

FEDERAL COURT OF AUSTRALIA

Mango Boulevard Pty Ltd v Whitton [2015] FCA 1169

Citation: Mango Boulevard Pty Ltd v Whitton [2015] FCA 1169

Parties: **MANGO BOULEVARD PTY LTD (ACN 101 544 601) and BMD HOLDINGS PTY LIMITED (ACN 010 093 349) v ROBERT WILLIAM WHITTON, RICHARD WILLIAM SPENCER and SILVANA PEROVICH**

File number: VID 1183 of 2010

Judge: **RANGIAH J**

Date of judgment: 2 November 2015

Catchwords: **BANKRUPTCY AND INSOLVENCY** – application to review trustee’s decision – consideration of ss 149B and 178 of the *Bankruptcy Act 1966* (Cth) – where trustee objected to discharge of bankruptcies – where objections extended bankruptcies and allowed bankrupts to put deed of compositions to creditors – whether review of trustee’s decision available – whether objection made for improper purpose – where objection advanced purpose of bankruptcy law – application dismissed

BANKRUPTCY AND INSOLVENCY – application to set aside creditors’ resolution to replace trustees – whether resolution made for an improper purpose – alleged that creditors replaced trustee to object to discharge of bankruptcies to enable bankrupts to put compositions – evidence unable to sustain definite inference – no improper purpose – application dismissed

PRACTICE AND PROCEDURE – application to reopen case to adduce further evidence – whether reopening in interests of justice – where evidence concerns events after judgment reserved – where leave to reopen would cause delay – where delay would render proceeding nugatory – where new evidence not dispositive of proceeding – application dismissed

Legislation: *Bankruptcy Act 1966* (Cth) ss 64, 73, 73A, 82, 86(1), 139U, 139W, 149, 149A, 149B, 149C, 149D, 149N, 153, 178 and 181
Bankruptcy Legislation Amendment Act 2002 (Cth)
Federal Court of Australia Act 1976 (Cth) ss 37M and 37N
Explanatory Memorandum for the Bankruptcy Legislation Amendment Bill 2002

Cases cited: *Adsett v Berlouis* (1992) 109 ALR 100 cited
Allan v Transurban City Link Ltd (2001) 208 CLR 167 applied
Ample Source International Ltd v Bonython Metals Group Pty Ltd (No 6) (2011) 285 ALR 488 cited
Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee (1945) 72 CLR 37 cited
Cummings v Claremont Petroleum NL (1996) 185 CLR 124 cited
Dare v Doolan [2004] FCA 461 cited
Frost v Sheahan (2005) 220 ALR 733 cited
Frost v Sheahan (as Trustee of the Bankrupt Estate of Frost) (2008) 249 ALR 538 distinguished
Gye v McIntyre (1991) 171 CLR 609 applied
Healey v Prentice (No 2) [2000] FCA 1598 cited
In re The Mayor & c. of the City of Hawthorn; Ex parte Co-Operative Brick Co. Ltd [1909] VLR 27 cited
Inspector-General in Bankruptcy v Nelson (1998) 86 FCR 67 applied
Macchia v Nilant (2001) 110 FCR 101 cited
Prentice v Wood (2002) 119 FCR 296 distinguished
Quinn v Official Trustee in Bankruptcy (1996) 63 FCR 136 cited
Re Ansett; Ex parte Ansett v Pattison (1995) 56 FCR 526 cited
Re Crawford (Deceased); Ex parte the Trustee of the Official Receiver and Autoterms Limited (1943) 13 ABC 201 cited
Re Hall (1994) 14 ACSR 488 cited
Re Tyndall; Ex parte Official Receiver (1977) 30 FLR 6 cited
Trustees of the Property of Cummins (a Bankrupt) v Cummins (2006) 227 CLR 278 cited
Van Reesema v Official Trustee in Bankruptcy (1983) 69 FLR 424 cited

Date of hearing: 8-12 September 2014, 10-12 November 2014, 22 October and 28 October 2015

Place: Brisbane

Division: GENERAL DIVISION

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| Category: | Catchwords |
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| Solicitor for the Second and Third Respondents: | Delta Law |

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**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 1183 of 2010

**BETWEEN: MANGO BOULEVARD PTY LTD (ACN 101 544 601)
First Applicant**

**BMD HOLDINGS PTY LIMITED (ACN 010 093 349)
Second Applicant**

**AND: ROBERT WILLIAM WHITTON
First Respondent**

**RICHARD WILLIAM SPENCER
Second Respondent**

**SILVANA PEROVICH
Third Respondent**

JUDGE: RANGIAH J

DATE OF ORDER: 2 NOVEMBER 2015

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The originating application is dismissed.
2. The first respondent's application to reopen his case is dismissed.
3. Order 1 of the orders made by Logan J on 29 April 2011 is set aside.
4. Order 1 of the orders made by Rangiah J on 22 October 2015 is set aside.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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First Respondent**

**RICHARD WILLIAM SPENCER
Second Respondent**

**SILVANA PEROVICH
Third Respondent**

JUDGE: RANGIAH J

DATE: 2 NOVEMBER 2015

PLACE: BRISBANE

REASONS FOR JUDGMENT

1 In this proceeding, the applicants seek review of decisions of a trustee in bankruptcy to object to the discharge of two bankrupts from their bankruptcies.

2 The applicants also seek review of resolutions made by creditors replacing the former trustees with the current trustee.

3 The applicants seek the following relief:

- Pursuant to s 178 of the *Bankruptcy Act 1966* (Cth), that the decision of the first respondent to object to the discharge of the second and third respondents from their bankruptcies, be set aside.

- Further or alternatively, that notices dated 12 November 2010 objecting to the discharge of the second and third respondents from their bankruptcies given by the first respondent, be set aside.

- Declarations that the second and third respondents are discharged from bankruptcy.

- Pursuant to s 30 of the Bankruptcy Act, that resolutions made on 5 November 2010 by the creditors of the bankrupt estates of the second and third respondents, namely, that the previous trustees be removed as trustees of the bankrupt estates and that the first respondent be appointed trustee in their stead, be set aside.
- Pursuant to s 30 of the Bankruptcy Act, that a new trustee be appointed as trustee of the bankrupt estates of the second and third respondents.
- That the respondents pay the applicants' costs of this application.

4 The second respondent, Richard William Spencer, and the third respondent, Silvana Perovich, are bankrupts. The first respondent, Robert William Whitton, is the trustee of the bankrupt estates of Spencer and Perovich. The applicants claim to be creditors of the bankrupts.

5 The case is an unusual one. Contrary to what would ordinarily be expected, it is the applicants who seek orders that would have the effect of discharging the bankrupts from bankruptcy, while the bankrupts oppose those orders.

THE ISSUES IN DISPUTE

6 Whitton lodged an objection to the discharge of Spencer and Perovich from bankruptcy under s 149B(1) of the Bankruptcy Act on 12 November 2010, two days before they were due to be automatically discharged. The grounds of objection relied on by Whitton were that each bankrupt had failed to provide written information about their property, income and expected income, and had failed to disclose any particulars of income as required by the Bankruptcy Act. The consequence of the objections was that the bankruptcies of Spencer and Perovich were extended by 5 years to 14 November 2015.

7 Whitton's evidence is that he lodged the objections in order to encourage the bankrupts to provide the information. The applicants allege that, in fact, Whitton lodged the objections in order to extend the periods of bankruptcy so as to allow Spencer and Perovich to put proposals for compositions under s 73 of the Bankruptcy Act to their creditors. The applicants assert that this is an improper purpose, by which they mean a purpose that is not a purpose for which a trustee is lawfully permitted to object under s 149B(1).

8 The applicants also allege that resolutions passed at a joint meeting of creditors held on 5 November 2010 appointing Whitton as trustee in place of Spencer's and Perovich's former trustees in bankruptcy were made for an improper purpose. The improper

purpose alleged is to have a trustee appointed who would lodge objections to discharge and thereby achieve extensions of the bankruptcies so as to allow the bankrupts to put forward proposals for compositions of their debts.

BACKGROUND

9 This proceeding arises out of a joint venture for the development of land at Mango Hill in Queensland. The first applicant, Mango Boulevard Pty Ltd (“Mango Boulevard”), Spencer and Perovich were parties to the joint venture. Mango Boulevard is a wholly owned subsidiary of the second applicant, BMD Holdings Pty Ltd (“BMD Holdings”). The joint venture was to be conducted through a company, Kinsella Heights Developments Pty Ltd (“Kinsella Heights”), which is not a party to this proceeding.

10 The parties have engaged in a litany of proceedings, particularly in the Supreme Court of Queensland and the Court of Appeal. The litigation has involved not just the parties to the present proceeding, but has also involved a number of other parties associated with the joint venture. It should be noted that the history of the proceedings is not directly relevant to deciding any of the issues in dispute, but the parties seem to agree that an understanding of the background is necessary.

11 Spencer and Perovich were formerly directors of a number of companies through which they conducted the business of property development. Those companies included Neo Lido Pty Ltd (“Neo Lido”), Neolido Holdings Pty Ltd (“Neolido Holdings”) and Neovest Ltd (“Neovest”). Those companies are not parties to this proceeding.

12 In 2002, Neo Lido contracted to purchase land at Mango Hill, acting as agent for Kinsella Heights. On 4 July 2003, a number of agreements were entered into concerning the development, including:

- a Share Sale Agreement between Spencer (as trustee for the Spencer Family Trust), Perovich and Mango Boulevard;
- a Shareholders Deed between Spencer (as trustee for the Spencer Family Trust), Perovich, Mango Boulevard and Kinsella Heights; and
- a Deed of Guarantee & Indemnity between BMD Holdings, Spencer (as trustee for the Spencer Family Trust), Perovich and Neolido Holdings.

13 Spencer (as trustee for the Spencer Family Trust) and Perovich initially held all of the shares in Kinsella Heights. By operation of the Share Sale Agreement, Mango Boulevard came to own 50% of the shares in Kinsella Heights. Spencer and Perovich each retained 25% of the shares – which equated to 25 shares each.

14 Following the declaration of Spencer’s bankruptcy, Mio Art Pty Ltd (“Mio Art”) replaced Spencer as trustee for the Spencer Family Trust.

15 Under the Share Sale Agreement, the price for the sale of the shares in Kinsella Heights to Mango Boulevard was an amount of \$5 million payable 7 days after the completion date and the balance, if any, within 2 days after the determination of the purchase price pursuant to cl 4. The determination of the purchase price required a market valuation of the property to be obtained in accordance with assumptions set out in cl 4.4.

16 Mango Boulevard has not paid the whole of the \$5 million. Spencer and Perovich claim that an amount of at least \$1,130,856.40 plus interest is outstanding. Mango Boulevard denies that it is obliged to make any further payments to Perovich or Spencer or Mio Art. Mio Art has proceedings against Mango Boulevard and BMD Holdings on foot in the Supreme Court in respect of money claimed to be owed under the Share Sale Agreement.

17 The major asset in Perovich’s estate is the 25 shares in Kinsella Heights. If Perovich’s composition proposal is approved by the creditors, Perovich would regain control of the 25 shares. On the other hand, if the applicants are successful and the bankrupts are discharged from bankruptcy, the shares will remain vested in the trustee in bankruptcy and will allow the applicants the opportunity to negotiate with the trustee to purchase the shares. Accordingly, this proceeding is a piece in the strategic battle between the applicants and the bankrupts for the land owned by Kinsella Heights.

18 I will set out a brief chronology of relevant events. I will address some of these events in more detail later in these reasons.

19 Sequestration orders were made against the estates of Perovich and Spencer on 20 August 2007 and 24 August 2007 respectively. Paul Desmond Sweeney and Terry Grant van der Velde (“the former trustees”) were appointed trustees of each of the bankrupt estates. The former trustees were employed by, or otherwise associated with, a company operating under the business name “SV Partners”.

20 Spencer and Perovich each filed a statement of affairs on 13 November 2007 and consequently, by force of s 149(1) of the Bankruptcy Act, were due to be automatically discharged from bankruptcy on 14 November 2010.

21 In March 2008, Perovich raised with Whitton a proposal to the effect that Whitton would replace the former trustees. Spencer and Perovich lobbied the creditors of their respective bankrupt estates to support this change. However, at a joint meeting of creditors on 5 August 2008, resolutions to remove the former trustees and to appoint Whitton failed.

22 There were further discussions between Perovich, Spencer and Whitton from July to October 2010 concerning replacement of the previous trustees with Whitton and proposals for compositions with the bankrupts' creditors.

23 On 25 September 2010, Perovich lodged a proposal with the former trustees setting out a proposal for a composition under s 73 of the Bankruptcy Act and requested that a meeting of the creditors be called to discuss the proposal. On 30 September 2010, the former trustees wrote to Perovich's solicitor requesting a substantial amount of information about the proposed composition and requiring, pursuant to s 73A, that Perovich lodge an amount of \$37,250 to cover estimated costs. Perovich did not provide the information requested by the former trustees or lodge the amount requested.

24 After lobbying by Perovich, a number of creditors requested that the former trustees convene a joint meeting of creditors to consider resolutions that Whitton be appointed as trustee in place of the former trustees. On 14 October 2010, Perovich withdrew her proposal for the composition and indicated to the former trustees that she would submit a substantially similar proposal for a composition to a new trustee.

25 On 15 October 2010, the former trustees called concurrent meetings of the creditors of the estates of Perovich and Spencer to be held on 29 October 2010. On 19 October 2010, the former trustees sent reports to Spencer's and Perovich's creditors. The reports indicated that the former trustees did not intend to object to the discharge of the bankrupts from bankruptcy. The report relating to Perovich's estate raised a number of questions and concerns about the proposal for composition that Perovich had lodged, despite that proposal having been withdrawn.

26 In the meantime, the former trustees had negotiated a heads of agreement with the applicants for resolution of the dispute relating to the Share Sale Agreement, but that agreement was never executed.

27 The meeting of creditors commenced on 29 October 2010, but was adjourned to 5 November 2010. On 1 November 2010, the former trustees applied to the Federal Magistrates Court of Australia for leave to resign as trustees. On 4 November 2010, the application was adjourned so as to allow the creditors' meeting to take its course.

28 On 5 November 2010, the creditors passed resolutions appointing Whitton as trustee of the estates of Spencer and Perovich in place of the former trustees. The Federal Magistrates Court proceeding was later dismissed by consent.

29 Whitton, as the new trustee, wrote to Spencer and Perovich on 8 November 2010. Whitton noted that Spencer and Perovich had not lodged sufficient details with the former trustees to enable the former trustees to determine Spencer and Perovich's level of income contribution (if any), as required by s 139U of the Bankruptcy Act. The letters asked whether Spencer and Perovich were prepared to provide that information within 14 days.

30 By letter dated 10 November 2010, Delta Law, solicitors for Spencer and Perovich, conceded that the bankrupts had failed to disclose particulars of their incomes required by the Bankruptcy Act, stated that they would not be able to provide that information within 14 days, said they had no objection to Whitton filing an objection to their discharge from bankruptcy and stated that, in fact, Whitton was obliged to do so.

31 On 12 November 2010, Whitton lodged with the Official Receiver written notices of objection to the discharge of Spencer and Perovich from bankruptcy pursuant to s 149B(1) of the Bankruptcy Act. But for those objections, they would have been automatically discharged from bankruptcy two days later.

32 On 29 December 2010, the applicants commenced the present proceedings.

33 On 11 February 2011, Spencer and Perovich each lodged with Whitton a proposal for a composition under s 73 of the Bankruptcy Act. If Whitton had not lodged the objections and the bankruptcies had not been extended there could have been no prospect of any compositions with creditors before the discharge of the bankrupts from bankruptcy.

34 Whitton applied to this Court for directions regarding the proposed compositions. On 29 April 2011, Logan J directed Whitton not to hold a meeting of creditors pending the determination of this proceeding. On 22 October 2015, I varied that order to allow Whitton to prepare for, call and hold a meeting under s 73, but directed that such meeting was not to be called or held prior to the delivery of these reasons.

REVIEW OF WHITTON'S DECISION TO OBJECT TO THE DISCHARGE OF THE BANKRUPTS FROM BANKRUPTCY

35 The applicants' challenge to Whitton's decision to object to the discharge of Spencer and Perovich from bankruptcy is brought pursuant to s 178 of the Bankruptcy Act. That provision is, relevantly, in the following terms:

- (1) If the bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.

36 In *Frost v Sheahan (as Trustee of the Bankrupt Estate of Frost)* (2008) 249 ALR 538 at [34], Besanko J summarised the principles which govern an application under s 178:

- (1) Section 178 confers a "supervisory jurisdiction over the conduct of the trustee".
- (2) It is not necessary for an applicant for relief under the section to show that the trustee's decision was absurd, unreasonable or taken in bad faith. The court has a wide discretion to make such order as seems appropriate in the circumstances of the case. At the same time, the court will be slow to make orders which will have the effect of interfering in the day-to-day administration of a bankrupt's estate and, in cases involving an exercise of business or commercial judgment, will place considerable weight on the trustee's decision. Furthermore, a court will not intervene under s 178 simply because the judge forms a different view from that of the trustee.
- (3) An order may be made under s 178 even if the trustee's decision was correct on the material before him, if, for example, additional material is put before the court.
- (4) The power to make orders under s 178 is not necessarily ousted by the presence of an alternative remedy...

(Citations omitted.)

37 In *Healey v Prentice (No 2)* [2000] FCA 1598, Madgwick J said at [21]:

It would be enough to excite the court to intervene if it be shown that the impugned conduct of the trustee was incorrect or that other conduct was, or on the material before the Court would be, preferable and that justice and equity require the Court's intervention. An applicant no doubt carries the onus of establishing this. It is plain that the Court should not be too ready to intervene for fear of making the role and work of a trustee unmanageable. That the judge who hears a review application might have acted differently from the way a trustee did is not to the point. The question is whether it is just and equitable that the Court should afterwards intervene in some fashion.

38 The applicants' challenge to Whitton's decision to object to the bankrupts' discharge from bankruptcy raises four issues. They are:

- (a) Whether Whitton's purpose in lodging the objections to discharge from bankruptcy was to allow the bankrupts the opportunity to make proposals for compositions to their creditors, or to encourage the bankrupts to provide details of their income, or a combination of both?
- (b) Whether a trustee can only object to the bankrupt's discharge from bankruptcy for the purpose of inducing the bankrupt to act in accordance with the bankrupt's obligations, on the proper construction of s 149B.
- (c) Whether the applicants have standing to apply to the Court under s 178(1).
- (d) Whether the Court's discretion under s 178(1) should be exercised in favour of granting the applicants the relief they seek.

39 Before considering these issues, it is useful to set out the relevant provisions of the Bankruptcy Act.

THE STATUTORY PROVISIONS

40 Subdivision B of Div 2 of Pt VII of the Bankruptcy Act deals with objections to discharge from bankruptcy. The relevant provisions of Subdiv B are these:

149B Objection to discharge

- (1) Subject to the following provisions of this Subdivision, at any time before a bankrupt is discharged from bankruptcy under section 149, the trustee may file with the Official Receiver a written notice of objection to the discharge.
- (2) The trustee of a bankrupt's estate must file a notice of objection to the discharge if the trustee believes:

- (a) that doing so will help make the bankrupt discharge a duty that the bankrupt has not discharged; and
- (b) that there is no other way for the trustee to induce the bankrupt to discharge any duties that the bankrupt has not discharged.

149C Form of notice of objection

- (1) A notice of objection must:
 - (a) set out the ground or each of the grounds of objection, being a ground or grounds set out in subsection 149D(1) but not being a ground or grounds of a previous objection to the discharge that was cancelled; and
 - (b) refer to the evidence or other material that, in the opinion of the trustee, establishes that ground or each of those grounds; and
 - (c) state the reasons of the trustee for objecting to the discharge on that ground or those grounds.
- (1A) Paragraph (1)(c) does not apply to a ground specified in paragraph 149D(1)(ab), (d), (da), (e), (f), (g), (h), (ha), (ia), (k) or (ma).
- (2) A notice of objection is not invalid merely because it does not state the ground or grounds of objection precisely as set out in subsection 149D(1) provided that the ground or grounds can reasonably be identified from the terms of the notice.

149D Grounds of objection

- (1) The grounds of objection that may be set out in a notice of objection are as follows:
 - ...
 - (ab) any transfer is void against the trustee in the bankruptcy because of section 121;
 - ...
 - (d) the bankrupt, when requested in writing by the trustee to provide written information about the bankrupt's property, income or expected income, failed to comply with the request;
 - (da) after the date of the bankruptcy, the bankrupt intentionally provided false or misleading information to the trustee;
 - (e) the bankrupt failed to disclose any particulars of income or expected income as required by a provision of this Act referred to in subsection 6A(1) or by section 139U;
 - (f) the bankrupt failed to pay to the trustee an amount that the bankrupt was liable to pay under section 139ZG;

- (g) at any time during the period of 5 years immediately before the commencement of the bankruptcy, or at any time during the bankruptcy, the bankrupt:
 - (i) spent money but failed to explain adequately to the trustee the purpose for which the money was spent; or
 - (ii) disposed of property but failed to explain adequately to the trustee why no money was received as a result of the disposal or what the bankrupt did with the money received as a result of the disposal;
 - (h) while the bankrupt was absent from Australia he or she was requested by the trustee to return to Australia by a particular date or within a particular period but the bankrupt failed to return by that date or within that period;
 - (ha) the bankrupt intentionally failed to disclose to the trustee a liability of the bankrupt that existed at the date of the bankruptcy;
 - ...
 - (ia) the bankrupt failed to comply with subparagraph 77(1)(a)(ii);
 - ...
 - (k) the bankrupt refused or failed to sign a document after being lawfully required by the trustee to sign that document;
 - ...
 - (ma) the bankrupt intentionally failed to disclose to the trustee the bankrupt's beneficial interest in any property;
 - ...
- (Underlining added.)

41 As I have noted, under s 149 of the Bankruptcy Act, Spencer and Perovich would, in the absence of an objection under s 149B, have been automatically discharged from bankruptcy on 14 November 2010.

42 When Whitton filed the notices of objection, ss 149A, 149B and 149G had the effect of extending the bankruptcies of Spencer and Perovich for a period of 5 years until 14 November 2015.

43 The provisions dealing with compositions are set out in Div 6 of Pt IV of the Bankruptcy Act. The relevant sections are as follows:

73 Composition or arrangement

(1) Where a bankrupt desires to make a proposal to his or her creditors for:

- (a) a composition in satisfaction of his or her debts; or
- (b) a scheme of arrangement of his or her affairs;

he or she may lodge with the trustee a proposal in writing signed by him or her setting out the terms of the proposed composition or scheme of arrangement and particulars of any sureties or securities forming part of the proposal.

(1A) The trustee must, within 2 working days after receiving the proposal, give a copy of the proposal to the Official Receiver.

...

(2) The trustee shall call a meeting of creditors and shall send to each creditor before the meeting a copy of the proposal accompanied by a report on it.

(2A) The report must indicate whether the proposal would benefit the bankrupt's creditors generally.

...

(2B) The trustee may refuse to call the meeting if the proposal does not make adequate provision for payment to the trustee of accrued fees that:

- (a) are owing to the trustee (at the time the proposal is lodged) in respect of the administration of the bankrupt's estate, but are not able to be taken out of the bankrupt's estate; and
- (b) have been approved by the creditors before the proposal is considered.

...

(4) The creditors may, by special resolution, accept the proposal.

...

73A Trustee may require surety for cost of meeting

(1) Before calling a meeting under section 73, the trustee may require the bankrupt to lodge with the trustee an amount that is sufficient to cover:

- (a) the estimated costs that will be incurred by the trustee in arranging and holding the meeting; and
- (b) the estimated fee that will (if approved by the creditors) be payable to the trustee in respect of the meeting.

...

74 Annulment of bankruptcy

(5) Upon the passing of a special resolution at a meeting of creditors of a bankrupt under subsection 73(4), the bankruptcy is annulled, by force of this subsection, on the date on which the special resolution was passed.

...

(6) Where a bankruptcy is annulled under this section, all sales and dispositions of property and payments duly made, and all acts done, by the trustee or any person acting under the authority of the trustee or the Court before the annulment shall be deemed to have been validly made or done but, subject to subsection (7), the property of the bankrupt still vested in the trustee vests in such person as the Court appoints or, in default of such an appointment, reverts to the bankrupt for all his or her estate or interest in it, on such terms and subject to such conditions (if any) as the Court orders.

...

75 Effect of composition or scheme of arrangement

(1) Subject to this section, a composition or scheme of arrangement accepted in accordance with this Division is binding on all the creditors of the bankrupt so far as relates to provable debts due to them from the bankrupt.

44 A discharged bankrupt is not a “bankrupt” for the purposes of s 73(1): *Quinn v Official Trustee in Bankruptcy* (1996) 63 FCR 136. It is necessary for a bankrupt to propose the composition, and have the composition accepted, before his or her discharge from bankruptcy.

Whitton’s purpose in lodging objections to the discharge of the bankrupts from bankruptcy

45 I will start by describing Whitton’s administration of the bankrupt estates after his appointment as trustee, then the history of his dealings with Spencer and Perovich before he was appointed trustee, and then consider what Whitton’s purpose in lodging objections was.

Whitton’s administration of the bankrupt estates after his appointment

46 Whitton was appointed as trustee on Friday, 5 November 2010. On Monday, 8 November 2010, Whitton wrote to each of Spencer and Perovich saying:

I am advised that in the course of the administration of your Bankrupt Estate you have as yet failed to lodge with the former Trustees sufficient details to enable them to determine your level of income and contribution (if any) in accordance with Section 139U of the Bankruptcy Act 1966. I note that such was requested in writing by the former Trustees initially on 4 August 2008 but on no subsequent occasion.

Given the imminent automatic discharge of your bankruptcy would you please advise

forthwith whether you are prepared to provide within 14 days such information to enable compliance with the relevant section.

47 On 10 November 2010, Delta Law, the solicitors for Spencer and Perovich replied saying:

We refer to your letters of 8 November 2010 to Messrs Spencer and Perovich. They have considered your request and concede that they have each, when requested in writing by their previous trustees, failed to comply with a request in writing to provide written information about their income, or expected income, and have failed to disclose, in material respects particulars of income as required by a provision of the *Bankruptcy Act 1966 (Cth)* referred to in section 6A or by section 139U.

Whilst your letter asks whether they are prepared to provide within 14 days such information to enable compliance with the relevant section, it would appear to us that relevantly, the period expires this Saturday 13 November 2010. This would be impossible to achieve.

If you were to file an objection to discharge, this would provide both Spencer and Perovich with an inducement to provide the information to you as soon as possible.

Also, we are unable to perceive any other way for you to induce them to discharge their duties they have not discharged. It therefore appears to us that the preconditions to filing an objection to discharge pursuant to s 149B(2) are fulfilled.

If you agree, we have no objection to your filing an objection to discharge, and in terms of the statute, you are obliged to do so.

As the matters are serious you can be assured that Spencer and Perovich will co-operate fully with you in the forthcoming period.

48 On 9 November 2010, solicitors acting for the applicants wrote to Whitton asking him whether or not he intended to object to the discharge of Spencer and Perovich from bankruptcy. Whitton relied on the same day, saying:

I refute your allegations that the rationale for the change in Trustee is to allow the bankrupts to submit proposals pursuant to Section 73 of the *Bankruptcy Act 1966* (“the Act”).

In respect to the objection of the bankrupts’ discharge, I will consider [the] same independently of any proposal pursuant to Section 73 of the Act.

49 On 10 November 2010. Mango Boulevard made an offer to Whitton to purchase the shares in Kinsella Heights for \$1 million, with there to be a further valuation to determine whether any additional payment was to be made under the Share Sale Agreement.

50 On 11 November 2010, Whitton received a letter from Anthony Commisso, the director of ACCA Business Building Team Pty Ltd, which claims to be a creditor of the estates of Spencer and Perovich. Commisso said that he was concerned that not all matters had been investigated by the former trustees, and that he would like to see the bankruptcies extended for the maximum period possible. Commisso's letter said that the issues of concern included that the bankrupts had failed to supply their trustees with all the documents and information they were required to provide, and failed to provide income returns. Commisso also noted that he had been contacted by Mango Boulevard to seek his support for the retention of the former trustees in order to conclude a deal between them. He expressed concern that Mango Boulevard had some ulterior motive, which he said should be investigated.

51 On 12 November 2010, Whitton lodged notices of objection to the discharge of Spencer and Perovich from bankruptcy. The notices were in almost identical terms. The notice relating to Perovich was as follows:

I, Robert Whitton, of William Buck, Level 29, 66 Goulburn Street, SYDNEY NSW 2000, the Trustee of the above bankrupt estate, hereby object to the discharge of Silvana Perovich from bankruptcy by force of Section 149B of the *Bankruptcy Act 1966* ("the Act") on the following grounds:

Pursuant to Section 149C(1)(c), the reason for the objection on the grounds set out under Section 149D(1)(d) and 149D(1)(e) is the bankrupt has failed to provide written information about her property, income and expected income, and she has failed to disclose any particulars of income as required by the Act.

The following documentation in support of the above is detailed below:

- Letter to bankrupt dated 8 November 2010 (enclosed as Annexure "A")
- Letter from bankrupt's solicitor dated 10 November 2010 (Annexure "B")
- Letter from unsecured creditor dated 11 November 2010 (Annexure "C")

This objection has the effect of extending the bankruptcy for a period of eight (8) years from the date on which the bankrupt filed her Statement of Affairs ("SOA"). In this regard, as the SOA was filed on 13 November 2007, the date of discharge has been extended until 14 November 2015.

52 Whitton deposed, in an affidavit admitted into evidence at the trial, that in exercising his discretion to object to the bankrupts' discharge from bankruptcy, he had regard to the following matters:

- (a) I had been appointed as the trustee of the Bankrupts' estates on Friday

5 November 2010;

- (b) the Bankrupts were due to be automatically discharged from bankruptcy on Sunday 14 November 2010;
- (c) the Bankrupts had not provided details of their income and property to the former trustees;
- (d) the former trustees had decided not to object to the Bankrupts' discharge but had also stated that they had "not turned their mind[s] to a detailed review of whether a ground for objection could be made out";
- (e) the Bankrupts appeared to have substantial access to lawyers and advisers, which might indicate that they had been obliged to contribute income to their estates;
- (f) to the best of my knowledge, the Bankrupts had not made income contributions;
- (g) the Bankrupts' failure to provide details of their income and property was a serious matter;
- (h) the former trustees had been removed by an overwhelming vote of the creditors, who had lost confidence in the former trustees and who, inferentially, would be interested in Mr Whitton making investigations as to what returns might be available in the estates;
- (i) by objecting to the discharge, I was conscious from my experience that the objection to their discharge would encourage the bankrupts to provide details of their income.

53 Whitton deposed that his reasons for exercising the discretion to object to the bankrupts' discharge from bankruptcy were:

- (a) the bankrupts had not lodged income information with their trustees in bankruptcy or me;
- (b) I had only been appointed a short time and wanted time to investigate whether the bankrupts had the capacity to contribute income for the benefit of their creditors;
- (c) The bankrupts appeared to have substantial access to resources that needed to be investigated and considered from an income perspective;
- (d) In my experience as a bankruptcy trustee, by objecting to the discharge from bankruptcy of a bankrupt, that encouraged bankrupts to provide details of their income;
- (e) I believed that my objections to discharge from bankruptcy of Spencer and Perovich would encourage these bankrupts to provide me with details of their income;

- (f) I could at any later time cease to object to the discharge or withdraw any objection under the Bankruptcy Act;
- (g) if my investigations revealed that the bankrupts had no capacity to contribute income for the benefit of their creditors, I could cease to object to the discharge or withdraw any objection under the Bankruptcy Act.

54 Whitton also deposed that:

In deciding to object to the discharge from bankruptcy of Spencer and Perovich, I did not take into account or have regard to the fact that the effect of the objection would enable Spencer and Perovich to make proposals for composition to their creditors.

55 The applicants allege that contrary to Whitton's evidence, he did not lodge the objections because he believed extensions of the bankruptcies would encourage Spencer and Perovich to provide details of their income. They allege that, instead, Whitton wished to allow Spencer and Perovich to make proposals to their creditors for compositions, which could only be achieved by extending the bankruptcies. The applicants submit that Whitton's earlier assistance to Spencer and Perovich by advising them as to removal of the former trustees and their proposals for compositions is consistent with assisting them by extending the bankruptcies to allow them to put their proposals for compositions. On the other hand, the respondents submit that Whitton was never the bankrupts' advisor and did no more than would be expected in circumstances where he had to consider whether he was prepared to act as trustee.

56 In order to assess the parties' submissions it is necessary to consider the history of Spencer and Perovich's earlier dealings with Whitton in some detail. It is also necessary to consider Whitton's evidence under cross-examination.

The history of Whitton's dealings with the bankrupts before he was appointed trustee

57 On 18 March 2008, Whitton spoke, for the first time, to Spencer and Perovich. The discussion was over the telephone. Perovich told Whitton that she had substantial claims against the applicants, that the quantum of claims against the applicants could be more than \$100 million and the claims were the subject of proceedings in the Supreme Court. Perovich expressed concerns about the former trustees' administration of the estate. In particular she was concerned that the former trustees had taken little or no action to pursue claims against the applicants. Perovich also told him that she and Spencer were looking for a way that they could change their trustees in bankruptcy.

58 On the same day, Whitton emailed Perovich a document summarising the options and steps to change a trustee. In his email, Whitton said:

The most obvious starting point is to get a significant creditor or creditors to write to the existing Trustee requesting him to either call a meeting for such purpose or to institute the streamlined approach as envisaged by s 181A of the Bankruptcy Act and at such time include a Consent to Act from me.

59 On 5 August 2008, Whitton attended a concurrent meeting of creditors of Spencer's and Perovich's bankrupt estates. The meeting was called at the request of Commisso and Jonathon McLeod, the liquidator of Neovest. Whitton had signed a Consent to Act as trustee. A resolution that Whitton be appointed to replace the former trustees was moved, but failed. Greener Investments Pty Ltd ("Greener Investments"), which claimed to be a creditor, was allowed to vote, having given its proxy to the former trustees. It had submitted a proof of debt for approximately \$116 million. Greener Investments' vote was critical to the failure of the resolution. The issue of the former trustees' dealings with Greener Investments remained controversial until they were eventually replaced.

60 Whitton cannot recall any other correspondence or telephone conversations with Spencer or Perovich between the meeting of creditors and about early July 2010.

61 In early July 2010, Whitton had a telephone conversation with Perovich. Perovich said that she and Spencer still had concerns about the former trustees. She also told Whitton that she and Spencer had been obtaining legal advice about their exits from bankruptcy and the possibility of putting forward deeds of composition to the creditors so that their claims against the applicants could be pursued. Whitton told Perovich that he was available to meet with her and Spencer and their lawyers to discuss their exits from bankruptcy and the proposed deeds of composition.

62 Whitton was copied into emails on 9 July and 13 July 2010 from Perovich to barristers acting for her, Francis Douglas QC and Kevin Connor. She proposed a meeting between Whitton and Douglas QC and Connor.

63 On 21 July 2010, Whitton received an email from Perovich which attached draft deeds of composition for both Spencer and Perovich and a draft proposal from Mio Art as trustee of the Spencer Family Trust regarding the compositions. Perovich set out what she thought were the options open to her and Spencer and indicated that their preferred option was to have Whitton appointed as trustee and put a deed of composition to the creditors. The

email referred to unresolved issues concerning the draft deeds of composition and concluded, “[L]ook forward to discussions with you on this”. The draft deeds of composition named Whitton as the trustee of each composition.

64 On 27 July 2010, Perovich sent Whitton an email attaching a judgment of Lander J of the Federal Court of Australia. The former trustees, who were also administrators of Greener Investments, had applied for an order that Greener Investments continue under administration rather than being wound up. Lander J held that there was clearly potential for conflicts of interest if Sweeney and van der Velde at once were administrators of Greener Investments and trustees of the estate of Perovich, and that they were not sufficiently independent. Their application was refused.

65 On 5 August 2010, Whitton sent an email to Perovich asking if there was any update regarding the proposed compositions. Perovich replied that she would call him later that day and give him an update.

66 On 2 September 2010, Perovich sent an email to Whitton containing a draft letter to one of the former trustees, Sweeney, and draft proposals for compositions for Perovich and Spencer. The email to Whitton said that timing was now an issue and that:

If Mr Sweeney does become slow or uncooperative we will need a slick game plan to change/remove SV Partners before the assets vest with them.

67 Whitton replied on 2 September 2010, saying “[W]ill review and revert asap”.

68 The draft compositions for Spencer and Perovich were provided to the former trustees on 3 September 2010. The former trustees replied to Spencer on 15 September 2010. They said they had reviewed the draft proposal and “wish to draw your attention to a few issues that need to be considered if you wish there to be any reasonable chance of a proposal firstly being put to creditors and secondly being accepted by creditors”. The former trustees described information which they said would be required so that they could complete a proper report. That information was extensive. They said that the costs of completing the report would be potentially in the order of \$20,000 to \$40,000, or more if it were necessary to obtain an independent valuation of the property owned by Kinsella Heights.

69 On 9 September 2010, Perovich emailed Whitton saying that Sweeney had said that he would need until the following week to consider and respond to her draft

proposal. The email said that Perovich expected that Sweeney would be approaching the solicitors for the applicants, Minter Ellison, to see if they would improve their offer or match the offer which the proposed composition represented. The email attached a letter that Spencer had received from the former trustees concerning his outstanding income statements. The email asked Whitton to give consideration to the time frames for the processes involved if it was determined to “force the composition” or remove the trustees. Whitton responded by telling Perovich that he would give her a call the next day.

70 On 15 September 2010, Perovich emailed Whitton and Douglas QC with a response from the former trustees to the draft proposal for a composition. Perovich expressed dissatisfaction with the former trustees’ response, suggesting that it may be better to spend their money taking the matter to court. Douglas QC responded, saying that Perovich should not act too hastily. Whitton responded saying that he agreed with Douglas QC. Perovich replied saying that she would send a summary of her commentary concerning the former trustees’ letter “so we can discuss”.

71 Sometime between 15 and 20 September 2010, Whitton had a telephone conversation with Perovich. Perovich expressed the view that the former trustees had put unreasonable barriers in front of her regarding the proposal. Perovich told Whitton that she and Spencer intended to forward proposals for compositions to their creditors if Whitton was appointed as their trustee in lieu of the former trustees. She said that it was their intention in making the proposals for composition to provide a method for the proper funding and prosecution of the claims against the applicants in the Supreme Court proceedings which would maximise the returns available to their creditors. During that conversation, Perovich said that she and Spencer had previously been asked by the former trustees to provide details of their income, but had failed to provide that information as they were unsure of their income, or the income that they had received during the bankruptcies.

72 On 24 September 2010, Whitton received an email from Spencer and Perovich that was also sent to Douglas QC and Connor. The email attached redrafted proposed deeds of composition. The email stated that in the proposed composition Spencer was having Mio Art cover all of his estate’s debts via the Perovich estate and that Spencer’s offer was for both estates. Spencer and Perovich asked Whitton how they would express this in the deeds of composition. Whitton responded advising them that he thought there would have to be three

estates, one for each of Spencer and Perovich and then a joint estate. There were further emails between Spencer and Whitton concerning this issue.

73 On 24 September 2010, Perovich sent an email to Whitton informing him that Connor had recommended that a formal proposal for composition for only Perovich's estate (and not Spencer's) should be put at that stage and asking Whitton what his thoughts were on this issue. There does not appear to have been any response by Whitton.

74 On 25 September 2010, Perovich formally lodged a proposal under s 73 with the former trustees setting out the terms of a proposed composition, and asked that a meeting of the creditors be called to discuss the proposal.

75 On 30 September 2010, the former trustees wrote to Perovich in response to her proposal for a composition. The letter required Perovich to provide security for the trustees' remuneration, costs and expenses in the sum of \$37,250 by 5 October 2010. They said that the trustees' report and notice convening the meeting would then be issued by 18 October 2010. The letter raised a number of queries concerning the proposal.

76 On 3 October 2010, Whitton was copied into an email from Perovich to Douglas QC and Connor. Perovich said that she and Spencer saw merit in trying to have the trustees changed. It is apparent from the email that Spencer and Perovich saw the former trustees as an impediment to having their compositions put to and accepted by the creditors.

77 At some stage after this, Whitton signed a Consent to Act as trustee of the bankrupt estates of both Perovich and Spencer. On 20 October 2010, Whitton was provided with a copy of the reports to creditors issued by the former trustees. In the reports, the former trustees noted that Perovich had asked for a meeting of creditors to be convened to consider her proposal for a composition. They noted that they had responded, but that instead of providing the surety and the further information requested, Perovich had arranged for a number of creditors to write asking them to convene a meeting of creditors for the purpose of removing them as trustees and replacing them with another trustee. They also noted that upon Perovich becoming aware of their intention to comment on and make a recommendation in relation to her proposal for a composition, she withdrew that proposal.

78 The report to creditors in respect of Perovich stated:

Whilst we had not turned our mind to a detailed review of whether a ground for objection could be made out, we had formed a view that there would be no utility in

lodging any objection to Ms Perovich's bankruptcy. That is there was no tangible benefit to be gained by the bankrupt estate in objecting to Ms Perovich's automatic discharge from bankruptcy. This matter was conveyed to Ms Perovich in answer to her enquiry.

79 The report then referred to Perovich's withdrawn proposal for a composition with her creditors. The report said:

With a meeting of creditors to be called and a report to creditors having to be issued (for the meeting to consider the change of Trustees), in the interests of not having the estate incur so many extra costs, we decided to proceed to issue a report and call a meeting of creditors to consider not only the proposed change of trustee but also the bankrupt's proposal under section 73 of the Act...

When we informed the Ms Perovich of that intention, she withdrew her proposal for a Composition with her creditors under section 73 of the Act. She did however confirm her intention to resubmit her proposal for a composition, on substantially similar terms, to that new trustee (if he is appointed) to call a further meeting to consider her proposal.

80 Despite the withdrawal of the proposal, the former trustees' report set out information which they said would be useful for any future consideration of the proposal. The former trustees set out a number of issues they had identified with the withdrawn proposal for composition and raised a number of queries.

81 The former trustees' reports noted that their work in progress for the administration of Perovich's estate was \$412,291.50, while for Spencer's estate their fees were \$112,650.50. They noted that their fees would be paid in priority to any distribution.

82 On 13 August 2010, Mango Boulevard had approached the former trustees of Perovich's estate in an attempt to settle the Supreme Court litigation. On 6 October 2010, a heads of agreement was agreed but not executed. The agreement provided for a guaranteed payment of \$500,000 for the purchase of Perovich's shares. The former trustees' reports did not refer to the heads of agreement.

83 On 29 October 2010, Whitton attended the concurrent meeting of the creditors of Spencer's and Perovich's bankrupt estates. At the meeting there was a discussion between Sweeney and the creditors concerning admitting a proof of debt for Greener Investments. A resolution was passed that the meeting be adjourned until 5 November 2010 with a view to court proceedings being taken to determine whether the former trustees should remain and whether Greener Investments was a creditor.

84 On 1 November 2010, the former trustees filed an application seeking orders under s 180 of the Bankruptcy Act that the Court accept their resignation as trustees and that Whitton be appointed as trustee. The application was set down to be heard on 4 November 2010. On 4 November 2010, the application was adjourned to allow the creditors' meeting to take place, as the applicants had filed a notice of opposition to the former trustees' application to resign.

85 On 5 November 2010, Whitton attended the reconvened concurrent meeting of creditors. At that meeting, Whitton was asked a number of questions. Whitton informed the creditors that he had not made any assessment as to whether he would lodge objections to Spencer's and Perovich's discharge from their bankruptcies. He said that it may be that a composition would be in the best interests of the creditors, but he had not formed any view upon it. He indicated there would not be enough time before the automatic discharge from bankruptcy for him to prepare a report upon any composition and give the requisite notice to the creditors. He reiterated that the first decision to be made was whether there were valid grounds to extend the bankruptcies.

86 At the meeting, a majority of the creditors (by value) voted in favour of resolutions that Whitton be appointed as trustee of the bankrupt estates of Spencer and Perovich in place of the former trustees.

What was Whitton's purpose in lodging the objections?

87 Having set out this history of events, I will turn to consider the applicants' allegation that Whitton lodged the objections in order to extend the bankruptcies for the purpose of allowing Spencer and Perovich to put proposals for compositions to their creditors. The investigation of Whitton's reasons requires consideration of what Whitton understood, from his meetings, telephone calls and emails, that Spencer and Perovich were hoping to achieve. It also requires consideration of whether Whitton was motivated to assist Spencer and Perovich to achieve their aims and to what end.

88 When he became trustee, Whitton was aware that Spencer and Perovich wished to exit their bankruptcies by way of annulment upon acceptance by their creditors of compositions, rather than automatic discharge. Whitton knew that Spencer's and Perovich's aim was to avoid the assets of their bankrupt estates remaining vested in the trustees after their exits from bankruptcy. He knew that the former trustees did not intend to object to Spencer's and Perovich's discharge. Whitton knew that the former trustees had stated in the

proceedings before Lander J that there would be no dividend payable to the creditors (although Sweeney seems to have qualified this to some extent in the meeting of 29 October 2010). He knew that there could be no compositions before the bankrupts' automatic discharge on 14 November 2010, given the short time frame.

89 Whitton had advised Spencer and Perovich in 2008 to lobby the creditors to call a meeting to replace the former trustees with Whitton. Whitton had advised Spencer and Perovich about their proposals for compositions and he knew that he was to be proposed as the trustee for each composition. Whitton knew that Spencer's and Perovich's motivation in seeking to have him replace the former trustees was that they believed that Whitton would be a "new and sympathetic" trustee who would lodge objections to their discharge from bankruptcy which would allow them time to propose compositions with their creditors.

90 The mere fact that Spencer and Perovich believed that Whitton would take particular steps that would support their interests does not mean that Whitton took those steps for the purpose of supporting their interests.

91 However, the applicants submit that the emails and discussions between Whitton and Spencer and Perovich show that Whitton acted as their advisor in relation to removing the former trustees, having Whitton replace the former trustees, and upon the compositions; and that makes it likely that he was motivated to act in their interests. They submit that Whitton's attempts in cross-examination to indicate that he was not acting as an advisor but was merely, for example, giving a "summary" of "options" or "commenting" were disingenuous and should not be accepted.

92 The emails and other communications I have described show that Whitton was more than a mere commentator in respect of Spencer's and Perovich's plans and proposals prior to being appointed as trustee. He advised them as to how they could go about removing the former trustees. Whitton had agreed to being appointed as trustee of the proposed compositions, or at least raised no objection to being appointed, and had advised them about the form of their proposals for compositions. Whitton was included in emails between Spencer, Perovich and their counsel and, together with their counsel, was treated as an advisor and was asked for and provided advice. He did act as their advisor in respect of the removal of the former trustees, the proposed compositions and strategy (for example, in his emails of 15 and 24 September 2010). In respect of some requests for advice, it is not clear

whether he provided advice, but he certainly expressed his willingness to do so (for example, in his emails of 5 August 2010 and 24 September 2010).

93 The applicants rely on Whitton's answer to questions asked of him by Tony Stocks, a director of Mango Boulevard, in the meeting on 5 November 2010. Stocks asked, "[H]ow do you know Mr Spencer and Ms Perovich?"

94 Whitton responded:

I think creditors, who were present at the meeting in 2008 were aware, that I considered and provide a consent at that time. Obviously on that occasion I met Mr Spencer and Ms Perovich. Mr Conomos, who is a creditor, again requested me to provide a consent for this meeting. I have again met Mr Spencer and Ms Perovich here. Other than that, I don't know them at all.

95 The applicants submit that this answer significantly understated Whitton's knowledge of and dealings with Spencer and Perovich. Under cross-examination, Whitton stated that he intended to convey that he had never physically met Spencer and Perovich other than at creditors' meetings held in 2008 and 2010. However, that was not what he said to Stocks. Even allowing for the likelihood that his response was not captured strictly verbatim, in giving his answer Whitton understated the extent of his knowledge of and dealings with Spencer and Perovich.

96 Whitton's evidence was that he disregarded the letter of 10 November 2010 from Spencer's and Perovich's solicitor inviting him to object to their discharge from bankruptcy. However, bearing in mind Whitton's role as Spencer's and Perovich's advisor prior to being appointed as trustee, it is improbable that Whitton ignored the fact that Spencer and Perovich wanted to have their bankruptcies extended when deciding to lodge the objections. It is also improbable that Whitton did not take into account the reason why Spencer and Perovich wanted to have their bankruptcies extended, namely to allow proposals for compositions to be put to their creditors before their discharge.

97 I reject Whitton's evidence insofar as he says he did not take into account or have regard to the fact that the effect of the objections would allow Spencer and Perovich to make their proposals for compositions to their creditors. I am assisted in reaching that conclusion by my rejection of some other aspects of Whitton's evidence. In particular, I consider that under cross-examination Whitton understated his role in advising Spencer and Perovich, and in the meeting of creditors he understated the extent of his dealings with

Spencer and Perovich. I find that allowing Spencer and Perovich the opportunity to have compositions considered by their creditors was one of Whitton's reasons for lodging the objections.

98 While I have found that one of Whitton's reasons was to allow Spencer and Perovich to make proposals for compositions to their creditors, I do not suggest that he acted with impropriety or that he abandoned his obligations as a trustee in favour of Spencer's and Perovich's interests. In *Macchia v Nilant* (2001) 110 FCR 101 at [38], French J (as his Honour was then) noted that trustees, "are appointed to administer the [estates] of bankrupts in the interests of creditors and, in so doing, to have regard also to the interests of the bankrupts." I consider that Whitton's decision to lodge the objection was motivated by his regard to the interests of the creditors as a whole. He was also required to have regard to the interests of the bankrupts. While Spencer and Perovich wished to make proposals for compositions, the creditors as a whole would have the opportunity to decide whether the proposals were in their best interests in comparison with the offer made by the applicants. Whitton's decision to lodge the objections was consistent with his obligations as trustee.

99 I should add that there is an area of nuance in terminology. The applicants describe Whitton's purpose as to allow Spencer and Perovich to put proposals for compositions. Whitton's purpose can be described, alternatively, as to allow the creditors the opportunity to consider proposals for compositions. Although put in different ways, with different connotations, they effectively amount to the same thing.

100 There is no suggestion that Whitton had any agreement or arrangement with Spencer and Perovich. While Whitton had regard to the interests of Spencer and Perovich, that does not mean he acted at their dictation, and that was not suggested by the applicants. Although Whitton acted as the bankrupts' advisor before he was appointed trustee and had regard to their interests after he was appointed, I consider that Whitton made his decisions to object independently of Spencer and Perovich.

101 The next issue is whether I should reject Whitton's evidence that he believed that his objections to Spencer's and Perovich's discharge from bankruptcy would encourage them to provide their income details. The applicants submit that this evidence is demonstrably false. They point to the letter from Spencer's and Perovich's solicitors dated 10 November 2010 which acknowledged that they had not provided income details and invited Whitton to lodge objections on that basis. The applicants submit that in these

circumstances, Whitton could not have regarded the extensions of the bankruptcies as either a carrot or a stick that would encourage Spencer and Perovich to provide their income details.

102 In considering the applicants' submissions, the first question is whether Whitton believed that it was desirable to have Spencer and Perovich comply with their obligations to provide their income details for the purposes of the administration of the bankruptcy. The next question is whether Whitton believed that extending the bankruptcies would encourage Spencer and Perovich to provide their income details.

103 As to the first question, Whitton's duty under s 19(1)(g) was to take whatever action was practicable to try to ensure that the bankrupts discharged all of their duties under the Bankruptcy Act. Spencer and Perovich had an obligation under s 139U to provide a statement of income no later than 21 days after the end of a contribution assessment period. They had not complied with their obligations. Whitton was obliged under s 139W to make an assessment of matters including the income likely to be derived by the bankrupts during an income assessment period. In his letter of 8 November 2010, Whitton asked Spencer and Perovich if they were prepared to provide the information. Whitton believed that Spencer and Perovich appeared to have substantial resources, including funds to pay lawyers. Whitton believed that if they had received income during their bankruptcies which was not the subject of assessment, the creditors could lose out. I accept that Whitton did consider that it was desirable that Spencer and Perovich comply with their obligations to provide their income details.

104 The next question is whether Whitton believed that extending the periods of the bankruptcies by objecting to the discharge of the bankrupts would encourage the bankrupts to provide their income details. My rejection of Whitton's evidence concerning whether he took into account allowing Spencer and Perovich the opportunity to put proposals for compositions does colour my approach to his evidence on this question, and I approach his evidence with a disposition towards doubting it. However, rejecting some parts of Whitton's evidence, does not preclude my accepting other parts of his evidence.

105 Having heard Whitton giving evidence, and having confirmed my impression by listening to a recording of his evidence, I accept that when he made his decision to object, Whitton genuinely believed that extending the periods of the bankruptcies would encourage Spencer and Perovich to provide their income details. Whitton's evidence on this issue was clear, unwavering and credible. In assessing his evidence, it is necessary to take into account

the obvious difficulties that anyone would have in trying to recall events, thought processes and beliefs in detail some 3 years later. That is particularly so given that Whitton has a busy practice and these were not the only estates he was administering.

106 It is also necessary to bear in mind Whitton's obligation under s 19(1)(g) and that he had to make his decisions under significant time pressure. I accept that he could see no other way to encourage Spencer and Perovich to provide their income details, at least in any practical sense. While it is true that it is an offence punishable by imprisonment for a bankrupt to contravene s 139U, it was not for Whitton to make any decision to prosecute.

107 I have found that one of Whitton's reasons for objecting was to allow Spencer and Perovich the opportunity to have proposals for compositions considered by their creditors. Extending the period of bankruptcy was an inducement to the bankrupts to provide their income details at least because Whitton would be required to provide reports to the creditors concerning the proposal for compositions and would require the income details to provide creditors with a comparison between the likely returns under the compositions and the likely returns under bankruptcy. As Spencer and Perovich wished to have proposals for compositions put to their creditors, they had an incentive to provide their income details. This is consistent with Whitton's evidence that he believed that extending the bankruptcies would encourage Spencer and Perovich to provide their income details.

108 In addition, while Spencer's and Perovich's solicitors invited Whitton to lodge objections to bankruptcy for the evident purpose of allowing their compositions to be put to creditors, there was no certainty that they would wish to remain in bankruptcy in the future, particularly if the creditors did not accept their proposals for compositions.

109 The applicants point out that the bankrupts' discharge from bankruptcy would not prevent Whitton from investigating whether the bankrupts had the capacity to contribute income or from seeking contributions from Spencer and Perovich. Whitton accepted as much. However, that does not mean that Whitton did not believe that keeping Spencer and Perovich in bankruptcy was not an appropriate way to investigate their income. In their letter of 10 November 2010, Delta Law had told Whitton, "[A]s the matters are serious you can be assured that Spencer and Perovich will co-operate fully with you in the forthcoming period." The letter read as a whole seems to communicate that Spencer and Perovich were unable to provide their income details within 14 days, but if they remained in bankruptcy they would

co-operate with Whitton by providing those details later. While I appreciate that Whitton's evidence was that he disregarded this letter, I have rejected that evidence.

110 The applicants rely on the fact that the manager assisting Whitton in the bankrupt administrations, Paul Ritchie, expressed a view in writing that there was nothing to be gained from objecting to discharge. However, Whitton was the trustee and the decision was ultimately his. Whitton was not bound by Ritchie's view. The applicants also attack Whitton's credit on the basis of an asserted inconsistency between Ritchie's answer and an answer Whitton gave under cross-examination that, "The general view was, we had – we had grounds". I cannot see that there is any inconsistency – there were obviously grounds for objecting, although whether anything was to be gained by objecting was less clear. In any event, if there is some inconsistency it is likely to be explained by the imperfection of Whitton's recollection some 3 years after the event.

111 The applicants submit that Whitton made virtually no effort to pursue the income details after he objected to the bankrupts' discharge from bankruptcy, and that this demonstrates that he had no genuine belief that extending the bankruptcy would encourage them to provide their income details. Whitton wrote a letter requesting those details on 19 November 2010, but the next letter he wrote concerning this issue was not until August 2013. Although Whitton's affidavits did not mention any oral requests of Spencer and Perovich for the provision of income information, Whitton stated in cross-examination that he did make oral requests. There are no file notes concerning those requests. The applicant submits that Whitton's evidence of these oral conversations ought not be accepted, particularly because his evidence as to these conversations was equivocal at first and then more definite later. However, that pattern is more consistent with Whitton trying to bring events to the forefront of his mind under cross-examination, his recollection being a little hazy at first and firming as he continued to be asked questions and he continued to focus on the issue. I accept that he did pursue the bankrupts for their income details orally and, to a lesser extent, in writing.

112 The question is as to what Whitton believed at the time he made his decision to object. Even if, with the luxury of time and hindsight, some criticisms can be made of Whitton's thinking about whether objecting would encourage the bankrupts to comply with their obligations, that does not mean that he did not believe that it would have that effect.

113 I find that Whitton had two reasons for lodging the objections. One was that the bankrupts had failed to lodge their income details and Whitton believed that extending the

period of bankruptcy would encourage the bankrupts to provide those details. The other was that extending the bankruptcies would allow Spencer and Perovich to propose compositions with their creditors. Underlying both of these reasons was a desire to investigate the position with a view to maximising the dividends to the creditors.

Construction of s 149B(1) of the Bankruptcy Act

114 Having found that one of the reasons for Whitton objecting to the discharge of Spencer and Perovich from bankruptcy was to allow the bankrupts to propose compositions with their creditors, the next question is whether that purpose was an improper purpose.

115 The applicants' allegation of improper purpose is that Whitton lodged the objection for a purpose other than a purpose for which a trustee is lawfully permitted to lodge objections. This involves a question of the proper construction of s 149B(1).

116 The applicants submit that the purpose of the objection procedure is to provide the trustee with a power by which he or she can induce the bankrupts to act in accordance with the bankrupts' obligations. They rely on the judgment of the Full Court in *Prentice v Wood* (2002) 119 FCR 296 and submit that this judgment remains applicable despite the amendments to the objections provisions made by the *Bankruptcy Legislation Amendment Act 2002* (Cth) ("the 2002 amendments"). The applicants submit that although s 149C(1)(c) does not require the trustee to state his or her reasons where a "special ground" exists, the trustee must nevertheless have reasons for objecting, and those reasons must involve inducing the bankrupt to comply with his or her obligations.

117 The 2002 amendments included adding ss 149C(1A) and 149N(1A) to the Bankruptcy Act. The respondents submit that the 2002 amendments answer the applicants' arguments. They submit that the trustee need not have reasons where he or she relies on special grounds. They submit that where there are special grounds the only limitation upon the trustee's power to object is that it must be directed to achievement of a purpose of the law of bankruptcy.

118 The respondents also submit that where special grounds are relied upon, no review is available of the trustee's reasons under s 178(1), or, alternatively, that the Court should decline to grant relief in the exercise of its discretion under s 178(1).

119 In order to analyse the parties' arguments, it is necessary to consider the 2002 amendments and any effect of those amendments upon earlier decisions of the Full Court.

120 Section 149C(1)(c) requires that the trustee state his or her reasons “for objecting to the discharge on that ground or those grounds”. This section was present before the 2002 amendments. The effect of s 149C(1A) is that the trustee need not give reasons for objecting to discharge where the trustee relies on certain grounds set out in s 149D(1) that have become known as “special grounds”.

121 In *Inspector-General v Nelson* (1998) 86 FCR 67, the Full Court, considering the objection provisions in their form prior to the 2002 amendments, said at 78-79:

In providing that the trustee “may file” a written notice of objection to discharge, s 149B(l) uses language by which discretions are commonly conferred.

The policy of the current bankruptcy legislation is that, prima facie, a bankrupt is entitled to the benefit of a discharge by operation of law. The sections dealing with objections to discharge are consistent with this policy. By requiring that a notice of objection must not only set out the ground or grounds of objection and refer to the evidentiary material relied upon in support, but also state the “reasons” for objecting, s 149C makes it clear that a trustee filing such a notice must have reasons for doing so, in addition to being satisfied that the evidentiary material establishes one or more permissible grounds. By providing for review by the Inspector-General of the decision to object, s 149K makes it clear that the reasons for objecting were intended to be subject to scrutiny. Finally, by providing for review by the AAT of, inter alia, a decision to file a notice of objection and the Inspector-General's decision on review of such a decision, s 149Q again makes it clear that the reasons for the filing of a notice of objection are to be the subject of scrutiny.

There is no reason to be found in these provisions for thinking that the considerations relevant to the exercise of the discretion to file a notice of objection are any less extensive than all those conformable to the purpose and objects of the Act. In the absence of any indication of a contrary legislative intention, we would be disposed to think that in order to “keep a person bankrupt” beyond the ordinary period, a trustee would need to have reasons directed to achievement of a purpose of the law of bankruptcy. In fact, although ss 149B-149D do not indicate what will be “sufficient reasons”, as distinct from “permissible grounds”, to support an objection, s 149N(1) (set out earlier) provides that on review of a trustee's decision to object the Inspector-General *must* cancel the objection if, inter alia, he is satisfied that the reasons given by the trustee for objecting “do not justify the making of the objection”. Thus, far from giving rise to a prima facie right to object, the existence of a permissible ground supported by sufficient evidence is a threshold: there must *also* be reasons *justifying* the making of the objection in the particular case.

(Underlining added.)

122 In *Prentice v Wood*, the Full Court, also considering the objections provision in their form prior to the 2002 amendments, said:

19 The power to prevent a discharge from bankruptcy by operation of law by filing a Notice of Objection is “a great power”: *Van Reesema v Official*

Trustee in Bankruptcy (1983) 69 FLR 424 at 430-431; 50 ALR 253 at 260.

- 20 Section 149C(1)(c) requires the notice to state the reasons for objecting to the discharge on the ground relied upon: *Re Ansett; Ex parte Ansett v Pattison* (1995) 56 FCR 526 at 530 per Olney J. There must be more than a recitation of the s 149D ground: *Re Hall* (1994) 14 ACSR 488 at 493. Section 149C makes it clear that a Trustee filing a Notice of Objection to Discharge *must have reasons* for doing so, in addition to being satisfied that the evidentiary material establishes one or more permissible grounds. One of the grounds on which the Inspector-General may cancel the objection is if the reasons given for objecting on that ground do not justify the making of the objection (s 149N(1)(c)).
- 21 In *Inspector-General in Bankruptcy v Nelson* (1998) 86 FCR 67 at 78 a Full Federal Court said that in order to “keep a person bankrupt” beyond the ordinary period, a trustee would need to have reasons directed to achievement of a purpose of the law of bankruptcy. The existence of a permissible ground supported by sufficient evidence is a threshold; there must also be reasons justifying the making of the objection in the particular case.
- 22 Thus, a Trustee would not be bound to lodge a Notice of Objection on the s 149D(1)(f) ground if the failure to pay was due to some circumstances outside the control of the bankrupt, or was trivial in amount. Equally, if the failure to pay was contumelious or unexplained, then a statement by the Trustee that he was objecting to the discharge on the s 149D(1)(f) ground for that reason would satisfy s 149C(1)(c), inasmuch as the reason (good or bad) for objecting on that ground has been given. That would enable a review to take place of whether the reasons given for objecting on that ground justify the making of the objection.
- 23 The Trustee relies upon the following statement in the Notice of Objection as constituting his reasons for objecting to the discharge on the s 149D(1)(f) ground:
- “In my opinion, creditors will directly benefit from my Notice of Objection to Discharge since, if Mr Wood continues to practice as he has done in the past, creditors will be entitled to enjoy a further five (5) assessment periods of Mr Wood's income.”
- ...
- 24 A notice is liable to cancellation if the reasons given for objecting on the ground specified in the notice do not justify the making of the objection, but a notice is not invalidated on that account. However, the passage relied upon in the notice does not state reasons for objecting to the discharge on the ground assigned. Rather, it simply records the consequence of an objection having been made, it being a consequence which is of equal application to all the grounds specified in s 149D. Section 149C(1)(c) is not a requirement that the Trustee state the reason or reasons for objecting to a bankrupt's discharge; rather it specifies the more particular requirement that the Trustee give the reason or reasons for objecting to the discharge of the bankrupt on the ground or grounds set out in the notice. The mandatory requirement of s 149C(1)(c) is to enable the bankrupt to know the answer to the question “why are you objecting on this ground to my discharge?” The so-called “reason” does not relate to the ground relied upon, hence it is not a reason for objecting to the

discharge on that ground.

(Underlining added.)

123 At least prior to the 2002 amendments, the trustee had to have reasons justifying the making of the objection on any ground. The reasons had to relate to the ground relied upon. The reasons had to be directed to the achievement of a purpose of the law of bankruptcy.

124 The Explanatory Memorandum for the *Bankruptcy Legislation Amendment Bill 2002* stated that its objects included to:

Strengthen the objection-to-discharge provisions of the *Bankruptcy Act 1966* (the Act) by making it easier for trustees to lodge objections to a person's discharge from bankruptcy and harder for bankrupts to sustain challenges to objections.

125 The Explanatory Memorandum also stated:

47 In practice, trustees have often found it difficult to maintain objections. Frequently objections have been cancelled on review by the Inspector-General, the Administrative Appeals Tribunal (AAT) or the Federal Court. The reasons for cancellation vary. Some trustees have found it difficult to differentiate clearly *the ground(s)* of an objection and the *reason* for filing the objection. Moreover, on occasions, the AAT has upheld a bankrupt's challenge to an objection simply because, either during an AAT hearing or just before it occurs, the bankrupt eventually has provided information long sought by the trustee and the non-supply of which information was the ground of the trustee's objection. Such decisions undermine a prime purpose of the objection regime which is to induce a bankrupt to cooperate, promptly, with the trustee of the bankrupt estate.

...

49 To address these deficiencies in the present law which have hampered a trustee's capacity to elicit cooperation from some bankrupts, and to strengthen the trustee's hand, the Bill proposes a tougher objection-to-discharge regime under which it is expected that more objections will withstand the review process.

50 It is proposed that trustee objections will fall into one of two groups, namely, those which specify at least one 'special ground' and those which specify none. In the first group, the trustee's notice of objection still will have to set out the ground(s) of objection and the evidence relied on to establish it or them, but need not state the reasons for filing an objection to the bankrupt's discharge from bankruptcy. For objections which contain no 'special ground', the trustee will be obliged, as now, to provide in the notice the trustee's reasons for filing an objection.

51 ...Special grounds are directed at deliberate actions by the bankrupt to defeat creditors or to hinder the trustee's administration. The bankrupt's pre-objection conduct, rather than the trustee's capacity to show that an objection will advance the conduct of the administration, will determine whether any notice of objection will have to state the reason(s) why it has been lodged. ...

126 It is necessary to consider the following issues in light of the 2002 amendments:

(a) Whether the trustee need not have any reasons for objecting where a trustee relies on special grounds.

(b) Whether review of the trustee's decision is available under s 178(1) where a trustee relies on special grounds, or alternatively, whether the Court should decline to allow review under that provision.

(c) Whether the sole purpose of the trustee's power to object is to induce the bankrupt to act in accordance with the bankrupt's obligations under the Bankruptcy Act; or whether the only limitation upon the trustee's power to object is that it must be directed to achievement of a purpose of the law of bankruptcy.

127 It is clear that s 149B(1) confers a discretion on the trustee to object where the trustee is satisfied that the evidentiary material establishes one or more permissible grounds.

128 Section 149C of the Bankruptcy Act sets out the requirements for a notice of objection. There are three requirements.

129 Firstly, the notice of objection must set out the ground or each of the grounds of the objection, being a ground or grounds set out in s 149D(1).

130 Secondly, the notice of objection must refer to the evidence or other material that, in the opinion of the trustee, establishes that ground or each of those grounds.

131 Thirdly, s 149C(1)(c) requires a notice of objection to state the reasons of the trustee for objecting to the discharge on that ground or those grounds.

132 However, s 149C(1A) provides that where special grounds are relied upon, the reasons for objecting on the special grounds need not be stated in the notice. The special grounds include the grounds specified in ss 149D(1)(d) and (e), which the trustee's notice relied on in this case.

133 Unless at least one of the grounds in s 149D(1) exists and the trustee exercises his or her discretion to object, the bankrupt is automatically discharged from bankruptcy at the end of three years from when he or she files a statement of affairs.

134 Section 149B(1) requires that the trustee exercise a discretion, even where special grounds exist. The exercise of that discretion must involve consideration of whether there are reasons that favour extension of the period of bankruptcy, and what those reasons are. If the legislative intention when making the 2002 amendments was to remove the necessity for the trustee to *have* reasons for objecting, it is likely that the discretion would not have been retained; or there would have been specific provisions to the effect that the trustee need not have reasons. The effect of s 149C(1A) is merely that the trustee need not *state* the trustee's reasons for objecting on special grounds in the notice of objection. Although the trustee need not *state* his or her reasons the trustee must still *have* reasons for exercising the discretion to lodge a notice of objection.

135 Nothing in the Explanatory Memorandum persuades me to a contrary view. It is true that the object of the 2002 amendments was to make it more difficult for a bankrupt to review a trustee's decision to lodge an objection to discharge from bankruptcy where there are special grounds. That is done in four ways. Firstly, it is more difficult to mount an application for review of the decision under s 178(1) because the trustee is not required to state reasons for the decision to object on special grounds. Secondly, the power of the Inspector-General and the Administrative Appeals Tribunal ("the AAT") to review an objection is restricted where the objection is based on special grounds, as I will discuss later. Thirdly, the situation in *Prentice v Wood*, where the bankrupt succeeded because the trustee stated the ground but not a reason is avoided in respect of special grounds. Fourthly, the situation where the AAT upholds a bankrupt's challenge to an objection because the bankrupt has finally provided the information sought by the trustee is avoided. While it would certainly make it more difficult for a bankrupt to review the trustee's decision made on special grounds if the trustee is not required to *have* reasons, the Explanatory Memorandum says nothing to indicate that was intended.

136 The respondents submit that the addition of s 149N(1A) under the 2002 amendments confirms their submission that the trustee need not have reasons for objecting where a special ground exists.

137 Section 149N provides as follows:

- (1) On a review of a decision, if the Inspector-General is satisfied that:
 - (a) the ground or grounds on which the objection was made was not a ground or were not grounds specified in subsection 149D(1); or
 - (b) there is insufficient evidence to support the existence of the ground or grounds of objection; or
 - (c) the reasons given for objecting on that ground or those grounds do not justify the making of the objection; or
 - (d) a previous objection that was made on that ground or those grounds, or on grounds that included that ground or those grounds, was cancelled;

the Inspector-General must cancel the objection.

- (1A) An objection must not be cancelled under subsection (1) if:
 - (a) the objection specifies at least one special ground; and
 - (b) there is sufficient evidence to support the existence of at least one special ground specified in the objection; and
 - (c) the bankrupt fails to establish that the bankrupt had a reasonable excuse for the conduct or failure that constituted the special ground.

For this purpose, *special ground* means a ground specified in paragraph 149D(1)(ab), (d), (da), (e), (f), (g), (h), (ha), (ia), (k) or (ma).

138 The respondents point out that where there are special grounds the Inspector-General can no longer cancel the objection on the basis set out in s 149N(1)(c), that the reasons given for objecting on those grounds do not justify the making of the objection. This is both because the trustee is not required to give reasons for objecting and, more specifically, because of s 149N(1A). The requirement of s 149N(1)(c) that the reasons for objecting on particular grounds must justify the objection was a factor that influenced the Full Court in *Nelson* to conclude that the trustee must have reasons. The respondents submit that amendment indicates that the trustee is not required to have reasons.

139 That submission would have merit if the discretion under s 149B(1) had been removed. But, it remains. The submission would also have merit if the only avenue for review is s 149N; but it is necessary to consider whether review is still available under s 178(1). If review is still available under s 178(1), and that review is capable of extending to review on the basis of the trustee's reasons for objecting, that would weaken the respondents' argument.

140 As to the availability of review under s 178(1), the respondents submit that s 149N(1A) demonstrates a legislative intention that no bankrupt or creditor or anyone else may challenge the trustee's reasons for lodging an objection based on a special ground. As an objection cannot be cancelled by the Inspector-General on the basis that the trustee's reasons do not justify the objection, the respondents submit that it would be incongruous if the objection could be set aside by the Court on the basis that the trustee's reasons do not justify the objection. This is said to indicate a legislative intention that there is to be no avenue of review of a trustee's reasons under s 178(1).

141 Section 178(1) of the Bankruptcy Act is in broad terms and, on its face, is capable of applying to a trustee's decision to object to discharge from bankruptcy on any grounds, special and general. In *Macchia v Nilant*, French J held at [40], prior to the 2002 amendments, that s 178 could be used by a bankrupt to review a trustee's decision to object to discharge from bankruptcy. His Honour said at [39]:

Trustees are, according to the weight of authority, properly to be regarded as officers of the Court: *Adsett v Berlouis* (1992) 37 FCR 201 at 208. Given the nature and importance of the office, the general supervisory function of the Court is not lightly to be excluded in respect of particular classes of decision notwithstanding that specific provision is made by other parts of the Act for their reversal or modification.

142 The legislature could have amended s 178(1) to provide that it does not apply where a trustee objects on special grounds and to make Div 2 of Part VII an exclusive regime for review of such a decision. No such amendment was made. The Explanatory Memorandum does not refer to any intention to restrict the power of bankruptcy creditors to seek review under s 178(1). In my opinion, s 178 allows the Court to review a decision of the trustee, whether the trustee relies on special or general grounds.

143 While s 149N(1A) prevents the Inspector-General from cancelling an objection made on special grounds on the basis that the reasons do not justify the making of the objection, the availability of review under s 178(1) is not inconsistent with the aim of the 2002 amendments of "a tougher objection-to-discharge regime" and to make it "harder for bankrupts to sustain challenges to objections". It is more difficult for a bankrupt to apply to the Court for review under s 178(1) than to apply to the Inspector-General and then the AAT for review.

144 The respondents also submit that there is a discretionary reason why the Court should not permit the applicants to seek review of a trustee's notice of objection under s 178(1). Division 2 makes available a review process for notices of objection founded on special grounds only to the Inspector-General on his or her own initiative and to bankrupts. Such review is not available to creditors. Be that as it may, s 178(1) expressly allows a creditor to seek review of a trustee's decision and Div 2 does not establish an exclusive regime for review of a trustee's decision to object. There is no alternative remedy for a creditor who wishes to challenge a trustee's decision to object. I cannot see that there is a basis for preventing the applicants from pursuing their application for review.

145 While the trustee need not state reasons in the notice of objection, the trustee's reasons may be ascertainable, as they were in this case. One basis of review available under s 178(1) is that the trustee's reasons demonstrate that the trustee failed to act according to law. The availability of review under s 178(1) based on the trustee's reasons tends against the respondents' submission that the trustee need not have reasons for objecting.

146 The next issue is whether s 149B(1) is to be construed such that a trustee may not lodge a notice of objection for the purpose of extending the bankruptcy so that a bankrupt can put a proposal for composition to his or her creditors.

147 The starting point is that the discretion under s 149B(1) is, on its face, a broad one. In *Nelson*, the Full Court stated that there is no reason for thinking that the considerations relevant to the exercise of the discretion to file a notice of objection are any less extensive than all of those conformable to the purpose and objects of the Bankruptcy Act.

148 In *Prentice v Wood*, the Full Court emphasised, however, that the requirement of s 149C(1)(c) is that the reasons must be reasons for objecting on the grounds relied upon. They must be reasons that relate to the ground relied upon. The applicants submit that the reason would only relate to the ground if the trustee objects for the purpose of inducing the bankrupt to comply with an obligation under the Bankruptcy Act.

149 The difficulty with the applicants' argument is that the observation in *Prentice v Wood* that the reason must relate to the ground relied upon was based on the requirement of s 149C(1)(c) that the notice of objection must state the reason for objecting to the discharge "on that ground or those grounds". Section 149C(1)(c) has no application to special grounds.

Where there are special grounds, the trustee's reasons need not be reasons for objecting on the special ground.

150 All that is left are the requirements of s 149C(1)(a) and (b) and the exercise of the discretion under s 149B. As to the exercise of the discretion, the requirement in *Nelson* is that the trustee must have a purpose directed to the achievement of a purpose of the law of bankruptcy.

151 The applicants rely on *Frost v Sheahan* (2005) 220 ALR 733, decided after the 2002 amendments. In that case, Lander J said:

[46] The purpose of the objection procedure is to provide the trustee with a power by which he can induce the bankrupt to act in accordance with the bankrupt's obligations.

[47] The trustee should not use the power for the purpose of punishing the bankrupt for acts taken by the bankrupt which cannot be rectified. Rather, the power should be used for the purpose of persuading the bankrupt to discharge the bankrupt's duties under the Act.

[48] It is a power, however, which must be used sparingly and for the purpose of protecting the interests of creditors and in generally advancing the administration of the estate of the bankrupt.

[49] In a sense, it is a power of last resort when no other form of persuasion will assist to remind the bankrupt of the bankrupt's obligations.

152 The context in which Lander J made these statements must be considered. The application was for review of the trustee's decision to not withdraw the objection to discharge under the trustee's power in s 149J. There was no challenge to the trustee's decision to object to the bankrupt's discharge from bankruptcy. Lander J made the comments simply as part of a recitation of the existing case law, and not in the context of ruling upon any argument. His Honour had no occasion to consider the effect of the 2002 amendments upon that case law. The case does not assist the applicants.

153 The applicants submit that s 149B(2) provides insight into the manner in which s 149B(1) is to operate: that is, a trustee would need to have reasons directed to achieving the purpose of inducing the bankrupt to discharge a duty. Section 149B(2) provides an exception to the requirement of s 149B(1) that a trustee exercise a discretion as to whether to object. Where the circumstances set out in s 149B(2) exist, the trustee has no discretion; the trustee must lodge an objection. As s 149B(2) provides an exception where

particular circumstances exist, it does not indicate how the discretion under s 149B(1) is to be exercised in other circumstances. Section 149B(2) provides no indication that the only purpose which the discretion may be exercised under s 149B(1) is to induce the bankrupt to discharge a duty that the bankrupt has not discharged.

154 In addition, contrary to the applicants' submission, not all the special grounds relate to an obligation on the bankrupt which an extension of the bankruptcy period may induce the bankrupt to comply with. Section 149D(1)(ab) is a special ground in relation to a transfer of property that is void against a trustee under s 121. Such a transfer must necessarily have occurred prior to bankruptcy, as s 121(1) refers to a "transfer of property by person who later becomes a bankrupt". As the transfer has already occurred, lodging a notice of objection to extend the period of bankruptcy could not encourage the bankrupt not to make the transfer, as the transfer must have already occurred prior to bankruptcy. The existence of this special ground tends against the applicants' submission that the only permissible purpose of lodging an objection is to induce the bankrupt to comply with his or her obligations.

155 The applicants submit that the purpose of allowing the bankrupts to propose compositions with creditors is not a permissible or proper purpose. However, as long as the purpose is directed to the achievement of a lawful purpose of bankruptcy, it is a proper purpose. The purpose of allowing the bankrupts to propose compositions with the creditors obviously comes within that description.

156 Even assuming I am wrong in my construction of s 149B(1), and the only purpose of objecting can be to induce the bankrupt to discharge a duty, I have concluded that Whitton had a genuine belief that extending the bankruptcy would encourage the bankrupts to provide income details in accordance with their obligations under s 139U of the Bankruptcy Act. That was a purpose directed to inducing the bankrupts to discharge a duty which had not been discharged. That purpose was a substantial purpose.

157 In addition, the purpose of allowing the bankrupts to put proposals for compositions to their creditors and the purpose of encouraging the bankrupts to provide their income details are not mutually exclusive. As I have said, the bankrupts would need to provide Whitton with their income details for the purpose of preparing reports to the creditors. In this way, Spencer and Perovich were encouraged to comply with their obligations by the continuation of the period of bankruptcy.

REVIEW OF THE RESOLUTIONS OF CREDITORS APPOINTING WHITTON AS TRUSTEE IN PLACE OF THE FORMER TRUSTEES

158 The second aspect of the applicants' case is their challenge to the resolutions of the creditors on 5 November 2010 appointing Whitton as trustee of the bankrupt estates of Spencer and Perovich in place of the former trustees.

159 The applicants seek relief pursuant to s 30(1) of the Bankruptcy Act, which provides:

- (1) The Court:
 - (a) has full power to decide all questions, whether of law or of fact, in any case of bankruptcy or any matter under Part IX, X or XI coming within the cognizance of the Court; and
 - (b) may make such orders (including declaratory orders and orders granting injunctions or other equitable remedies) as the Court considers necessary for the purposes of carrying out or giving effect to this Act in any such case or matter.

160 The respondents deny that the applicants have standing to seek relief, but do not otherwise dispute that s 30(1) gives the Court power to determine the issue raised by the applicants.

161 The applicants submit that the creditors' resolutions were made for an improper purpose. The applicants' argument starts with their proposition that it is an improper exercise of the power under s 149B(1) for a trustee to object to discharge from bankruptcy so as to extend the bankruptcies in order to allow a composition to be put. Their argument continues that it must also be an improper purpose for creditors to replace the former trustees under s 181 in order to have the new trustee lodge an objection for that improper purpose.

162 There are four issues involved in the applicants' arguments. They are:

- (a) Whether creditors who supported the resolutions appointing Whitton in place of the former trustees did so for the purpose of obtaining a trustee who would object to discharge to allow Spencer and Perovich to make proposals for compositions.
- (b) Whether that purpose was an improper purpose on the proper construction of ss 149B and 181.
- (c) Whether the applicants have standing to apply for relief under s 30(1).

(d) Whether the Court should refuse relief in the exercise of its discretion.

What was the creditors' purpose in appointing Whitton as trustee in place of the former trustees?

163 I have already discussed some of the events leading to the meeting of creditors on 5 November 2010. It is necessary to highlight some of those events and to refer to others.

164 Prior to the creditors' meetings of 29 October 2010 and 5 November 2010, Perovich had lodged her proposal for a composition with the former trustees. The former trustees had required that Perovich pay \$37,250 for their costs and had also asked Perovich to provide substantial further information about the proposed composition so that they could prepare a report to the creditors. Perovich then withdrew her proposal.

165 At the request of a number of creditors, the former trustees convened a concurrent meeting of the creditors on 29 October 2010. In their report to creditors, the former trustees addressed Perovich's withdrawn proposal for a composition. The former trustees raised a number of questions and issues about the proposal. The former trustees also stated that they had formed the view that there would be no utility in lodging any objection to Spencer's and Perovich's discharge from bankruptcy.

166 As Spencer and Perovich were due to be automatically discharged from bankruptcy on 14 November 2010, the creditors of the bankrupt estates must have been aware on 5 November 2010 that unless the former trustees were replaced with another trustee, there would be no extension of the bankruptcy and no opportunity for Spencer and Perovich to put proposals for compositions prior to their automatic discharge from bankruptcy.

167 The applicants point to a number of communications between Spencer, Perovich and various creditors, or representatives of the creditors, lobbying for the removal of the former trustees so that proposals for compositions could be made.

168 From late September to early October 2010, Spencer and Perovich sent emails to creditors asking them to sign a pro-forma letter addressed to Sweeney requiring him to call a joint meeting of creditors. A typical example of the emails sent by Perovich is the following email to Ian Lanser sent on 30 September 2010:

I will send to you shortly a draft letter for a request of a change of trustee which we think we will need as a backstop measure to ensure that the asset does not fall into the wrong hands.

SV Partners have had 3 years in which to realise the assets of the estate and have done nothing to either preserve or enhance them.

The composition has been designed to return 100 cents in the dollar to creditors. Let me know what you think of it.

169 The reference to “the asset” must be to the shares in Kinsella Heights.

170 Another example is an email from Perovich to Howard Hilton, a trustee of the Hilton Group Superannuation Fund, on 6 October 2010 which stated:

Attached is a proposed letter requesting a meeting for a change of trustee. I have asked Delta Law to collate the requests from creditors so that we can show that we have 25% in value to call the meeting.

If you agree can you arrange to put this on your letterhead and sign, scan and email to Delta Law (email address is in this email) by tomorrow morning so we can ensure that Sweeney and ITSA receive the collated letters by Friday? The letter has been approved by Francis Douglas QC who is in charge of the Mango Hill litigation.

Please call me if you have any questions on this.

171 Perovich also lobbied creditors with more specific emails. For example, she sent an email dated 4 October 2010 to McLeod, the liquidator of Neovest, saying:

Following the issuing of a Deed of Composition from me, Mr Sweeney replied, see attached. He has asked that I pay \$37,000 for the preparation of a report and calling of a meeting to consider my composition. (is this a reasonable figure to ask for?)

...

Francis Douglas QC and Kevin Connor SC have been assisting us in the Mango Hill matters and they are concerned that come 13 November 2010 we will fall out of bankruptcy and the asset will fall into Sweeney’s hands to deal with it as he wishes. This is not a good thing for the creditors as Sweeney has done nothing to protect or enhance the asset unlike Mio Art and ourselves who have got the 1999 litigation to a point where we won the last appeal and Mango have not taken any further steps. Sydney counsel are keen to commence a strike-out application and further application to force Mango to mediate the Share Sale Agreement (which they have refused to do since July last year).

I do not believe that Sweeney will do anything to assist us in maximising the payment, quite contrary.

In addition he has no understanding of how the agreements work and has been unduly influenced by Minters. To suggest in the letter attached – that he will ask Minters how long the litigation will take to resolve shows how poorly his thinking is on these sort of matters.

The best option we see is changing the trustee so that we can then work with the new trustee to ensure that payment under the Share Sale Agreement is maximised.

...

Can you consider calling the meeting on behalf of Neovest and I am also marshaling other creditors to do the same thing.

...

172 Another example is that on 4 October 2010, Perovich emailed Comisso saying:

We have been busy making sure that the assets available to pay our creditors are protected. We have now made a formal request for a composition which will provide the best result for all concerned. SV Partners have not been very supportive and we are keen to make sure that they do not end up with the asset which they can then sell at a discount.

173 A further example is that on 6 October 2010, Perovich emailed Mike Cummin, stating:

1. A Deed of Composition has been proposed that will pay the creditors up to 100 cents in the dollar. This is from my half of the price received from the Share Sale Agreement.
2. The demand by Sweeney to pay \$37,250 for the preparation of a report on the proposal has made us reconsider how we handle this and we have instead decided to call upon the creditors to call a meeting to change the trustee which if he called upon by 25% of the creditors means he cannot charge for it.

...

5. A Composition will provide the best result but in the absence of payment to Sweeney the alternative is to change Trustee; Robert Whitton of William Buck in Sydney has consented to act, and then work through an orderly composition without the obstructing that Sweeney has engaged in to the detriment of the assets with the estate.

174 The applicants point to a circular to creditors from Spencer and Perovich dated 25 October 2010. It is not clear which creditors the circular was sent to. The circular stated, under the heading, "Why change the trustees?".

- The trustees demonstrated a tendency to obfuscate and delay our composition proposals, requiring unrealistic fees for a report, requesting materials and information already provided, claiming lack of creditor support for the necessary meeting and delaying when such

conduct might allow the assets to be retained by them post bankruptcy.

- We and key creditors have lost faith in their administration. We believe they ought to be removed so that creditors have the opportunity to fairly and efficiently consider compositions that will allow the assets to be realised to their full value.

175 On 8 October 2010, Delta Law, the solicitors acting for Spencer and Perovich, forwarded pro forma letters signed by 25 creditors requesting a joint meeting of creditors to Sweeney. Those creditors later voted in favour of the resolution appointing Whitton in place of the former trustees at the meeting on 5 November 2010.

176 In her correspondence to creditors, Perovich was highly critical of the former trustees. She stated that the trustees had done nothing in three years to either preserve or enhance the assets of the estates. She suggested that the trustees had done nothing to pursue the litigation against the applicants in the Supreme Court and that the former trustees were being unduly influenced by the solicitors acting for the applicants.

177 It may be noted that the applicants were also lobbying creditors to support the retention of the former trustees. For example, Mango Boulevard offered Greener Investments an indemnity for costs in order to secure Greener Investments' proxy to vote at the meeting on 5 November 2010.

178 At the meeting on 29 October 2010, Sweeney was questioned extensively, particularly by Conomos. The minutes record Sweeney accepted that the former trustees had said in the course of the litigation before Lander J there would not be a dividend from Spencer's and Perovich's estates. Sweeney later noted that this aspect of the minutes was incomplete and inaccurate because he had also said that the position was now different. There was discussion concerning whether Greener Investments should be allowed to vote and allegations made that the former trustees had a conflict of interest as a result of their previous appointment as administrators of Greener Investments.

179 At the meeting on 5 November 2010, Spencer and Perovich were asked whether they would be putting forward proposals for compositions following the meeting, but both gave non-committal answers. Whitton was also asked whether he had considered Perovich's withdrawn proposal for a composition. Whitton indicated that he had not formed any view as to a composition. Whitton indicated that the first decision he would have to make would have to be as to whether there were valid grounds to extend the bankruptcies. It

emerged at the meeting that Mango Boulevard had been conducting negotiations with the former trustees for the purchase of the shares in Kinsella Heights. Sweeney said that the proposal would, in his view, have brought an end to the litigation between the applicants and Spencer and Perovich. There was no statement made by any of the creditors at either meeting that the reason they intended to vote to replace the former trustees was because they expected Whitton to lodge a notice of objection to allow proposals for compositions to be made.

180 The former trustees applied to the Federal Magistrates Court on 1 November 2010 to resign as trustees. The applicants objected to their resignation.

181 The applicants contend that the purpose of the creditors who voted in favour of the resolution at the meeting on 5 November 2010 can be inferred from Perovich's communications with the creditors. The applicants do not contend that there was any agreement between the creditors and Spencer and Perovich. Nor do they contend that there was any agreement between Whitton and Spencer and Perovich. The applicants submit, however, that the evidence supports an inference that the purpose of the creditors who voted to appoint Whitton in place of the former trustees was to have Whitton object to a discharge of the bankruptcy in order to extend the bankruptcies and allow the bankrupts to put compositions to the creditors.

182 The respondents point out that the applicants did not adduce direct evidence from the majority of creditors as to their motivations for voting in favour of the resolutions. They submit that no inference is available that the creditors' purpose was that alleged by the applicants. They submit that it is at least equally probable that the majority of creditors voted to remove the former trustees because they had lost confidence in them.

183 The applicants are required to establish that the circumstances appearing from the evidence give rise to a reasonable and definite inference that the majority of creditors had the purpose they allege, not merely to conflicting inferences of equal degree of probability: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278 at [34].

184 In *In re The Mayor & c. of the City of Hawthorn; Ex parte Co-Operative Brick Co. Ltd* [1909] VLR 27 at 51, Cussen J said:

Each councillor may be actuated by many reasons, each having some different reasons from the others, and it seems to be almost, if not quite, impossible to penetrate into their minds. It must at least be necessary to show that the improper motive was the sole or dominant one, and that but for it a majority would have voted against adopting the by-law.

185 In *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37, Dixon J at 82 cited this passage from the judgment of Cussen J. The passage has relevance for this case.

186 The respondents rely on evidence concerning Perovich's communications with McLeod, as liquidator of Neovest. They also refer to evidence concerning statements made by Hilton, who was a trustee of Hilton Group Superannuation Fund.

187 Creditors to the value of \$38,377,671 voted in favour of the resolutions for appointment of Whitton in place of the former trustees. Creditors to the value of \$11,078,566 voted against the resolutions.

188 McLeod as liquidator of Neovest was admitted for voting purposes in the sum of \$16,775,350. The Hilton Group Superannuation fund was admitted for voting purposes in the sum of \$15,949,159. Both McLeod and Hilton voted in favour of the resolutions. The votes of either of them would have resulted in the resolution being passed.

189 Ian Walker of Minter Ellison, solicitors acting for the applicants, spoke to Hilton on 4 November 2010 and told him that Mango Boulevard was interested in knowing how he was proposing to vote at the creditors' meeting the next day. Walker deposed that:

Mr Hilton replied to the effect that he did not know why there was to be a change of trustee. He said to me that it was not clear what he wanted to do. He said [it] was hard to know what to do and everyone had competing interests. He said to me he had no reason to believe what Silvana Perovich was telling him and the last time the issue of change the of trustee came up, he told Silvana Perovich that he was not going to agree to a change.

190 Walker asked Hilton if it would help if he had a bit more background about what was going on and sent Hilton an affidavit that he had sworn in the Federal Magistrates Court proceedings. Later that evening, Walker spoke to Hilton again. Hilton said that he had read the affidavit, but was going to be talking to Douglas QC about the position and would let Walker know in the morning. Hilton and his co-trustee later voted in favour of the resolution.

191 This evidence shows that Hilton was not influenced by anything that Perovich had said to him. It supports an inference that he made an independent decision as to how to vote. The evidence does not support an inference that Hilton's purpose in voting for

replacement of the trustees was to have the new trustee lodge an objection to extend the bankruptcies in order to allow the bankrupts to propose compositions.

192 As to McLeod, the respondents submit that the most probable inference from the evidence is that he wanted the former trustees to be replaced because he lacked confidence in them as trustees and wanted a new trustee to be appointed who might work to produce a dividend to creditors.

193 The email from Perovich to McLeod on 4 October 2010 was highly critical of Sweeney. It asked McLeod to consider calling a meeting of creditors on behalf of Neovest.

194 The respondents also point out that McLeod was a party to the hearing before Lander J where it was found by his Honour that the former trustees had a potential conflict of interest with respect to their administration of Greener Investments. The former involvement of the former trustees with Greener Investments remained topical at the meeting on 29 October 2010. In the proceeding before Lander J, van der Velde had deposed that there was to be no dividend in the estates. While that view seems to have been qualified to some extent in the meeting of 29 October 2010 by Sweeney, there was nothing said as to how any dividend was to be produced, and it was far from clear that negotiations with the applicants would result in any more than the former trustees' fees being paid.

195 It is possible that McLeod did vote in favour of the resolution for the reasons alleged by the applicants. However, it is at least equally likely that he voted in favour of the resolution because he had lost confidence in the trustees. The applicants cannot demonstrate that McLeod voted as he did in order to have the new trustee object to the bankrupts' discharge so as to allow proposals for compositions to be made.

196 I cannot infer from Perovich's strong lobbying of the creditors that the purpose of any of them in voting in favour of the resolution was to install a new trustee who would object to the bankrupts' discharge so that a proposal for composition could be put. The question is not what Perovich's purpose in seeking replacement of the former trustees was. The question is as to the creditors' purpose. There is no necessary coincidence between the two. It is at least equally probable that the majority of creditors voted in favour of replacing the former trustees with Whitton simply because they had lost confidence in the former trustees.

197 The applicants seek to make something of the extensive involvement of Conomos in various capacities. For example, at various times Conomos acted for Spencer and Perovich, Whitton, and Mio Art. However, I cannot see that Conomos' involvement takes the applicants' case as to the purpose of the creditors anywhere.

198 I therefore find that the applicants have not proved that the majority of creditors voting in favour of the resolutions to appoint Whitton in place of the former trustees did so for the purpose of installing a new trustee who would object to the bankrupts' discharge in order to extend the bankruptcies so that proposals for compositions could be put.

Whether the purpose alleged by the applicants was an improper purpose.

199 The applicants rely on *Re Crawford (Deceased); Ex parte the Trustee of the Official Receiver and Autotermis Limited* (1943) 13 ABC 201 where Clyne J stated:

There is no doubt, as a general rule, that under s 153 of the Bankruptcy Act, 1924–1933, the removal of a trustee is within the province of the creditors – but there is also no doubt that in an appropriate case, the Court can make such an order as is sought in paragraph (a), but in the exercise of its power to do so, the Court ought not to interfere with a proposal or resolution of the creditors that the trustee be removed, unless good cause is shown for its interference.

200 Clyne J concluded at 205:

There is probably no reason why, when a trustee who is honestly and properly carrying out his duties, should not be removed from his office if the creditors so desire, but, when creditors make improper and unfounded allegations against a trustee to secure or justify his removal, and the conduct of these same creditors leads to the strongest suspicions that their reason for having the trustee removed is a desire to help an important shareholder of the company which is a creditor, the Court should interfere.

201 In *Dare v Doolan* [2004] FCA 461, Cooper J said:

[12] Prima facie, the Act empowers the creditors to remove a trustee in circumstances which appear to the creditors to justify such a removal. The power to remove is not preconditioned upon there being any misconduct on the part of the trustee. If, for example, relations between the trustee and the creditors have broken down for whatever reason, that will be sufficient. Where a trustee has lost the confidence of creditors and those creditors seek the removal of the trustee, he or she should not resist removal unless there are proper reasons to do so: *Adsett v Berlouis* (1992) 109 ALR 100 at 112.

[13] Ordinarily, the Court would not interfere with an exercise of the power under s 181 to remove a trustee unless a good cause is shown for its interference: *Re Crawford Ex parte The Trustee* (1943) 13 ABC 201 at 202; *Macks v*

Ardalich [1999] FCA 679 at [22] - [23].

202 The applicants submit that good cause is shown for the setting aside of the resolution of creditors where their purpose was to replace the former trustees with a trustee who would object to the discharge of the bankrupts from bankruptcy in order to extend the period of bankruptcy and allow the bankrupts to put compositions to the creditors.

203 The applicants submit that such a purpose is an improper purpose. The question of whether it is an improper purpose depends on whether it is an improper purpose for a trustee to object in order to extend the periods of bankruptcy so as to allow bankrupts to propose compositions with their creditors. I have already rejected that argument. This is an additional reason why the applicants' application for relief under s 30(1) cannot succeed.

STANDING

204 The applicants allege that they are each, within s 178(1), "a creditor" and "any other person...affected by an act, omission or decision of the trustee".

205 The applicants allege that Mango Boulevard is a creditor of the bankrupt estates of Spencer and Perovich because:

(a) On 15 June 2007, the Supreme Court ordered that Spencer and Perovich pay Mango Boulevard's costs fixed in the amount of \$9,880.90, and that debt is the subject of proofs of debt.

(b) On 21 November 2006 and 20 March 2007, the Supreme Court ordered that Spencer and Perovich pay Mango Boulevard's costs on the standard basis, and on 26 February 2007 and 3 April 2007 that they pay Mango Boulevard's costs on an indemnity basis. Those costs have not been assessed, but are the subject of proofs of debt for the amount of \$23,258.65.

(c) On 22 September 2006, the Supreme Court ordered that Spencer and Perovich pay Mango Boulevard's costs. Those costs have not yet been formally quantified and are not the subject of a proof of debt.

(d) Mango Boulevard has a claim against Spencer and Perovich arising from an undertaking as to damages which they gave to the Supreme Court on 2 June 2006, which is yet to be the subject of a proof of debt.

(e) Mango Boulevard has a claim against Spencer and Perovich for damages for breaches of the Shareholders Deed, the breach being that Spencer and Perovich became bankrupt, which claim is yet to be subject to a proof of debt.

206 The applicants allege that BMD Holdings is a creditor because on 7 December 2006 the Federal Court ordered that Spencer and Perovich pay BMD Holdings' costs. Those costs were taxed and allowed in the amount of \$47,075. That debt is the subject of a proof of debt submitted by BMD Holdings.

207 Spencer and Perovich deny the applicants are creditors. They allege that while the extent of the applicants' debts claimed to be proved in the bankruptcies totals \$80,214.55, those companies owe Perovich and Mio Art as trustee for the Spencer Family Trust amounts well in excess of \$1 million under the Share Sale Agreement. The question of whether any such amounts are owed is the subject of proceedings in the Supreme Court and a private arbitration. Spencer and Perovich assert that, pursuant to s 86(1) of the Bankruptcy Act, the applicants may only claim the amounts they are owed less deduction of the amounts that they owe the bankrupt estates. They argue that the applicants have no claims against the estates.

208 The applicants submit that there can be no question of any set-off arising in relation to Spencer. Spencer is personally liable for the costs orders. On the other hand, the claim against the applicants in the Supreme Court is asserted by Mio Art as trustees of the Spencer Family Trust.

209 Section 86 of the Bankruptcy Act provides:

- (1) Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person who has become a bankrupt and a person claiming to prove a debt in the bankruptcy:
 - (a) an account shall be taken of what is due from the one party to the other in respect of those mutual dealings;
 - (b) the sum due from the one party shall be set off against any sum due from the other party; and
 - (c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.

210 I accept the applicants' submission. The costs orders made against Spencer were made in his capacity as trustee of the Spencer Family Trust, but he is personally liable for those costs (although he has a right of indemnity against the Spencer Family Trust).

Spencer has been replaced as trustee of the Spencer Family Trust by Mio Art. Any order that may be made by the Supreme Court will be in favour of Mio Art, not Spencer. For s 86(1) to apply, the credits, the debts and the claims must be between the same persons: *Gye v McIntyre* (1991) 171 CLR 609 at 623. Therefore, no set-off is available.

211 The applicants argue that any claim by Perovich for monies owing under the Share Sale Agreement is not yet a liability. There has been no determination as to any amount due from the applicants to Perovich. I accept that it is not presently established that there is any “sum due” from the applicants to Perovich for the purposes of s 86(1).

212 The applicants are creditors of each of the estates of Spencer and Perovich for the purposes of s 178(1). As they are creditors, they also have standing for the purposes of their application under s 30(1).

213 I will briefly consider the applicants’ claim to have standing under s 178(1) on the basis that they are persons affected by the trustee’s decision. The substance of their argument is that but for the objection to discharge, they could have avoided once and for all the possibility of the shares in Kinsella Heights reverting to Perovich if her proposal for a composition succeeds, and could have avoided the possibility of having to pursue commercial negotiations with Perovich to resolve the proceedings, rather than with her trustee in bankruptcy.

214 In *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, the High Court considered whether the appellant was a “person affected” within the statute under consideration. Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ said:

16 In *Re McHattan and Collector of Customs (NSW)*, Brennan J stated that “[a]cross the pool of sundry interest, the ripples of affection may widely extend”. However, as Davies J pointed out in *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*, Brennan J “did not propose that any ripple of affection would be sufficient to support an interest”...The starting point, as indicated by several authorities in the Full Court of the Federal Court, is the construction of the Authority Act with regard to its subject, scope and purpose.

17 Transurban correctly submitted that the phrase in s 119(1) of the Authority Act “who is affected by a reviewable decision” has an ambulatory operation. What serves to identify a person as one affected by a reviewable decision will vary having regard to the nature of the reviewable decision itself.

215 The fact that s 178(1) gives a right to the bankrupt, a creditor or “any other person [who] is affected” by an act, omission or decision of the trustee indicates that there may be parties other than the bankrupt or a creditor who are sufficiently affected to have standing to seek review of the trustee’s decision.

216 The applicants’ argument is, in substance, that it is affected as a potential debtor of the bankrupts’ estates. The affection claimed is to the effect that it will be more difficult to negotiate a commercial resolution with Perovich than the trustee. I do not think that the ripples of affection extend so far as to give the applicants standing on the basis that they prefer to negotiate with the trustee, rather than Perovich.

217 Until this point I have considered the question of standing on the basis of the evidence led and the submissions put at the trial. However, on 22 October 2015 the first respondent applied to reopen his case. That application was supported by Spencer and Perovich.

218 Whitton wishes to lead evidence which is said to demonstrate that the applicants are not creditors. The evidence concerns events that have occurred since the trial.

219 Whitton deposes that he caused a creditor’s statutory demand to be served on BMD Holdings. It is not clear when the statutory demand was served, but it must have been after 22 May 2015. The statutory demand demanded an amount of \$602,728 said to payable to Perovich under the Share Sale Agreement, less certain set-offs. The set-offs totalled \$80,214.55. That amount consisted of \$9,880.90 in respect of the costs order made on 15 June 2007, \$47,075 in respect of the costs order made on 7 December 2006 and \$23,258.65 in respect of the costs arising from orders made on 21 November 2006 and 26 February, 20 March and 3 April 2007. Those amounts are the subject of proofs of debt. Those amounts were claimed jointly and severally in both bankrupt estates.

220 On 22 July 2015, solicitors acting for BMD Holdings wrote to Whitton concerning the creditor’s statutory demand. The letter is headed “Without prejudice save as to costs”, but the applicants made no objection to the letter being admitted into evidence for the purposes of the application for reopening. That letter indicates that BMD Holdings was prepared to make a payment into Court in return for Whitton withdrawing the statutory demand. BMD Holdings offered to pay \$428,879 less the set-offs of \$80,214.55, an amount of \$348,664.45, in return for Whitton agreeing to withdraw the demand.

221 The solicitor's letter notes that Mango Boulevard and BMD Holdings had received notices of assignment in relation to certain of Perovich's rights to receive certain amounts under the Share Sale Agreement. The letter notes that Whitton would be unable to provide any valid discharge in view of those notices of assignments. Accordingly, it was proposed that the amount of \$348,664.45 be paid into Court. The solicitor's letter also says that "[f]or the avoidance of doubt, our clients do not accept that such a payment into court would extinguish their claims in the bankrupts' estates."

222 In a further letter dated 10 August 2015, BMD Holdings' solicitors state:

BMD Holdings accepts that it is liable to pay \$348,664.45 of the amount demanded. However, in light of the various assignments entered into by Ms Perovich of certain of her rights to payment under the Share Sale Agreement, our client does not know whether to make payment to you or one or more of the assignees.

223 On 26 August 2015, BMD Holdings paid the \$348,664.45 into the trust account of the solicitors acting for Whitton.

224 The respondents submit that s 86(1) of the Bankruptcy Act operates such that there is no amount that may now be claimed in the bankruptcy by the applicants. They submit that, therefore, the applicants are not creditors and have no standing to bring this application.

225 The applicants oppose the application for reopening. They claim that they remain creditors of the bankrupt estates for a number of reasons.

226 Firstly, the applicants argue that they do not owe Perovich or her estate any amount under the Share Sale Agreement. They point to the notices of assignments they have received. They also note their solicitor's qualification that the applicants did not accept that the payment they proposed would extinguish their claims in the bankrupts' estates. They submit that the correspondence shows that the payment made into Whitton's solicitor's trust account was simply a commercial decision made in response to the creditor's statutory demand, rather than amounting to an admission of any kind.

227 Secondly, the applicants submit that they have another debt provable in the bankruptcy. On 3 April 2007, the Supreme Court ordered that unless Spencer and Perovich complied with certain orders by 4 pm on 27 April 2007, there would be an order that Spencer and Perovich pay Mango Boulevard's costs to be assessed on the standard basis. Those costs

have not yet been the subject of any proof of debt. The applicants' solicitors estimate that the amount of the costs will be at least \$16,000. The applicants assert that the costs order is a debt or liability to which the bankrupts were subject at the date of the bankruptcy within s 82(1) and is provable in the bankruptcies.

228 Thirdly, the applicants claim that the fact that Spencer and Perovich became bankrupt in August 2007 meant that they were in breach of a Shareholder's Deed between Spencer, Perovich, Mango Boulevard and Kinsella Heights. Any damages arising from that breach have not yet been quantified. They argue that such damages are a liability provable in the bankruptcies.

229 In *Ample Source International Ltd v Bonython Metals Group Pty Ltd (No 6)* (2011) 285 ALR 488, Robertson J succinctly summarised the principles to be applied by the Federal Court in considering an application for leave to reopen:

[355] Leave to reopen needs to be considered by reference to the Full Court decision in *Londish v Gulf Pacific Pty Ltd* (1993) 45 FCR 128 at 138–9; 117 ALR 361 at 372 (*Londish*). The threshold is lower than that which applies after the entry of judgment. If there was no deliberate decision not to call material, the primary consideration is embarrassment or prejudice to the other side: *Smith v New South Wales Bar Association (No 2)* (1992) 176 CLR 256 at 266–7; 108 ALR 55 at 62. The essential principle is that the court should do justice as between the parties. Within that concept, of course, must be the cogency or relevance of the material sought to be adduced on the application to reopen. There is reference in *Londish* to applications to amend and therefore the approach in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; 258 ALR 14; [2009] HCA 27 must now inform the principle.

[356] In my view, the approach taken in other courts, examples of which are *Reid v Brett* [2005] VSC 18 and *EB v CT (No 2)* [2008] QSC 306, relied on by Ample Source, is inconsistent with the principle in relation to reopening as articulated in *Londish*. I must follow the authority in this court and I apply *Londish*.

230 It is also necessary to take into account ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).

231 There is no question of any deliberate decision not to call the evidence that the first respondent now seeks to adduce. The evidence concerns events which occurred after judgment was reserved.

232 However, the first respondent has delayed in bringing this application. The applicants paid the \$348,864.45 on 26 August 2015. Whitton has not provided an adequate explanation for waiting nearly two months before applying to reopen his case.

233 The primary issues are prejudice to the applicants, how that prejudice can be ameliorated and the just resolution of the dispute.

234 If leave to reopen were granted, the first step would be for Whitton to further amend his defence. The applicants would have to be given an opportunity to further amend their statement of claim or to further amend their reply. The applicants would also have to be given the opportunity to call further evidence. There are substantial questions of law and fact involved in the determination of the argument that Whitton wishes to raise. The applicants have indicated that it is likely to be some months before there could be a further hearing.

235 Spencer and Perovich will be automatically discharged from bankruptcy on 14 November 2015. After that date, it will be too late for them to put their proposed compositions to the creditors. Although they support the first respondent's application for reopening, I understand them to oppose any delay in conclusion of the proceeding.

236 The findings I have made so far concerning the principal proceeding require that it must be dismissed. The proposed new evidence would not alter that outcome.

237 In these circumstances, it would not be in the interests of justice to allow Whitton to reopen his case.

DISCRETION

238 The respondents submit that even if I accept the applicants' submissions as to improper purpose, I should exercise the Court's discretion under ss 30(1) and 178(1) against granting the applicants any relief. They raise a number of factors in support of their submissions.

239 Having rejected the applicants' submissions, I have found that the exercise of considering the exercise of the discretion on the fictitious premise that I accepted the applicants' submissions is simply too artificial and difficult to complete. I do not propose to embark further on that exercise.

SUMMARY

240 I find that Whitton did not lodge objections to the discharge of Spencer and Perovich from bankruptcy for an improper purpose.

241 I find that the applicants have not proved that the creditors who voted in favour of the resolutions put at the meeting on 5 November 2010 did so for an improper purpose.

242 I decline to allow Whitton to reopen his case.

243 The application will be dismissed.

244 I will set aside Order 1 of the orders made by Logan J on 29 April 2011. I will also set aside Order 1 of the orders I made on 22 October 2015. I set aside those orders because there is no longer any basis for Whitton to be prevented from preparing for, calling and holding any meeting of creditors under s 73 of the Bankruptcy Act.

245 I will hear the parties as to costs.

I certify that the preceding two hundred and forty-five (245) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 2 November 2015