, you mean the employment agreement you’ve referred to for the first time today, which may have been with Quintin Rozario & Associates?---Well, I didn’t say it was - - -

No, it may have been?---May have been.

Yes?---Yes.

15 I just want to be clear what you’re referring to. Can I ask you, then, about some more recent events, Mr Rozario. In 2018, you went to Melbourne and were present at a mediation in relation to the Mango Hill litigation; is that correct?---Yes, that’s correct.

20 And you were there in your capacity as solicitor for Mio Art - - -?---That is correct. - - - as legal practice director of Delta?---That is correct.

25 And can I ask you to take up your second affidavit. That’s the one which is sworn the 13th of November 2019?---Yes, I’ve got it before me.

You say in paragraph 22, on page 5:

30 *I became aware that there had been some form of settlement on the day of mediation*
–

in the first sentence. Do you see that?---That is correct.

35 How did you become aware of that?---At the end of the mediation, Mr Douglas, Mr – Mr Douglas, Ms Perovich and Mr Conomos were speaking about what had been agreed to. Although I was not a direct part of those discussions, it became clear to me that an arrangement – an agreement had been reached. And I spoke to Ms Perovich about it, and she told me that they had reached an agreement with the creditors TVM Earnings and the others who were there.

40 You signed the agreement, didn’t you, Mr Rozario?---The agreement was signed some time later. I don’t think the agreement was signed on that day, unless you could correct me with that.

45 Whether it was signed that day or not, you signed that agreement?---I believe I did.

All right. And so when do you say it was signed, roughly?---It would've been around the end of August, I think. I don't have it in front of me, sorry.

5 Did you read the agreement before you signed it?---Yes. If I've signed the agreement, I would've read it.

Could I ask that the witness be shown exhibit 8, please, your Honour.

10 THE CHIEF JUSTICE: Yes.

MR WEBSTER: Could you turn to the last sheet of that, Mr Rozario?---Yes.

Is that your signature at the top of the page on the left?---That is my signature.

15 And do I take it from what you said before that you read this before you signed it?---Yes.

I have a spare, your Honour, if - - -

20 THE CHIEF JUSTICE: No, it's okay. Thanks.

MR WEBSTER: And you understood from clause 3.3, I suggest to you, that as a result of this deed, the sum of 8.45 million would be paid to Mio Art?---Could you take me to that, sir?

25 Yes, clause 3.3 on page 7.

30 THE CHIEF JUSTICE: I might get your spare copy. I think I'm looking at the other settlement agreement. Thanks.

MR WEBSTER: I take it you read that at the time that you signed the deed?---I probably did. I have – this is not the original of the agreement, this is a copy, but I – I would expect that I did and I expect that I would have signed it, although some of the dates of the signatures here are a bit different.

35 Are you saying, Mr Rozario, that when you signed on page 15 under the date “14th day of June”, that that was in fact the day that you applied your signature?---I'm not saying that, counsel. I'm just – I just notice the difference because one of the things now, from my recollection, is that this document was circulated in counterparts' signatures. So my memory of that is not terribly correct, but I'll – sorry, not very clear, but I would expect that, my signature having been on this, that I would have read the document.

40 You would have taken note of the date that appears above your signature before you signed it, I take it?---I must have, yes.

And you would have corrected that date if it was incorrect at the time you signed it?---That would be correct.

5 So we should conclude that you signed this on the 14th day of June 2018?---You may, sir.

That was the day of the mediation, wasn't it?---Yes, I think it was.

10 So you accept that you signed this settlement deed on the day of the mediation?---I have very little recollection, to tell you the truth, of signing anything on that date. So I will have to accept that this document is a correct document, because my further recollection is that this was circulated further after the event to obtain – there were some adjustments made on the moneys and I can't take it further than that. I will have – have to accept this on its face value.

15 Do you recall – are you – I want to be clear about this. Are you saying that you think you might have signed the same agreement, or two versions of the agreement, at two different times?---That is possible, because, as I said to you, the one thing that I recall about this was that there were several variations to this si – sent around
20 subsequently in terms of the money, unless, of course – unless, of course, I'm mistaken on that and I am referring to some other document.

But from your answers you accept these things, I take it: that this version at least you signed on the 14th day of June?---It looks like it.

25 Do you accept that you did?---Well, there doesn't seem to be any amendment or any changes to it, so I would accept it.

And you read it before you signed it?---I would have read it before I signed it.

30 So you knew at the end of the mediation that the settlement terms included that 8.45 million would be paid to Mio Art?---That's correct. Mio Art was a client.

35 Yes. So when you say in paragraph 22 of your affidavit, two two-thirds of the way through:

I was unaware whether any document was in fact signed that day - - -

40 ?---That's what I said previously.

That's because until I'd shown you this - - -?---Correct.

- - - you couldn't remember what date you'd signed it?---That is correct, yeah.

45 So following June 2018 you knew that a distribution was going to be made to Mio Art of the settle – of these proceeds?---Yes.

And you knew that the money was ultimately sitting in a trust account for James Conomos Lawyers?---That is correct.

5 And you knew that the – there was a proposal that an authority would be given for that money to be paid out as directed by each of the four parties entitled to that money?---I know there were directions given to Mr Conomos. I don't recall what exactly those directions were.

10 Could the witness please be shown exhibit 7, Mr Conomos' statutory declaration?

THE CHIEF JUSTICE: Yes.

15 MR WEBSTER: Just excuse me. Could I ask you to – this bundle is paginated in the bottom right-hand corner, Mr Rozario. Could I ask you to turn to page 40?---Yes.

And you see there an email from Mr Conomos which foreshadows the imminent process to distribute the moneys?---Yes.

20 And you were aware of that at the time?---Yes.

Did you write back to Mr Conomos as a result of this, as far as you can recall?---No, I was having discussions with the client over this.

25 So the answer to my question is no, you didn't write back to Mr Conomos?---I don't think I wrote – I don't recall having wrote – written back to Mr Conomos over this particular - - -

30 Well, you didn't write back to him in rel – in relation to this particular email?---Yes.

And you didn't write back to him in the following days in response to any other email either, or generally in relation to the distributions; is that right?---I'm just trying to look for the date of this document, counsel.

35 So if you're on page 40, the date of the email is the 20th of November 2018, up the top?---In 43?

40 Page 40 I was on, Mr Rozario. Forty-three is the same date?---Yes, but, counsel, you would notice that I was not included in this, which is my – in the email.

I asked you before if you were aware of this and you said you were. On what basis were you aware of it?---Well, subsequently I've come across a number of documents, after I got an IT technician to [indistinct] my server – Delta Law's server.

45 I'm – well, I'm sorry if this was unclear?---Yes.

My question to you before was: looking at the email on page 40 and the things that are in it, you were aware of those things on or around the 20th of November – was my question?---Yes.

5 You were aware of those things?---Well, I will have to withdraw that answer of mine, because I see the date on this and it triggers something else here. I was subsequently - - -

I'm – I haven't asked you about something else?---Sorry. Sorry.

10

I'm just asking you - - -?---Yes.

15

- - - whether your evidence is that around the 20th of November you were or were not aware of the matters set out in this email?---I will have to answer no to that, counsel.

20

And is the re – is the basis of your answer that you now remember that you didn't know these things or because you are looking at the email addressees and thinking That's not an email which would have come to you?---No, there's two reasons for that, if I may? The first being that I have recently, over the last few months, become familiar with these documents. I must say that prior to this, prior to discovering that nothing was sent to me, I couldn't have been aware of it, but looking at that – at this, you know, and the – and the discoveries I've made since the dispute between myself and my client, they look familiar, but, now, double-checking the date and the addresses to which it was sent, I must say that I was not aware of it during that time and I apologise if my memory is not consistent, or my answer.

25

MR WEBSTER: Well, just leaving aside any reconstruction based on more recently becoming aware of certain things to do with email addresses?---Yes. Yes.

30

I'm just asking you, thinking back to the 20th of November, were you aware of the matters set out in this email or not?---I don't think so.

All right. Can I, please, show you a document?---Yes.

35

Actually, I'm sorry, I've just got to ask one more question before I do that. Is the email address that you used in your capacity as legal practice director for Delta Law q.rozario@deltalaw.com.au?---That is correct.

40

All right. I'll show you a document, please. One for her Honour. Just the front page of this document, Mr Rozario?---Yes.

The front page?---Yes.

45

Okay. Do you have at the top a line that says:

From Delta Law admin.

?---Yes.

And then “to q.rozario”?---I have that here, yes.

5 Dated the 20th of November?---Yes.

And it forwards to you, your email address, does it not, the email from Mr Conomos on page 40 that we’ve just been looking at?---Can I just double-check the emails to see if they’re the same?

10

Yes. Yes, by all means. It’s the email on page 40 of exhibit 7?---Yes, and 41.

Page 40, four-zero?---Yes.

15 And the front page of the bundle I’ve just handed to you?---They look identical, and I must say yes, from looking at this, I would have received the email from admin@deltalaw, which includes this document which you showed me previously, which was - - -

20 Page 40?---Yes.

You can assume, Mr Rozario, that there’s – that the emails are in identical terms. You needn’t check it word for word?---Yes.

25 You can take - - -?---Yes.

I’ll ask you to assume that?---Yes.

30 So do you now accept that as at the 20th of November you were aware of the content of Mr Conomos’ email?---I’d have to admit to that, yes.

And you’d also accept, I take it, that the operator of admin@deltalaw had provided you with that information by forwarding it to you?---Yes, it appears so.

35 And that was consistent with a practice where emails that went to admin@deltalaw were regularly forwarded to q.rozario@deltalaw if you hadn’t been sent the original email.

40 MR PEDEN: Well, I object, your Honour. This witness can’t talk to the practice of having received things if - - -

MR WEBSTER: I’ll rephrase the question, your Honour.

45 THE CHIEF JUSTICE: Thank you.

MR WEBSTER: You often received emails from admin@deltalaw forwarding emails relating to the Mio Art mail?---Often, yes.

And this was one of them?---This would have been one of them.

5 And we got here, I think, Mr Rozario, because I was asking – I was putting to you that, being aware of the contents of Mr Conomos’ email of the 20th of November, you didn’t send any email to Mr Conomos either on that day or in the subsequent days giving any direction or corresponding about the distribution of the funds?---The client had been dealing directly with Mr Conomos. As was counsel, I believe. And I, because of the calculations and because of some of the matters involving the – the solicitors and salvage lien and the other creditors, I was told that they were dealing
10 with the sum total because they were aware I was effectively not part of the – the negotiations, although I was there – I was present at the mediation.

I’m now asking you about 20 November and the subsequent days and at the moment I’m just asking you the simple question of whether in the – on the 20th, or in the
15 subsequent days, you sent any emails – any correspondence with Mr Conomos about the distribution of the moneys?---It would have been in January of this year, but - - -

I’m just talking about November?---Okay, November. No, not that I recall.

20 All right. But you were aware in November – 20 November that Mr Conomos was intending to distribute the moneys imminently?---I wasn’t aware that he was intending to distribute the money in this regard, because from my recollection there was subsequent discussions between the parties as to the correctness of the figure – of the amounts to be distributed.

25 Are you now talking about a – something that you knew contemporaneously or something you say you found out subsequently?---No, they were – there’s a substantial amount of correspondence between Mr Conomos and the client over the accuracy of the figures - - -

30 Yes?--- - - - provided in this calculation.

My question to you, Mr Rozario, was - - -?---Yes.

35 I’m asking you about what you knew at the time and what you did at the time. Did you know at the time that there was substantial correspondence back and forth about the figures?---Well, I gathered that subsequently from the email – the server - - -

40 I – can I ask you – and the questions I’m asking for you now – to confine your answers to what you knew at the time and what you did at the time?---Yeah.

And not things that you might now say you’ve found out subsequently. Is that - - -?---Okay. So, counsel, can I ask you to repeat that question again - - -

45 Yes?--- - - - please.

I was suggesting to you – asking you whether you agree or not that in or around 20th of November, and subsequently in that month, you didn't correspond with Mr Conomos about the distributions. And I understand that you do – agreed with that; is that right?---Yes.

5

All right. And then, I think, you volunteered that the reason – what I understood to be the reason for that was because there was some complexity in relation to the figures and so Mio Art was better placed to deal with that directly than yourself. Is that the explanation for why you didn't correspond with Mr Conomos - - -?---Yes.

10

- - - in November 2018?---Yes.

And you were aware in 2018 that that was the reason?---That what?

15

In November 2018?---Yes.

You were aware of that reason at the time?---The reason that? The - - -

20

The reason that there was some complexity with the figures and, therefore, Mio Art or its representatives would correspond directly with Mr Conomos?---Yes, it was not the arrangement, but that's how it turned out.

25

Well, I'm sorry, you – I understood you to be saying the reason you didn't correspond was because there was an arrangement that Mio Art would correspond directly with Mr Conomos?---And I said because I wasn't – the arrangement was between me and Mio Art and Ms Perovich that because they had the – the exact figures on this, and to save time – everybody wants to be paid – that they would, therefore, correspond with Mr Conomos in terms of the figures.

30

Right. And a few days after this, on the 22nd of November, \$1 million was transferred to gen – Delta Law's general account?---That is correct.

And you became aware of that at or about that time?---A little later.

35

You had access to the bank accounts of Delta Law?---I do.

Including - - -?---I had.

40

Including that account?---Yes.

Yes. And you became aware of it, I want to suggest to you, before the end of November?---Yes, about that time, yes.

45

Right. In your report – excuse me a moment. Subsequent to the administration of – you can put those documents away, if you like, Mr Rozario?---Thank you.

THE CHIEF JUSTICE: And you didn't want to tender anything out of that?

MR WEBSTER: I'm sorry, yes, your Honour. The – probably just the cover sheet that – the first two pages of that bundle. I don't think I've – I mean, I'm content to tender the whole, but - - -

5 THE CHIEF JUSTICE: I think you probably should. You – if these things were together, preferable to.

MR WEBSTER: Yes. We under – it's disclosed document 46 on Mr Rozario's list of documents, but I'm happy to tender it as a bundle with a – with the covering email
10 being from Delta Law to q.rozario@deltalaw.com.au, and others, dated the 20th of November 2017.

THE CHIEF JUSTICE: My question really is what's – were all the subsequent documents forwarded with that? Are they the single email or not? I just don't want
15 the - - -

MR WEBSTER: I'm instructed that this is the document as a whole that was disclosed, document 46.

20 THE CHIEF JUSTICE: Yes, but – so it's an email, plus attachments to the email?

MR WEBSTER: Well, there seems to be another email at the back, your Honour, which is separate.

25 MR PEDEN: Your Honour, I do object to this, in the sense that the email appears – that was put to Mr Rozario doesn't have any attachments to it.

THE CHIEF JUSTICE: I thought this thing was - - -

30 MR PEDEN: No, no, no. On the face of the email, it doesn't show that there are any attachments.

THE CHIEF JUSTICE: Okay. All right.

35 MR WEBSTER: Our difficulty, your Honour, is this is the form in which the document was disclosed to us. I'm – I am content to just tender the front two documents, because whether they're attachments or not are re – not really relevant to any submissions.

40 THE CHIEF JUSTICE: Okay. Do you mean the front two pages when you say "two documents"?

MR WEBSTER: Yes.

45 THE CHIEF JUSTICE: Okay.

MR WEBSTER: The front two pages, I'm sorry.

THE CHIEF JUSTICE: All right. That will be exhibit 15.

EXHIBIT #15 ADMITTED AND MARKED

5

THE CHIEF JUSTICE: Yes. Have you another copy of that email to become the exhibit, because I have written on the copy you gave me.

10 MR WEBSTER: I am sure I do, your Honour. Just excuse me for a moment.

THE CHIEF JUSTICE: Did you get it back from Mr Rozario or - - -

15 MR WEBSTER: I haven't got a copy back from Mr Rozario. He may still have it.

WITNESS: Okay.

20 THE CHIEF JUSTICE: Yes. Okay. Well, maybe we'll make that the exhibit. So it's just the email [indistinct] if you take the front two pages off and then return it to Mr Webster.

25 MR WEBSTER: While that's occurring, Mr Rozario. In – subsequent to the administration of Delta Law, you submitted a report on the company activities and properties of Delta Law form to Mr – to the administrator – or for ASIC; is that right?--I believe so. I don't have it before me.

It's an exhibit to Mr Cotter's affidavit. Could Mr – I might ask Mr Rozario be shown a copy of Mr Cotter's affidavit, which is - - -

30 MR EADE: Your Honour, sorry to interrupt. If it assists, I have a spare copy of Mr Cotter's affidavit that I was - - -

THE CHIEF JUSTICE: Okay.

35 MR EADE: - - - intending to use for Mr Cotter.

THE CHIEF JUSTICE: Okay. That - - -

40 MR WEBSTER: Yes, that would be very useful.

THE CHIEF JUSTICE: Thanks very much.

MR WEBSTER: Thank you. Mr Bailiff, I think that's for the witness.

45 THE CHIEF JUSTICE: For the witness, that one, please.

MR WEBSTER: If you go to page 107 of the exhibit bundle, Mr Rozario. The numbers are in the top right and bottom right corner, for ease of identification?---A hundred and seven?

5 Yes?---Yes.

Just flick through the first couple of pages, if you like, and – does that look familiar to you as a document that you sent to ASIC subsequent to the administration of Delta Law – to the administrator, I should say?---I’m not totally – I can’t say that. I know
10 there were some documents that I had prepared.

Well, can you go to page 195, please?---One-nine-five?

15 Yes, 195. Is that your signature?---Yes, that is my signature.

And did you sign this document?---Yes, I signed this document.

Do you - - -

20 MR PEDEN: Might I just ask for some precision about the signing of this document, as to how many pages my learned friend says comprised the document that Mr Rozario signed.

25 THE CHIEF JUSTICE: The page signed does say page 8 of 8, Mr Webster.

MR WEBSTER: Yes, I’m sorry, your Honour. I should do this in a slightly neater way. I do apologise.

30 Mr Rozario, can I take you back. I think it’s easiest to do it this way. Can I take you back to page 107, please?---Yes.

I’m sorry. I do apologise, it’s 183?---One-eight-three?

35 Yes, 183. Yes, I think there are multiple copies, but 183 is Report on Company Activities and Property Part A?---Yes.

Can you turn forward to 187. You see that’s part page 5 of 5, down the bottom right?---Would you bear with me for just a minute, please?

40 Of course?---Okay. So 187; 183 was the one before that?

Yes, I’m suggesting to you that there’s a document that ends on page 183 and ends on 187 which you’ve signed on page 187?---Okay. It’s 183 and 187. Sorry, counsel, what was the question to that?

45 You’ve signed that document?---I did.

You read it before you signed it?---I would've read it before I signed it.

Turning over to 188, there's a document which commences which is called Report on Company Activities and Property Part B?---That's correct.

5

And it continues over to page 195 for - - -?---Yes.

- - - the body of the document, and then I suggest to you that the attachments continue, thereafter, to page 233?---Oh, 233. Yeah.

10

MR PEDEN: Well, again, this question - - -

WITNESS: Yes.

15

MR PEDEN: - - - needs some precision. Is my learned friend suggesting that the documents that appear on page 196 and onwards were part of the document that Mr Rozario signed? Or is he just saying that there are some documents behind the document that Mr Rozario signed?

20

THE CHIEF JUSTICE: I thought Mr Webster was saying these were attachments to the signed document. I thought that was fairly clear.

25

Up to you, Mr Rozario. Were the following documents part – well, were they accompanying the previous document which you've signed?---I'm not sure. I'm not sure.

MR WEBSTER: Well, it's probably sufficient for my purposes, Mr Rozario, if you turn to page 203?---Yes.

30

Is that your handwriting on that page at all?---The ones in pencil are.

“The ones in pencil are”, you're saying. Is that the lighter colour on the page?---The lighter coloured ones look like – like my handwriting, although not - - -

35

The signature at the top, is that your signature?---Yes, the one at the top is my signature.

And you signed this after you read and accepted the contracts?---Yes, after I read it.

40

All right?---I - - -

This - - -?---Yes. Sorry.

45

Yes, I'm sorry. This lists, as amounts the company owes to its creditors, amounts owing to, among others, Mr Colditz, Mr Keane and Mr Douglas?---Yes.

Do you see that?---I see Mr Keane's. I see - - -

Mr Colditz is above Mr Keane?---Yes. Yes.

5 And next to Mr Douglas it says, and I take it from your answer not in your handwriting, but somebody else's - - -?---No, I'm sorry, can I – that – that – yes, I've got – I thought it looked like Florence somebody, but it's Francis Douglas. Yes.

Yeah, I assume that's Francis?---Yes.

10 It's unknown because Mio Art were paying him?---No. I had no knowledge that Mio Art was paying Mr Douglas. In fact, Mr Douglas issued an invoice and continued to demand that it be paid.

Did you read this page before you signed it?---Yes, I did.

15 And you're telling the court that you signed it and gave it to the administrator, knowing that what was written next to Mr Douglas was not what you believed to be the case?---No, unknowing, because Mr Douglas I don't believe had by then submitted his proof of debt. They - - -

20 Do you accept that when you signed this document and gave it to the administrator, the things - - -?---Yes.

- - - written on this page reflected what you believed to be the case?---That's correct.

25 All right. So you believed that there were quantified amounts owing by Delta Law to Mr Colditz and Mr Keane - - -?---Yes.

30 - - - and a possibly unquantified amount owing to Mr Douglas because Mio Art were paying him?---I had no knowledge at the time I placed the company in the hands of the administrator. I had not knowledge or any notice of Mr Douglas or any of the other counsel entering into arrangements with Mio Art to be paid.

35 So are you saying that when you read – I'm sorry, whose handwriting – do you know whose handwriting this is?---I'm trying to think whether it was - - -

Did somebody give you assistance in filling out this form?---Well, yes.

40 Who?---There was – I – when I was – I went there with James Law, a man who's no longer practicing.

45 Yes?---That was a friend of mine, and I was – at that stage, because I was under a great deal of pressure, Mr Law had agreed to assist me. I don't know whether that's his handwriting. It doesn't look like his handwriting, but it could've been somebody from the firm, itself. I'm not terribly sure.

THE CHIEF JUSTICE: You're quite confident it's not yours?---I am quite confident that parts of these are mine, those I think are the lighter ones.

MR WEBSTER: Mr Rozario?---Yes.

5 Did Ms Perovich or Mr Spencer help you fill out this form?---No, I was not – I was not on talking terms with them. I think they would’ve liked to see me fall under a steamroller, but I had no connection with them after late January in 2009.

And you say at the time that you placed the company into administration - - -?---Yes.

10 And I take it at the time of submitting this form, which is dated the 31st of July 2019, so only a couple of days later, you say you had no knowledge of any arrangement by which Mio Art was paying Mr Douglas?---That is correct.

Can I suggest to you – and yet you signed this page - - -?---Yes.

15 - - - which says on it “because Mio Art were paying him”? You must’ve agreed with that when you signed the page?---Well, I can’t even read that bit here.

20 You can assume - - -?---Somebody would’ve written it there, and, as I told you previously, parts of this are not my handwriting. I think it would be better - - -

I’m not asking who wrote it for the moment, Mr Rozario. I’m asking - - -?---Yes.

When you signed this - - -?---Yes.

25 I’m putting to you that when you signed this page, you believed that to be true, “because Mio Art were paying him”?---No.

30 All right. So you signed - - -?---No. No. Sorry, what I meant was I did not at any stage believe that Mio Art was paying Mr Douglas, Keane or Colditz.

35 So you signed this page knowing it contained inaccurate information?---Well, I have – I – I don’t – I’m a bit confused as to how somebody else would’ve written this, because it doesn’t look like James Law’s writing to me. So I have – what I’m saying, I think, is I have some doubts about the providence of the rest of this document, and I think that is a – a question perhaps Mr Cotter would be able to answer.

Yes, we can ask Mr Cotter - - -?---Yes.

40 - - - about the veracity of the document. Are you now saying that you might not have signed this page in this form at all?---I’m – I’m not saying that. This is a bit confusing to me because - - -

45 Well, perhaps you can explain this to me, Mr Rozario - - -?---Yes.

- - - how – if you didn’t know that Mio Art was being paid – was paying Mr Douglas, and nobody from Mio Art assisted you paying this form, how could anyone

possibly have written this in onto the form?---I'm unaware if – if anyone from Mio Art actually entered anything to this form or did anything with the liquidator or with anybody else. That is my signature up there. It is my signature. One of the things that concerns me now that I take a second look at it is that, if you look at my recent
5 signature, you find it's significantly – I'm starting to now investigate this here, look into it a second time. The signatures appear to be mine, but mine from an earlier date, so I can't really comment any further on that.

10 How did you, Mr Rozario, send this document to the administrator?---I don't know, but if I sent it, it would've contained the additional – I'm unsure of that. I can't answer it.

You accept that you filled out a document, this document?---Similar to this.

15 Yes. And you did it because you were required to submit it to the administrator?---That is correct.

20 You don't now have any recollection of how you sent it to the administrator?---No. What I'm confused about are these other bits of writing in it. What looks like mine are the light ones. That does look like my handwriting done in a pencil, perhaps.

I understand?---Lead pencil.

25 I don't want to hold you up too much longer on this, Mr Rozario. Can I just put to you some things, and you can agree with them or disagree with them. I want to suggest to you that you signed this – when you sign this page it had all the information which now appears on page 203; you agree or disagree?---Looking at my signature, I'm starting to have a bit – a few concerns about the providence of this document.

30 And I want to suggest to you - - -?---Yes.

35 - - - that whether you wrote the entry next to Mr Douglas or not, you knew, at the time you signed this document, that Mio Art were paying him?---I did not. That is, if I signed this document.

All right.

40 THE CHIEF JUSTICE: What's the proposition, then? That there's a document which somebody has found with an earlier signature of yours and some writing by you on it and then been able to alter it and provide it to the administrator?---Your Honour, there are a number of documents that have been bled from the server, part of which were submitted at the – at the mediation bore my signature, but – which were not documents prepared by me nor were they documents that I signed. I'm – I take it
45 on face value that, yes, this is something, because it bears my signature. But with the doubts that – with the issues that counsel has raised, I'm starting to worry about the –

well, the – the providence of this document. And that signature is certainly not mine. I don't sign that way of the last three or four years.

5 Okay. So as I put to you then, the proposition is that somebody's got hold of your – an older signature on a form relating to a liquidation of the company - - -?---Yes.

- - - with some pencilled entries. Is there some context in which you would've filled out a form other than the present voluntary administration that somebody could get their hands on?---Your Honour's asking me?

10

I'm asking you - - -?---Yes.

- - - how somebody else would've got hold of this form, a form with what you say looks like an older signature - - -?---That's correct.

15

- - - which you concede has some handwriting of yours in pencil? Why would the form exist in the first place?---Why would the - - -

20 Why would you have a form like this with handwriting on except for the purposes of this – of placing the company into administration by Mr Cotter?---I don't know.

MR PEDEN: Your Honour, I think, to be fair, this is a report as to affairs which follows on after the administration.

25 THE CHIEF JUSTICE: All right.

But in the context of this administration – so, all right. You can't think of any other context in which you'd have been writing on form looking like this, except the current administration of this company?---That is correct.

30

MR WEBSTER: Mr Rozario, before coming to the witness box today, have you seen this affidavit of Mr Cotter? Has it been provided to you by your solicitors or counsel?---Affidavit of Mr Cotter?

35 That's what we're looking at now, yes?---Yes.

I'm asking, before you've come into the witness box, have you previously been provided it by your solicitors or counsel?---I have seen an affidavit of Mr Cotter's.

40 You can take it from me this is Mr Cotter's only affidavit. So if it's his only affidavit, you've seen it; is that right?---If it's his only affidavit, I've – I've seen an affidavit and I can't compare it with this. I might have a copy in my folder, if I'm allowed to look at it.

45 No objection from me, Mr Rozario. By all means. Maybe if you just checked that the date that it's sworn - - -?---Yes.

- - - matches page 40 of the affidavit, sworn on the 13th of November 2019, and confirm if that's the one you've been provided?---I've got a circular here which is quite voluminous.

5 No. If you go to the front of the affidavit - - -?---Sorry, counsel, I'm just looking for - - -

I'm sorry, you're saying you don't have a copy of the affidavit there with you?---No, I'm just trying to see if I have. I – I think I've cited one previously recently.

10

This may not be necessary, depending on your answer to my next question, Mr Rozario?---Yes.

15 Did you read it? Have it you read it before today? Have you read the affidavit before today?---Mr Cotter's affidavit, the one that I read, was fairly small, but they had large volume of exhibits to them.

Before today, you have read an affidavit of Mr Cotter?---That's correct.

20 I'm going to suggest it is this affidavit and I'm going to suggest that you read paragraphs 29, 30, 31 and 32 of the affidavit?---I'm – I probably have.

On page 11?---But I've skipped through it. I didn't – I didn't study it in too much detail. I've read the affidavit.

25

Can I ask you to go to paragraph 29, please?---Twenty-nine?

Yes. Mr Cotter says that you provided him with a completed report on company activities and property on the 31st of July 2019?---Is that in 30?

30

Paragraph 29?---Sorry, 29, yes.

Do you see that?---Yes.

35 That's true?---Yes.

You did provide Mr Cotter - - -?---Yes.

- - - with that document?---I – I – the person assisting me helped me with that.

40

Who's the person assisting you, Mr Rozario?---The person assisting me is Mr James Beresford Loel.

And Mr Cotter says that the document –

45

A true a correct copy of part A and part B of the RCAP –

that's the report – is pages 183 to 233 – that includes the page 203 we've been looking at. You accept that's what Mr Cotter says?---Sorry, where do I find this?

5

Paragraph 31?---Yes. One-eight-three to 233.

I'm just, for the moment, getting you to identify, Mr Rozario, that what Mr Cotter says is on 31 July - - -?---Yes.

10

- - - he received this document, and you accepted that you sent – you or the person assisting you sent it on that date, I think, yes?---Yes.

15

And Mr Cotter says that it's the document which is at page 183 to 233. And I'm just getting you for the moment to accept that that page range includes page 203 that we've been looking at?---This is Mr – this is Mr Cotter's affidavit.

Yes?---So - - -

20

I'm – all I'm just getting you, for the moment, to accept that that page range includes page 203 that we've been looking at?---But this is Mr – is Mr Cotter's affidavit.

Yes?---So - - -

25

All I'm getting you to accept, for the moment, is that the page we've been looking at, 203, is - - -?---Yes.

- - - a page which Mr Cotter says forms part of the true and correct copy of the report. Do you accept that?---Well, if Mr Cotter says so.

30

Yes. Okay. Now, there's no time between when you submitted this document - - -?---Yes.

- - - or Mr Law assisted you to submit this document, on the 31st of July - - -?---Yes.

35

- - - for anybody to intervene and change or insert a signature before it went to Mr Cotter, is there?---I – I – I couldn't speculate on that; all I can comment on is with the issues that you've raised, double-check my signature. I – I'm concerned about it, but – but I don't - - -

40

All right. What I'm putting to you, Mr Rozario, is the only people who have had a copy of this document are yourself, Mr Law - - -?---Yes.

- - - Mr Cotter and perhaps people employed by Mr Cotter?---Perhaps.

45

All right.

THE CHIEF JUSTICE: Can I just ask – how did you give your reports to Mr Cotter? How were they physically provided?---Yes. I filled – I would fill out forms, and James Law used to look through them for me.

5 I'm just asking about the transmission to Mr Cotter?---Yeah, they would be taken to Mr Cotter either in person or they were emailed to him, I think.

Okay. In person or emailed?---Yes.

10 All right. Thank you for that. Yes, Mr Webster.

MR WEBSTER: Thank you, your Honour.

15 Leaving aside Mr Douglas, you believed at the time this form was submitted that there were moneys owing by Delta Law to Mr Colditz and Mr Keane at least?---That is correct.

20 All right. And were they recent invoices that had just been issued in July or June of 2019, or were they related to earlier invoices?---They were May. Some of them, Mr Colditz's invoice, was issued a little earlier, I think. Mr Keane's was in May, and Mr Douglas' was by way of a letter to my former solicitors, FC Lawyers, for over 2 million.

25 Just excuse me. You're saying the invoice from Mr Keane - - -?---Yes.

- - - that's referred to on page 203 was only issued in May?---Sorry, counsel, 203 of which document?

30 Page 203 of the exhibit bundle, the page we've just been looking at?---Oh, Mr Cotter's affidavit?

You're saying that invoice for 520,000 was issued in May 2019?---Is this in – is this Mr Cotter's affidavit?

35 Yes?---Which page is that again?

Two-zero-three?---Two-zero-three.

40 THE CHIEF JUSTICE: I think perhaps you're not making this very clear.

MR WEBSTER: Yes.

45 THE CHIEF JUSTICE: I think Mr Rozario is under the impression he's looking for an invoice.

MR WEBSTER: I'm sorry.

Page 203 of Mr Cotter's exhibit bundle - - -?---Yes.

- - - is the page we've been looking at previously - - -?---Yes. Yes.

5 - - - where there is an amount next to Mr King's name on a page which appears to bear your signature for the amount of \$520,000?---Yes.

Do you see that?---Yes.

10 And I'm just clarifying that your evidence is that sum is a debt which arose in May 2019, when an invoice was issued at that time?---From my recollection, in or around May Mr Keane issued an invoice for that amount, for about that amount.

I want to suggest to you, Mr Rozario, that that is – that all of that amount is
15 attributable to invoices issued prior to 2018?---No, that's not correct, not to my - - -

Could you please go to page 18 of Mr Cotter's affidavit, the body of his affidavit?---Paragraph?

20 Page 18?---Page 18. Yes.

You'll see a table appears on page 18, page 18 of the body of the affidavit?---Yes. Yes.

25 The total at the bottom of the table is 520,945?---That's correct.

It's identical to the amount on page 203 attributable to Mr Keane of 520,945?---Yes.

30 It's attributed, in this table, to invoices between 2011 and 2017?---Yes. That is a break up of it, and the sum total at the bottom is 529,045.

Yes, and that sum is attributable to invoices issued by Mr Keane prior to 2018?---I see what you mean. That's - - -

35 You accept that is - - -?---That's possibly - - -

It's true, isn't it?---That's possible. I don't know, because if he was being paid by the client directly, as you suggest, then – which I think might've been the case – then
40 some of those invoices would be doubtful. What I received was a summary of the invoices. I met with Mr Keane in January, and in May of this year he issued an invoice for 529,045.

Are you saying that before May of this year, you had no idea that Mr Keane had issued invoices or for what amounts?---Oh, I was aware that Mr Keane had issued
45 invoices from time to time, but I received some of them, not all of them. They went to admin@deltalaw.

You received some of them, at least, before May 2019?---Before May 2019?

And what did you believe was the status of those invoices as at May 2019?---They were due and payable.

5

By Delta Law?---By Delta Law.

And it was the same position in April, March, February of 2019, too, I suggest to you. He'd issued invoices. Mr Keane had issued invoices, at least some of which you'd seen, and you believed they were due and payable at that time?---Yes.

10

All right. And is it a similar position with Mr Colditz, that he'd issued invoices over a number of years, at least some of which you'd seen and which you believed were due and payable, at least in part, as at February to June 2019?---Well, the difficulty here is this. The client sent out - - -

15

I'm just asking what you believed, Mr Rozario?---What I believe is that those invoices had not been paid.

And you believed Delta Law was liable to pay them?---That is correct.

20

When – in November, late November or early December 2018 – you became aware that \$1 million had been deposited in Delta Law's bank account, what part of that \$1 million did you use to pay counsel's fees?---What part did I use?

25

Yes?---Sorry, what was the question again, please?

When Delta Law received \$1 million - - -?---Yes.

- - - in November 2018 - - -?---Yes.

30

- - - what part of that sum did you use to pay counsel?---None.

Did you believe at that time that there were invoices owing to counsel?---I wasn't aware of the quantum of the invoices payable to counsel, because there was some difficulty with money taken earlier. So no.

35

In November 2018 and subsequently, Mr Rozario, you knew - - -?---Yes.

- - - that there was an arrangement, of which you were part, where counsel were not pressing for the immediate payment of their fees from Delta Law because of arrangements worked out with Mio Art?---The arrangements were between Delta Law and counsel, that counsel will be paid when the matter ended.

40

So you understood that there was no amount due and payable to counsel until the matter ended?---That is correct.

45

All right. And did you regard the receipt of the \$1 million as signalling the end of the matter or not?---The payment of \$1 million was not the end of the matter.

5 Indeed, the matter has not ended yet because there are still a large number of costs orders outstanding which have yet to be finalised?---I believe so.

10 So based on what you knew and understood, none of counsel's invoices were yet due and payable by Delta Law because the matter had not yet ended?---No, that's not the way it was explained to me by counsel or by the client.

Mr Rozario, I want to suggest to you - - -?---Yes.

- - - that in your capacity as legal practice director of Delta Law - - -?---Yes.

15 - - - up until the point that you put Delta Law into administration, you were operating on the basis that counsel's fees were not due and payable, at least as a matter of practicality, until some future time?---Yes.

20 But when you decided to put the company into administration, you had sought to state and represent that those invoices are immediately due and payable so as to try and suggest that the company's insolvent?---Mr Douglas had issued a warning to me from Hokkaido, Mr Keane had issued a warning to me that they – if I didn't resolve the issue with the client, that they will issue invoices to me which would be due and payable immediately; they made demands on the firm and those demands continue.
25 So at the time I placed the company into the hands of a – an administrator, it was clear in my mind that those invoices, by whatever arrangement were now due and payable, they were not the only invoices so - - -

30 You – you know that none of Mr Keane, Mr Douglas or Mr Colditz have lodged proof of debts in the administration?---They are able to do that at any time.

You know that they haven't?---I'm aware that they haven't.

35 All right. So if the \$1 million wasn't used to pay counsel, Mr Rozario, what was it used for?---The money was given to me as what the client said was a gratuitous payment to me.

40 I'm sorry, I'm not asking about how it got to you, I'm asking what has it been used for?---It has been used mainly for defending these proceedings, there are about four of them outstanding.

Well, Mr Rozario, the money was received in November 2018, by May 2019, none of these proceedings had started, had they?---No.

45 And - - -?---But none of the money was moved either till later – till sometime earlier this year.

Two hundred thousand was used before May two thousand - - -?---That is correct.

Before any of the proceedings were started?---That's correct. I didn't say all of it was used.

5

No, I - - -?---Sorry, I don't mean - - -

And the 800 – the balance of 800,000 was withdrawn in May 2018 by you – by May 2019 by you?---Yes, that is correct.

10

And that was before any of these proceedings had been commenced?---There were proceedings – yes, I think you're correct there.

At the time you withdrew them, you couldn't therefore have had in mind using them as to fund the defence of this proceeding?---No.

15

Where is the money now?---Well, the money – much of the money's dissipated, some of it is with my lawyers.

20 How much has been dissipated?---Well over \$600,000.

You can't seriously suggest to the court you've paid over \$600,000 for the defence of these proceedings?---No. I would say it would've been closer to \$400,000.

25 So of the million, more than half has been used other than in relation to this proceeding?---That is correct.

You are aware that the Queensland Law Society investigated the withdrawal of the \$800,000?---I am aware that a couple of lawyers made complaints to them. They've written to me since. They've asked me for an explanation, which I've provided them, and the matter is still unresolved.

30

Just excuse me, your Honour.

35 On 5 November of this year, you received a supplementary report from the Queensland Law Society about its investigation?---That is correct.

All right. It was not a draft for you to comment upon, but was given to you for information and for your records as recording what the QLS had determined in that report. Do you accept that?

40

MR PEDEN: Well, your Honour, I'm not sure that Mr Rozario can comment on the purpose from – of the Queensland Law Society.

45 THE CHIEF JUSTICE: All right. Well, maybe he can give his understanding.

MR WEBSTER: Yes. Your understanding, Mr Rozario, is that it was not a draft report given to you for comment, but a final – a report in final form give to you for your records?---Well, I was asked to respond to it by the 19th.

5 The 19th of this month?---Of November. Yes.

And do you intend to?---Yes.

10 Can I ask you, in Mr Cotter’s exhibit bundle, to go to page 626 of the exhibits, please?---Two-six?

Six-two-six?---Yes.

15 This is a copy of the letter that you received from the Queensland Law Society?---Look, I – I’m looking at 266. I don’t see that.

Six-two-six, Mr Rozario?---Sorry. I beg your pardon. Yes.

20 This is a copy of the letter which you received? Yes?---Yes, it looks like it. It’s got - - -

And the report which commences on the following page and goes to page 629 is the report that you received with the letter?---Yes.

25 The letter asks, in the second paragraph:

At this stage, I ask you to confirm in writing that the reported matter has been corrected.

30 Page 626, middle of the page. There’s a sentence in the letter to you from the law society which says:

At this stage, I ask you to confirm in writing that the reported matter has been corrected.

35

Do you see that?---Yes.

40 Do you understand what the correction is that the law society is referring to?---Not immediately off the top of my head. I was intending to look at this just before the 19th and get further legal advice on it before responding, but I’m happy to look at it now.

You received a letter from the Queensland Law Society - - -?---Yes.

45 - - - about an investigation it has carried out into your dealings with moneys?---Yes.

And you're telling the court that you have not, up until this time, identified what it is that the Queensland Law Society has asked you to do?---I didn't say that, counsel, respectfully.

5 Well, I'm asking you – is that your evidence?---No.

Okay. What have you determined the Queensland Law Society is asking you to do?---Well, they're – they've asked in one part that I return an amount:

10 *It's requested you refund 472,292 to the law practice trust account immediately and advise the law society in writing that it has been done.*

Were you aware of that request before today?---Yes, on the 5th of November.

15 Have you done that?---No.

Do you intend to do that?---Well, I intend to rely on the legal advice I get, the updated information which the Queensland Law Society is not in possession of and then to respond to them accordingly. This matter is not yet resolved.

20

Is that a long way of saying, no, you don't intend at this stage to refund that money?---Well, that isn't what I said.

25 MR PEDEN: Your Honour, that's not – that's got a whole series of assumptions in it, and it really doesn't follow from what the witness has said.

MR WEBSTER: [indistinct]

30 MR PEDEN: The witness has said - - -

THE CHIEF JUSTICE: Well, what might follow is he doesn't intend to refund it by the due date. I think that would be a reasonable proposition to put to him.

35 MR WEBSTER: I'm happy to put it that way, your Honour.

40 Mr Rozario, do I understand from your answer that you do not intend – tell me if I'm wrong, but do I understand from your answer that you do not intend to refund the moneys requested by the Queensland Law Society by the 19th of November?---Well, the first thing is that I don't have control of the trust account. The second thing is that, you know, I need legal advice on that and then I intend to respond to them, but – and by the 19th and if it is required then on the basis of legal advice, because this is a matter that's not yet concluded. I have the right to respond to it.

45 We're not suggesting anything about that, Mr Rozario. Do you know the bank account details of the trust account of Delta Law Proprietary Limited? Do you know the bank details for the trust account of Delta Law Proprietary Limited?---I – not off the top of my head, but I know that it is with the ANZ Bank.

Do you have a written record somewhere, having acted as legal practice director for 10 years, of the bank account details of the trust account of Delta Law?---I have them. I have them at my office.

5 So you could – I’ll put this another way. You have the details which are required to make a refund if you decided to make a refund; yes?---Yes.

All right. And my question to you is do you intend or do you not intend, by the 19th of November, to refund this sum to that account?---Subject to legal advice, I would
10 be able to answer that. I can’t, at the moment.

You have not yet formed a view as to – a final view, at least, as to whether or not you’re going to refund the money. Is that your evidence?---Well, I have to get legal advice on that to find out why it is I’d have to return that money because – and I
15 don’t need to go – I don’t wish to go too far into it. My view is that the calculations made by the Queensland Law Society are incorrect.

These calculations, you understand, are based on the Queensland Law Society’s assessment of invoices which you provided to the Queensland Law Society?---That’s
20 correct. I assume that’s – that’s what it’s based on.

That’s your understanding - - -?---Yes.

- - - at the time, the – and you think that there are perhaps more invoices or a
25 different way of reading the invoices which might lead to a different result?---Well, on the basis of the invoices – and this is without further analysis – without too deep analysis of their allegations here, so they haven’t considered all of the invoices.

These are invoices – or you provided some invoices to the Queensland Law Society
30 in response to their inquiry; is that right?---That’s correct.

Could I ask the witness please be shown – just bear with me, your Honour – exhibit
15 – sorry. Exhibit 15 is a bundle of invoices, I believe. Is that right? I’m sorry, your Honour. I - - -
35

THE CHIEF JUSTICE: No, 15 is an email - - -

MR WEBSTER: MFI – I’m sorry, MFID is what I was after.

40 THE CHIEF JUSTICE: Yes.

MR PEDEN: Your Honour, could I just rise to object. Your Honour, can I just
object generally, at this stage. My learned friend knows that there’s a freezing order
in place that restricts the dealing with this money. So for my learned friend to
45 suggest to the witness that he should be dealing with the money in contravention of the freezing order is unfair - - -

THE CHIEF JUSTICE: Aren't you just given evidence from the bar table? I mean, Mr Rozario is perfectly capable of saying that if that was his issue.

MR PEDEN: Thank you, your Honour.

5

MR WEBSTER: Just excuse me a moment, Mr Rozario. Do you have that document, Mr Rozario? There's two pages which are extracted from the affidavit of Mr Cotter, and then you should see, behind that, a bundle of Delta Law invoices. Do you see that? I'm not asking anything specific. I'm just making sure you've got the document I'm referring to?---I've got one on page 21.

10

All right?---And one on page 22.

What I want to suggest to you, Mr Rozario, is the documents – the invoices which appear from the third sheet of this MFI are the invoices which you provided to the Queensland Law Society which are referred to – that you understand to be referred to in the report we've been looking at?---This would have been extracted from the invoices, I believe. I don't have them in front of me, but, yes.

15

Just to give you an example, if you turn to – these aren't numbered. Can you see, in the top right-hand corner, there's a tax invoice number for each of the invoices, Mr Rozario, just under the words Tax Invoice at the top right-hand corner of the invoices? So you need to go to the third sheet?---Yes.

20

You see how there are tax invoice numbers?---Yes.

25

And they are roughly sequential. They start at 153; they go to 154, 155, 156, then they jump back to 129. Can I ask you to go forward 14 sheets of the invoices. You should find one that's numbered 160 of what looks like 3016, 106 of - - -?---Yes. Yes.

30

Do you have that?---DLI16. DL160.

All right. This is one of the invoices which you provided to the Queensland Law Society to explain your withdrawal from the general account?---This is one of the invoices created, generated, by the client, which I sent to the Queensland Law Society.

35

All of the invoices you sent to the Queensland Law Society were generated by the client?---That is correct.

40

They were generated by the client, you know, for the purposes of the mediation?---That is correct.

You haven't generated any invoices, yourself?---Not yet.

45

Did you tell the Queensland Law Society that these were invoices generated by the client, rather than yourself?---No, I don't think I did.

5 And you know that, in fact, Delta Law has not issued any bills of costs to Mio Art, itself?---It has. They were prepared by the same people that prepared the invoices used at mediation.

10 Well, I'm suggesting to you that Delta Law has not prepared bills of costs?---On behalf of Delta Law, there have been a number of bills of cost prepared.

And I want to suggest to you that you know that there is no entitlement, based on these invoices, for Delta Law – I'm sorry – for Delta Law to claim the \$1 million as fees paid for legal work properly invoiced in accordance with the Legal Profession Act?---Apart from these invoices, the invoices were not the only document that I submitted to the Queensland Law Society. I submitted a letter from the client which confirmed that the payment of \$1 million was a gratuitous payment to Delta Law. I think that's - - -

20 And that - - -?---I think that's to Delta Law - - -

You provided a document to the Queensland Law Society, you say, from Mio Art, which said that the \$1 million was a gratuitous payment?---Yes, on – based on an invoice issued in BS1740.

25 And you provided that document to the Queensland Law Society because you wished them to understand your position to be that that was the case, that the \$1 million was a gratuitous payment by Mio Art?---Yes, by the client to Delta.

30 All right. And what provision did you make within Delta Law for the payment of any GST by Delta Law on that amount?---I had not yet even considered it then.

Have you ever considered GST liabilities for Delta Law in the past?---I have left that mainly to my accountant, Mr Barry Jeffrey.

35 Mr Jeffrey is the person who does the accounts for Delta Law?---He does the accounts for myself and Delta Law. Excuse me. That's in terms of the goods and services tax.

40 He also generates the financial reports each year which are required to be submitted for Delta Law?---That is correct.

And he liaises with you as necessary to confirm details for the purpose of compiling those accounts? Yes?---Sorry, I - - -

45 So you and he liaise as necessary to confirm details for the purposes of compiling those accounts and doing the GST reports?---Well, the practice has been that Ms Perovich deals with the accounts with him at the – work with Delta Law.

I thought you just told me, Mr Rozario, that you had an accountant who handled both yours and Delta Law's accounts who you spoke to about these matters?---Yes.

Have I misunderstood?---Yes.

5

All right. And that is Mr Jeffrey?---That's correct.

All right. I'm sorry, your Honour, just excuse me.

10 THE CHIEF JUSTICE: That's all right.

MR WEBSTER: Mr Rozario, can I take you back to your first affidavit?---My first - - -

15 Your first affidavit. It's the one sworn 19 September 2019?---Yes.

In paragraph 24 of that affidavit you say that in January 2019 you made requests to Mr Spencer and Ms Perovich for the payment of outstanding fees owed to Delta Law; do you see that?---Paragraph 24?

20

Yes. You say in January 2019 you formed a particular view and then, over the page:

Having formed that view, I made requests to Mr Spencer and Ms Perovich for the payment of the outstanding fees owed to Delta Law.

25

?---Mio Art had directed that the award moneys from the arbitration were to be paid to Robert Whitton, this other one?

The last sentence, Mr Rozario:

30

Having formed that view.

?---I beg your pardon, yes.

35 Do you have that?---Yes.

And either Mr Spencer or Ms Perovich told you that Delta Law needed to produced itemised bills of costs; do you accept that?---Where do I find that here?

40 I'm putting it to you, Mr Rozario?---No.

And you said that you weren't prepared to do that?---No.

You've never prepared itemised bills of costs; that's true, isn't it?

45 Yourself?---Itemised bills of costs were prepared by Ms Perovich right throughout our engagement with them and kept at their premises and we went through them occasionally as they accumulated.

Mr Rozario, you, yourself, have never prepared itemised bills of costs?---Personally?

Yes?---I assisted with it. I didn't prepare them myself.

5 Right. And Mr Spencer and Ms Perovich have asked you, as recently as January 2019, to provide assistance or yourself to prepare itemised bills of costs for outstanding fees owed to Delta Law?---That is not correct.

And you told them that you weren't prepared to do that?---That is not correct.

10

That you wanted to be paid without having to do that?---That is not correct.

15 So you – your position was that you didn't want to have to undertake that activity and you wanted to be paid without having to do that activity?---That is a proposition that I reject, counsel.

20 So you accept – I'm sorry, I withdraw that. Are you prepared, Mr Rozario, to assist Mio Art, if it needs – if it requests that assistance, to prepare itemised bills of costs for the purposes of recovering on the costs awards which Mio Art has?---Well, if Mio Art is prepared to give an undertaking that they will pay on those bills of costs, yes, but, in any event, I am preparing them.

25 You are preparing them now?---Yes. Yes. On my own, because what they have, they will not release to me. Neither will they release the bundle of over 110 boxes of files which accumulated over the years, which they were keeping for security, because they've made it quite clear to me that that is not my property and that I won't be getting any assistance from them.

30 Mr Rozario, the reason that you placed Delta Law into administration in July 2019 was because of the dispute which had emerged between you, and Mr Spencer and Ms Perovich?---Delta Law – the dispute would've triggered a number of things. I was told outside the Supreme Court on the 23rd of January, when I met with the clients after speaking to Mr Keane, who had become aware of the dispute, about what was going to happen with this, and they offered to pay me three and a-half million dollars if I stayed with them till the DGI matter was over. But they said that, in their view, 35 Delta Law was not owed anything; there might be a prospective claim, but Delta Law was not owed anything. On that basis, I terminated the relationship. I looked at the books of the company. Mr Douglas had threatened to issue a very large bill to me if I didn't resolve the dispute with the client, and he came back and issued a bill 40 for over \$2 million. Mr Keane subsequently issued one. I looked at the – the fact that there were other people, including a Mr Winkler, but that matter has been settled, that was owed money. And, as I mentioned earlier, I brought somebody from the – I brought an IT technician in. There were a number of loans that appeared to have been taken by Ms Perovich and Mr Spencer, the information of which I was not 45 copied in on, but it went to a Mr Thompson at Blackstones. Now, I – and it was clear to me that Delta Law was going to be faced with large bills apart from that we had been faced with immediately that were liquidated bills, in other words, Mister,

five immediate ones which were significant; three from counsel; one from Mr Winkler; one which was prospective, which has since crystallised, from the ATO. And there's the possibility of others coming in, and it looked to me, when I looked into the bank, that Delta Law had no prospects of paying these bills as and when they would fall due or at any time in the near future.

Mr Rozario, you had no thought in your mind in July 2019 of a prospective bill from the ATO coming in?---It was quite clear, as – you had asked me previously if I had made provisions for GST, and, apart from that, any amount of money of that significant – any amount of money that's a significant [indistinct] as what was paid into my general account for me would attract income tax consequences.

Mr Rozario, you told me a moment ago that when the money came in, you gave not a thought to the issue of GST at all?---No, I didn't give any thought to GST at that stage. That's correct, when it came in in November. But this is going to after January, after the dispute. We're talking July. I had given thought to it then.

You suddenly twigged after you'd removed the 800,000 in May? A couple of months later, you suddenly twigged then to a potential GST liability?---Well, I - - -

Is that what your evidence is?---Sorry, counsel, I didn't mean to interrupt you.

No. No?---The matter was acute by then. Mr Douglas was going out for his bill, as were the others. And I knew that – that Delta Law didn't have the resources to pay those bills, and it became obvious to me then that the best way to go about it – I'd formed a bona fide – an opinion on the basis of the state of finance of the company and the fact that it had five creditors at that stage; one debtor, who said he would not pay because Delta Law was not entitled to anything. Perhaps a prospective claim, and the thing that really concerned me was that Delta Law might be trading insolvent because it had no resources to meet those demands, and it was a matter that I considered very seriously. I had, earlier, approached Mr Cotter. Mr Cotter wouldn't grab at anything, but what Mr Cotter said is, "When I see proof of any of this, a reasonable amount of proof, we can talk about it," and that was a date in which – which was, I think, the 29th, that Mr Cotter said – and he was prepared to accept the – to accept to be the administrator for - - -

Mr - - -

THE CHIEF JUSTICE: Can I just ask a question?---Yes.

I thought you mentioned something about loans taken by Mr Spencer and Ms Perovich. Did I hear that correctly?---Yes, Mr – Ms Spencer and Ms Perovi – Mr Spencer and Ms Perovich had been dealing with a solicitor – a firm of solicitors in Melbourne called Blackstone. They had an agent solicitor up here. Immediately, the money had been paid from the arbitration, they were communicating with a solicitor, and he was an intermediary for fairly usurious loans. I don't know what the purpose of that was at that time. I wasn't aware of this till I had the technician of the server

because I wasn't copied in on these emails, and they claimed that I was giving up my solicitor – prepared to give up my solicitor's lien and that Delta Law was prepared to give up its fruits of litigation - - -

5 All right. That seems a bit on a different issue. I was just interested in what these loans were about?---There are two emails, I think my counsel might have a copy of it. I don't know whether – these loans were for purposes not associated with Delta Law. I think one of the emails said it was to go to them for their personal expenses and for their property development initiatives.

10

And where were these loans being paid – where were the funds being advanced from?---They were through the company Blackstone and Mr Alan Thompson.

15

But who was the source of the loans? Is it anything to do with Delta Law?---There are some documents which had recently been recovered from the server. They were coming from various sources who lent to building companies – building construction companies in New South Wales.

20

Okay.

MR WEBSTER: Mr Rozario, your – none – neither of your affidavits refer to these loans, I suggest to you?---They don't.

25

I want to suggest to you that as at the date you put Delta Law into administration, you knew or believed the following things – and I'd like you to tell me whether you agree or disagree – I'm not, at the moment, asking you for an explanation, just whether you agree or disagree: you knew at the date – I'm sorry, the date you put Delta Law into administration, I suggest to you, that you had no apprehension or thought about prospective liability to the ATO?---That is not correct.

30

I suggest to you that at the date you put Delta Law into administration, you did not regard any amounts, invoiced by counsel, as immediately due and payable by Delta Law?---That is not correct. I believed that all of those bills were due and payable because the invoice had been issued.

35

You knew that the debt of Mr Winkler had been assigned to another party?---I was told that, yes.

40

Who?---I was told that.

Who was it assigned to? That you were told?---Mr Loel, I understand.

45

And you knew that there was ongoing litigation in the District Court between Mr Winkler and Ms Perovich and Mr Spencer about the same debt?---Yes.

And you knew that there was a dispute in that proceeding about whether the debt was owed and by whom?---But the results were - - -

I'm sorry, do you agree or disagree with knowing that?---No. By then I was out of it. I – by the time I went to speak to Mr Loel, he'd asked me to speak to the firm that he used to work for. We had a discussion. I was trying to find out what commitments had been made and whether that was still - - -

5

The date you – on the date that you put Delta Law into administration - - -?---Yes.

- - - you knew there were District Court proceedings in which the debt, asserted to be owed to Mr Winkler, was the subject of that proceeding?---Well, I didn't know whether it was the subject of that proceeding. I stand to be corrected. But I knew that conditions for which the loan was to be paid by Delta Law had arisen and had been triggered.

10

Were you aware of District Court proceedings brought by Mr Winkler against Ms Perovich and Mr Spencer relating to that debt?---Yes. Look, I have a recollection of that.

15

You knew that at the time you put Delta Law into administration?---Yes.

20

And you know that, subsequently, Mr Winkler's proof of debt has been withdrawn?---I understand they've had a settlement. Mr Winkler was paid.

Do you understand that Mr Winkler's debt has been – proof of debt has been withdrawn?---I'm not aware of that. I'm aware that he's been paid.

25

All right. And you mentioned five debts, I think we've covered three, in terms of [indistinct] so one from Mr Winkler, what's the fifth one? Is that another - - -?---There's Mr Keane. The ones that I was aware of?

30

Yes, please?---The ones - - -

The fifth. You mentioned five, I think?---Yes. The ones that I was aware of, at the date I put the company advance with the administrator, were Mr Francis Douglas, David Keane, Stephen Colditz, Mr Winkler and the ATO.

35

All right. And I want to suggest to you that, at the date that you put the company into administration, you knew, for the – you did not believe that any of those were real debts which would have to be paid by Delta Law?---That is not correct, counsel.

40

And I want to suggest to you that the reason that you put Delta Law into administration was not because of a concern about those debts but because of a concern about the breakdown of your relationship with Mr Spencer and Ms Perovich and their – and attempts that had been made to remove you as director?---No. The first attempt had failed.

45

Yes?---The decision of Justice Dalton, her Honour Justice Dalton, was clear and unequivocal about that. The second point I wish to make is that at the date – the – at

the date the company was placed into the hands of the administrator, I had an honest belief – had a genuine belief, rather – a bona fide belief that the company was insolvent. It was hopelessly insolvent and I wasn't going to wait a day because of the fear that I might have been allowing the company to trade whilst it was insolvent.

5

What trading were you doing at this time, Mr Rozario?---There was nothing. But as long as the company was alive – and if somebody else would have come up and said that, “Look, here is your fruits of litigation guarantee and your agreement to give your – to pledge your solicitor’s lien for X amount of dollars”, the company was still operating. It was not an entity that had gone into administration. I didn’t wish to get to that stage. So that really is it. So my view – and I repeat that – my view, at that date that it went into administration, it was clear to me, I had formed the view, after carefully considering all of the outstanding debts, that the company was insolvent.

10

15

Mr Rozario, turning now to the present – turning now to the present - - -?---Yes.

- - - assuming that – sorry, I think you’ve accepted – or you understand that the Winkler debt has been compromised or is no longer a live debt; do you understand that?---Subsequent to that debt.

20

Yes, I understand that?---Yes.

Turning to the present?---Yes.

25

Yes? You understand that?---I understand it, yes.

All right. Now – and on the assumption that the three counsel, who we’ve talked about, Mr Colditz, Mr Keane and Mr Douglas, are not, in fact, pressing for immediate payment of their invoices from Delta Law on the assumption – I’m not asking you whether you agree with it or not; yes – and is the only debt of Delta Law, which you’re – which you would be concerned about, in terms of its solvency or insolvency, the debt to the ATO?---That’s a hypothetical situation I can’t answer. I can only answer for the actions that I took as at the date - - -

30

35

I’ll put it another way, Mr Rozario?---Yes.

Apart from – I’m sorry. As at the present date, as far as you’re aware, the only possible debts against Delta Law that are relevant to its solvency or insolvency are debts in relation to fees for Mr Keane, Mr Colditz and Mr Douglas and a proof of debt by the ATO; is that correct?---Yes.

40

If those debts could be accommodated or were not pressed, you have no reason to consider Delta Law as insolvent?---Well, I have reason to believe that there are other debts that are about to emerge, because there was a considerable amount of time during which Ms Perovich and Mr – Mr Spencer were offering Delta Law’s fruits of litigation and my solicitor’s lien for other loans. Now, I’m unaware of whether or

45

not those loans have been made or they haven't, but the evidence that I've gathered over the last couple months - - -

5 You are not aware at present of any other specific debts?---No, I'm not.

And your affidavits don't identify any other specific debts?---They go back to what I was aware of at the time I swore the affidavit.

10 Well, your second affidavit, Mr Rozario, was provided - - -?---Yes.

THE CHIEF JUSTICE: Tuesday.

MR WEBSTER: - - - three days ago. Yes?---Yes.

15 Yes, and you don't set out there any concerns about any further or different debts?---No, that's correct.

All right. All right. And subject to questions about properly protecting any moneys which Mio Art receives from its costs orders, you are prepared to work with
20 whomever to assist in the preparation of bills of costs, to assist Mio Art in recovering those sums?---Well, I'm interested in putting together those bills of cost that would be – that would relate to Delta Law. I don't know whether it would be appropriate at this stage, knowing that others know of the disputes between myself and Delta Law – whether either Mio Art, or Mr Douglas or anybody connected with them would
25 necessarily want Delta Law to be part of it any more.

Well, you have told the court already, I think, that you are, on your own initiative, preparing bills of costs already?---That's for Delta Law.

30 Yes, and would you be prepared to provide those to whoever is in control of Delta Law, be it an administrator or another director, to assist Mio Art in recovering on its costs orders?---If the administrator saw – requested me to do so, I would do that, because I have no longer – any powers as a director of Delta Law.

35 If somebody else is in control of Delta Law, what would your attitude be then?---That would be – somebody else is in control of Delta Law, and he's the administrator.

40 A person other than the administrator, then? A new director?---Well, I can't contemplate anything beyond that because there is an administrator, and it's the same reason I can't contemplate any resolution outside of the administrator. It would be a preference.

45 Just excuse me, your Honour.

Just in relation to your present work in compiling bills of costs, Mr Rozario, is that work done by reference to records that you have?---It is done by reference to the time - - -

5 Yes?--- - - - that I have spent in the Mango Hill matter.

And is that time – well, are there records that you’re having regard to in relation to that time?---Well, I have to go back and collate whatever records I have in reference to the agreement that I had with Mr Spencer and Ms Perovich at Mio Art.

10

And is that what you’ve been doing? Have you been going back and collating records?---On and off. Yes.

15 And so you have at least some records that relate to time and costs for work done for Mio Art?---Yes, based on the agreement.

And are you prepared to share those records with the administrator?---Yes.

20 And would you be prepared to share those records with Mio Art?---Well, that is up to the administrator, because I – I – I can’t agree to somebody outside of the administrator doing deals with – I’m not expert in insolvency, but I think anybody seeking to do deals outside of the administrator – and if I am to be – to participate in them, I might run afoul of the Act, because there might be preferences. The administrator has the right – and I’m not speaking on behalf of the administrator –

25 has a right to know where those moneys are coming from the counsel is being paid, who it’s going to, why it’s going there. That’s the administrator’s task. I will assist the administrator as much as I can, but I will not go outside of that and presume the role of a functioning director of Delta Law.

30 Just excuse me. Nothing further, your Honour.

THE CHIEF JUSTICE: Thank you.

MR WEBSTER: I’m sorry for the time.

35

THE CHIEF JUSTICE: That’s all right. Mr Peden.

MR PEDEN: I’ll be very quick.

40

RE-EXAMINATION BY MR PEDEN

[4.40 pm]

45 MR PEDEN: You don’t have that. Could I hand up the bundle in court book 5 [indistinct] Mr Rozario. And I wanted to ask you – you’ve referred to a letter - - -?---Yes.

- - - received by your lawyers from Mr Douglas claiming fees?---Where would I find that, counsel?

5 Well, that's what I was going to ask you. If you turn to page 161 of the bundle, and if you could tell the court if that's the letter or if it's some other letter that you're referring to?---One-six-one? That appears to be the letter that was sent to Mr Vernados, my former solicitor.

10 All right. And after that date, the 21st of June, through to the 29th of July, did you receive any other communication from Mr Douglas QC about fees owed to him?---No, I don't think there was any communication with Mr Douglas after that period.

15 All right. I'm just turning to Mr Keane's position?---Yes.

You referred to Mr Keane having issued an invoice. I think it was in May?---Correct.

20 Now, if you could just go back to page 137 through to 140, at page 137 - - -?---Yes.

- - - looks to be the most recent in the email chain, but that's only dated 15th of January 2019?---Yes.

25 Do you think there was a further document that followed after this, that Mr Keane sent?---Yes, there was one in May. This was merely a summary of the invoices. The one in May was the total of 560 or \$520,000.

30 All right. Well, if you go back to page 138 and 139, there's a summary – sorry, there's a listing there of the invoices totalling 520,945?---That's correct.

But you think there was another document afterwards. And do you remember what the format of that document was?---Without having that in front me, I can't tell you, but it was an invoice. It was not a summary, but it was an invoice - - -

35 Yes. That's all right. Thank you?--- - - - from – from my recollection.

All right. And you were asked - - -?---Excuse me.

40 - - - some questions about the Queensland Law Society investigation and - - -?---Sorry, counsel, I'm - - -

Sorry. You were asked some questions about the Queensland Law Society investigation - - -?---Yes.

45 - - - and reasons why you might not have already paid money owed back to the law society, and you answered in part to the effect that there was a response due by the 19th of November. Is there any other legal reason that you're aware of that might

restrict you from paying money back into the trust account of Delta Law?---Well, the first reason is that that money was made to me. It was paid into Delta Law's general account. It was made – paid – made – it was paid through the general trust – to the general trust account for my personal benefit because more than \$4 million had
5 already been paid to Mr Galea, 2 million in November, 700,000 in April of last year - - -

MR WEBSTER: I object, your Honour. First of all, Mr Rozario seems to be giving evidence of payments received by a third-party, which he can't have direct
10 knowledge of, and it's not responsive to the question either.

THE CHIEF JUSTICE: No, I don't think it's the response hoped for either.

So – anyway, you felt you had an entitlement to the money? That seems to - - -?---I
15 was told that the money was for me. It was reinforced by a letter from Richard Spencer to my previous lawyer and they had - - -

Okay. You don't need to elaborate, I don't think?---Yes.

20 So is there any other reason?---Your Honour, I can't really immediately recall what the other – I have to go back and sit and look through it. I've been preparing for this particularly at trial. But I need to respond to the Queensland Law Society and I have to take legal advice on that because it is my view that some of the calculations that they have in their report are dated and not accurate.

25 All right. There's your answer.

MR PEDEN: But I was actually asking about something slightly different, that is – and I'm hesitant to lead on it based on what your Honour said before.

30 THE CHIEF JUSTICE: I don't think you should lead.

MR PEDEN: No. So I'll – can I ask - - -

35 THE CHIEF JUSTICE: Look, if there's evidence somewhere in the material, you can mention it in submissions - - -

MR PEDEN: Yes.

40 THE CHIEF JUSTICE: - - - but I don't think you're doing much good here.

MR PEDEN: No. Thank you, your Honour. That's the re-examination. Might the witness be excused?

45 THE CHIEF JUSTICE: Yes, thanks. You can step down, thanks, Mr Rozario?---Thank you, your Honour.

WITNESS EXCUSED

[4.47 pm]

5 THE CHIEF JUSTICE: Look, I'm afraid I just can't stay any longer for Mr Cotter. I just can't. I can take a punt on finishing in applications by 3 o'clock on Monday or Tuesday. Those are possible times to resume to try and finish the evidence and the submissions. Or, failing that, there are sort of patches in the following week that I might manage. So what do you want to do?

10 MR PEDEN: I think as between – as between counsel, your Honour, I think Monday afternoon is suitable and I think my learned friend's solicitor is just checking about Mr Cotter's personal availability.

15 THE CHIEF JUSTICE: Okay.

MR PEDEN: Subject to that, was your Honour thinking not before 4 pm or prior to - - -

20 THE CHIEF JUSTICE: Three, I'm thinking I can - - -

MR PEDEN: Three?

THE CHIEF JUSTICE: Looking at the list - - -

25 MR PEDEN: Not before 3 pm on Monday?

THE CHIEF JUSTICE: Yes, I would think. Look, it could be even earlier. If you want to say not before 2.30, I'll just see how I go.

30 MR PEDEN: Yes, thank you, your Honour.

THE CHIEF JUSTICE: It might all clean up in the morning.

35 MR PEDEN: And that would be on the basis, your Honour, that we'd go directly onto address after that.

40 THE CHIEF JUSTICE: Yes. Now, look, I have to break this to you, I'm pretty sure I said someone else could use this court for the next weeks on the happy assumption I wouldn't be wanting it, so I don't know where we'll end up. We'll just have to find another courtroom in the interim.

MR WEBSTER: We'll tidy up, your Honour. That's - - -

45 THE CHIEF JUSTICE: That means you'll have to clean up, I'm afraid.

MR WEBSTER: Yes, we understand. Yes.

THE CHIEF JUSTICE: All systems go?

MR WEBSTER: Mr Cotter's okay with Monday afternoon, your Honour.

THE CHIEF JUSTICE: All right.

MR WEBSTER: Thank you.

THE CHIEF JUSTICE: Not before 2.30 on Monday somewhere.

MATTER ADJOURNED at 4.49 pm UNTIL MONDAY, 18 NOVEMBER 2018

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HOLMES CJ

No 8866 of 2019

**EMPEROR INVESTMENT GROUP PTY LTD and ANOTHER
and
QUINTIN GEORGE ROZARIO and OTHERS**

Applicants

Respondents

No 8867 of 2019

**EMPEROR INVESTMENT GROUP PTY LTD
and
DELTA LAW PTY LTD and ANOTHER**

Applicant

Respondents

BRISBANE

2.31 PM, MONDAY, 18 NOVEMBER 2019

Continued from 15.11.19

DAY 3

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

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THE CHIEF JUSTICE: I wish you didn't do that.

MR S.J. WEBSTER: I'm sorry, your Honour.

5

THE CHIEF JUSTICE: Mr Peden, I've just got some submissions from your side, but I haven't had time to read them.

MR J.W. PEDEN: Thank you, your Honour.

10

THE CHIEF JUSTICE: They've only just come through. Yes, Mr Webster.

MR WEBSTER: Your Honour, there are a couple of housekeeping things before, I think, my learned friend was going to call Mr Cotter. On the first day, there was, following debate about the pleadings, a requirement for my side to provide some further particulars.

15

THE CHIEF JUSTICE: Yes.

MR WEBSTER: They were provided and I understand there's no issue, but I should hand up a copy to complete - - -

20

THE CHIEF JUSTICE: Yes.

MR WEBSTER: - - - the court record.

25

THE CHIEF JUSTICE: All right. Thank you. And then - - -

MR WEBSTER: We understand on the basis of the provision of these particulars, there's no further objections to the amended statement of claim.

30

THE CHIEF JUSTICE: Good. All right. Well, I guess the best thing is probably just to give you leave to file further particulars of the amended points of claim. Okay.

35

MR WEBSTER: Thank you. The second thing, your Honour, is that following the evidence last week, Mio Art has identified that it wishes to offer an undertaking in this proceeding if the administration is terminated. Unlike Mr Douglas, I won't say that I act for Mr - for Mio Art, but its solicitor, Mr Lavercombe, is here in court and is able to give that undertaking.

40

THE CHIEF JUSTICE: All right. And, sorry, the gentleman's name again?

MR WEBSTER: Lavercombe, L-a-v - - -

45

THE CHIEF JUSTICE: Lavercombe, yes.

MR WEBSTER: - - - e-r-c-o-m-b-e, and he's sworn a short affidavit, which exhibits the undertaking. So I thought it might be convenient for your Honour to hear about that, so Mr Lavercombe need not stay if – once he's given that undertaken.

5 THE CHIEF JUSTICE: All right. So Mr Lavercombe is – yes, Mr Lavercombe.

ME J.M. LAVERCOMBE: I'll just announce my appearance on behalf of Mio Art. If it pleases the court, it's Lavercombe. It's L-a-v-e-r-c-o-m-b-e, initials J.M., solicitor at JML Rose for Mio Art in a particular proceedings, which is BS6970/19,
10 and for the purposes of this proceeding, I'm instructed on behalf of Mio Art to give an undertaking relating to the – what it is prepared to do in relation to barrister's fees if the term – if the VA of Delta Law is terminated, all of which is deposed to within an affidavit that I've sworn today, and I seek leave to read and file. I have an original here and copies.

15

THE CHIEF JUSTICE: All right. But what's your position, Mr Peden?

MR PEDEN: Firstly, your Honour, this appears to be an application on behalf of the applicant to reopen the evidence, the respondent, having closed its case. So
20 we're really not sure what it – what, actually, they're trying to do by this. Certainly, we – at the moment, we've never seen any affidavit. We were sent a copy of a document, something called – well, it actually didn't have a description, but it purports to be some form of undertaking. We've got no idea how that fits into the scheme of the case. We've got no idea why they say they should be entitled to
25 reopen their evidence - - -

THE CHIEF JUSTICE: Insofar as it's fitting in - - -

MR PEDEN: - - - because - - -

30

THE CHIEF JUSTICE: Into the scheme goes, presumably they're saying, "If you terminate the administration, don't worry about a thing. Those counsel will get paid", because, you know, I do lose sleep worrying about counsel's fees.

35 MR PEDEN: Well, I mean, for example, we've got no witness here from Mio Art who is going to depose, for example, to the worth of Mio Art.

THE CHIEF JUSTICE: All right. But that's a qualification you can make to this undertaking. That doesn't necessarily mean that I wouldn't receive it. You'll just be
40 able to - - -

MR PEDEN: Well, it depends, your – as I say, your Honour, if this is an application to reopen the evidence, then we should be entitled to have been on notice of that more than half an hour or so, and be able to consider what position we take in
45 response to that. For example, we might – well, I mean, there's a few different options we could take, but – and we haven't seen the affidavit yet, so I don't know what that says.

THE CHIEF JUSTICE: All right. I think maybe we'll have to leave it with you. Presumably, Mr Lavercombe's never going to be in a position to give evidence about anything, Mr Webster. He's just doing something on behalf of his client. So having - - -

5

MR WEBSTER: That's so, your Honour.

THE CHIEF JUSTICE: - - - produced this, he can - - -

10 MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - go on his merry way.

MR WEBSTER: Yes.

15

THE CHIEF JUSTICE: Do you agree with that, Mr Peden?

MR PEDEN: Can I just read the affidavit, first?

20 THE CHIEF JUSTICE: Sure. Sure. Just have a look at it, but - - -

MR PEDEN: Well, I mean, it certainly seems to be something about which there's an objection that we take on hearsay anyway. I mean, it's – the affidavit just says:

25 *I today received, by email, from Mio Art –*

Now, that's a company, so - - -

30 THE CHIEF JUSTICE: Okay. Okay. But, look, can I just ask you this. Do you see yourself, at any stage, wanting to cross-examine Mr Lavercombe about it?

MR PEDEN: I just have to consider it, that's all.

35 THE CHIEF JUSTICE: Sorry, Mr Lavercombe. I was trying to extract you, but I don't think it's going to happen very quickly.

MR PEDEN: I'm sorry, your Honour. There's a number of emails that are also attached to the affidavit, which we've never seen before. So it'll just take me a moment to read them. They're purportedly from the council.

40

THE CHIEF JUSTICE: Okay.

45 MR WEBSTER: I was going to say, your Honour. I hadn't seen, myself, the emails, and in terms of the submission that this is a reopening of our case, it's not the intent – my intent, as counsel for Emperor, to lead – to seek to lead further evidence – substantive evidence, but to bring to the court's attention that this undertaking is offered. The offering of an undertaking is not itself, in my submission, reopening the

evidence. It's something that a party is offering to put. So we would be content for the court to receive the offer of the undertaking in its terms – there's a written undertaking which is offered, I understand, by the solicitor for Mio Art – and for the court not to receive the other emails from the barristers, if that's of concern to my
5 learned friend, because, for our part, it's – the significance is that the court is aware that the undertaking was offered.

THE CHIEF JUSTICE: Yes. All right. Mr Peden?

10 MR PEDEN: Well, as I said, the difficulty for us is that we don't know what the work is of the undertaking, and we've got no witness to test - - -

THE CHIEF JUSTICE: Yes, but that's something you can make submissions about. You've got an undertaking, but who knows what it's worth. It's not - - -

15 MR PEDEN: No, but if there were a witness from Mio Art, for example, who says, "I offer this undertaking", then we could test the value of the undertaking. At the moment, the difficulty is there's no evidence about the value of the undertaking. Now, my learned friend would say, "Well, it's a valuable one", and which - - -

20 THE CHIEF JUSTICE: Well, and in the absence of any evidence about that, I won't be able to reach a view.

MR PEDEN: No.

25 THE CHIEF JUSTICE: I would've thought, frankly, that you might be a bit better off without the evidence, but it seems to me that if he wants to – or if Mio Art wants to offer this undertaking in its bare form, that there's not really a problem about it. What use it is to me may be of a different question, but the offering of an
30 undertaking itself, I don't think, is problematic, or, as Mr Webster says, amounts to going into evidence.

MR PEDEN: As your Honour pleases, then. In terms of what's been tendered, is it just the undertaking or is it the affidavit? With – with the emails? Do they - - if they
35 now withdraw the emails.

THE CHIEF JUSTICE: So I imagine that the affidavit is in it to support the fact that it's offered on behalf of Mio Art.

40 MR PEDEN: Yes. Yes. If – if the affidavit – if we could – I could read paragraphs 1, 2 and 3 of the affidavit, they just identify that the under – the undertakings offered. And then exhibit JML1 which is the undertaking itself signed by the director. And I don't read the balance of the affidavit or its exhibits.

45 THE CHIEF JUSTICE: Okay. Did you want anything else in?

MR PEDEN: No. That's – if that's the basis on which it's offered then - - -

THE CHIEF JUSTICE: All right. I'll - - -

MR PEDEN: - - - on the basis of your Honour's indications I can't take it - - -

5 THE CHIEF JUSTICE: - - - receive those - - -

MR PEDEN: - - - any further.

10 THE CHIEF JUSTICE: - - - parts of it. But could somebody just strike out the bits that I'm not actually receiving?

MR WEBSTER: Yes. Do you wish me to do that before I hand it up, your Honour?

15 THE CHIEF JUSTICE: Yes. Would you do it in pen - - -

MR WEBSTER: Yes.

THE CHIEF JUSTICE: Show it to Mr Peden so that we're all of one view.

20 MR WEBSTER: Yes. Do you wish it to be done on the original, your Honour? Or just on a copy?

THE CHIEF JUSTICE: On the original, I think.

25 MR WEBSTER: Yes. All right.

THE CHIEF JUSTICE: I'd like that on the record. I'm not asking Mr Lavercombe to amend his affidavit, I just want a - - -

30 MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - mark on the face of it that shows me what's relied on. So he's not swearing to anything new, I just want somebody to mark the bits that - - -

35

MR WEBSTER: Yes.

40 THE CHIEF JUSTICE: - - - are not before the court, effectively. What are you going to do about the exhibits? Take them off or - might be the easiest mightn't it? Mr Peden?

MR PEDEN: Yes. They should just be removed.

45 THE CHIEF JUSTICE: All right. So if you can get a staple remover or rip them apart or something. All right. Does that need another staple in it?

MR PEDEN: I think it might be okay, your Honour.

THE CHIEF JUSTICE: All right. Thank you. All right. Can Mr Lavercombe go now, Mr Peden, or - - -

MR PEDEN: Yes. Thank you, your Honour.

5

THE CHIEF JUSTICE: - - - do you see – all right. Thanks, Mr Lavercombe. You're excused.

MR LAVERCOMBE: And I'll just make it certain that just on behalf of Mio Art I'm instructed to give the undertaking that's canvased in paras 1, 2, 3 of my affidavit today.

THE CHIEF JUSTICE: Yes. All right.

15 MR LAVERCOMBE: May I please be excused?

THE CHIEF JUSTICE: Yes. Thank you. You are. Yes, Mr Webster.

MR WEBSTER: Those were the only housekeeping matters, your Honour.

20

THE CHIEF JUSTICE: All right. Thank you. And Mr Eade.

MR EADE: Thank you, your Honour. Your Honour, there's one witness on behalf of Delta Law Proprietary Limited and Administration and that is it's administrator Mr William Paul Cotter who is here to assist the court.

25

THE CHIEF JUSTICE: Thank you.

MR EADE: Your Honour, while Mr Cotter is being called, on the last occasion I handed up a large – I think your Honour has a bundle that contains just the affidavit, but I think there was another one that was used by the witness that I handed up on Friday for use by Mr Spencer. Is that still with your Honour or your Honour's Associate?

30

THE CHIEF JUSTICE: I've got a couple of versions of it. I've got the material that came from Mr Peden – Mr Webster's side and I've also got the bundle that you gave. Which would you rather I look at?---I'd rather look at the bundle that I've given you.

35

THE CHIEF JUSTICE: Got it.

40

MR EADE: But whether there's a second working copy for the purposes of Mr Cotter which I handed up on Friday.

THE CHIEF JUSTICE: So you've given me one lot. Do you want him to look at it or - - -

45

MR EADE: I thought I handed up a second one on Friday for the purposes of Mr Spencer's cross-examination - - -

THE CHIEF JUSTICE: Yes.

5

MR EADE: - - - to assist my learned friends - - -

THE CHIEF JUSTICE: That'll be that, I think.

10 MR EADE: - - - if that's still there.

THE CHIEF JUSTICE: Yes. Yes. Okay. So, actually, that one can go to Mr Cotter. I'll hang on to that one since I've put a couple of flags in it. I think we're right now.

15

MR EADE: Wonderful. Thank you, your Honour.

WILLIAM PAUL COTTER, SWORN

[2.44 pm]

20

EXAMINATION-IN-CHIEF BY MR EADE

25 MR EADE: Mr Cotter, can you please state for the record your full name?---William Paul Cotter.

And your occupation, Mr Cotter?---Chartered accountant.

30 And your address?---Business address?

Business address?---Level 1, seven – unit 1, 78 Logan Road, Woolloongabba.

And what business is that, Mr Cotter?---Robson Cotter Insolvency Group.

35

Thank you. And, Mr Cotter, you've sworn an affidavit in these proceedings, is that correct?---That is correct.

40 Can you please have a look at the folder in front of you, Mr Cotter? Can you please just confirm that that is a copy of the affidavit that you have sworn in these proceedings?---That is.

Thank you. Your Honour, that's the evidence-in-chief.

45 THE CHIEF JUSTICE: Thank you. Now, you first, Mr Webster.

MR WEBSTER: Thank you, your Honour.

CROSS-EXAMINATION BY MR WEBSTER

[2.45 pm]

5 MR WEBSTER: Mr Cotter, could I ask you to open up the affidavit to page 2,
paragraph 7?---Yes.

When you - - -

10 THE CHIEF JUSTICE: Look, I'm sorry, I'm just thinking about this. It might be
fairer if Mr Peden went first, really, since you're the - - -

MR WEBSTER: Applicant.

15 THE CHIEF JUSTICE: Yes.

MR WEBSTER: Yes.

20 THE CHIEF JUSTICE: Well, more to that you want to do the real cross-
examination, I think. So, Mr Peden, I'll get you to go first.

MR PEDEN: Thank you. That's – that's appropriate, your Honour.

CROSS-EXAMINATION BY MR PEDEN

[2.46 pm]

25

MR PEDEN: Mr Cotter, in your affidavit at paragraph 64, you compiled a table – a
series of tables with references to invoices?---Yes.

30 Could you have a look at – or, actually, could the witness be shown MFID, your
Honour?

THE CHIEF JUSTICE: Yes.

35 MR PEDEN: Now, Mr Cotter, you had the opportunity before now to check the
items listed in that table with the invoices that are referred to in that?---Have I
checked them?

40 Yes?---I believe so, yes.

45 Yes. And that MFID, does that comprise the bundle of invoices together with the
two pages of your affidavit, pages 21 and 22 which contain the tables of the
invoices? I think with one exception. I think one – the one in Roman 4 of paragraph
64(a), which is the invoice of 20 December 2016 is not there. But apart from that
invoice, all the other invoices are there?---It certainly appears to be them, yeah. It's
read [indistinct] is there as well.

Sorry, it's the other one. It is – it's Roman 3. I'm sorry. That's my fault. The \$800,000 Delta fee invoice with the NA under invoice and date?---Yeah

5 So apart from that invoice, all the other invoices are in that bundle?---Yeah. It appears to be to the case.

MR PEDEN: Your Honour, I tender, then, what was MFID as an exhibit in the trial.

10 THE CHIEF JUSTICE: All right. It will now be exhibit 16.

EXHIBIT #16 ADMITTED AND MARKED

15 MR PEDEN: That's the - - -

THE CHIEF JUSTICE: Yes.

20 MR PEDEN: - - - cross-examination on behalf of Mr Rozario, your Honour.

THE CHIEF JUSTICE: Right. Thank you.

MR PEDEN: Thank you, your Honour.

25 THE CHIEF JUSTICE: Mr Webster.

MR WEBSTER: Yes. Thank you, your Honour.

30 **CROSS-EXAMINATION BY MR WEBSTER** **[2.48 pm]**

MR WEBSTER: Mr Cotter, could I ask you to go to your affidavit, page 2, paragraph 7, please? That's where you deal with your appointment – sorry, the
35 events leading up to your appointment as administrator. And in para 7 you say on 16th of July you received a telephone call from Mr Loel. And is that the first time that you were approached in relation to acting in any capacity for Delta Law?---Yes.

40 All right. And you took telephone – you took a note of that telephone conversation is that correct?---I did.

And does that appear at page 89 of your exhibit bundle?---Yes, it does.

45 And do you have a recollection of the conversation that you had with Mr Loel?---It was Mr Loel and Mr Rozario, but - - -

I'm sorry, this telephone call – was it with both Mr Loel and Mr Rozario. I'm sorry. Yes?---Yeah.

5 Do you have a recollection of the telephone call?---A vague recollection. As - - -
A recollection?--- - - - far the notes will - - -

Well, do the notes assist you in refreshing that recollection?---Yes. Certainly.

10 All right. Can I ask you to look at those notes. The first thing that you were told was that there was a complicated legal proceeding which Delta had acted for a client against BMD in, involving Mr Rozario. Do you recall words to that effect being said?---Yes.

15 All right. And then there was some discussion about figures and amounts that had been paid or not paid to various people as a result of that litigation?---Yes.

Yes. And then you were told that somebody had tried to take control of the firm. Words to that effect were said?---Yes.

20 Do you remember if you were told who was trying to take control of the firm?---Well, the next line says:

They hold some shareholdings.

25 So it's other shareholders.

Do you recall something like that being said?---[indistinct] I've written that at the time. So yes.

30 Do you remember if it was Mr Loel or Mr Rozario who told you that?---No, I wouldn't know that.

35 All right. You were told that you could google Mio Art or Spencer and try and find some things out about that?---Yep.

Did you do that?---I think I did. Yes.

40 What did you discern from that Google?---Just that there was a lot of litigation going on, Mango-Hill-related litigation.

And somebody, either Mr Loel or Mr Rozario, told you that somebody needed to take some actions. Is that - - -?---That's correct.

45 Do you recall who told you that?---I don't. No. Sorry.

Do you recall what actions, if any, were discussed at that point?---Well, I think it just very quickly went to, well, we need to sit down tomorrow to talk about it.

5 All right. Where you record “need appointment ASAP”, do you recall whether what was being discussed was a meeting or the appointment of you ASAP in some capacity?---I think this was about the meeting, which we then booked for the next day.

10 Right. It’s fair to say that, in this discussion, the main concern that was related to you was about shareholders trying to take control of Delta Law?---That – that appears to be the case. Yeah.

And you accept that?---Yeah.

15 [indistinct] the best of your recollection?---Yes.

And there was no particular discussion about creditors or imminent debts being due at this particular discussion?---That’s correct. Yes.

20 Okay. Can I ask you, then – we might as well stay with this part of the affidavit. If you go over the page to page 9 of the exhibit bundle, there you have some more notes which you’ve taken?---Yes.

25 Is that correct? And they’re from a meeting which you attended with Mr Loel and Mr Rozario the following day?---Correct.

Where was the meeting held?---At my office.

30 All right?---There was one other person present.

And I don’t want to go through everything here, but if you can just – well, I should ask you this first. Do you have a recollection of that meeting taking place?---Yes.

35 And do these notes assist you in refreshing your recollection as to the detail of that meeting?---Yes.

All right. Without going into all of the detail – I’m sorry. Does your Honour have a copy of this?

40 THE CHIEF JUSTICE: I’m just looking for it, actually.

MR WEBSTER: Because I certainly have a spare here, if it would assist.

45 THE CHIEF JUSTICE: Okay. Thanks.

MR WEBSTER: This is just an extract of these particular notes from Mr Cotter’s exhibits.

THE CHIEF JUSTICE: Okay. Thank you.

MR WEBSTER: And the page numbers down the bottom should correspond, your Honour. So we're on page 90.

5

THE CHIEF JUSTICE: All right. Thank you. Yes.

MR WEBSTER: So, Mr Cotter, at the beginning of the meeting, you were provided some further background about Delta Law and Silvana and Richard. You recall that?---Yes.

10

And you were told some again, or some more, about the dispute that Mio Art had been in with BMD or Mango Boulevard - - -?---Yes.

15

- - - and about moneys paid or payable in relation to that. At one point, is it right that Mr Rozario said that there was some sort of fraud by Mr Spencer and Silvana Perovich?---Yes. That's correct.

20

You recall it being said. All right. And you understood from what you were told, I take it, that Delta Law was no longer trading, or operating as a solicitor, given that case had wound down?---I think would've known that. Yes. I'm not sure if they said it in so many words, but yes.

25

Certainly picked that up - - -?---Yeah.

- - - from what you were told?---Yes.

30

Over on the next page, I think you were told about a statutory demand. That's about .8 of the page, Winkler – from a Winkler?---Yeah.

Do you recall being told about that?---I do.

35

And you were told that the Winkler debt had been purchased by another entity?---Yes.

Were you – did you ask, or were you told, what – who that other entity was?---No, I don't think so.

40

And have you subsequently made inquiries about who that other entity is?---No.

All right. You also [indistinct] that you were told that the assignment – the top of page 92:

45

...allows Winkler – Winkler's name to be used.

Is that – am I reading that correctly?---That is correct.

All right. And who told you that?---It doesn't say who said what, but - - -

I'm asking whether you recall?---I would probably imagine James Loel.

5 Right. And did you know – do you know that to be true?---Sorry? Which – that - - -

Do you know it to be true that the deed of assignment allows Winkler's name to be used?---No. Absolutely not. Haven't seen the deed of assignment.

10 You haven't seen it?---No.

Have you asked for it?---No.

15 So have you proceeded on the basis, since you were told this on the 17th of July, that the deed of assignment does allow Winkler's name to be used or that it doesn't or that you have no way of knowing?---I have no way of knowing.

And you haven't made any particular inquiries to try and find out?---No.

20 All right. So it's fair to say that, at that point in time and subsequently, you weren't in a position to verify if the claim being pursued in Winkler's name was being legitimately pursued or not?---Well, I had two lawyers telling me these facts and another set of lawyers about to file a statutory demand with the court. So the [indistinct] liquidation process, we normally don't know an awful lot about the
25 claims that are being pursued. It's up to the court, if the court sees fit, to make an appointment.

Of course. You weren't being put in the position of a judge at this stage, having to decide things?---No.

30

But, based on what you knew and did, you didn't yourself verify if any claim being brought in Mr Winkler's name was being legitimately pursued or not?---Not so much in terms of this. No. I - - -

35 And did you give any thought to how Mr Loel would know what a deed of assignment in relation to Mr Winkler's debt provided?---Well, obviously, Mr Loel is formerly of the – the firm Lillas & Loel, who were the ones that were acting on behalf of Mr Winkler. So I could assume there was some knowledge there.

40 You were aware of that during this meeting?---That?

That Mr Loel was formerly of Lillas & Loel – were acting for Mr Winkler?---Well, they were asking me to give a statu – sorry – a consent to act to Lillas & Loel.

45 I see. And what connection did Mr Rozario have with Mr Winkler at this time?---Connection between Rozario and Winkler?

Well, you said that the purpose of this meeting was to see whether you would act as liquidator for Winkler - - -?---Yep. Yep [indistinct]

- - - but Mr Rozario was present at the meeting?---Yeah.

5

Why is he there?---Well, I guess Mr Rozario's clearly the director of Delta Law. Delta Law is the company that is being wound up by Mr Winkler.

10 So did you understand Mr Loel was there as a representative of Mr Winkler or Delta Law?---Certainly of Delta Law, of – of Quintin Rozario.

So nobody at the meeting was there representing Winkler?---Not specifically, but there – as I said, there was somebody else there, this Liam. I'm not sure where he was from. He was – he accompanied them.

15

Right.

THE CHIEF JUSTICE: Sorry. Who was that?---Liam is the name that I've written down. I don't know if he's from Lillas & Loel or where he's from.

20

MR WEBSTER: I'll suggest to you it was Liam Burrow, who's a barrister?---Okay [indistinct]

You don't know whether that's true or not?---No.

25

Okay. Did this Liam tell you at any point that he acted on behalf of Winkler?---I don't think he said much at all.

30 Okay. So, at this point, you understood that you were being asked to give a consent to act as liquidator on an application brought by Winkler?---Yes.

And you were being asked to do that on behalf of Delta Law and Mr Rozario, which was the company to be wound up?---Well, it was Mr Rozario and – that was asking me to – to submit the consent to Lillas & Loel. So yes. That – that is correct.

35

In your experience, when you're being asked to give a consent to act as a liquidator on application by a creditor to wind a company up, are you usually asked by the creditor to give the consent?---Yes. Of course.

40 Not usually the company being wound up?---Correct.

So did it strike you as a little bit strange, what was happening?---It certainly was unusual. Everything that they had just told me was very unusual.

45 All right. You did, in fact, give a consent to act as liquidator?---That's correct.

And you were kept generally informed about the status of the application and whether that consent was going to materialise into you being appointed or not?---I think there might have been one call or two calls following that sort of updated on it.

5 Yes. So if we skip forward a page to the bottom of page 93?---Yes.

I'm sorry. It's the next one that I want to go to. Top of page 94?---Yes.

10 I will ask you to – you might remember. Do you remember that the application to wind up Delta Law at the instance of Winkler was to be held on the 26th of July, the Friday the 26th of July?---I probably didn't know that, but - - -

15 All right. In any event, you were called by Mr Rozario on the 27th of July in the evening?---That's correct.

And he told you words to the effect that they hadn't succeeded on Friday?---Yes. That's correct.

20 And what did you understand him to mean by that?---That the winding up application by Winkler hadn't been ordered – granted.

Right. And – excuse me. You understood that the winding up had been based on the Winkler debt, which had been assigned?---Correct.

25 Yes. And you were then – Mr Rozario then told you something about a receiver being appointed, which you clarified in some way. Can you just tell me to your best recollection of what happened in that part of the conversation?---Yes, certainly. He used the word receiver and he obviously didn't quite understand what he might be talking about in terms of receiver, because there's not necessarily a secured creditor involved that I'm aware of.

30 Yes?---So dug a bit further and, yes, found out that he was actually talking about a voluntary administration process.

35 Right. Did you understand at this point that Mr Rozario wished, having not had success in the liquidation application, to take an alternative approach of having an administrator appointed instead?---Yes. That's correct.

40 All right. You noted that this was your first suggestion. Do you mean to say you had earlier suggested that a voluntary administration might be the way to go?---I think so, in a discussion back on the 17th.

45 Right. And you raised an issue in the telephone call – well, you tell me if it was you or Mr Rozario. One of you appears to have raised an issue about keeping the appointment as soon as the first meeting was called?---Correct.

Do you recall who raised that issue?---I think I would have.

I'm sorry?---I think I would have.

5 You would have. And was the concern that if you were appointed, there could have been, at the first meeting of both, to appoint a different administrator rather than you?---Yes. I don't think it was a concern. Just raising it as a fact that was certainly a possibility.

10 What caused you to think that that – I shouldn't – sorry, I will start again. Is this an issue which happens in every administration?---Well, absolutely. Creditors have plenty of opportunities to change administrators, moreso at the moment – these days, after recent changes.

15 But why would the creditors have any thought of replacing you, did you think at this stage, Mr Cotter?---Just given the background that I had been – that had been explained to me. I was aware of the barrister claims and I expected, you know, if the barristers showed up and had an alternate view, they held numbers and values, so - - -

20 And you had a view also that – you knew that there was a sort of underlying dispute between Mr Rozario on the one hand and people associated with Mio Art on the other?---Yes.

25 Is that right? And you were concerned that that may also have some effect or risk?---Not concerned. Just raising it as a - - -

You recognised it as a potential?---Absolutely.

30 All right. Who said that it needed to be done on Monday morning?---I think he would have.

And do you know why it needed to be done on Monday morning, in his view?---Is it to do – I'm surmising now, the reconvening of shareholders meeting was obviously around this time also.

35 Yes. I was going to suggest to you that there was a further shareholders meeting set for the 30th of July, which was the Tuesday, and you had been told something about that, obviously, at some point before this?---I think so, yes. Yes.

40 And you understood Mr Rozario's concern to be that you needed to be appointed before that meeting took place, because otherwise, he would lose the chance to appoint - - -?---Yes.

- - - if he was removed as director?---Correct.

45 All right. And you didn't discuss anything in particular about outstanding creditor's balances and solvency during this conversation?---No, I was at a country music festival in Broadbeach at the time.

I'm sorry that you were interrupted, Mr Cotter. Thank you. You did, in fact, then have a meeting the following Monday morning, the 29th of July. Is that right?---That is correct.

5 And you've taken some notes about – beginning at the – towards the bottom of page 94?---Yes.

This was the day that you were appointed as administrator?---Yes.

10 You were told a little bit about what had happened with the liquidation application and how it had not succeeded. Do you accept that?---Yes.

And you were told about halfway down page 95 that the notice of meeting was still on for tomorrow?---Yes.

15

And you were filled in again on the various shareholding of the different parties?---Yes.

20 And I want to suggest to you – I think that – I think you've already accepted this before, that the immanency of that meeting was the catalyst for the urgency of your current meeting with Mr Rozario, precipitated by his phone call on the Saturday previous?---I think that was clear.

25 All right. You weren't, at this point, given anything in writing detailing either the financial position or creditors of Delta Law, I suggest to you?---I think, at this meeting on the 29th, there was some documents on hand.

30 Have you retained copies of those documents?---No, I think that was the stuff that was later emailed, or at least some of it was copies that were emailed to me very soon after.

Right. You haven't made any particular notes in here about those documents, I suggest to you?---No, I don't think so.

35 All right. And towards the bottom, you've recorded – I should say this is on page 97?---Yes.

Under Mr Rozario's email address?---Yes.

40 Some things that you noted?---Yes.

Did you recall that during the meeting or shortly after it or - - -?---I think that's probably my short summary shortly afterwards, yes.

45 Shortly afterwards. And it's a reflection of the way you were thinking about things coming out of the meeting?---Yes. Correct.

I just wanted to ask you about it. You noted that the director was very clear in his view that the company was insolvent?---Yes.

5 What did you understand to be the basis of Mr Rozario's view to that effect?---Well, it was just a – the number of creditors that had been discussed, so – barristers, himself, Winkler, primarily.

Right. And you say it clearly is and you so you were agreeing with Mr Rozario's assessment as he related it to you?---Yes. Certainly.

10 Based on what you knew at the time?---Certainly.

Yes. So where you refer then a little bit further on to several creditors, are those the creditors being the barrister creditors and Winkler that you just referred to?---I think I'm just talking generally, yes, so the barristers, Winkler, himself.

20 You weren't aware of any other external trade creditors at this point in time?---No. Certainly there was a – I think a query in my head about the tax office, yeah, which – who are normally in every job that we see, but - - -

Sure. They often ultimately make claims, but you weren't aware of any particular claim at that point in time?---No.

25 All right. Then you said – had:

Has failed to comply with stat demand.

Was that a reference to the Winkler statutory demand?---Yes.

30 Right. And what did you know or understand about why or how Delta Law had failed to comply with the Winkler statutory demand?---I think I'm just relying on what I was being told.

35 Okay. You had just been told that Delta Law had failed to comply with that statutory demand?---In order to go to court to seek a winding up order, it would have had to have, relying on that.

I understand. Then you go on to say:

40 *This differentiates it from other court cases where the ground is found to be an improper purpose, i.e. defeat a member's meeting.*

?---Yes.

45 You were conscious at this point in time that there might be an appearance that this appointment was made to avoid the member's meeting that was going to be on the following day?---Yes.

And you took some comfort in the fact in particular that Delta Law had failed to comply with the statutory demand, which you thought was quite a clear indication that it was not just for the purpose of avoiding the member's meeting?---Well, I'm not sure that's relating just to the compliance with the stat demand, but all the
5 creditors and the fact the company appeared to be insolvent, yeah, that whole paragraph.

I understand. Just focusing on the statutory demand for now, had you been told that an application to set aside that statutory demand had originally been filed by Delta
10 Law?---It was very confusing, the whole winding up thing. Sorry. Could you say that again, that Delta Law had - - -

No. I agree with you; it's very confusing. Had you been told at this stage – and tell me if you don't remember, but had you been told at this stage that Delta Law had
15 originally applied to set aside the statutory demand from Winkler?---I think I had that this is when Mr Spencer was director - - -

Yes. That's right?--- - - - that he had taken some steps. Yes.

20 And then Mr Rozario, after he had come back to the helm, had not pursued that, so that the statutory demand was not set aside?---Yes.

You were aware of that?---I think so, yes.

25 All right. Did you make inquiries as to why the statutory demand was originally opposed and why Mr Rozario withdrew that opposition?---Why it was opposed by Mr Spencer?

30 Yes, to seek to gain some understanding as to whether the statutory demand was a real debt or not?---Right. So, sorry, what was the question, did I make inquiries?

Did you do any – did you make any inquiries, either at this point or earlier, about the reasons why Delta Law had originally sought to set aside the statutory
35 demand?---Well, certainly not earlier. I think, you know, these notes are all my knowledge at that time.

I understand. And is it also true that you hadn't at this stage asked or found out why Mr Rozario, when he came back to the helm, didn't keep trying to set aside the
40 statutory demand, but actually consented to it standing?---Well, obviously, he seemed to be of the view that the company was insolvent. And I think he was certainly of the view that it needed independent control, so - - -

So you got the impression that it was – suited Mr Rozario's purposes for the statutory demand to stay, because that may lead to insolvent – deemed insolvency and an
45 application based on that? That was your understanding?---Well, I'm not sure that it went as far as, you know, deemed insolvency and other things, but - - -

All right. If you knew at this point in time that the statutory demand related to a debt where there was a genuine dispute about whether Delta Law owed it at all, would that have affected your assessment of solvency?---I don't think so, not with the barristers and Mr Rozario himself all saying that they were owed money.

5

If you knew that the barristers had not made any demand for payment and had entered into arrangements where they were giving support to Delta Law by not requiring immediate payment, would that have affected your assessment of solvency?---Well, it all would have added to it, absolutely.

10

All right. And just tell me at this stage, were you – what awareness did you have of a potential claim by Mr Rozario as an employee, in terms of the details or documentation or support for such a claim?---Yeah. Certainly hadn't seen any documentation. And I'm not sure if he'd meant – I certainly don't think he'd mentioned a sum. I certainly would think that he had mentioned that he was a – creditor had, basically, had not been paid anything in 10 years, so it seemed reasonable that he was a creditor to some extent.

15

In your experience, Mr Cotter, for a company with a sole director to – for the director to say that the company's insolvent based on the fact that the company hasn't paid the director employee entitlements, is that a normal reason – or a reason you've come across for companies being placed into administration?---Probably not on its own.

20

No?---Normally, there's other factors, as well.

25

So, really, if I can summarise what I understand – you tell me if I'm wrong – the factors were Mr Rozario's potential claim, which on its own probably wouldn't be normal, at least, the barristers – and you had a certain knowledge of their status, but necessarily a limited one, because of what you'd been told was limited to date. Do you accept that?---I think I'd seen their letters where they - - -

30

Yes?--- - - - said that - - -

All right. Well, I might?--- - - - moneys were outstanding.

35

Right. You think you'd seen those letters by this stage?---I think so, yeah. I think that was in the bundle.

40

All right. We'll come to those in a little while. And you had some knowledge of a statutory demand, but you'd been told that it had been assigned. You didn't know who to. You'd been told that the assignment didn't affect the enforceability of the debt. But you hadn't been able to verify that yourself at the time?---I don't think I'd attempted to verify it, but, you know, yes.

45

Hadn't attempted and hadn't been able to verify it at the time. So I want to suggest to you at this point in time there was a real – a reason to doubt – I'm sorry. I withdraw that. If you – so what I want to suggest to you is if you had known that the

barristers' claim – the barristers were willing to give support to Delta Law at this point in time and if you had known that the statutory demand was at least of highly questionable enforceability, you would have had to reconsider your view that the company was clearly insolvent, I suggest to you?---That probably would have had
5 some impact on my view. I mean, it's certainly the director's view that - - -

I?--- - - - it was the relevant one.

10 I'm not going to cavil with your view of the director's view?---Yes.

But just dealing with your own view, based on the things I told you, you're saying you would have had to reconsider that assessment and consider it again more carefully, perhaps?---Well, I'd certainly – yeah. The issue with the barrister does [indistinct] looking for, you know, whether there was arrangements that others may
15 step into their shoes or whatever the case may be to explain why they weren't being pressed.

Yes. So the support of those creditors for Delta Law in a sense of not insisting on immediate payment would have been a significant fact, though, if you'd been aware
20 of?---It certainly would have been relevant, but the resolution is certainly that it's insolvent or likely to become insolvent, so I guess it's a two limb - - -

I understand. All right. And then, in the second line, you say:

25 *No criticism possible from acceptance of VA appointment.*

That's after a little arrow?---Yes. Sorry. Yep.

I'm sorry. Just further down the page on the notes there's a little arrow.
30 And - - -?---Yep.

- - - you go on to say, I think:

35 *No criticism possible from acceptance of VA appointment.*

?---Correct.

All right. And you were aware of the potential for criticism at this point, but you thought, for the reasons you've sort of set out, no real criticism could ultimately be
40 made?---That was certainly the view based on what I'd been told.

That was your view at the time. I understand. Thank you. And you were appointed later that day, Mr Cotter, by – after you – by resolution given by Mr Rozario on page
45 98?---Yes.

I'm sorry. I think that's where your Honour's bundle ends. Does your Honour – the third volume which we handed up to your Honour on Thursday, I wondered whether that might not have - - -

5 THE CHIEF JUSTICE: That's the - - -

MR WEBSTER: It was called Supplementary Brief.

10 THE CHIEF JUSTICE: So – sorry. Just bear with me a moment. I think in my extracting exhibits I might have made a bit of a mess of the bundle is the present problem.

MR WEBSTER: It probably doesn't matter for these purposes, your Honour.

15 THE CHIEF JUSTICE: Yes.

MR WEBSTER: If there's something significant - - -

20 THE CHIEF JUSTICE: So what are we looking for now?

MR WEBSTER: I was just taking Mr Cotter to Mr Rozario's resolution signed on page 98. But I will in time be going to page 107 and following of the exhibits. Does your Honour have those?

25 THE CHIEF JUSTICE: The trouble is I think there's a combination of documents here. So what's - - -

30 MR WEBSTER: It's the report on company activities and properties which I was cross-examining Mr Rozario about on Friday afternoon in relation to his signature. It goes from page 107 through to two hundred and – we've – we do have a spare - - -

THE CHIEF JUSTICE: Yes. I think I'm going to have to - - -

35 MR WEBSTER: - - - copy here, your Honour.

THE CHIEF JUSTICE: - - - get them. It would make it a lot simpler. That's okay.

40 MR WEBSTER: I haven't removed the cover of that folder, your Honour, which will be misleading. I'm sorry. But the contents of it are Mr Cotter's affidavit.

THE CHIEF JUSTICE: That's okay. Thank you. So 107, you said?

45 MR WEBSTER: Just page 98 for now, your Honour. I'm sorry. I'll be going to 107 in a minute. I'm sorry, Mr Cotter. So you were appointed on – as a result of that resolution by Mr Rozario. And you subsequently submitted some documents to ASIC in relation to your appointment?---That's correct.

Right. Did you disclose somewhere here the fees and charges associated with you fulfilling the role of administrator?---Disclosed it to the director?

Or to ASIC or anyone?---Not at this stage, I don't think.

5

All right. Had you made such a disclosure since your appointment?---I think the disclosure would be in our first report to creditors.

All right.

10

THE CHIEF JUSTICE: Look, Mr Webster, I can give you this back. This is just Mr Cotter's affidavit in the exhibits, isn't it?

MR WEBSTER: Yes. I'm sorry, your Honour. That was what I - - -

15

THE CHIEF JUSTICE: We must have been at cross-purposes. I thought you were talking about the exhibit bundle that we had been - - -

MR WEBSTER: No, I'm sorry.

20

THE CHIEF JUSTICE: - - - working with the other day. So I've got this - - -

MR WEBSTER: No, no. Sorry, I was talking about the bundle of exhibits to Mr Cotter's affidavit. I'm sorry.

25

THE CHIEF JUSTICE: Got it, yes. I've got that. Right.

MR WEBSTER: Mr Cotter, a couple of days after your appointment on the 29th of July, you had a meeting with Barry Jeffrey on the 31st of July. Do you recall that?---I think that would have been a phone discussion.

30

All right. You spoke with him by telephone. I'm not sure that it's in your affidavit. You can tell me if I'm wrong. But I think you disclosed some handwritten notes of that meeting. Can I had a copy of these up, please.

35

THE CHIEF JUSTICE: And, sorry, who is Mr Jeffrey?

MR WEBSTER: Well, who did you understand Mr Jeffrey to be, Mr Cotter?---The accountant for the company.

40

THE CHIEF JUSTICE: Thanks?---Barry – Barry Jeffrey.

MR WEBSTER: The accountant for Delta Law?---For Delta Law.

45

And how have you gotten his details. Do you recall?---That's the reason I mentioned a little while ago. His name is on page 97 and – the bottom of 96 and page 97.

So you've been told about him during your meeting?---Yes.

All right. Is this a note that you took - - -?---Yes.

5 - - - Mr Cotter? Yes. And you explained to Mr Jeffrey that you had been appointed as administrator. And you were told some things by Mr Jeffrey about the way he had kept accounts or the way accounts of Delta Law had been kept?---Yes.

10 He told you told you that accrued legal fees were never accounted for?---Yes.

He told you that the \$1 million, when it was received, was treated as non-income deposit?---Yes.

15 And that Mr Rozario had told him that it was not income?---Yes.

And he thought – Mr Jeffrey thought there was an issue around who it belonged to?---Yes.

20 All right. He told you that towards the bottom – about five lines from the bottom, that in terms of the bank system Quintin would “code it up”?---Yes

By that, you understood him to be saying that Quintin would attribute entries in the banking system to particular kinds of expenses, categories and accounts?---Yes.

25 All right. And he also told you that he didn't think that BRJ was a creditor of Delta Law?---Yes.

30 All right. Thank you. I – sorry, just to clarify. You are accepting that Mr Jeffrey told you that he didn't think that BRJ was a creditor of - - -?---Let's – I've written this at the time. Doesn't think he's - - -

Yes. Yes, no, I'm not trying to trick you. I just - - -?---Yeah.

35 - - - wasn't sure that I'd asked you what I intended to ask you?---He said maybe only just last short while – was his final sentence, so - - -

Sure. He hasn't subsequently submitted - - -?---No.

40 - - - a proof of debt. All right. I tender that, your Honour.

THE CHIEF JUSTICE: Well, yes, that will be exhibit 17.

45 **EXHIBIT #17 ADMITTED AND MARKED**

MR PEDEN: Your Honour, might I just rise – to the extent this is said to be admissible against my client, I do object on the grounds of hearsay.

THE CHIEF JUSTICE: It is pretty clearly hearsay.

5

MR WEBSTER: Yes.

THE CHIEF JUSTICE: Unless you want to say something about Mr Cotter's bona fides in acting on it or something. I don't know. So – and I'm not sure where it goes. What is the point?

10

MR WEBSTER: Your Honour, it goes to – well, the last part goes to the status of Delta Law in terms of creditors. And the part before that in terms of the million dollars – really, it's only there to identify Mr Cotter's understanding. It's not to make a submission of a lack of bona fides, but in combination with some other things which I ultimately want to submit to your Honour as relevant to the state of knowledge that Mr Cotter had and what he'd been – what he was told at different times in the administration by different people.

15

THE CHIEF JUSTICE: Okay. But in any event, he's given evidence of that and you probably don't need the document, do you? His understanding, for what it's worth, is that the million dollars was not supposed to be income – or that's his - - -

20

MR WEBSTER: Yes.

25

THE CHIEF JUSTICE: - - - understanding, as at that time.

MR WEBSTER: I accept that, your Honour. I accept that.

THE CHIEF JUSTICE: And he said that the accountant didn't lodge a proof of debt. So you probably don't need it anyway, do you?

30

MR WEBSTER: I accept that, your Honour.

THE CHIEF JUSTICE: All right.

35

MR WEBSTER: I withdraw the tender.

THE CHIEF JUSTICE: Okay.

40

MR WEBSTER: If we can go back to the body of your affidavit for a moment, please, Mr Cotter. And it's the paragraph 32 on page 11?---Yes.

I should take you to paragraph 29. You or your firm received from Mr Rozario a report on company activities and property on the same day you met with BRJ, the 31st of July?---We received it on the 31st of July.

45

Yes, 31st of July?---Made up to the 29th of July, yes.

And do you recall how you received it?---I think by email to one of my staff.

5 All right. Any particular staff member you could identify who would have received it?---I imagine Mr Abdul Tarmal.

All right. He's be working with you on this administration?---He's been the case manager.

10

All right. And after – between when you – you or Mr Tarmal received it and when it found its way into your affidavit, who would have had access to this document?---Well, we would have only had a soft copy of it, I think, so – in terms of what – access to what we printed out or - - -

15

Yes?---Well, it certainly wouldn't have left our office, I wouldn't imagine. So it would have been internal to our office.

20 So the version which you have exhibited to your affidavit, based on your operations of your firm, would be a true copy – you're confident – of the version you received of Mr – your associate received?---I certainly would expect so, yes. All right. You want to take me to it? But yes – yes, certainly no reason why I wouldn't.

25 All right. Could I ask you to turn to page – to that document, just so you can see what – see it and remind yourself of it. It appears beginning on page 107 of the exhibit bundle. Do you have that?---Yes, I do.

30 And you'll see that it then continues over to a part B – I'm sorry. I think this is a blank one?---This is a blank version.

Yes. It's – so the one I want to go to starts on page 183. And there's a – what looks like Mr Rosario's signature on page 187?---Yes.

35 And then again on page 195?---Yes.

And then on pages 202 and 203 are some particular things which are recorded about amounts the company owes to its creditors and amounts the company owes to its employees?---Yes.

40 And as far as you know, has there been any alteration by you or anybody else in your firm to these pages, between when you received it and when you've exhibited it to your affidavit?---No.

45 Can I ask you about page 202. This is the employee claim by Mr Rozario?---Yes.

And he has claims – tell me if this is how you understood it. About \$4 million dollars eight hours a day five days a week, on call seven days for some particular period?---Yes.

5 And then the rate goes up to \$550 in August 2012, and then he claims further amounts including four weeks holidays and superannuation totalling an amount of \$8,100,000-odd?---Yes.

And then says:

10

Make a deduction for a million that was paid on 22 November.

?---Yes.

15 At this point in time or subsequently, has Mr Rozario provided you with a written employment agreement?---Sorry, an appointment?

A written employment - - -?---Oh, employment. No, he has not.

20 Has he told you that a written employment agreement exists?---I don't think he has.

Has he provided you with any other forms of documentation to support this claim?---I don't think he has, to be totally honest.

25 At the first meeting of creditors, is it right that you admitted this claim for a dollar?---Correct.

And that was consistent with your view that with a lack of - because of the lack of documentation in support, that was the appropriate way to treat a claim?---Yes.

30

And if the position in regards to documentation and support continues as it is, that will continue to be your view about how the claim needs to be treated?---Yes.

35 Can I also ask you to go back to page 203: that deals with Mr Winkler. It gives a postal address for Mr Winkler as Lilas & Loel, and the email address for Winkler is scott@lilasandloel. Do you see that?---Yes.

40 That was consistent with your understanding that Lilas & Loel were acting for both Mr Winkler and Delta Law by Mr Rozario in this point in time?---I don't thin Lilas and Loel were acting for Mr Rozario, if that's what you said.

All right. You're aware that they're now acting for Mr Rozario?---Yes. I think - - -

45 You weren't sure about that at the time?---I think FC Lawyers at the time were acting for him.

Certainly every meeting that you had with Mr Rozario was in the company of Mr James Loel?---Yes.

5 Then in relation to - if we go down the page to Mr Douglas, there's a hand-written entry which I'll suggest the first words say:

Unknown because Mio Art were paying him.

10 Do you see that?---Yep.

You'd been told something to that effect in one of your meetings or phone calls, that there was an issue that Mio Art had been paying some of these bills?---That sounds familiar. Yes.

15 Sounds likely that you've been told that at some point?---I think so.

Yes. So this didn't come as a surprise to you when you saw it?---No.

20 No. All right. And in relation to Mr Keane's fees, you can see there's the word "disputed" that's been written above the figure?---Yes.

Did you have an understanding of what that meant?---No.

25 Do you have an understanding now of what that means?---No, I don't.

All right. Can I take you back to Mr Rozario's employment entitlements claim which I asked you about before?---Yes.

30 And show you a document. This is an email which you sent. It's got in the two field:

ID free

35 But do you recognise this as an email which you sent to Mr Rozario?---Yes.

And it was sent on the 6th of August subsequent to you receiving Mr Rozario's report as to company affairs?---Yes.

40 And you're asking him to provide some substantiation of verification for his employee entitlements claim?---Yes.

45 And did you receive any response to these queries from Mr Rozario that you can recall?---I don't recall. And I certainly don't think we've had substantial explanation of this any further so - - -

All right?--- - - - I don't recall.

I tender that, your Honour.

THE CHIEF JUSTICE: Exhibit 17.

5

EXHIBIT #17 ADMITTED AND MARKED

10 MR WEBSTER: After you were appointed, Mr Cotter, you were sent or copied or into quite a large number of emails from Mr Rozario and Mr Loel about the position between Delta Law, Mio Art, Ms Perovich and Mr Spencer?---Yes.

Do you recall that?---Yes.

15 How did you understand those emails to be relevant to you when you received them? And tell me if you need more details about what I'm talking about?---Yeah, I'm not 100 per cent certain which emails, but - - -

20 Yes, okay. Well, let - - -?---- - - are we talking about the debt generally or - - -

Let me give you an example. Can I show you this one please?

THE CHIEF JUSTICE: Thank you.

25 MR WEBSTER: That's an email from Mr Rozario to you on the 12th of August?---Yes.

30 And he's discussing there a response to a letter from Mr Conomos that morning, I'm not sure that you've exhibit that letter. Do you recall what letter that's referring to?---No, I don't.

35 All right. It probably doesn't matter. But he's seeking to contest the – some of the assertions which he regards as being wrong in that letter. Is that how you understood his email?---Yes.

He's wanting to fill you in on his version of events, in a sense, and to say that the version of events set out in Mr Conomos' letter is quite wrong?---Yeah, so this is about the prior shareholder's meeting I think, is it? Yes.

40 Yes, well, yes. I think Mr Conomos, in his letter, might've been suggesting that the reason that he wanted to appoint you was to avoid a further shareholder's meeting and that may be what's being addressed. But you received, it'd be fair to say, that you received a number of emails over the course of your administration which had this sort of character of an email from either Mr Rozario or Mr Loel seeking to
45 explain things further to you in terms of their version of events about facts that'd been raised in some other correspondence?---But, yeah, well I think that would probably be fair, yes.

All right. And what did you understand to be the purpose of res – what did you think you should do with this information which Mr Rozario had provided you?---This particular email?

5 Yes?---Well I'm not sure he's telling me anything too particularly important or asking me to do anything. I'm not quite sure what he's after in this email.

All right, that's okay, you're not sure?---No.

10 All right. Well you can put that aside, thank you. Can I show you another document please? On the, I should start this way, on the 15th of August, Mr Cotter, you sent a demand to Mio Art for the payment of outstanding legal fees: I think that appears on page 364 of your affidavit, perhaps if you could go to that?---Yes.

15 It's signed by you on 365?---Yes.

And it attaches some tables on page 366, 367 and 368?---Yes.

20 All right. And do you recall whether those tables were put together by yourself or one of your associates or were provided by somebody?---No, absolutely not. That was in the bundles that we were given. I believe that was something put together during arbitration or mediation or by the – by Delta, Perovich or - - -

All right. I understand?--- - - - Spencer, I think.

25 And if we just stay with the letter for the moment, if we look at the tally on page 364, you'll see that the second court matter, BS1999 of '06 - - -?---Yes.

- - - has a sum of 3.379, etcetera?---Yes.

30 And if you go over to the table on page 367, at about .6 of the page there's total line and total unpaid?---Yes.

And it's got the same amount, 3379 - - -?---Yes. Agreed.

35 - - - 854, etcetera. And I want to suggest to you that that is a total – that that total is worked out in the following way. If you go up the top, the first thing in bold in Cost Order, 607,000?---Sorry, top of 367?

40 Sorry. If you move - - -?---Okay.

- - - up – if you move - - -?---Sorry. Yes. Got you.

45 - - - upwards on 367, the first bolded entry, I think, is next to the words Cost Order?---Yes.

And then there's another one for 50,000 below that?---Yes.

Add those two together. Then you have another total of 2.757 million under a single line?---Yes.

5 And that gives you a subtotal of 3.414 from which 35,000 is subtracted to arrive at 3.379?---That appears to be right.

Well, I'll ask you to accept that. I'm no mathematician, but it worked when I checked it earlier?---Yes.

10 Can I ask you – direct your attention just to the top of the page. Those where four invoices appear to be listed, numbers 21, 40, 60 and 79?---Yes.

Do you see that? And if you go across, there's the letters L&L next to those. Do you recall being told or seeking an explanation as to what those invoices were?---No.

15 All right?---I don't recall.

Can I suggest to you that those invoices were not included in any Delta Law invoices that were provided to you?---No [indistinct] might be right.

20 And they relate to fees charges Lillas & Loel when it previously acted for Mio Art?---Right.

Do you accept that or you're just not sure?---No. That appears to be fair.

25 All right. And so they couldn't form any part of a claim against Mio Art to pay Delta Law fees in 2019, could they?---I wouldn't have thought so, no.

30 No. They've been included in this total, though, in your letter of the 3.379 million and the balance outstanding asserted to be 7.7 million?---They have.

And that was, I assume, an oversight on your part?---Yeah. I'd say it was an oversight or lack of understanding of exactly how this has been put together.

35 And, really, the reason for that is because this was a claim that was, really, formulated by Mr Rozario and passed on to you, not one that you or [indistinct] anybody in your office had sort of put together themselves?---We certainly did not put this together. As - - -

40 No?--- - - - I say, I thought it was prepared by Mr Perovich for Delta Law previously.

Right. But it had been provided to you by or on behalf of Mr Rozario after your appointment?---Yes.

45 And you'd been – you were passing it on as something which Mr Rozario had provided to you as a claim to be made against Mio Art?---Correct.

All right. Without having had much of an opportunity to sort of interrogate the detail very much?---Absolutely. We had limited access to documents to verify it at that point in time.

5 All right. Excuse me a moment. Would it have been better, do you think, Mr Cotter, rather than to send this out so quickly on the 15th of August, to have spent a bit more time interrogating it and looking at the detail of it before it was sent out?---Well, the period of time in a voluntary administration to do anything is very short, so I think we had a report going out on the 23rd. So I think we needed to at least raise the issue.
10 And I think we certainly amended our standard debtors letter to make it a little bit more – well, you know, it may be subject to variation. And I think my understanding was that that – these documents had been relied upon in previous mediation, so were not going to be any surprise to Mio Art. They’d seen it before.

15 I understand. And then if we go back to your affidavit, Mr Cotter, the body of it, this is part of the document which my learned friend Mr Peden showed you before at page 21, 21 of your affidavit, the body of it?---Yes.

In paragraph 64, you’ve collated there the tally of invoices that were provided on the
20 13th of August, and is it right that you’ve done this sort of - this work has been done since that letter on the 15th of August - - - ?---Yeah. Absolutely.

- - - was sent out?---That was - we hadn’t gone through those 492 pages at that stage.

25 I understand; I’m sorry you had to at all. About half-way down page 22, you’ve included a total of the Delta Law invoices, counsel invoices and other. Do you see that?---Yes.

30 And the figures in those are somewhat different to the figures that are included in your letter on the 15th of - - -?---Correct.

- - - August, aren’t they?---Yes.

35 All right. I understand. Thank you. Just excuse me. Sorry, your Honour. Just excuse me.

THE CHIEF JUSTICE: That’s all right.

40 MR WEBSTER: Mr Cotter, subsequent to your letter to Mio Art that we just looked at on the 15th of August, you received a response on behalf of Mio Art which said, “Actually that’s not quite right; we don’t owe the money like you think we do, and we’re not going to pay it in accordance with that claim”?---Correct.

45 Is that right? And you’ve since formed the view – I think, just bear with me – that the underlying nature of that claim by Delta Law against Mio Art has some complexity to it?---Absolutely.

Some factual complexity?---How do you mean factual?

I mean there may be contested facts that have to be resolved to establish the claim?---Yes.

5

And there may be some legal points that are contested which have to be resolved to establish the claim as well?---I guess so. Yes.

All right. And so if the claim is going to be pursued in a sort of adversarial way, it's probably not going to be resolved quickly?---Yeah, it's certainly - - -

10

There's certainly a risk that it - - -?---Not unless it's - - -

There's a risk that it won't be resolved quickly?---Yes.

15

And if at the second meeting of creditors, the company is facing liquidation, it would be up to a liquidator to pursue that claim?---Correct.

And in order to do so properly, a liquidator would require funding?---Correct.

20

And as at this stage, you're not aware of any specific offer for funding to pursue that claim?---Certainly not an offer. I've mentioned it in passing to a litigation funder who was interested, but [indistinct] not to - - -

And if a litigation funder did ultimately provide funding and was interested, they'd want their cut of the proceeds, I'd assume?---Absolutely.

25

Twenty to 30 per cent is the going rate these days?---Yes.

All right. And on top of that, there would be the legal fees of whichever external lawyers were retained?---Yes.

30

And there would be also some component of your own remuneration associated with being the person managing that claim over a period of time?---Correct.

35

All right.

THE CHIEF JUSTICE: Who have you got currently admitted to proof as a creditor? Who's going to turn up for a creditor's meeting?---Who do we have - Mr Rozario, the employment claim - - -

40

MR WEBSTER: And he's admitted for \$1?---He's admitted for \$1. There is his loan account issue, so I'm not sure if he's going to add that to his claim in some way.

THE CHIEF JUSTICE: Sorry, his loan account issues? What's that? His loan - lent money to the - to Delta Law?---Yeah, so the balance sheet at 2018 which we - is the only balance sheet we have, I think reflects him on being owed 70,000. And he's

45

given us some information recently which he's supposedly brought it more up to date which talks about 400-odd thousand, I think that's all in the emails. But we certainly haven't looked at that so I don't know.

5 MR WEBSTER: Can I help you with that maybe a little bit?---Yes.

Mr Cotter, in your – in the body of your affidavit – I'm sorry, if your Honour doesn't mind. I don't think Mr Cotter's - - -

10 THE CHIEF JUSTICE: No, that's fine.

MR WEBSTER: - - - quite finished answering your Honour's question but if it's convenient.

15 THE CHIEF JUSTICE: Look, you go with this and then I'll just find out who's left in the creditors.

MR WEBSTER: You, in your affidavit from page 25, deal with the books and records you received, Mr Cotter. And I think on page 26, in paragraph 27 –
20 paragraph 77, you identify that you've received certain documents from BRJ - - -?---Correct.

- - - Accountants. Including, in subparagraph (B), coding report for the months of December, January and March 2009?---Yes.

25 For certain accounts. And a ledger report over the page?---Yes.

If we turn to that, if we turn to page 545 please. Is that partway through one of the ledger reports that was provided by BRJ?---Yep.

30 And the heading at the top of that page and the previous page, I should say, is Loans from Directors/Loans to Directors?---Correct.

And can I suggest to you, I'm now straying well beyond my expertise, this is a liability account so that figures that're entered as positive, recorded as positive
35 figures, represent amounts owing by the director to the company and amounts that're represented as negative with brackets around them are, in effect, repayments or amounts which are owing by the company to the director. Have I got that around the right way?

40 THE CHIEF JUSTICE: And I'm sorry, I haven't got the right page number. What was it again?

MR WEBSTER: Five-four-four, your Honour.

45 THE CHIEF JUSTICE: Thanks.

WITNESS: So positive numbers - - -

MR WEBSTER: Positive numbers mean – increases the amount the director owes to the company and negative numbers increases the amount the company owes to the director?---I think that's correct, yes.

All right. And that, the running summary of that account, we don't have an opening balance but we do have a closing balance which seems to appear on page 561?---Yes.

10 As of March 2019?---Yes.

And that would be – that should be understood as an amount owing by Mr Rozario to the company as at that date, of 21-odd thousand?---Pretty sure this is not a running balance, this is just a total. So - - -

15

I'm sorry?--- - - - for the period of October '18 to March '19, it's 21,000 in his - - -

I see, you'd have to know the – whatever the balance was prior to that?---Yes, so we know it was 70 at June '18, or 1 July '18.

20

Yes?---And there's a gap till October '18.

Yes?---And then there's another gap after from March to July '19.

25 Yes. Well I was going to say I think Mr Rozario recently provided you with an updated version of this document - - -?---Yes.

- - - is that right? And is that what you were referring to before to her Honour - - -?---Yeah.

30

- - - when you talked about him potentially amended - - -?---Yes, correct.

- - - his proof [indistinct] or something like that. Can I show you a document with this on it?

35

THE CHIEF JUSTICE: Could I just ask, what is this essentially? He's got a credit card and this is how he uses it? Or - - -?---Well, it'd normally be expenses for the business being run via his account, but it looks like, you know, he's living - - -

40 Liquorland?--- - - - from this money a little bit, yes. Meals, you know, whether they're business meals or not I don't know.

Thank you.

45 MR WEBSTER: Is this the email and the accounts you were referring to, Mr Cotter?---Yes, correct.

Can I suggest to you a couple of things? One: that the million dollars – which you're aware was paid into Delta Law in November and subsequently withdrawn by Mr Rozario – isn't reflected anywhere at all in this account?---That is my understanding. Yes.

5

All right. However, if one goes to page 25, please?---Yes.

There's a transaction about half-way through the page: 22nd of May 2019?---Yes.

10 Where the director's loan account is improved in favour of the director by \$450,000?---Yes.

This is the positive money apparently coming from FC Lawyers?---Correct.

15 And if we go forward to the final balance - again, I'm not sure if this is a running balance or this is just a total?---I think it's a total.

Okay. So again, we're not 100 per cent sure whether this reflects the - this is from the 2nd of July so it should be added to the 70,000?---He's filled in the blanks. Yeah.

20

He's said that. But the total for this is less than the 450,000 which was paid in on the 22nd of May?---Yes.

25 So if that transaction were not properly recorded in this account, this would in fact be a balance the other way; an amount owing by Mr Rozario to the company, rather than the other way around?---Yeah. Correct. It would be negative 45 for this particular period.

Yes. All right. Thank you. Her Honour was asking you, I think - - -

30

THE CHIEF JUSTICE: Sorry, did you want to do anything with that, or - - -

MR WEBSTER: I will tender it, your Honour.

35 THE CHIEF JUSTICE: Thank you. That can be exhibit 18.

EXHIBIT #18 ADMITTED AND MARKED

40

MR WEBSTER: I should say, that was sent to you about a month ago, Mr Cotter?---Eighteenth. Correct. Yes.

You haven't got any updated or different proof of debt - - -?---No.

45

- - - since that night?---No, we haven't.

I think her Honour was asking you before, Mr Cotter, about who would be the creditors of Delta Law at a second meeting. I think you said - - -?---Yes.

5 - - - Mr Rozario for a dollar - - -?---Mr Rozario - - -

- - - subject to some alteration or potential alteration of that?---Yes.

10 I think that's as far as we got?---What else did I say? So Mr Hopkins, is it? The 1650 assigned - sorry. Assigned to Emperor; \$1650 proof of debt.

Yes?---Obviously there's a Winkler proof of debt, but things have moved, so - actually, no. That has been withdrawn I believe - - -

15 That's - - -?---- - - very recently.

That's been withdrawn?---Yes.

Yes?---The ATO has lodged a proof of debt.

20 For \$90,000-odd?---Correct.

Yes?---They're the proof of debts that we've got. Obviously whether barristers or otherwise are going to come to a meeting, I don't know.

25 They've yet to lodge proofs of debt - - -?---They have not lodged proof of debt.

But in theory, at least, they could still do so before the meeting?---Correct.

30 If they did, on the present state of affairs, they'd have a majority in number and value on the present state of affairs, assuming that the 1650 that's been assigned to Emperor voted the same way?---Yeah. Well, that would be four in number. It's obviously subject to what the amounts are, but if it's as per their correspondence, yeah, that's about 2.75 million versus what's on the other side. ATO and - and if - Mr Rozario's one dollar, then yeah, actually. They'd have majorities.

35 All right. Thank you. I asked you before about pursuing Mio Art and the cost and involvement in doing that. Can I ask you about investigating the withdrawal of the \$1,000,000 by Mr Rozario from the bank account Delta Law?---Yes.

40 Is that in a similar category in the sense that there may be some factual disputes about the entitlement of the - sorry, I'll withdraw the word "factual". There may be some disputes about the appropriateness or legality of that withdrawal, as far as you're aware?---Well, certainly I'm aware there's allegations of it being inappropriate. Absolutely.

45 Which you've indeed reported to ASIC?---Yes.

So if anyone - if a liquidator was to investigate that, there would be some contested matters or allegations which would have to be worked out one way or the other?--- Yes.

5 And a liquidator would only do that if they were funded?---Not necessarily. But, yeah, we can do things - - -

Right?--- - - - [indistinct] ourselves.

10 In order to – in order to pursue a claim against Mr Rozario, a liquidator would normally want some sort of funding to do that?---Not necessarily. We do pursue those types of claims, yeah, if that is – yeah, where we’re going to get funded from by successful recovery and sometimes that’s - - -

15 I understand. You might find a law firm who was willing to act on a speculative basis?---For sure.

For that particular claim as it’s a director claim - - -?---Yes.

20 - - - is that because of the nature of the claim? Right. You’re aware that the Queensland Law Society has been conducting its own investigations into that withdrawal?---Into the trust account audit or to - - -

Yes. Yes?---Yes. Certainly.

25 Yes?---Yes.

The withdrawal – yes. Thank you. In para – can I take you to paragraph 88 of your affidavit, please, on page 34?---Yes.

30 There you express a view or explain the reasons for – of you that you reached in your second report to creditors?---Yes.

35 That right? You at that time thought that the only viable option was for the company to be wound up?---Yes.

40 And the first thing that was relevant to that was information to hand regarding barristers and other creditors who had sought or previously sought payment from the company?---Yes.

45 And what did you understand as at 23 August 2019 was the status of the barrister’s claims?---So it’s any correspondence that stated that they were owed moneys. I think it was about 2.75 in total. Obviously had seen or been told that they weren’t necessarily pressing the claims, but had not heard a word from them themselves.

I see. So you were aware of the fact that there were certainly potential debts out there owing to the barristers based on invoices and - - -?---We'd certainly seen all the invoices.

5 All right. You'd seen the invoices?---And we've seen their letters where they said, "I'm owed the money."

You – you – those letters weren't letters to you or to Delta Law, though, were they?---Were they to Delta Law? Not to me. I certainly have no correspondence from – from them.

Well, I want to suggest that they were also not letters sent to Delta Law itself. Do you know?---I can see [indistinct] it says written to HopgoodGanim and the FC lawyers. So I assume that's on behalf of Delta Law.

15 Can you tell me which page you're looking at there, Mr - - -?---Yes. That is 324.

All right. Well, let's start there. It says at about .7 of the page in bold:

20 *Re Delta Law, your client Mr Quintin Rozario.*

You see that?---Yes.

And I want to suggest that this is a letter which is directed to Mr Rozario himself rather than Delta Law. You accept that?---Sorry – sorry, I'm not quite following you. So I think FC Lawyers was acting for Rozario personally with HopgoodGanim - - -

Yes?--- - - - acting for the company, so – you know – sorry, there's a lot of lawyers.

30 I want to suggest HopgoodGanim's never acted for Delta Law?---Okay.

You're not sure?---Well, the only real communication I've had with them was them giving me the company's books and records, so I'm not sure why they had those.

35 They act, I want to suggest, for Port Klang Proprietary Limited, one of the shareholders?---Okay.

40 Okay. You're not disagreeing with me but you're not agreeing with me?---Yeah. I just don't know, sorry.

All right. That's fine. Well, I want to suggest to you that this letter is not addressed to Delta Law or to solicitors acting for Delta Law, but it's a claim directed to Mr Rozario – I'm sorry, it's a letter directed to Mr Rozario and which is triggered by a concern about Mr Rozario's conduct in removing the million dollars from Delta Law's account. And it's a – it is a letter written in relation to that occurring?---Sure.

You accept that?---Yes.

5 All right. And so I want to suggest to you again that there has not been any demand, letter, correspondence sent by a barrister to Delta Law or to yourself, since your appointment as administrator, making a demand for payment which you have seen?---Certainly, as I said, I have not received anything from them since I have been appointed.

10 Yes?---I haven't gone to the other two yet to see who they're actually addressed to. But if that's correct, then - - -

All right. Well, if you go back to what I think is the one that's said to be Mr Keane's one. Does that start on page 285?---Yes, yes. Yes, yes, there it is – which is an email to Quintin Rozario, yes.

15 Yes, at Gmail, for whatever that's worth. And it says:

For your information and records, here was my email with my unpaid invoices.

20 And it – below it appears an earlier email from 27 November 2018?---Yes.

Which is an email from Mr Keane's administrative assistance, Ms Cottle - - -?---Yes - - - it appears – which attaches the invoices and tabulates them?---Yes.

25 None of this, I would suggest to you, is in the form of a demand for Delta Law for the immediate payment of fees?---Well, the email on the 27th of November was certainly an email to Delta Law.

30 I accept that?---That the attached invoices have not yet been paid, so not a demand as such.

A demand as such. And the email of January is certainly not a demand as such?---No.

35 No, all right. And as to Mr Douglas, just excuse me. I'll just see if I can turn that up quickly. Just excuse me, your Honour. I'm sorry. I can't find the reference. Yes. I think it's in Mr Rozario's first affidavit. It may be somewhere else, but that's what I have. I'll just – this is exhibit 14 to Mr Rozario's first affidavit. I'll just give you the copy – my copy, Mr Cotter, to save time. I apologise if this is somewhere in your exhibit bundle. But this way – is that the correspondence or the letter that you recall seeing in relation to Mr Douglas' - - -?---Yes, it is.

45 Okay. And again, I want to suggest to you this is not addressed to Delta Law?---No. It's addressed to FC Lawyers.

Who you understood to be acting for Mr Rozario personally?---Yes, I think so.

And I want to suggest that it – the complaint in it relates to Mr Rozario’s withdrawal of the million dollars. It’s not a claim directed to Delta Law, per se, for any immediate payment of fees?---No, certainly. It does say:

5 *In excess of \$2 million of fees is owing to me. It remains outstanding because it is not - - -*

It is not written to Delta Law, pressing it for payment of those fees at that time?---No.

10

All right. Thank you. I might have that back, if I could. So we were – in your affidavit, Mr Cotter – at paragraph 88 on page 34?---Yes.

15 And I want to suggest to you, at least in relation to the barristers, that their potential debts alone are – as you currently understand them, are not a sufficient reason to put the company into a winding-up?---Sorry, say that again?

20 Sure. Just considering the barrister’s debts alone, I want to suggest on the basis of the things I have taken to you – and to be clear, the absence of any direct demand on Delta Law, the absence of proofs of debts, the absence of any demand on you and – we’ll just leave it there for the moment. Those debts are not, by themselves – ignoring anything else – a sufficient reason to wind up the company because it appears that they are willing to continue to support Delta Law?---Well, they certainly say that they’re creditors. You’re talking about winding-up the company.

25

Yes?---I’m not quite sure I follow you. But certainly, an involuntary administration where it was insolvent or likely to become insolvent meant they could, obviously, send a demand tomorrow and - - -

30 They could, yes. I understand. All right. I might – I might come at it a different way, Mr Cotter. Given – I want to put this to you. Given the status of the barrister creditors, at least, it would appear viable to bring the company out of administration and back to being out of administration and normally – be normally run again?---I – I guess anything is viable. I know there’s some issue which I haven’t seen much about
35 ,about guarantees and assignments. So it was always, sort of, uncertain whether there might be somebody – you know, as in Mr Hopkins, wanting to - - -

40 Yes?---Step in for amounts paid on behalf of the barristers. But at this stage, I guess it’s viable because we haven’t heard from them.

All right. In 88(b), you say the only disclosed substantial asset of the company, being the debt apparently owed by Mio Art, was disputed?---Yes.

45 And as to that, if there is to be an attempt to recover that which is resisted in any way, I think you accepted it’s likely to require funding and take significant time, probably, or at least there’s a risk of that – to recover that asset?---If it’s going to be defended or aggressively denied, then yes.

We'll pass over (c). And you say it was unviable to return the company to the director – that's Mr Rozario?---Yes.

5 Given the disputes between various persons and entities. And is that recording of you – that because of the falling-out or disputes which you understand exist between Mr Rozario, on the one hand, and others – including Ms Perovich and Mr Spencer on the other – there would be some concern about returning the company to the director?---Well, I think at the time, certainly, returning an insolvent company to a director, subject to the range of disputes that was going on – yes, it didn't seem
10 sensible. Yes.

Let's leave solvency to one side - - -?---Sorry.

- - - for the moment. If we leave that to one side, is there any particular reason why
15 it's today unviable to return the company to the director, in your opinion?---Today?

Yes?---So to Mr Rozario – and ignoring any other creditors and - - -

Ignoring solvency for the moment?---I guess anything is viable. So yes, it could be
20 returned to Mr Rozario. I mean, the – obviously, there is no business and - - -

Yes. Yes?---Yes. In order that – so the Law Society, for example, is - - -

Looking at things?---They require the company to be wound up.
25

Yes. Well, it – your understanding is because Mr Rozario is no longer a legal practitioner, director, the company couldn't continue to operate as an incorporated legal practice?---Yes.

30 Is that right?---Yes.

All right. Are you – I don't need to ask that. I'm sorry. Just excuse me, your Honour. No further questions.

35 THE CHIEF JUSTICE: If there isn't a vote to wind it up, is there anything you can usefully do in – as administrator?---Sorry, if there's not a resolution to wind the company up?

40 Yes. What's the next step if there's not that?---well, there has to be a second meeting. So that has to be called – strict time frames, I think I've got to call it, after 30th of November currently.

45 Yes?---And the only options are adjourn, wind-up, DOCA or return control. So it's - - -

Okay?--- - - - pretty clearly, there's three options, so if there's no doc - deed of company arrangement proposal - and there has been discussions about a deed of

company arrangement proposal, but it hasn't necessarily gone anywhere, so it's return to director, it's wind up or DOCA, really.

5 And in the interim are you doing anything? If there were an adjournment, is there anything you're doing or going to do or - - -?---Well, yeah, I'm certainly trying to sit on my hands, just because of the cost factors and there is obviously the order that says not to take any steps, which - - -

10 Sorry - I forgot that bit?--- - - - whatever that means. Yeah.

Yes. All right?---Which is a bit unclear.

Yes. Okay. Anything arising?

15 MR WEBSTER: No. Thank you, your Honour.

THE CHIEF JUSTICE: No. All right. Thank you. Mr Eade?

20 MR EADE: No re-examination, your Honour. May the witness be excused.

THE CHIEF JUSTICE: Yes.

Thanks, Mr Cotter?---Thank you.

25

WITNESS EXCUSED

[4.15 pm]

30 THE CHIEF JUSTICE: Is that the point at which you wanted to be excused too, Mr Eade, or what's your position?

35 MR EADE: Your Honour, subject to anything that my learned friends might say in oral submissions, for the purposes of me protecting my client there were some things that I wished to address you on orally, which would take a matter of 30 seconds to a minute.

THE CHIEF JUSTICE: That's fine. I - - -

40 MR EADE: But aside from that - - -

THE CHIEF JUSTICE: Yes. I just didn't want to detain you if you - - -

MR EADE: - - - not really.

45 THE CHIEF JUSTICE: But that's fine. You stay put there.

MR EADE: Thank you, your Honour.

THE CHIEF JUSTICE: All right. Can I just clarify one thing. Port Klang hasn't entered an appearance - or what's its position?

MR PEDEN: No, it's not a party.

5

THE CHIEF JUSTICE: It is a party.

MR PEDEN: It's not - - -

10 THE CHIEF JUSTICE: It is a party. I thought it was a party to the second application.

MR PEDEN: Sorry - it is a party in 8866 and that's Mr Rozario's company.

15 THE CHIEF JUSTICE: Yes, I - - -

MR PEDEN: It's the shareholder.

20 THE CHIEF JUSTICE: I know, I know, but is it formally before me or not? Nobody announced an appearance for it, so - - -

MR PEDEN: Good question. Can I just get some instructions about that?

THE CHIEF JUSTICE: Sure.

25

MR PEDEN: I mean, I imagine, it's the same interest as Mr Rozario, but I don't know.

THE CHIEF JUSTICE: I'd just like to tidy up what its position is, that's all.

30

MR PEDEN: Yes. I'm going to have to seek some instructions, your Honour, about that.

THE CHIEF JUSTICE: All right.

35

MR PEDEN: I apologise for not being able to give your Honour a direct answer now.

40 THE CHIEF JUSTICE: Well, it probably doesn't make much difference to anything. I'd just like to know, you know, what's to be said about it formally, that's all.

45 MR PEDEN: Yes. So that's the evidence, your Honour, we're looking to address. Is your Honour happy to proceed immediately? We've taken the liberty of - well, my instructing solicitors have - emailing through a copy of the final trial submissions. Can I hand up a copy, your Honour, for the file so that - does your Honour want another copy for working?

THE CHIEF JUSTICE: Yes. I've got the email copy, so I'll make this document - I think I've been making the submissions identification exhibits, so I'll make this one E.

5

MFI #E MARKED FOR IDENTIFICATION

THE CHIEF JUSTICE: Yes.

10

MR PEDEN: Now, I'm in your Honour's whether your Honour wants to read it through or I can take your Honour through it.

15

THE CHIEF JUSTICE: Just give me a couple of minutes and I'll do a speed read, if you'll take a seat. Okay. I have had a quick look at that, Mr Peden. Yes.

20

MR PEDEN: Thank you, your Honour. So the pathway for your Honour to approach this application is, as we've set out in the issues for consideration at paragraph 43.

THE CHIEF JUSTICE: Yes.

25

MR PEDEN: So the first matter then is insolvency as a matter of fact, and that is irrelevant to section 447A subsection (2)(a), where, if your Honour is satisfied – because the applicant has established its burden of proof that the company is solvent, then that is a matter that the court can take into account in whether or not the – it – the company – whether or not the administration should end. It's not definitive. It's just one of the three matters in 447A sub (2) that your Honour takes into account. The principles about solvency are set out in 46. What we have here, though, your Honour, is certainly in relation to the tax debt, there is a proof of debt that has been launched by the ATO. In paragraph 48 – sorry, 47, I refer there to the decision of Justice Jackson. That's at first instance in relation to the principle that the alleged insolvent company's financial position should be assessed by having regard to its unmet tax liabilities.

35

THE CHIEF JUSTICE: Okay. Is the ATO debt the GST on the million? Is that what it ended up being?

40

MR PEDEN: Yes.

THE CHIEF JUSTICE: Or it something else? All right.

45

MR PEDEN: In essence, that's right. Now, it was, I think, opened by my learned friend or by the applicant that that sum shouldn't be 90,000, but it was going to be half that, I think, on the basis of some argument. Now, we've not heard that pressed, so there's an – effectively an unchallenged debt by the ATO of 90-odd thousand dollars. Now, can I turn then to the - - -

THE CHIEF JUSTICE: Why – I’m sorry. 49B, why haven’t you got the ATO debt in there?

5 MR PEDEN: Yes. I think that’s because, your Honour, that summary there was – is from the report to the – by the director to the administrator, and at that time, the proof of debt hadn’t been received.

THE CHIEF JUSTICE: Okay. You don’t say as much. You say it’s a state of evidence as to its assets and liabilities, but - - -

10 MR PEDEN: Yes. But I think we’ve referenced that by the footnotes to the report, and at paragraph 59, your Honour, is where we set out the ATO debt.

THE CHIEF JUSTICE: Sure.

15 MR PEDEN: So returning, though, to the second category, if you like, of the barrister’s debts, it’s not – the evidence is not really satisfactory in this sense and that the – there’s no direct evidence from the barristers in this – in these proceedings. That is, no affidavit has been produced on behalf of any of them to say or support the propositions that my learned friend has been putting to Mr Spencer and Mr Cotter. Rather, what’s put to these witnesses is a theory based on correspondence, which – and I think the latest attacks were on the basis that relate – they weren’t claims because they were addressed to Mr Rozario personally and not to Delta Law. Now, that, of course doesn’t mean that the barristers aren’t owed the debts on the face of it. 20 The invoices that they’ve issued and the letters that they’ve issued are saying they’re owed the money. Now, it’s another matter to say, well, they’re not – they haven’t yet issued a statutory demand or a – they have asserted - - -

THE CHIEF JUSTICE: Well, they haven’t even put in a proof of debt.

30 MR PEDEN: No. So – and – and the problem – the problem is this: if they were at – at – at the – my – for my learned friend to establish and satisfy your Honour on the – and he bears the onus of proof to show that the barristers are not, in fact, owed any money. It would be a simple enough matter to put in an affidavit from each of the 35 barristers to say we’re not owed. Instead what we have is Mr Colditz has a deed that’s been annexed which doesn’t, in fact, release Delta Law. All it does is says, “Well, I accept that I – I’m going to look also to [indistinct] and to its solicitor – and to its – some of the beneficiaries. I’m going to look also to those entities for payment”. Mr Douglas’ email, your Honour will recall, was when he said, “I agree 40 to the undertaking”, that was in the context of the – the offer having been made to both himself and Mr Colditz agreeing to release Delta.

So we’re in this gray zone and – and certainly with Mr Keane, there’s nothing from Mr Keane apart from his letters which say – or his emails which – which say that 45 he’s issued invoices and they’re outstanding. Now, if – if it were to be pursued really on behalf of the applicant that the barristers were no longer creditors at all then it would be simple enough for them to get an affidavit from each of them to that

effect. Can I just take your Honour to the undertaking that was given today by Mr Lavercombe?

THE CHIEF JUSTICE: Yes.

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MR PEDEN: And your Honour will see that that's a conditional undertaking in – in that it's Mio Art undertakes upon the administration of Delta Law being terminated to indemnify and [indistinct] etcetera. So it's only in the event that the administration is terminated that this undertaking will bite. So that if the

10 undertakings not terminated – sorry. If the – if the administration is not undertaking – not terminated then this undertaking doesn't bite and the barristers are left in the position of being creditors no – no doubt so that they can turn up to the creditors meeting and – and vote. But this is the – this is the difficulty.

15 On – in one hand we're – we're told, "They're not creditors for some purposes", and then on another hand we say, "Well, actually we want to reserve our rights in case we have to exercise those rights as creditors in a – in a couple of weeks time". So - - -

20 THE CHIEF JUSTICE: Look, [indistinct] your argument generally seems to be premised on the notion that the creditors will vote for a winding up.

MR PEDEN: Well, we don't know. We don't know but that – and that – the – the whole [indistinct] of this application is that it should be put in the hands of the

25 creditors to determine that at the – at the creditors meeting. It shouldn't be taken out of the hands of the creditors. And that's what this application's all about.

THE CHIEF JUSTICE: Okay. Can we come back to your assets and liabilities.

30 MR PEDEN: Yes.

THE CHIEF JUSTICE: How would I find that there are employee entitlements of \$11 million. Why would I find there were any employee entitlements?

35 MR PEDEN: Well, your Honour might find as a matter of fact that they're not but that – that matter hasn't been fully explored in the sense that all we have is Mr Rozario has put in a report as to affairs which records that he says he's owed money. Now, that's a matter for the administrator to admit in some sum or not at the second meeting of creditors. Mr – you heard – you heard Mr Connor's evidence before that

40 on the current state of the evidence – sorry. Current state of the material provided to him he's going to allow that as a proof of debt at \$1. Now, that doesn't mean that it's not a – that's doesn't mean that there's not a claim. It's just that he can't value it.

45 THE CHIEF JUSTICE: Yes, but when we're talking insolvency, if I don't think there's much basis to think that there is any agreement for Mr Rozario to be payed as an employee, why would I even take it into account?

MR PEDEN: Well, the evidence that's before your Honour is that Mr Rozario worked for over 10 years for Delta Law and received about \$20,000 in remuneration for that - - -

5 THE CHIEF JUSTICE: But maybe he did it all in the anticipation that as a shareholder he'd benefit. Or - sorry. He's a shareholder in Port Klang, isn't he?

MR PEDEN: Yes.

10 THE CHIEF JUSTICE: Maybe he thought that that's how it would all come home.

MR WEBSTER: Well, if that's what my learned friend's case was, they should have put that to Mr Rozario.

15 THE CHIEF JUSTICE: Okay.

MR WEBSTER: But the difficulty is there is no answer to the tax office claim that's there.

20 THE CHIEF JUSTICE: Well, but - all right. So those are the liabilities, but what if Delta Law is entitled to a million dollars to be put back into its account? The money that has disappeared into Mr Rozario's pocket - - -

MR WEBSTER: Yes. And your Honour's - - -

25 THE CHIEF JUSTICE: That would - - -

MR WEBSTER: - - - quite right, and your Honour heard in the cross-examination of Mr Cotter that that would be a complex claim. It's not currently funded. It could - - -

30 THE CHIEF JUSTICE: But if we're talking solvency and insolvency, again, don't I need to form some view of whether in fact there might be this asset for Delta Law?

35 MR WEBSTER: That's right. There might well be assets there. There are certainly contingent assets; we say there are because there's the claim against Mr Rozario, that's one. There's a claim for - - -

40 THE CHIEF JUSTICE: Is that really contingent? I mean, if it's an entitlement, what's it contingent on?

MR WEBSTER: Well, it's contingent on recovery, obviously. It's contingent on being pursued and being recovered.

45 THE CHIEF JUSTICE: Okay. Yes.

MR WEBSTER: So for example if - well, I mean, it has to be - - -

THE CHIEF JUSTICE: It's not cash at the bank.

MR WEBSTER: It's not - well, and it's not something that's - well, it's not cash at the bank, obviously, but nor is it something certain to be recovered, and it's like any
5 case, any insolvency. I mean, in every insolvent company, there are assets, otherwise the insolvency industry wouldn't exist.

The question is are there assets available to meet all the liabilities as and when they fall due, and the difficulty is at the moment – the difficulty for the company at the
10 moment – is there is a tax liability that is due. We say there are also, it seems, liabilities to the barristers that are due, and query how much, if anything, is owed to Mr Rozario, but there are certainly claims. And what assets are there available at the moment to pay those debts?

15 The company just doesn't have any assets to do that. It has claims that it can pursue; it can also pursue the claim against Mio Art for the legal fees owed to it. That's certainly an asset; a contingent asset again that is contingent upon being pursued. That might be worth some millions of dollars. Unless, of course – and this is where Mr Spencer says he has the conflict, of course – if he gets back in control, he can just
20 apply what he called the cash sharing arrangement, as opposed to the payment of the creditors. Your Honour will recall that evidence.

THE CHIEF JUSTICE: Yes.

25 MR WEBSTER: I think it's at transcript page 12 and again at transcript page 45. We've put it in the outline at paragraph 36 and 37.

THE CHIEF JUSTICE: Well, but - sorry, you said you put it in your outline at 36
30 and 37?

MR WEBSTER: Paragraph 36 and 37. So rather than paying the debts of the company, he did what - he referred to what he called the sharing of receipts arrangement, and this is really one of the troubling aspects of this case: that your Honour might find that there are good reasons for not allowing this company to be
35 put back under the control of either Mr Rozario or Mr Spencer or anyone associated with any of them.

THE CHIEF JUSTICE: The undertaking, though, prevents any payment out without Mr Rozario's consent or the shareholders, so arguments about that sort of thing
40 would have to be resolved before anybody got a cent.

MR WEBSTER: Well, I suppose a few things: firstly, there is no evidence to any value of this undertaking.

45 THE CHIEF JUSTICE: But it's not really an undertaking as to damages, so that's not quite - what I'd be more concerned about it I have no idea – I have a feeling that Mr Spencer senior might have said his son lived in Sydney.

MR WEBSTER: Yes.

THE CHIEF JUSTICE: So you'd be looking at contempt if it weren't complied with, but if he's in Sydney that might be a little tricky.

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MR WEBSTER: Yes.

THE CHIEF JUSTICE: That would be more my concern, but it's not really an undertaking to pay any amount, it's just an undertaking to proceed in a certain way.

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MR WEBSTER: Well, it's a – it's an undertaking to indemnify Delta Law for any claim by any barristers.

THE CHIEF JUSTICE: Yes. That's true. I suppose I was focusing - - -

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MR WEBSTER: So - - -

THE CHIEF JUSTICE: - - - more, though, on if money comes in and in relation to Delta Law.

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MR WEBSTER: Yes. But if – but if money doesn't come in - - -

THE CHIEF JUSTICE: Yes. But if money doesn't come in then nobody's getting anywhere.

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MR WEBSTER: And that's – that's really the problem. Because Delta Law is entitled to pursue Mio Art for this money and so to put the – put Mio Art back in control of Delta Law, and I'm using that in – in a broad sense because it's Mr Richard Spencer on the evidence who might be – might be the one who's – well, is the one who is conflicted.

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THE CHIEF JUSTICE: What do you say Delta Law's entitlement to pursue Mio Art is? It's above and beyond any [indistinct]

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MR WEBSTER: Well, it has a monetary claim for acting for Mio – for Mio Art in accordance with the various fee agreements which are in the evidence. So there are fee agreements back to 2009, I think it is. It's in the trial bundle. Page 3 is the first of the – the fee agreements, and then there is subsequent fee agreements and there's – whatever it is, 19 - - -

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THE CHIEF JUSTICE: I would have thought the earliest one was 2013. Is there a 20 – a 2009 one?

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MR WEBSTER: The much earlier ones, yeah. Just [indistinct] trial bundle is – in the trial bundle. The first one is at page 3. That's – so - - -

THE CHIEF JUSTICE: Sorry. When you say the trial bundle, I have not hung onto anything except exhibits. So - - -

5 MR PEDEN: Yes. But the trial bundle collects the documents. And I can give your Honour the exhibit number. It's - - -

THE CHIEF JUSTICE: Okay.

10 MR PEDEN: It's costs agreement between Delta Law – exhibit 12, I think, is the - - -

THE CHIEF JUSTICE: Twelve is the first costs agreement.

15 MR PEDEN: Two thousand and thirteen.

THE CHIEF JUSTICE: That's what I've got written down.

MR PEDEN: Yes.

20 THE CHIEF JUSTICE: And is it 2009, are you telling me?

MR PEDEN: No, sorry, that's 2013.

25 THE CHIEF JUSTICE: Yes. So is there an earlier one?"

MR PEDEN: No. It was Mr Douglas' agreement that I was referring to as 2009.

THE CHIEF JUSTICE: Okay.

30 MR PEDEN: It's – Delta Law is 2013. And that was – well, there's a subsequent document.

THE CHIEF JUSTICE: There's a 2018 one.

35 MR PEDEN: That's 2018, yes, which was the one about which Mr Spencer gave the slightly unsatisfactory evidence. But the court – and taking on – taking these matters on the face of things, Mr Cotter pulled together the various invoices that have been issued by Mio Art – sorry, by Delta Law to Mio Art. And that was the document that was MFI 15 – sorry, MFI B and it became exhibit 16. And this – this
40 document, your Honour might recall from the cross-examination a few moments ago, was Mr Cotter's updated analysis of the debts that would be due to Delta Law by Mio Art in respect of the invoices that have been issued.

45 And your Honour might recall that he – Mr Cotter was taken to the paragraph of his report, I think, where he said that the claims were about seven million. And then that – he said these documents supplant that earlier figure on the basis of now having looked at the invoices. So there is a significant amount of money that could be

recovered by Delta Law against Mio Art. Now, as we say, the problem is it's contingent upon it being recovered. And if Mr Spencer goes back into control of – or goes back into control – or goes back into control since the May hearing of Delta Law and also controls Mio Art, then the creditors and shareholders of Delta Law are going to be the ones that lose out.

THE CHIEF JUSTICE: Okay. So your position is Delta Law's owed money, whether Mio Art ever recovers another cent on costs orders.

10 MR PEDEN: Yes.

THE CHIEF JUSTICE: But the more pragmatic position is that if this company goes into liquidation, nobody will ever fund any recovery of anything. So it will be academic.

15

MR PEDEN: No, no. Not at all. Mr Cotter said that he's got interest from an insolvency – a litigation fund – preliminary.

THE CHIEF JUSTICE: Sorry? He said what, sorry?

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MR PEDEN: He said he's got interest from a – preliminary interest from a litigation funder.

THE CHIEF JUSTICE: I thought that was for pursuing Mr Rozario for the million.

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MR PEDEN: No. I thought that was generally, for - - -

THE CHIEF JUSTICE: Okay.

30 MR PEDEN: - - - for recoveries.

THE CHIEF JUSTICE: All right. I must have missed that.

MR PEDEN: Sorry. That was my understanding of what he said.

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THE CHIEF JUSTICE: Okay. Well, I can see that in the transcript. That's all right.

MR WEBSTER: I think that's right, your Honour.

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THE CHIEF JUSTICE: Yes, okay.

MR WEBSTER: What Mr Peden's saying.

45 MR PEDEN: So that's – in terms of solvency, we certainly accept there are assets. The recoverability of those is contingent upon, we say, someone independent being

in control. That is, if you put – Mr Spencer’s in control, then there’s difficulties. We accept that.

5 THE CHIEF JUSTICE: Do you make any argument that your client was entitled to withdraw funds from the account? Or is your argument just, “Oh, well, I’ll have to try and get it back and that needs a winding-up”?

MR PEDEN: Your Honour, I’m not sure I can put forward any argument one way or another about how defensible a transaction is.

10

THE CHIEF JUSTICE: Okay.

MR PEDEN: That’s a matter for investigation. We absolutely accept that. And I think all the parties, including Mr Galea and Mr Clapin, both accepted that there was some – there was a need for independent investigation – as, I think, Mr Spencer said there was a need for investigation. But he wanted to do it himself or via Mr Thompson. So that’s actual insolvency. Can we just come back to the appointment question?

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20 THE CHIEF JUSTICE: Yes.

MR PEDEN: Because this is to do with the abuse of process question - - -

THE CHIEF JUSTICE: Yes.

25

MR PEDEN: - - - and the test there is a different one: it’s not actual insolvency. It’s when the director had a reason to - - -

THE CHIEF JUSTICE: Had reason to believe. Yes.

30

MR PEDEN: And so that’s focused, really, on his state of mind, and his state of mind of course, obviously, in relation to the barristers, was he had those various letters – the one that had come in from Mr Douglas saying that he was owed two million – and the email from Mr Keane. Now, in the material, we’ve only got the January ones. Mr Rozario seemed to think there was another one in May, but there’s no evidence of that.

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THE CHIEF JUSTICE: How do I believe Mr Rozario about his state of mind if I don’t really believe him when he says, for example, “Oh, that’s not my signature”, or “that’s an old signature and that document’s been tampered with”? Where do I go?

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MR PEDEN: I think your Honour looks for contemporaneous independent evidence, and your Honour would be entitled to do that because - - -

45 THE CHIEF JUSTICE: Yes. Because I have to say, the lead witnesses here – Mr Spencer and Mr Rozario – I don’t find either of them credible.

MR PEDEN: Couldn't agree with your Honour more.

THE CHIEF JUSTICE: I don't think you're supposed to say that. Anyway.

5 MR PEDEN: The difficulty is - - -

THE CHIEF JUSTICE: Well, that's why I'm focusing a bit more on what's the practical outcome and what's the best thing in the interests of the company.

10 MR PEDEN: Well, the best thing in the interests of the company is to allow to go to a second meeting of creditors, and then that's where it falls.

15 THE CHIEF JUSTICE: If I were against you and decided that it should come out of administration, you've got the Clapin claim: does he have to have probate in order to be registered? Have you given me the law on that? I haven't looked at it.

MR PEDEN: He doesn't - well, the question mark about probate is that there's no reason why he wouldn't get probate. There was some question which had been raised earlier in the material about the - - -

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THE CHIEF JUSTICE: The validity of the will. But that seemed to be nonsense, didn't it?

25 MR PEDEN: Well, when your Honour says "nonsense", there was a sister or - I think it was a sister in the Philippines who - - -

THE CHIEF JUSTICE: But - - -

30 MR PEDEN: - - - had a question mark about it, and then there was some evidence about whether or not that was - and those matters weren't put to Mr Rozario, but I accept your Honour's - if they were probate, then there's little that could be said to prevent the - or no reason why the shares shouldn't be transferred. Of course, Mr Clapin has agreed to transfer the share immediately to Mr Spencer's company.

35 THE CHIEF JUSTICE: Yes. I'll just see what the terms of - you see the order - sorry, the originating application asks for an order that he's entitled to be registered. You would say not unless he gets a probate, though; is that right?

MR PEDEN: Yes. Not unless he gets a probate.

40

THE CHIEF JUSTICE: And the alternative is that on a grant of probate.

MR PEDEN: Yes.

45 THE CHIEF JUSTICE: Okay.

MR PEDEN: But that really depends upon what happens with the company in administration. I mean, if the company comes out of administration - - -

THE CHIEF JUSTICE: Yes, sure.

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MR PEDEN: - - - then subject to a grant of probate, there's nothing that could be - I can't take it any further on that.

THE CHIEF JUSTICE: All right. So that one is - - -

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MR PEDEN: Dependent.

THE CHIEF JUSTICE: - - - lying quiet for the time being.

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MR PEDEN: The - - -

THE CHIEF JUSTICE: Sorry, I'll just stop you for a minute. Madam Bailiff, if you need to go, I don't think we need you any more.

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MR PEDEN: So, your Honour, just - we've picked up the cases on that part of insolvency. But can I just address briefly the other parts of the alleged abuse of the part 5.3(a). And once again, it probably falls under the same category - what objective evidence is there? There were seven grounds identified in the points of claim. I - we've dealt with each one of them in the - in the - in the outline, from pages 18 onwards. I'll just address each of them briefly. The first one - it's said that it was an abuse of part 5.3(a) for the million dollars to be transferred. But we point out that's - the transfer of \$1 million is actually nothing to do with any abuse of part 5.3(a). It's - if anything, it's a - some form of voidable transaction as against the company.

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THE CHIEF JUSTICE: Yes. But isn't there an argument that this whole process of putting the company into voluntary administration is to avoid that issue?

MR PEDEN: Well, no - - -

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THE CHIEF JUSTICE: In other words, the thwart the other shareholders and - - -

MR PEDEN: Well, I'll come back to that. But just in terms of this first one about the transfer of the money, that's - that, of itself, can't be an abuse of part 5.3(a) because it's just a transfer of money.

35

THE CHIEF JUSTICE: Okay. But can't it be a motive for an abuse?

MR PEDEN: Again, no, because it's not connected with putting the company into administration. Because putting the company into administration might lead to it either - one of the three - one of the three outcomes from the second meeting of creditors. That is, either a DOCA being put forward, the company being returned

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back to the directors or the company going into creditors' voluntary liquidation. So – and if it's – and it seems to be it is common ground that the company should be under – I said common ground. Certainly, my client's position is the company should be under independent control and be investigated by someone independent.

5 And the insolvency practitioner is the best person to do that. Now, your Honour will recall there was initially – or in the outline – allegations against the propriety of Mr Cotter. But that wasn't pursued at all in cross-examination, so I think that's gone.

10 THE CHIEF JUSTICE: Yes. And everything I've seen and read suggests to me that he is entirely independent, if – having his hands very much tied.

MR PEDEN: Quite. So that's the first one. The second one is, again, the purchase of the motor vehicle. But again, that's not an abuse of part 5.3(a). If anything, it's either just a replacement of a cash asset with an item of plant or – you know, if
15 you're going to even say there's something nefarious about it, well, it's some form of antecedent transaction which should be pursued – again, by a company – by the company with the powers of a liquidator. The third one is the one I was going to come back to, which is to frustrate the shareholder's attempts to remove him. Now,
20 your Honour, I've referred there to the decision of Condor Blanco. That's at paragraph 78. That – that decision is one that's against me on the facts in the sense that there were four grounds of challenge. And one of the grounds that was upheld was that the – that director had put the company into administration for the purpose of frustrating a meeting of shareholders.

25 THE CHIEF JUSTICE: Do you actually have copies of the cases you were referring to?

MR PEDEN: We do have copies of them all.

30 THE CHIEF JUSTICE: That will save me a bit of time if - - -

MR PEDEN: Yes.

35 THE CHIEF JUSTICE: - - - you do. Thanks.

MR PEDEN: Can we - they're actually not all - - -

THE CHIEF JUSTICE: Okay. Can - - -

40 MR PEDEN: - - - packaged together, but we'll put them together, your Honour.

THE CHIEF JUSTICE: All right. I'll hope to get them from you at some stage.

45 MR PEDEN: We could probably do it jointly, if that assists.

THE CHIEF JUSTICE: That would be a help, if you give me a joint bundle. Thanks.

MR PEDEN: But in that decision, there were four grounds of attack and one of them was, as I say, this putting the company into administration in order to preserve the director's control over the company. Now, there's a few things that flow from that to this case. Firstly in terms of the purpose or the improper purpose, it has to be
5 the predominant purpose and the authority for that proposition goes back to Williams v Spautz which is a decision of the High Court in 1992 [174] CLR 509, and that's been followed in relation to section 447A in a decision of Foti – F-o-t-i – and Foti v P&S Investments Pty Ltd [2009] FCA 1409 where Justice Besanko, with this question and held that the applicant would have to establish that the improper
10 purpose was the dominant purpose.

Now, in this case, Mr Rozario's evidence is that he thought they were the creditors – this is back on the 30th of July – so he thought they were the creditors, and there were the concerns about the company being put into the hands of Mr Spencer, which
15 would mean that Mio Art would control both sides of the transactions. Allied with the fruits of litigation lien not being pursued. So the forth ground was said to be failure to resist Mr Winkler's application. Again, Mr Rozario said, based on his consideration of the debt, it was a true one.

20 THE CHIEF JUSTICE: You knew it was disputed though; how do you explain the pulling the plug on the statutory demand, the application to set it aside?

MR PEDEN: Because he saw an agreement which showed that Delta Law was liable.
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THE CHIEF JUSTICE: Sorry, that - - -

MR PEDEN: That Delta Law was in fact liable for the debt. I think that Mio Art had been liable, and then there was an agreement by which Delta Law agreed that it
30 would become liable, and so while Mr Spencer was in control after the 10th of May, he tried to set it aside and then after Justice Dalton's decision, he was - the control was returned back to Mr Rozario, and so he says, well, I can see this agreement here and there's no basis for Delta Law to oppose that.

35 THE CHIEF JUSTICE: And Mr Rozario deposes somewhere to actually taking that view and - - -

MR PEDEN: Yes. I think that's in his first affidavit - - -

40 THE CHIEF JUSTICE: Okay.

MR PEDEN: - - - at paragraph 40. Well, in paragraph 39, he says:

45 *The facts material to the debt owed to Mr Winkler are set out in Mr Winkler's affidavit sworn on 25 July '29, and which I believe to be true.*

Here's the copy of the affidavit with the exhibits, and then he says in para 40:

In consequence of the above, I form the opinion that the debt owed to Mr Winkler was a true debt, and I cause Delta Law to consent to the dismissal of the application seeking to have the statutory demand set aside.

5 THE CHIEF JUSTICE: Yes. Okay.

MR PEDEN: So – so that’s ground 4. Ground 5 – that’s – well, that’s similar. Just the flip side of that, the support of the Emperor application. Ground 6 is the appointment of Mr Cotter – or, again, the – the appointment of a VA can’t be an
10 abuse of the – of the part 5.3 of itself. In the circumstances, we formed the – formed an opinion. And then ground 7 was just a summary. So where we’re then left, your Honour, is back to the statements of principle in paragraph 72. That’s from the decision of Justice Young in Cawthorne v Cura Constructions. So the court has to do whatever it thinks just in all the circumstances. But the court has to bear in mind,
15 when exercising those powers, the rights of the various groups of people that are affected by the voluntary administration.

And that has to be read, as well, in light of the statements in Condor Blanco Mines which we’ve extracted at paragraph 80 there. That is the power that is – the director
20 has exercised has to be done in the interest of the company as a whole. And so that brings us back, then, to a consideration – well, what are all of the circumstances? And your Honour has the broad power, then, to look at all of the circumstances and say, “Well, what’s in the interests of the company, bearing in mind the rights of the various groups. And the various groups would be the creditors, the shareholders and
25 the company itself. So we’d say the relevant circumstances are that the company’s currently insolvent, but it has debts that it could pursue for the benefit of both the creditors and – I mean, ultimately, hopefully the members.

The – there is a significant risk of putting the company back under the control – or
30 potentially getting it under the control of Mr Spencer, because of his immediate conflict with Mio Art. And it wouldn’t be hard to foresee that if Mr Spencer got – took over the control, as he might if he gets Mr Clapin’s share through Law and Commerce Partners and, as we heard from Mr Galea, the shares in Emperor are actually – sorry, Mr Spencer, it was. Mr Galea said – remember, in relation to
35 Emperor, that it wasn’t – it was owned – there was no beneficial interest. But Mr Spencer said yes, it is beneficially owned under the sub-trust by Mio Art.

THE CHIEF JUSTICE: Did Mr Galea actually say that? I know Spencer – I know what Spencer said. But did Mr Galea actually say the contrary?
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MR PEDEN: Can I - - -

THE CHIEF JUSTICE: I wasn’t sure that he did.

45 MR PEDEN: - - - check the transcript. I thought I’d asked him about that – that he was - - -

THE CHIEF JUSTICE: Okay.

MR PEDEN: Because we wanted to know who Emperor was in all of this – why was Emperor involving itself in these proceedings? It is a shareholder, obviously, and it acquired the debt. But can we come back to that, your Honour, if - - -

THE CHIEF JUSTICE: Yes. Well, it's probably not critical. But - - -

MR PEDEN: But in any event, that's – that would be the outcome, potentially. Now, it may be – and your Honour has really recognised this – that at the end of the day, the creditors may vote to return the company to the control of the director anyway. But it's – the – our submission is the company being in administration, in light of all of these circumstances – it's best that the company remains in administration and at least the creditors have their say. And if the outcome is that it is returned to the – the outcome of the creditors' wishes is that it's returned to the control of Mr Rozario, then that's the wish of the creditors. Alternatively – but your Honour's heard Mr Rozario's position is he says it shouldn't be. He says it shouldn't remain in administration and should go into liquidation.

THE CHIEF JUSTICE: But if they were to vote that it returned to the control of Mr Rozario, then that will be an unfortunate outcome if, in fact – because there's a range of possible findings here, but if in fact the appointment of the administrator was for an improper purpose, if there should be a vote returning it to his control, if it's left to the creditors, then there's no scope for making this other order sought by the applicants as to, you know, the creditors meeting and whether he should be permitted to chair it and so on. So it's a pretty hard and fast result. I mean, it just really gives an option between winding up and what most of the shareholders would regard as disaster, I suppose.

MR PEDEN: Well, wouldn't say most of the shareholders. I mean, one can see - - -

THE CHIEF JUSTICE: Well, two out of three.

MR PEDEN: Two out of three. But as I say, it's not impossible to see down the track, if it's returned to Mr Spencer's control and Mr Spencer starts dealing with the assets and compromising the debts owed by Mio Art, then the person who misses out is the one-third shareholder who is not in control, which is poor planning. So none of these are ideal outcomes, but where we come back to is there is a regime in the Corporations Act for the control of companies and your Honour might, or some other judge in future might say, well, this is a case where the court can't be satisfied that there is - that this company is under proper conduct and management of its directors. So it's just to lead to just an equitable winding up under section 461. But we're not at that stage; that application's not before your Honour.

THE CHIEF JUSTICE: All right.

MR PEDEN: Does your Honour have any questions arising out of that?

THE CHIEF JUSTICE: Not at the moment, I don't think.

5 MR PEDEN: We'll put together the bundle of authorities in conjunction with my learned friend.

THE CHIEF JUSTICE: All right. Thank you. Mr Wacker?

10 MR WEBSTER: Yes, your Honour. Can I hand up two copies of some updated closing submissions.

THE CHIEF JUSTICE: And they will be - - -

15 MR WEBSTER: So a copy for the file and a copy for your Honour.

THE CHIEF JUSTICE: Exhibit F.

20 **MFI #F MARKED FOR IDENTIFICATION**

THE CHIEF JUSTICE: And again, could you just give me a minute to flick through them?

25 MR WEBSTER: Yes. Of course.

THE CHIEF JUSTICE: All right. Thanks, Mr Webster. I've had a quick look.

30 MR WEBSTER: Thank you, your Honour. I think it's common ground, at least to this extent, that your Honour's got a broad discretion under 447A, set out in paragraph 42. And it's to the exercise, having regard to the – all of the rather peculiar circumstances of this case. It's also common ground, it appears, that the question of solvency is quite an important threshold question to your Honour's
35 exercise of that discretion. And so can I start there. Can I ask your Honour to go back to my learned friend's submissions – to the statement of assets and liabilities that appeared at paragraph 49.

40 Making an allowance for an additional 90,000 for the ATO claim, your Honour will see that the very large substance of those liabilities as set out there consist of Mr Rozario's employee entitlements claim, which your Honour would reject, which Mr Cotter at this stage is not prepared to accept for more than a dollar and which is not properly substantiated – and any evidence about which you should reject. Mr
45 Rozario ultimately accepted that the ultimate arrangements – in my submission, the ultimate arrangements for his payment were informal ones. And there's no proper substantiation of that claim. Now, if that be the case, your Honour will see that the assets far exceed the liabilities for this company. That's, of course, because of the

right or entitlement which Delta Law has to claim against Mio Art for recovery. So just looking at that statement - - -

5 THE CHIEF JUSTICE: But can I stop you for a moment.

MR WEBSTER: Yes.

10 THE CHIEF JUSTICE: I didn't take this up with Mr Peden. But that disputed Mio Art debt - - -

MR WEBSTER: Yes.

15 THE CHIEF JUSTICE: Those are the invoices you say were just whipped up – sorry, Mr Spencer said were just whipped up for the purposes of the mediation, aren't they?

20 MR WEBSTER: I – I'd have to check whether that figure is the figure that's in Mr Cotter's tabulation. But it probably doesn't matter for these purposes, your Honour. It's right to say that at the moment, the – can I start – put it this way. It seems to be common ground between all of the witnesses, really, that there's an entitlement for Delta Law to recover against Mio Art. But the quality of that entitlement – and I accept the exact value of it – is not common ground – in fact, hasn't been particularised. Mio Art's position, as Mr Spencer seemed to articulate it was – there's an entitlement there. But you have to do proper bills of cost first, and that hasn't been done. Mr Rozario accepted that those particular bills or invoices, I should say, had been not prepared by him, but by Mio Art for the purposes of the mediation. And so – and accepted that he hadn't himself prepared bills of costs, though he said he was going to.

30 THE CHIEF JUSTICE: So it's anybody's guess, isn't it?

MR WEBSTER: Well - - -

35 THE CHIEF JUSTICE: What that's worth.

40 MR WEBSTER: - - - the exact – of course, one can't put an exact dollar figure on it, your Honour. But on the basis that there's work that's been done over 10 years on a number of proceedings, one can reasonably draw the inference that it's going to be more than a few thousand dollars. And indeed, your Honour can also infer that there's value to the cost orders which Mio Art has from the attitude which the litigants have taken. Mr Rozario says he's, on his own initiative, preparing bills of cost today. You've heard from Mr Spencer that Mio Art wants to pursue costs orders. You heard from Mr Galea for Emperor that he's hoping that it can all be pursued because of an entitlement as a shareholder – whether that ultimately goes to him or not is unclear, I accept. But that was certainly his evidence. So there is a sufficient basis in the evidence for your Honour to infer – if not that it's worth \$7.7 million, at least that it's worth a substantial amount of money.

THE CHIEF JUSTICE: Yes. And, look, can I just side-track you to a moment - - -

MR WEBSTER: Of course.

5 THE CHIEF JUSTICE: - - - to your undertaking.

MR WEBSTER: Yes.

10 THE CHIEF JUSTICE: The problem with that is, isn't it, that even if Mio now pays the net proceeds of the costs order – orders into an interest-bearing trust account - - -

MR WEBSTER: Yes.

15 THE CHIEF JUSTICE: - - - if you accept that – or if I were to accept that really, there was, as per the written three agreements, a lead over the proceeds - - -

MR WEBSTER: Yes.

20 THE CHIEF JUSTICE: - - - of the litigation - - -

MR WEBSTER: Yes.

25 THE CHIEF JUSTICE: - - - then there's five million that's been paid to Delta already – sorry, paid to Mio already - - -

MR WEBSTER: Yes.

30 THE CHIEF JUSTICE: - - - to which Delta may have been entitled. But that'll never be fixed.

MR WEBSTER: Yes.

THE CHIEF JUSTICE: Not by this undertaking.

35 MR WEBSTER: By this – I accept – this undertaking is prospective. So it only – is only dealing with moneys received into the future.

40 THE CHIEF JUSTICE: So it won't address amounts that, on one view of things, ought to have been paid to Delta already.

45 MR WEBSTER: I accept that, your Honour. But against that, one has to ask – well, what's the – what's the alternative position in administration? It's not likely that any of those moneys are going to be recovered, certainly, in the short term. And even in the long term, on a contested basis, only after significant costs are expended, litigation funders are involved, they're paid. It – and there's a significant uncertainty about that recovery because it seems – it did seem, ultimately – or your Honour should find ultimately to be the case – that leaving aside the question of costs

agreements and which one operated, there weren't formal bills of costs that Mr Rozario ever prepared as the legal director of - and issued to the client, and so recovery, particularly in the context of the legal profession to have to recover, as a debt, legal fees, is going to be a very difficult task as things presently stand for Delta Law - - -

THE CHIEF JUSTICE: The - - -

MR WEBSTER: - - - and certainly for a liquidator.

THE CHIEF JUSTICE: In theory at least, a liquidator could proceed against Mio Art for the outstanding amounts regardless of Mio Art ever recovering on these costs orders.

MR WEBSTER: Absolutely, your Honour. In theory, it could. That would, as Mr Cotter explained, though, normally only happen if there were funding, which is uncertain, and would take significant time, and would have no guarantee of success and would have this problem also: that it would delay and tend to impede, probably, at least as a matter of practice, Mio Art's recovery of its costs orders, because it's going to be having to respond to the liquidator's claim at the same time.

THE CHIEF JUSTICE: Okay, but for all I know, Mio Art is awash with funds and - - -

MR WEBSTER: We - - -

THE CHIEF JUSTICE: - - - there's opportunities for recovery if a liquidator can get the necessary funding regardless of all these costs orders.

MR WEBSTER: It is, and so - and I accept that, your Honour, if - but the submission I'm making to your Honour is there are a number of steps which would have to be taken before that would be realised, each of which is uncertain and carries substantial risk. One is the ability to get funding. The other is whether you could actually, as a matter of law, recover on the present state of the facts, and given the failure of Delta Law through Mr Rozario to issue proper bills of costs over the years. The apparent absence of compliance with the Legal Profession Act in that regard. There would be a significant risk. This is not just simply a creditor-debtor relationship between two commercial parties. It's governed by a statutory framework and it's one in which there are particular requirements. Now - - -

THE CHIEF JUSTICE: Are there any that can't be met now by Mr Rozario just putting his invoices into a proper form?

MR WEBSTER: Well, as I understand the operation of the Act, your Honour, once a proper bill is rendered, then the client has the opportunity to request an assessment, and while that's happening, there can be no enforcement of the invoice, and so there

certainly would be a period of delay there, and whether Mr Rozario on assessment bills of costs made up would stand up to scrutiny – again, there’s another - - -

5 THE CHIEF JUSTICE: I wonder whether anybody’s bills in this would ever stand up to real scrutiny but - - -

MR WEBSTER: So I understand what your Honour is saying in the sense that the undertaking, as far as it goes, doesn’t protect – doesn’t deal with moneys received in the past. But can I address it in this way. What is to be recovered by Mio Art are its legal – substantial legal costs and if one is assuming that Delta Law has a worthwhile and substantial claim in the first place against Mio Art it’s on the basis that there’s substantial legal costs have been incurred.

15 And your Honour asked me before, what’s the value of the asset? One ultimately has to come to some landing on that. If it’s not worth very much, then none of these points really matter. But if it is worth something – and we would submit that it is – if it is worth something, then Mio Art’s costs orders are also worth quite a lot in its hands. The one invites the other. And on that basis, what’s going to be paid into court will be a significant – one expects, will, like the Delta Law’s entitlement, be a significant sum.

20 So our position really is, as a practical matter, this is the most appropriate way to seek recovery of moneys both by Delta Law and to facilitate recovery of moneys by Mio Art. It’s obviously Mio Art’s interest in this, is recovering other cost orders but it’s prepared – rather than – can I put it this way, your Honour. Mio Art could have walked away from all of this. It has received whatever it received from the mediation. It could have walked away from all of this and said, “We’re done”. The fact that it wants to continue, the fact that it’s still involved, the fact that it’s giving these undertakings, demonstrates really or leads to – the only real inference is that the costs orders are valuable.

25 THE CHIEF JUSTICE: All right. Well, if they’re that valuable, it might want to fund the liquidator in getting Delta Law to prepare its bills of costs, so that they can be sent on to the – whoever it is, Mango Boulevard.

35 MR WEBSTER: It might. And your Honour heard, I think, Mr Spencer give some evidence on this topic and his evidence was sometimes you can work with external administrators but it’s often difficult and the difficulties involve the fact that there’s another person interposed in the circumstances, they involve the fact that you’re paying fees for that person to be interposed which you otherwise wouldn’t have to pay, and that there’s everything, in a sense, has to go through extra pairs of hands.

40 And you don’t know what the attitude of the liquidator is necessarily going to be from time to time to your position. In this case, the exact attitude which Mr Cotter or another liquidator might take to Mio Art is difficult, with respect, to predict, because it could – a liquidator could either say, “Let’s take a collaborative approach, let’s put aside our claim against you for now and let’s work together to pursue this”. Or a

liquidator might say, “I think there’s an entitlement to be paid now. I’m going to go hard as I can, if I can get some sort of funding, to pursue this against you now, Mio Art”. Or might try to walk some sort of line between the two. And all of those would have practical implications for how Mio Art could and with what timeframe recover on its costs orders.

So I hear what your Honour is saying but there are a lot of ifs and practical roadblocks or hurdles at least thrown up by a liquidation. And that’s why, really, I started with solvency, your Honour, because the idea of having somebody in there as a liquidator if the company’s not insolvent is not, with respect, an appropriate one. So if your Honour finds, as we submit your Honour should, the company’s not insolvent, then one looks for different solutions to accommodate the concerns that there might be.

THE CHIEF JUSTICE: Okay. Listen, we’ll come to that in a minute.

MR WEBSTER: Yeah.

THE CHIEF JUSTICE: Just one more question about the undertaking. I don’t know anything about Michael Spencer but I have an idea that it was said he lived in another state. The only way of this having any teeth would be through contempt, wouldn’t it?

MR WEBSTER: Non-compliance with four would have to be enforced through contempt proceedings, that’s – but in relation to that, your Honour could draw some comfort from these facts. First, although he’s in Sydney, that wouldn’t make contempt proceedings against him impossible, although it would make it more difficult. Second, your Honour knows from the evidence that Mr Spencer and Ms Perovich are acting as consultants of Delta Law. Sorry, consultants of Mio Art.

Mr Spencer is based in Brisbane and certainly if – and the costs orders all relate to proceedings in Queensland. They’re set out in the schedule. There’s certainly – if Mr Spencer was knowingly concerned in any breach of these orders, he would be liable for contempt as well and so there would, of course, the possibility of enforcing against him. There’s a clear – or put it another way. Given the nature of these orders, there is a very clear incentive for him and Ms Perovich as consultants to ensure that Mio Art complies with these undertakings.

THE CHIEF JUSTICE: Can you safely infer that they even know about them?

MR WEBSTER: I think you can - - -

THE CHIEF JUSTICE: If you were talking in contempt proceedings, I don’t think you’d draw the inference.

MR WEBSTER: Well, your Honour could make it a condition of your Honour’s order – ultimate order that this order be served or delivered to Mr Spencer and Ms

Perovich. And/or we could seek instructions to have it given by those natural persons as well, I suppose. I haven't done that but - - -

THE CHIEF JUSTICE: Okay. All right.

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MR WEBSTER: - - - your Honour understands there's a mechanism there. I was addressing your Honour on solvency.

THE CHIEF JUSTICE: Yes.

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MR WEBSTER: I made the point that on the findings we would submit your Honour should make, there would be an excess of – your Honour would conclude there's an excess of assets of liabilities. And then one comes really to the more significant cash flow test or commercial reality test, which we've dealt with in our written submissions. The principles, in particular, starting at paragraph 47 – and we have drawn attention in particular to the fact that it's commercial reality in light of all the circumstances and the first extract from Justice Osborn's decision and then identified in 49 the decision of Justice Jackson of this court in *Re Cube Footwear Pty Ltd* [2012] QC 398, which identifies that support of major creditors can be a decisive factor.

20

And we say that's relevant both to the barristers' positions and also to the undertaking which is offered. If a company has creditors – and I want to make it clear that it's not our submission that we need to establish that the barristers are not creditors, in the technical sense of having claims which they could, if they wished to, seek to enforce against Delta Law. What we – our submission is that when one looks at the course of conduct and when one looks at the state of the correspondence and the evidence, they were not – any of them – creditors who were requiring Delta Law to pay them, either in whole or in part, their invoices, either at the date it was placed into administration or indeed today. The absence of the proof of debts, as your Honour's referred to, is significant in that regard.

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THE CHIEF JUSTICE: But can you say it's the support of the creditors as opposed to nobody is pressing just at this moment for payment?

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MR WEBSTER: Well, a creditor withholding or forbearing – a creditor forbearing is a form of support. It's giving a company time – so the forbearings of the creditor provides a company with time to realise whatever assets it may have in order to meet that debt. So, in my respectful submission, yes, the position of the barristers can be characterised as a position of support for Delta Law. Mr Rozario gave evidence, which, in this respect, we would submit your Honour should accept that the understanding was that the barristers would be paid by Delta Law when everything came to the end, which included the costs orders being recovered on, and that's consistent with their conduct in not pressing for immediate payment.

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THE CHIEF JUSTICE: Have you got a transcript reference? I just don't remember the - - -

MR WEBSTER: Yes, yes. I do. If your Honour can just excuse me.

THE CHIEF JUSTICE: Okay.

5 MR WEBSTER: It's page 79 of yesterday's transcript, your Honour.

THE CHIEF JUSTICE: Friday's [indistinct]

MR WEBSTER: Friday's. Sorry. It was a short weekend.

10

THE CHIEF JUSTICE: Okay.

MR WEBSTER: So, from line 40 - - -

15

THE CHIEF JUSTICE: I can see that.

MR WEBSTER:

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The arrangements were between Delta Law and counsel that counsel would be paid when the matter ended.

And then over the page at lines 4 and 5:

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Indeed, the matter had not ended yet, because there were still – a large number of costs orders were outstanding?---I believe so.

THE CHIEF JUSTICE: But then - - -

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MR WEBSTER: Then he goes on to say:

None of counsels - - -

I ask him:

35

...None of counsels' invoices were yet due and payable.

And he says:

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No. That's not the way it was explained to me by counsel or the client.

But then, again, at line 15, I say:

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Up until the point you put Delta Law into administration, you were operating on the basis that counsels' fees were not due and payable, at least as a matter of practicality, until some future time?---Yes.

So, leaving aside the subsequent letters from the barristers, which I will come to, the evidence is and the arrangements were, your Honour should find, that there was no immediate call for payment by any of the barristers. They had issued fee notes, but none of them were pressing for payment and, indeed, they were forbearing from requiring payment, which was, in substance, a form of support. The question is did something change in May, June, July 2019, and there's really only two things that are pointed to, which is a letter from Mr Douglas to FC Lawyers and a letter from Mr Colditz to FC Lawyers and HopgoodGanim, both of which I took Mr Cotter to.

I won't trouble your Honour to take your Honour back to them now, unless your Honour needs me to, but your Honour really heard in the questions I put to Mr Cotter what we say about those letters. Neither of them was directed to Delta Law itself; neither of them was expressed as a demand to Delta Law for immediate payment; and they have to be assessed in the context in which the barristers had not put in proofs of debt since the company went into administration. The only – it was said that it would have been – we could have called each of the barristers or put in affidavits from them, but that's not, with respect, the test. The test is what does the evidence demonstrate and, in my respectful submission, it demonstrates, taken as a whole, that the three barristers were prepared to support Delta Law by forbearing from requiring payment of their invoices until some future time.

Now, that really just leaves the ATO debt as the only serious debt. Your Honour has raised with my learned friend about the potential for that liability to be met as a result of some repayment from Mr Rozario. We took the effect of Mr Rozario's evidence to be that he – about 600,000 of the million had been dissipated, but 400,000 remained. Well, that's more than enough to cover the \$90,000 to the Tax Office. And we have a – yes – there's a freezing order in place, so, presumably, that 400,000 is relatively secure for the time being. Beyond that, of course, this undertaking has been given as well to indemnify Delta Law. It's submitted in my learned friend's written outline, and I accept it was before he had seen this undertaking, so it's not a criticism – it's submitted that nobody was prepared to – nobody is prepared to stand behind Delta Law.

That now is not quite the position, because Mio Art has said it's willing to stand behind Delta Law. And, of course, as my learned friend - your Honour raised, "Where is the evidence that Mio Art has got any – is a company of substance?" We've said there's no evidence of that, but there is reason to infer it has got some substance, because it's seeking to pursue these costs orders; it has costs orders; they're at least of some value; and, really, we wouldn't be here if there was no consideration that Mio Art is worth something or will be worth something if it can enforce these costs orders. So, while one might say in the abstract - one looks at these undertakings and says, "Well, where is the evidence of substance", in the context of this case, there is sufficient ground for the court to think that it's of substance. The undertaking is not a worthless one.

THE CHIEF JUSTICE: Can I just ask you a quick question?

MR WEBSTER: Yes.

THE CHIEF JUSTICE: The freezing order - - -

5 MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - concerning Mr Rozario, I don't think I've seen it. I don't know if it's in the material anywhere, but - - -

10 MR WEBSTER: It's – I'm sorry – it's an undertaking. It's in the form of an undertaking given by Mr Rozario. It's on this court file.

THE CHIEF JUSTICE: Okay. Pending what?

15 MR WEBSTER: Pending the determination of this application, I think, your Honour. Yes.

THE CHIEF JUSTICE: Okay.

20 MR WEBSTER: I did have a copy at one stage, your Honour, but I don't think I brought it back today.

THE CHIEF JUSTICE: Yes. All right.

25 MR WEBSTER: It's an order made on the 23rd of August in 8867 of '19.

THE CHIEF JUSTICE: Okay. Thanks.

MR WEBSTER: Your Honour will – it's an undertaking.

30

THE CHIEF JUSTICE: Yes. Okay.

MR WEBSTER: So we would submit that - - -

35 THE CHIEF JUSTICE: Sorry. I've got another question.

MR WEBSTER: Yes. Of course.

THE CHIEF JUSTICE: The state of play with the Winkler debt - - -

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MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - you said it was disputed, but was it only disputed by Mio Art? In other words, any debt by it to Winkler as opposed to Delta Law's liability to Winkler?

45

MR WEBSTER: Well, Delta – while Mr Spencer was in charge of Delta Law, he did dispute the liability of Delta Law to Winkler.

THE CHIEF JUSTICE: On what basis?

5

MR WEBSTER: That there was no obligation to pay. Would your Honour just excuse me a moment? I think it's in Mr Spencer's affidavit.

THE CHIEF JUSTICE: And can you give me a quick precis of - - -

10

MR WEBSTER: Yes.

THE CHIEF JUSTICE: - - - what his argument was about it?

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MR WEBSTER: My understanding is that there were two prongs to it. One is that there had been no effective assignment of the debt – of the liability from Mio Art to Mr Winkler. So I think my learned friend told your Honour that there was an agreement to assign the debt from Mio Art to – assign liability from Mio Art to Delta Law and that's why Winkler could recover against Delta Law.

20

THE CHIEF JUSTICE: Okay.

25

MR WEBSTER: And that agreement, as far as we can tell, the substance of it is a single-sentence email from Mr Rozario. Not – there's no written – a formal written agreement or anything like that. I wanted to give your Honour a good reference to that, if your Honour would just excuse me. If your Honour were to go to Mr – I don't think I need to take your Honour there, but I can just tell your Honour – if your Honour were to go to Mr Spencer's affidavit sworn the 20th of August 2019 in these proceedings, he deals with Mr Winkler from paragraphs 18 and following and he exhibits the statutory demand at page – I'm sorry – at exhibit 6 – RWS1, pages 6 to 30 10. And it records – the statutory demand, that is, records:

In consideration from the creditor –

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that is, Winkler –

withdrawing the said statutory demand issued to Mio Art by email dated 19 January 2017, the debtor –

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Delta Law -

conceded in favour of Winkler its fruits of the litigation lien in respect of the proceedings.

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So the "agreement" which is said to underlie Mr – that's page 8 of the exhibit bundle – that's said to underlie Winkler's debt in favour – against Delta Law was an email, not a formal agreement of any kind, that is, a contract - or signed contract. And the

second basis was that the triggering of the obligation to repay Winkler was condition on a number of preconditions. And I understand – I should say, sorry, at the time that the statutory demand from Winkler was being pursued against Delta Law, Winkler was still concurrently pursuing Spencer and Perovich and Mio Art in the District Court for the very same debt. And that’s also exhibited in Mr Spencer’s affidavit.

THE CHIEF JUSTICE: Yes. I remember seeing that. That’s - - -

10 MR WEBSTER: Yes. And that was - - -

THE CHIEF JUSTICE: - - - why I was asking you about whose dispute it was.

15 MR WEBSTER: And that was defended. And that was defended. And so the other ground was, how can there be no dispute about Delta – Winkler’s entitlement to recover against Delta Law, if in respect to the very same debt that’s [indistinct] current proceedings where the debt’s in dispute.

THE CHIEF JUSTICE: Okay.

20 MR WEBSTER: Seems unlikely. The test to set aside a statutory demand is a very low one. And Mr Rosario, again accepted in cross-examination that he was aware of that – that there was a dispute about Winkler’s entitlement to enforce against Mio Art. Although, again, his evidence, sort of, went so far and then he stepped it back and then he conceded, in my submission, ultimately, that that was the case. Yeah. But in terms of the status of that debt, of course, your Honour knows that now the proof of debt has been withdrawn. And so it’s no longer a consideration – it’s a consideration only insofar as it might be relevant to the abuse of part 5.3 and Mr Rosario’s state of mind at the time he put the company into administration.

30 THE CHIEF JUSTICE: Yes. Thank you.

35 MR WEBSTER: We’ve dealt with it in that context. So – yes. Your Honour knows that - your Honour was taken to the exhibit 16 bundle and told, well, here are invoices. I did want to say in relation to that to remind your Honour that they were prepared for a mediation. They’ve got the without prejudice across them in watermark, and Mr Rosario accepted he didn’t himself prepare them. Though, I think he said he tried to assist in preparing them.

40 THE CHIEF JUSTICE: Should they be regarded as inauthentic?

45 MR WEBSTER: I don’t think they should be regarded as inauthentic, so much as ineffective for the purposes of a formal recovery by Delta Law against its client. They may well represent, with some degree of accuracy, approximations of the legal fees, which Delta Law would be entitled to. But that’s different to saying that they’re effective, as between Mio Art and Delta Law to create an obligation to pay at the present. So your Honour needn’t find that they’re inauthentic or spurious to find

that they're still not effective. In terms of the – your Honour asked my learned friend a question about Mr Clapham and the position under – in proceeding 8866.

5 Could I just tell your Honour very briefly our position on that. It is that – it's, of course, only of utility if your Honour is minded to bring the company out of administration. We don't – our position is, we don't have to demonstrate or get Mr Clapham to get probate of the will. The will is now not contentious, as we understand it. And under section 35 of the Evidence Act – of the Succession Act, I'm sorry, Mr Clapham is the executor of the will, whether he obtains probate or not.
10 He needs to obtain probate to become - - -

THE CHIEF JUSTICE: Okay. What's the position for getting your shares registered? I've never looked at it.

15 MR WEBSTER: Yes.

THE CHIEF JUSTICE: What do you have to demonstrate?

MR WEBSTER: We – if he is an executor, which we say he is, then the court can
20 order that he be registered under section a hundred and – 1072E, subsection (2) - - -

THE CHIEF JUSTICE: Okay.

MR WEBSTER: - - - of the Corporations Act. And there's a case which we'll give
25 your Honour in the bundle, which we rely on, called Wood v Inglis [2008] 68 AC SR 420. And we say that if you're an executor, you have an entitlement to be registered. The words of Justice Brereton in that case, was the executor has a statutory right to be registered. Given there's no challenge to the will, the Succession Act makes Mr Clapin the executor automatically, by his appointment under the will, whether or not
30 he's obtained probate, and so that's enough. The words – the word “executor” in 1072E is used in contradistinction to the words “personal representative”, which are used in 1072A, and so there's a reason for the court distinguishing between the two. Personal representative needs probate and the executor does not.

35 Your Honour will see from our written submissions we then point to – apart from solvency, point to three other factors, I think, which we say favour the termination of the insolvency. The next one is beginning at paragraph 58, we say – there's been some suggestion about a need for investigations. That alone is not a sufficient reason to keep the company in administration, put it into liquidation. “Investigations” can
40 be undertaken by a range of parties, and it's not a sufficient justification. In relation to Mr Cotter, the submission is not that he, in fact, lacks any independence, but there is this concern: that the nature of his appointment and his contact, and his – those matters, really, place him in a position a little like anybody being nominated by my side of the record, where there's immediate suspicion.

45 As soon as we say, “There's this gentleman who's had nothing much to do with this, from Blackstone costs consulting,” it's said, “Well, he's in your camp because

you've picked him out." We don't submit that Mr Cotter, in fact, lacks independence. But in a – in what's essentially a shareholder or dispute between people like this, there is some concern that a person who's been appointed by one camp, one side of the warring camps, who's had significant time with them, who's
5 been paid by them, got an indemnity from them, it looks not as good as it could, in terms of - - -

THE CHIEF JUSTICE: Yes. But everything Mr Cotter's done has demonstrated he hasn't taken Mr Rozario's word for anything.

10 MR WEBSTER: I accept that, your Honour.

THE CHIEF JUSTICE: So I really think that's obviated - - -

15 MR WEBSTER: And that's why I don't put any further - - -

THE CHIEF JUSTICE: - - - any possible perception.

MR WEBSTER: No. I don't take that any further, your Honour. And then the final
20 point is the use of part 5.3, by Mr Rozario. Your Honour knows, really, the facts of this very well now. Your Honour wouldn't accept Mr Rozario's protestations that he formed a bona fide belief in the solvency – insolvency of Delta Law. When one looks at the time at which that application was – those steps were taken, and all the surrounding circumstances which your Honour is entitled to take into account, the
25 obvious reason for him putting the company into administration was to avoid being removed as a director. And that is a classic example of the misuse of part 5.3A.

And can we put it in this way, your Honour: it's clear that Mr Rozario didn't put the company into administration until after the application to wind up the company had
30 been put off. He could have done – if he was so concerned about insolvent trading or debts being accrued, or something like that, he could've done it at any time prior to the court application to wind up on the 24th of July – 26th of July 2019. Nothing material changed between the 26th of July 2019 and the 29th of July, when he put it into administration, except that the Winkler attempt to wind up the company didn't
35 succeed on the 26th, and therefore plan B was, put it into administration.

There was no reason – there was nothing in the barrister's position, in the debts, the demands, that changed – indeed, that had changed from January or October the year before that materially would've changed a director's state of mind in thinking, "This
40 company wasn't insolvent, but now it is." The thing which triggered his concern, the thing which motivated him, the clear dominant purpose, was to avoid the creditors who were going to meet on the next day, the 30th of July, and the shareholders who were going to meet on the next day, the 30th of July, to avoid that happening to avoid his removal, and your Honour should so conclude.

45 THE CHIEF JUSTICE: What about the stark argument, though, that this company may have assets that can be retrieved and the choice is between, at some expense

getting it done by an independent party, or returning it to the interests associated with Mr Spencer, who doesn't have much credibility?

5 MR WEBSTER: Yes. Two things. We do submit that although neither – both courses have their potential upsides and downsides, we accept that. For the reasons, really – I don't want to repeat myself – that I've given, our submission is that the costs and risks associated with going down the liquidation route are substantial.

10 THE CHIEF JUSTICE: Okay. I've got that point.

MR WEBSTER: And the second point is, if your Honour had a significant concern about somebody in the camp of Mr Spencer being appointed, your Honour could, of course, fashion an order which contemplated a nomination of the director by a third party, such as the Queensland Law Society, or something like that. There would be a way of, in my respectful submission, fashioning relief. My side can make inquiries of other persons who might be prepared to act as directors who have no connection. So if the ultimate concern comes down to simply that question, somebody in Mr Spencer's camp being appointed, in my respectful submission, under 447A, the court could fashion relief which required the nomination of a person who didn't have a prior connection with Mr Spencer or Ms Perovich, to avoid that particular concern.

THE CHIEF JUSTICE: Is it that easy, though, to find somebody who'd be prepared to step into this situation and act as the legal practitioner director of a company?

25 MR WEBSTER: Well, it wouldn't need – my submission is it wouldn't need to be a legal practitioner director.

THE CHIEF JUSTICE: Well, we're going to get the legal – because you say you're just going to - - -

30 MR WEBSTER: It's not trading as a law firm any further - - -

THE CHIEF JUSTICE: Yes. You don't need to trade.

35 MR WEBSTER: - - - giving legal advice.

THE CHIEF JUSTICE: What's the status of an incorporated legal practice when the legal practitioner director's no longer there? Does it just go back to being a company? Or - - -

40 MR WEBSTER: Yes. I understand the legislation – I've only looked at it fairly briefly. I understand one has to give a notice to the law society. And from that point on, the prohibition on doing legal work generally will apply to that corporation, but it doesn't have to be wound up as a matter of course. If it stops doing legal work, then that's okay. And we don't see the compilation of costs – bills of costs and for the purpose of providing to Mio Art as being that legal work that would contravene the prohibition.

THE CHIEF JUSTICE: But, anyway, going back to the question, the prospects of finding a director - - -

MR WEBSTER: Yes.

5

THE CHIEF JUSTICE: - - - who'd want to take all this on, who has nothing to do with anybody.

MR WEBSTER: Yes, yes. I don't want to give evidence about this, your Honour, that goes beyond what I can say now, but my side has made inquiries about other people. And if it came to it, there's a person who's a registered – who's a registered liquidator, who'd be prepared to act as a director – be appointed as director, who, as far as I can tell, has no connection with - - -

15 THE CHIEF JUSTICE: And why would that be any cheaper than a liquidator who's acting as a liquidator doing it?

MR WEBSTER: Well, we understand it would be on the basis that the person wouldn't be required to – wouldn't charge the normal administration or insolvency fees.

20

THE CHIEF JUSTICE: Okay. You are giving quite a lot of evidence from the bar table now.

25 MR WEBSTER: Well - - -

THE CHIEF JUSTICE: All right. But I - - -

MR WEBSTER: Your Honour asked me what are the chances.

30

THE CHIEF JUSTICE: I did ask you, yes.

MR WEBSTER: What I should say to your Honour is if that's the one thing, then it would be preferable for your Honour to fashion relief which at least permitted the parties to see if that possibility was open, rather than reject out of hand that that could possibly happen. Your Honour shouldn't - - -

35

THE CHIEF JUSTICE: You know, I think there's an argument, though, that if that possibility were open, you'd have come up with it by now, rather than having Mr Spencer proposing his friend Mr Alan Thompson.

40

MR WEBSTER: Well, there wasn't any evidence that it was his friend, your Honour. But - - -

45 THE CHIEF JUSTICE: Sorry. Well, somebody who'd done work for him.

MR WEBSTER: Somebody who he'd known – yes, that's right – who is a lawyer and who's based in Melbourne, not in Brisbane or Sydney. And – anyway, I understand what your Honour's saying to me.

5 THE CHIEF JUSTICE: All right. Now, there's just a couple of other things.

MR WEBSTER: Yes.

10 THE CHIEF JUSTICE: One is the transcript from Friday needs correction, only just a couple of things that I wanted to point to, because this might become material somewhere along the line. Two eleven, at page 30 – at line 36-ish - - -

MR WEBSTER: Yes.

15 THE CHIEF JUSTICE: - - - in a discussion with Mr Spencer - - -

MR WEBSTER: Yes.

20 THE CHIEF JUSTICE: - - - the question put by me is recorded as:

Somebody might describe it as just the faults claim.

That was “a false” – f-a-l-s-e – “claim”.

25 MR WEBSTER: Yes. Thank you, your Honour.

THE CHIEF JUSTICE: And another thing that comes up from about 271 – it's James Loel that's been talked about at all instances, isn't it? It just is recorded as James Loel all along the line.

30

MR WEBSTER: Yes. Yes.

THE CHIEF JUSTICE: So that should be corrected to Loel.

35 MR WEBSTER: L-o-e-l. Yes, your Honour.

THE CHIEF JUSTICE: Now, I suppose I'd better hear Mr – well, have you finished, Mr Webster, sorry? I'm not sure.

40 MR WEBSTER: Can your Honour just bear with me? I think I have. Could your Honour just bear with me a moment? Yes. No. We've given your Honour many more transcript references in the written submissions, but I'm not going to try to take your Honour to those now, but in terms of what we rely on from Mr Rozario's evidence. The other thing my instructing solicitor's reminded me to bring to your
45 attention is there is this – it's sort of related. This Thursday in the applications list the – an application is still technically on foot by Winkler to wind up Delta Law, and is there a – mar Rozario's filed an application in that seeking to be substituted

himself as a creditor. So I really just thought I should draw that to your Honour's attention since your Honour, I understand, is sitting in applications. I'm not at this stage free to appear in that, but in due course maybe something your Honour has to take into account in connection with how your Honour manages those matters.

5

THE CHIEF JUSTICE: Okay. Well, on present inclinations I think it'd be better for me to deal with it because I'm seized of it and I'll elect to have somebody - - -

MR WEBSTER: Yes. Yes. Sorry. I wasn't suggesting anything about that, but - - -

10

THE CHIEF JUSTICE: Yes.

MR WEBSTER: - - - in terms of whether it's appropriate for it to go ahead before your Honour's made a decision in this matter, or - - -

15

THE CHIEF JUSTICE: Yes. Yes.

MR WEBSTER: - - - something else like that.

20

THE CHIEF JUSTICE: That's fine. I'll see what the applicant - - -

MR WEBSTER: Yes. That's all I wanted to draw to your Honour's attention.

THE CHIEF JUSTICE: - - - and [indistinct] to say about it, but in terms of applications, Mr Eade, there will need to be an application to postpone the next meeting of creditors. I just don't remember when it was, but I was just going to say I'm in applications all week. So - - -

25

MR EADE: Your Honour, my - that was on my one of my notes to bring to your attention. I don't know if it needs another application for that to occur, or whether it can just be an order.

30

THE CHIEF JUSTICE: And do you want me just to make it to save some costs here? Would that be a good idea?

35

MR EADE: Yes.

MR WEBSTER: I think - I believe that such an order - like, a further order was made already in this proceeding without a further application.

40

MR EADE: Quite.

MR WEBSTER: When the trial was adjourned the first time. So we wouldn't oppose your Honour making an order extending it until further order of the court probably.

45

THE CHIEF JUSTICE: Yes. All right.

MR WEBSTER: Because - - -

5 THE CHIEF JUSTICE: Is everybody in agreement about that?

MR PEDEN: We are, although I think usually there is a date that should be fixed rather than just until a further order without putting pressure - - -

10 MR LAVERCOMBE: That's my understanding, your Honour. There does need to be a date as opposed to just pending to your Honour's judgment in these proceedings, or something to that effect, and I think that's why it's just constantly had to be pushed back a month or two at a time.

15 THE CHIEF JUSTICE: Look, I'm going to try really hard to get this judgment done, and I haven't even finished the submissions yet before Christmas, but I wouldn't think much would be happening until January so far as feasibly being able to organise this creditor's meeting. So can you find a date in January?

20 MR PEDEN: Yes, your Honour.

THE CHIEF JUSTICE: Mid to January onwards, and give me a draft order.

MR PEDEN: Yes, your Honour.

25

THE CHIEF JUSTICE: And – or if you want to fix it now, I don't mind. Whichever way.

30 MR LAVERCOMBE: I've just heard my instructing solicitor ask Mr Cotter for some days. While I'm on my feet, your Honour, in relation to potentially just another housekeeping matter or administrative matter, right at the very beginning there was discussion about whether the evidence in one proceeding was the evidence in another, or there had been orders to that effect. Just to assist your Honour, there is – there are two orders, one in each proceeding, of Justice Davis on 19 September
35 2019, and each one says that its evidence will be - - -

THE CHIEF JUSTICE: Good. Well, that's - - -

40 MR LAVERCOMBE: So that might save your Honour that issue. It's court document 10 in 8866 of '19 and court document 15 in 8867 of '19. Your Honour, in relation to Mr Cotter's submission – well, actually Delta Law Proprietary Limited submissions as administrator appointed. Your Honour will see that there – Mr Cotter himself is not a party to these proceedings. There's no allegation of misconduct levied against him. There's no allegation of independence or lack thereof levied
45 against him, and no relief is sought.

In that sense, the principles which are set out in my opening submissions which – with respect, if your Honour could take them as our closing submissions as well, that Mr Cotter has adopted a position of central neutrality and has sought to be here to assist the court and present all relevant facts, which is why that affidavit contains so many exhibits before your Honour. There were two witnesses, Mr Galea and Mr Spencer, who, although not asked specific questions, did volunteer further information about their concerns as to Mr Cotter and his risk of not being independent.

10 In my submission, those answers themselves are inadmissible because they're irrelevant and also opinion evidence insofar as they suggest that Mr Cotter may not be independent. We also respectfully adopt, if we can, the – your Honour's observations in relation to my learned friend's submissions just now as to why that's another reason the appointment – sorry – the voluntary administration should end
15 Insofar as there is a perception potentially of being in one person's camp. There has been some suggestion, your Honour, or some uncertainty as to what a further step in the administration actually is in terms of the order, and although probably not the appropriate time now at 6 pm on a Monday, Mr Cotter is rightfully concerned as to what may or may not be a further step, given the uncertainty, and that might actually
20 have – it could be a subject of contempt proceedings or the like.

So in – it might be that further submissions could be determined or the parties might be able to agree certain specific wording, but that's something that – given that this will be potentially delayed for another month or so, that Mr Cotter would find some comfort in, and, finally, your Honour, the position of Mr Cotter rightfully, we say, is subject to his right to be heard as to issues of costs and potential issues of remuneration. It's my understanding that should your Honour find that the voluntary administration should never have occurred at all because, for example, there wasn't a bona fide [indistinct] or something of that nature, then he does not enjoy a lien under
25 443E and 443F of the Corporations Act.
30

So there may be further issues that your Honour may need to decide which I can't provide any submissions to your Honour on now because it's a matter for how your Honour decides the primary dispute between the parties. I have one decision that I was going to hand up to your Honour, but it might be best if we can just put it all in that one bundle for your Honour.
35

THE CHIEF JUSTICE: All right. What's it called? Just so I know that that one's yours.
40

MR LAVERCOMBE: It's Condor Blanco Mines Limited (No 2).

THE CHIEF JUSTICE: It's been referred to.

45 MR LAVERCOMBE: My learned friend, Mr Peden, referred to number 1 - - -

THE CHIEF JUSTICE: One.

MR LAVERCOMBE: - - - and number 2 deals with an administrator who had – whose appointment was challenged, and he or she entered the fray, so to speak, and thus was actually liable for costs. Half of the costs, but it contains the relevant principles as to what a voluntary administrator ought to do when he or she finds
5 themselves in the situation Mr Cotter has found himself in here.

THE CHIEF JUSTICE: Okay. You say it's he's done it all by the book. He's just presented these documents to the court and left it at that.

10 MR LAVERCOMBE: Quite. And subject to anyone actually challenging him in the form of misconduct or independence, for which he is entitled to enter the fray, he otherwise sits back and doesn't seek to be heard.

THE CHIEF JUSTICE: Yes.

15

MR LAVERCOMBE: Thank you, your Honour. Those are my submissions.

THE CHIEF JUSTICE: Thank you. Mr Peden.

20 MR PEDEN: Just one matter, your Honour. I mentioned to your Honour about Mr Galea's evidence and the beneficial ownership. I double-checked the transcript and there isn't – I didn't actually ask Mr Galea that question. My recollection was that I had, but I've checked it and I haven't.

25 THE CHIEF JUSTICE: Yes. Yes. I have no recall of this.

MR PEDEN: So – yes. The state of evidence is just Mr Spencer's evidence about the sub-sub-trust.

30 THE CHIEF JUSTICE: Yes. I see no reason not to accept that, but - - -

MR PEDEN: No. No.

THE CHIEF JUSTICE: All right.

35

MR PEDEN: Other than that, your Honour, there's no further submissions in reply.

THE CHIEF JUSTICE: Yes.

40 MR LAVERCOMBE: Your Honour, if I can just provide a potential date, potentially, your Honour be able to fix it. I can give your Honour the form of orders. The date that I've been provided by Mr Cotter is the 31st of January 2020 and the order would be, pursuant to section 447A of the Corporations Act 2001, Commonwealth, the period for convening the meeting of creditors to decide the first
45 respondent's future is extended to 31 January 2020 and the meeting of creditors is adjourned to a date to be fixed, but if it's easier for your Honour, we can do up an order and send it to your Honour.

HER HONOUR: Just do. That will be simpler instead of me - - -

MR LAVERCOMBE: Thank you, your Honour.

5 HER HONOUR: - - - making the notes. The only remaining matter is this. When I give my judgment, it would be useful for Mr Spencer to be here, for reasons I won't go into. Now, I know that nobody appears for him, but you might communicate that I've given that indication. If he's here, good; if he's not, that's all right, but - - -

10 MR WEBSTER: You are referring to the Mr Spencer who gave evidence, not the director of Mio Art, your Honour?

HER HONOUR: Yes. Mr Richard Spencer.

15 MR WEBSTER: Yes, yes.

HER HONOUR: Yes.

MR WEBSTER: Thank you, your Honour.

20

HER HONOUR: All right. I will reserve my decision and I will adjourn.

ADJOURNED

[6.06 pm]

25