FEDERAL COURT OF AUSTRALIA

Mango Boulevard Pty Ltd v Whitton [2015] FCA 1295

Citation:	Mango Boulevard Pty Ltd v Whitton [2015] FCA 1295
Parties:	**MANGO BOULEVARD PTY LTD (ACN 101 544 601) and BMD HOLDINGS PTY LIMITED (ACN 101 093 349) v ROBERT WILLIAM WHITTON, RICHARD WILLIAM SPENCER and SILVANA PEROVICH**
File number:	VID 1183 of 2010
Judge:	**RANGIAH J**
Date of judgment:	24 November 2015
Catchwords:	**BANKRUPTCY AND INSOLVENCY** – application for abridgment of time – proposal for composition and trustee's report – trustee unable to meet prescribed time limit under reg 4.18 of the *Bankruptcy Regulations 1996* (Cth) – factors relevant to granting abridgement – whether adequate explanation for delay – where bankrupts delayed in paying surety to trustee and providing income details – whether trustee's report adequate – where report included recommendation – whether prejudice to the parties – where defects can be remedied
Legislation:	*Bankruptcy Act 1966* (Cth) ss 33(1)(c), 73, 74, 76B and 222 *Bankruptcy Regulations 1996* (Cth) regs 4.18 and 16.01
Cases cited:	*Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 cited *Labocus Precious Metals Pty Ltd v Thomas* [2007] FCA 1154 applied *Mango Boulevard Pty Ltd v Whitton* [2015] FCA 1169 cited *Re Bendel, Ex parte Bendel & Ors v Pattison* (1997) 80 FCR 123 distinguished
Date of hearing:	10 November 2015
Dates of Orders:	10 and 24 November 2015
Place:	Brisbane
Division:	GENERAL DIVISION
Category:	Catchwords

Number of paragraphs:	82
Counsel for the Applicants:	Mr AB Crowe QC with Mr DM Turner
Solicitor for the Applicants:	Minter Ellison
Counsel for the First Respondent:	Mr PP McQuade QC
Solicitor for the First Respondent:	James Conomos Lawyers
Counsel for the Second and Third Respondents:	Mr DD Keane
Solicitor for the Second and Third Respondents:	Delta Law

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 101 093 349) **Second Applicant**
AND:	**ROBERT WILLIAM WHITTON** **First Respondent**
	RICHARD WILLIAM SPENCER **Second Respondent**
	SILVANA PEROVICH **Third Respondent**

JUDGE: **RANGIAH J**
DATE OF ORDER: **10 NOVEMBER 2015**
WHERE MADE: **BRISBANE**

THE COURT ORDERS THAT:

1. The time provided for by regulation 4.18 of the *Bankruptcy Regulations 1996* (Cth) be abridged to two days in respect of each of the bankruptcy estates of the second and third respondents.

2. Any person or entity claiming to be a creditor of the bankruptcy estate of the second respondent or third respondent have liberty to apply within 28 days to set aside Order 1 of these orders.

3. The first respondent provide a copy of this order forthwith to the persons or entities identified as creditors in annexure JNC-2 to the affidavit of James Nicholas Conomos filed 9 November 2015.

4. The costs of the first respondent of and incidental to the application for directions and the abridgement of time be his costs in the bankruptcy estates of the second and third respondents.

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

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 101 093 349) **Second Applicant**
AND:	**ROBERT WILLIAM WHITTON** **First Respondent**
	RICHARD WILLIAM SPENCER **Second Respondent**
	SILVANA PEROVICH **Third Respondent**

JUDGE:	**RANGIAH J**
DATE OF ORDER:	**24 NOVEMBER 2015**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The trustee provide a copy of these reasons forthwith to the persons or entities identified as creditors in Annexure "JNC-2" to the affidavit of James Nicholas Conomos filed 9 November 2015.

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

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 101 093 349) **Second Applicant**
AND:	**ROBERT WILLIAM WHITTON** **First Respondent**
	RICHARD WILLIAM SPENCER **Second Respondent**
	SILVANA PEROVICH **Third Respondent**

JUDGE:	**RANGIAH J**
DATE:	**24 NOVEMBER 2015**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

1 The first respondent has applied for abridgment of the time prescribed under reg 4.18 of the *Bankruptcy Regulations 1996* (Cth) for the provision of proposals for compositions and a report to the creditors of two bankrupt estates.

2 The second respondent to the principal proceeding, Richard William Spencer, and the third respondent, Silvana Perovich, are bankrupts. The first respondent, Robert William Whitton ("the trustee"), is the trustee of their bankrupt estates. The first and second applicants claim to be creditors of the bankrupt estates.

3 On 2 November 2015, I dismissed the first and second applicants' application for review of decisions made by the trustee and review of resolutions passed by the bankrupts' creditors: *Mango Boulevard Pty Ltd v Whitton* [2015] FCA 1169 ("the principal proceeding"). The principal proceeding was, in substance, aimed at preventing the trustee from holding a meeting of the creditors pursuant to s 73 of the *Bankruptcy Act 1966* (Cth) to consider the bankrupts' proposals for compositions. After my judgment, there was no

impediment to the trustee holding such a meeting, but any resolutions accepting the proposals had to be passed by 14 November 2015 to be effective.

4 The trustee called a meeting of creditors for 13 November 2015. Regulation 4.18 of the Bankruptcy Regulations requires a bankrupt's proposal for a composition and the trustee's report on the proposal to be provided to the creditors at least seven days before the meeting. On 5 November 2015, the trustee applied for abridgment of that time.

5 I heard the trustee's application on 10 November 2015. The parties submitted that it was desirable that I decide the application on that day. I decided to allow the application and I made orders that the time prescribed under reg 4.18 be abridged to two days and ancillary orders. I indicated that I would provide my reasons later. These are my reasons.

BACKGROUND

6 There has been a very substantial history of litigation between the applicants and the bankrupts over a long period of time. The litigation principally concerns shares in a company called Kinsella Heights Developments Pty Ltd ("Kinsella Heights"). What underlies the litigation is that Kinsella Heights owns a valuable piece of land at Mango Hill in Queensland. If Perovich's proposal for a composition is approved by the creditors and her bankruptcy is annulled, she will have control of 25 shares in Kinsella Heights and the litigation concerning those shares. On the other hand, if she is discharged from bankruptcy, the shares will remain vested in the trustee and this would allow the applicants to negotiate with the trustee to resolve the litigation. In my previous judgment, I indicated that the principal proceeding was a piece in the strategic battle between the applicants and the bankrupts for the land owned by Kinsella Heights. The submissions of the applicants and the bankrupts upon the present application may be seen through the same lens.

7 Sequestration orders were made against the estates of Perovich and Spencer on 20 August 2007 and 24 August 2007 respectively. The bankrupts were due to be automatically discharged from bankruptcy on 14 November 2010, but the trustee lodged notices of objection to their discharge with the Official Receiver. As a result of the objections, the periods of the bankruptcies were extended to 14 November 2015.

8 On 11 February 2011, the bankrupts lodged proposals for compositions with the trustee. The trustee then sought directions from the Court concerning the proposals. On 29 April 2011, Logan J directed the trustee not to hold a meeting of creditors pending the determination of the principal proceeding. The trial of the principal proceeding was completed on 12 November 2014 and judgment reserved.

9 On 9 October 2015, the bankrupts delivered new proposals for compositions to the trustee. On 19 October 2015, the bankrupts applied for a variation of the order made by Logan J. I made the following order on 22 October 2015:

> Upon the second and third respondents pursuant to s 73A of the *Bankruptcy Act 1966* (Cth) paying to the first respondent, the sum of $55,000 by way of surety within seven (7) days of the date hereof and the first respondent being satisfied pursuant to s 73(2B) that the first and second respondents' proposals for compositions under s 73 dated 9 October 2015 and exhibited to the affidavits of the second and third respondents filed on 16 October 2015 (***the Proposals***) make adequate provision for payment of accrued fees,
>
> It is directed that the first respondent, in his present capacity as trustee of the bankrupt estates of each of the second and third respondents, prepare for, call and hold a meeting of their respective creditors under s 73 of the *Bankruptcy Act 1966* (Cth) to consider the Proposals, such meetings not to be called or held before the delivery of judgment in the principal proceeding.

10 Despite seeking the order, the bankrupts failed to pay the $55,000 by the date required under the order, 30 October 2015.

11 On Thursday, 5 November 2015, Spencer and Perovich paid to the trustee $35,000 of the $55,000. On the same day, the trustee sought further directions concerning the holding of a meeting of creditors and also sought an abridgment of the time prescribed under reg 4.18. On Friday, 6 November 2015, I ordered that:

> Provided that by 1.00 pm on 6 November 2015 the second and third respondents pay in cleared funds to the first respondent the sum of $55,000 the First Respondent, in his capacity as trustee of the bankrupt estates of each of the second and third respondents, is directed to call a meeting of their respective creditors under s 73 of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) for the purpose of considering proposals for compositions.

12 I adjourned the trustee's application for the abridgement of time to Tuesday, 10 November 2015 for hearing.

13 The bankrupts paid the remaining $20,000 by 1 pm on 6 November 2015. The trustee decided to call a concurrent meeting of the creditors for Friday, 13 November 2015.

14 There are 129 persons or entities who claim to be creditors of the estates of Spencer and Perovich. On 6 November 2015, the trustee forwarded the bankrupts' proposals and his report ("the material") and a notice of meeting by email to the 63 creditors whose email addresses he had. On the same day, he posted the material and the notices of meeting by express post to each of the 129 creditors. The evidence is that the letters posted would have reached the creditors on Monday, 9 November 2015.

THE STATUTORY PROVISIONS

15 The provisions of the Bankruptcy Act dealing with compositions are set out in Div 6 of Pt IV. 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.
>
> (2AA) The report must name each creditor who was identified as a related entity of the bankrupt in the bankrupt's statement of affairs.
>
> (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.

(3) The bankrupt may, at the meeting, amend the terms of his or her proposal, but not in a way that reduces any provision for payment to the trustee of fees referred to in subsection (2B).

(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.

16 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 therefore necessary for a bankrupt to propose the composition and have a special resolution passed accepting the proposal

before his or her discharge from bankruptcy in order for the consequences set out in ss 74(5) and (6) to ensue.

17 Regulation 4.18 of the Bankruptcy Regulations provides:

> **4.18 Proposal and report for a composition or arrangement**
>
> Where a trustee is required, under subsection 73(2) of the Act, to send a copy of a proposal and a report to creditors before a meeting, the trustee must send those documents to each creditor so that they arrive, or should in due course of post arrive, at least 7 days before the meeting.

18 Section 33(1)(c) of the Bankruptcy Act provides:

> **33 Adjournment, amendment of process and extension and abridgment of times**
>
> (1) The Court may:
>
> …
>
> (c) extend before its expiration or, if this Act does not expressly provide to the contrary, after its expiration, any time limited by this Act, or any time fixed by the Court or the Registrar under this Act … for doing an act or thing or abridge any such time.

CONSIDERATION

19 It is common ground that the time provided for in reg 4.18 may be abridged pursuant to s 33(1)(c) of the Bankruptcy Act. There are no authorities which have directly considered abridgment of time under s 33(1)(c), but it is common ground that the factors relevant to an extension of time set out in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 are also relevant to an abridgment of time. The relevant factors include:

(a) that the statutory time limit is not lightly to be ignored;

(b) whether there are acceptable reasons for the delay and the length of the delay;

(c) the merits of the substantive matter – in this case the proposals and the trustee's report to the creditors;

(d) any prejudice to affected parties.

The statutory time limit is not lightly to be ignored

20 Regulation 4.18 of the Bankruptcy Regulations requires a trustee to send a copy of the proposal and the trustee's report to creditors so that they arrive, or should in the due course of post arrive, at least seven days before the meeting.

21 Regulation 16.01(1) allows documents required to be sent under the Bankruptcy Act or Bankruptcy Regulations to be sent by post or email. Documents sent by email are taken, in the absence of proof to the contrary, to have been served when the document is transmitted: reg 16.01(2)(b). Accordingly, in respect of 63 of the creditors, the material is taken to have arrived six days before the meeting.

22 Documents sent by post are taken to have been received when the document would, in the due course of post, be delivered to the person's address: reg 16.01(2)(a). In respect of the remaining 66 creditors, the evidence is that the material would be delivered on Monday, 9 November 2015, three days before the meeting.

23 Regulation 4.18 is cast in imperative terms. The minimum period of seven days is intended to ensure that creditors have a fair opportunity to assess a proposal, with the assistance of the trustee's report, and to decide whether to support it, reject it or do nothing in relation to it. The minimum period is designed to allow creditors adequate time to review, consider and decide upon the proposal and to decide whether to participate in the meeting, by attendance, proxy or power of attorney.

24 In the exercise of the discretion to abridge time, considerable weight should be given to the fact that the seven day period is prescribed as the minimum. Substantial reasons must be shown for abridging that period.

Explanation for the delay

25 On about 9 October 2015, Spencer and Perovich each provided the trustee with new proposals for compositions. The trustee responded to the bankrupts by letter dated 12 October 2015. The letter stated that the trustee would not commence the steps necessary to call a meeting under s 73 until they had paid him $33,000 in respect of his estimated costs of arranging and holding a meeting. The letter also requested that the bankrupts arrange for the trustee's legal costs associated with the proposals to be paid by a third party, or that he be indemnified in respect of those costs to his satisfaction.

26 The trustee's letter also pointed out that the results of an income assessment over the period of bankruptcy would be a vital component of his recommendation to the creditors. It said that if he did not have sufficient material to conduct the income assessments, there was no obligation for him to call a meeting. The letter also noted that under the proposal, the funding was to be provided by private sources and requested information concerning that funding.

27 The trustee's letter also noted that in order for the meeting to be held prior to the discharge of the bankrupts from their bankruptcies, he would be required to issue the relevant reports to the creditors by 4 November 2015 at the latest. It also said that he would require 15 business days to properly assess the compositions, make recommendations and prepare the report to creditors.

28 On 22 October 2015, I made the order to the effect that upon the bankrupts paying $55,000, the trustee call and hold a meeting of creditors, such meeting not to be called or held before the delivery of judgment in the principal proceeding.

29 The bankrupts did not pay Whitton any part of the amount of $55,000 until 5 November 2015, when they paid $35,000. They paid the remaining $20,000 on 6 November 2015.

30 On 27 October 2015, Perovich provided a completed Income Questionnaire to the trustee. Spencer did likewise on 1 November 2015. On 5 November 2015, the trustee wrote to the bankrupts' solicitors noting that the Income Questionnaires covered 8 years and that substantial research would be needed to confirm exactly what income, if any, may be assessable. The letter said that as there was no way this could be done in the available time, their proposals should be amended to add such income contributions as may be assessed to ensure that creditors were not adversely impacted. On 5 November 2015, the bankrupts amended their proposals accordingly. The proposals were also amended to significantly change the timing for payments to be made by the bankrupts.

31 The bankrupts had not supplied the information that the trustee requested on 12 October 2015 concerning the source of the funding of the compositions by the time the trustee's report was sent to the creditors. In an email of 9 November 2015 to the trustee, the bankrupts' solicitor said, concerning the funding, that he believed that the bankrupts could

address all issues raised and would do so progressively not later than 10 am on 12 November 2015.

32 The applicants submit that the bankrupts delayed in providing the $55,000, delayed in providing their income details and delayed in providing information about their source of funding. The applicants submit that these delays are unexplained or not adequately explained and should result in the dismissal of the application for abridgment of time.

33 One of the applicants' principal criticisms is that the bankrupts had agreed on 22 October 2015 to provide the $55,000 by 30 October 2015, but they did not do so. The applicants submit that the bankrupts have known since at least the trustee's letter of 12 October 2015 that they needed to find a substantial amount of money if a meeting of creditors was to be called.

34 On 16 October 2015, Edmund Galea, a director of Award Litigation Funding ("ALF"), deposed that ALF had agreed to fund the bankrupts' compositions. As it turns out, ALF sourced the funding from an unidentified person or entity based overseas.

35 The bankrupts gave an explanation of the delay in providing the $55,000 through the evidence of their solicitor, Quintin Rozario of Delta Law. He explained that the bankrupts have no personal capacity to arrange for the funding of the compositions, and are obliged to rely on third parties for funding. Mr Galea was informed of the order of 22 October 2015 on the day the order was made. There were unexpected delays associated with provision of the funding by ALF. In particular, there were delays due to the Foreign Investment Review Board taking an interest in the underlying financial transactions, an interest taken by the Australian Taxation Office and protocols engaged by an intermediate fiduciary entity supervising the transactions. The nature of and reasons for the delay in the provision of funding by ALF are not otherwise explained.

36 I find that ALF had agreed to fund the bankrupts' compositions, that the bankrupts notified ALF of the order of 22 October 2015 on the day it was made and that ALF experienced unexpected delays in providing the funding. I consider that the delays were not the fault of the bankrupts. It is true that the bankrupts would have been wiser to arrange for the funds to be made available earlier. However, the delay was unexpected and it is easy to be wise in hindsight. While the bankrupts' delay in providing the $55,000 resulted in the

proposals and the trustee's report not being emailed or posted to the creditors until 6 November 2015, the bankrupts have provided an acceptable explanation for their delay.

37 The bankrupts also argue that any delay providing funding between 22 October 2015 and 6 November 2015 was a small part of the overall delay in the holding of a creditors' meeting, which they attribute to the applicants. In particular, the bankrupts point to the order which the applicants obtained on 29 April 2011 preventing the trustee from holding a meeting of creditors pending the determination of the principal proceeding.

38 The bankrupts blame the applicants for the subsequent delay in prosecuting the application, such that the trial did not commence until September 2014. However, my impression at the trial was that there was delay on all sides.

39 There is force in the bankrupts' submission that the meeting of creditors was likely to have proceeded in 2011 if not for the litigation commenced by the applicants. The applicants were unsuccessful in that litigation. Any delay on the part of the bankrupts in providing the $55,000 to the trustee has been short in comparison to the contribution of the principal proceeding to the overall delay in the holding of a creditors' meeting.

40 Spencer and Perovich have not provided any explanation for their failure to provide the income details required under s 139U of the Bankruptcy Act over the eight years of their bankruptcies until 1 November 2015 and 27 October 2015 respectively. The proposals were amended on 5 November 2015 at the trustee's suggestion to add such income contributions as may be assessed. The bankrupts' delay in providing their income details is one of the reasons for the necessity for an abridgment of time. Such delay is a factor that weighs significantly against granting of the abridgment.

41 The delay of the bankrupts in providing details of their funding source did not delay the provision of the material to the creditors. However, delay in providing that information is relevant to the question of prejudice to creditors.

Merit of the substantive matter

42 The applicants submit that the Court should take into account the lack of merit in the proposals of composition, the inadequacy of the trustee's report and the lack of utility in allowing the meeting to proceed.

43 As to the merit of the proposals, the applicants note that the proposals have changed substantially over time. In the proposals made by Ms Perovich in September 2010 and February 2011, the whole of the proceeds of the award in an arbitration relating to the shares in Kinsella Heights were to be paid to the composition trustee. In Perovich's proposal of 9 October 2015, 25% of the proceeds of the arbitration were to be paid to the trustee, in addition to the payment of $1 million upon "Court approval of this proposed Composition being put to Creditors" and a further $4 million upon the creditors' approval of the composition. Spencer's proposal was for payments to the trustee of $100,000 and $200,000 on the same dates respectively.

44 On 5 November 2015, the proposals were amended following the trustee notifying the bankrupts' solicitor on 5 November 2015 that the initial payments due under the proposals of 9 October 2015 had not been made. Perovich's amended proposal provides for payment of $1 million within seven days of creditor approval of the composition and $4 million within 14 days of the delivery of the award in the arbitration. Spencer's amended proposal sets out the same timing in respect of his payments of $100,000 and $200,000.

45 The applicants submit that the amended proposals represent a significant deterioration of the benefits to the creditors. They submit that the bankrupts have given no explanation for why they did not make good on their intention conveyed by the proposals of 9 October 2015 to make the initial payments, and why the timing for the initial composition payments has changed so radically. They also submit that the proposals are uninformative as to what is to happen to the remaining 75% component of any money payable to Perovich and what is to happen to the shares themselves in Kinsella Heights.

46 The difficulty with the applicants' submission is that it asks the Court to decide that there is such a lack of merit in the bankrupts' proposals that the Court should prevent the creditors from having the opportunity to consider them. The applicants also ask the Court to make a comparison between the earlier proposals and the more recent ones and conclude that the earlier ones were significantly more advantageous for the creditors. The evidence to allow the Court to assess the merit of the proposals or to allow such a comparison to be made is simply not available.

47 If there is no or little merit in the proposals, then the creditors will have the opportunity to reject them at the creditors' meeting. The questions raised by the applicants as

to changes to the amounts payable by the bankrupts under the proposals and the timing of payments are matters that the creditors will have an opportunity to take up at the meeting.

48 I do not accept that the alleged lack of merit of the proposals is a matter that weighs against an abridgment of time.

49 The applicants next submit the trustee's report to the creditors of 6 November 2015 does not comply with the requirements of ss 73(2) and (2A) of the Bankruptcy Act, or, alternatively, is so deficient as to be substantially worthless to creditors. Section 73 requires the trustee to send to each creditor before the meeting a copy of the proposal accompanied by "a report on it". Section 73(2A) provides that the report must indicate "whether the proposal would benefit the bankrupt's creditors generally".

50 The trustee's letter of 12 October 2015 stated that he would need 15 business days to properly assess the composition proposals. It appears that he has had substantially less time than that to do so.

51 The trustee's report to creditors dated 6 November 2015 states:

> I do not believe that the Composition proposals would benefit the bankrupts' creditors generally and therefore recommend that creditors do not accept the bankrupts' proposals for a Composition.

52 The trustee's reasons for recommending against compositions are principally that he has not had sufficient time to address matters such as the status of the various pieces of litigation involving the bankrupts, the likely award under the arbitration and the bankrupts' asset position and value. The trustee stated that he had not had sufficient time to compare the quantum of any returns available for creditors under the composition proposals to the quantum of any returns under bankruptcy. He had not had sufficient time to verify whether ALF had the capacity to fund the proposed contributions.

53 The trustee's report notes that if Perovich's proposal is rejected by creditors and a sum greater than $4 million is recovered by the trustee as a result of the arbitration, the creditors would receive the whole sum. The trustee also refers to matters raised by the first applicant in a letter dated 3 November 2015 and notes that he has not had the opportunity to investigate those matters.

54 In *Re Bendel, Ex parte Bendel & Ors v Pattison* (1997) 80 FCR 123 at 132, Heerey J said:

> A report by the trustee "on" the proposal should, or at the very least could, include the trustee's views as to the merits of the proposal, including its benefits for creditors generally in comparison with a continuation of the bankruptcy administration.

55 The trustee has been unable to make a comparison of the type described by Heerey J, but, in my opinion, his Honour did not suggest that a report in which the trustee was unable to make a comparison between the benefits of the composition and a continuation of the bankruptcy administration would not comply with ss 73(2) or (2A). His Honour indicated only what the trustee's report "should" or "could" include.

56 The trustee's report does comply with ss 73(2) and (2A). Although the trustee was very limited in his ability to comment upon the proposals and compare them to the likely returns under bankruptcy, the report is a report "on" the proposal and meets the requirements of s 73(2). The report does "indicate whether the proposal would benefit the bankrupts' creditors generally" as is required by s 73(2A). The trustee's report, although not particularly informative, is nevertheless a report that complies with the requirements of ss 73(2) and (2A).

57 The applicants submit that the trustee's report fails to comply with his obligation under s 73(2AA) to provide details of the bankrupts' related entities. While that is so, the trustee has indicated that the deficiency will be remedied prior to the creditors' meeting. It is also relevant to note that the former trustees of the bankrupts' estates previously notified the creditors as to the related interest entities of the bankrupts as disclosed in their statements of affairs.

58 Section 73 contemplates an orderly process involving the provision of a single comprehensive report to creditors at least seven days prior to the meeting. It is undesirable to have relevant information provided in an ambulatory way within the seven days leading up to the meeting. However, it is to be expected that this will sometimes be unavoidable as creditors raise queries and new or further information comes to hand or becomes relevant. Section 73(3) contemplates that a proposal may change and it is to be expected that further information relevant to a new proposal may be given. The fact that the process will not be as orderly as desirable should be taken into account, but does not require that an abridgment of time be refused.

59 The procedural defect in the trustee's failure to comply with s 73(2AA) does not necessarily mean that any resolutions carried at the meeting, will be invalid: see ss 76B, 222(3), *Labocus Precious Metals Pty Ltd v Thomas* [2007] FCA 1154 at [60]. If the defect causes any prejudice to any of the creditors, they will have the opportunity to apply to set aside an order abridging time, as I will discuss later.

60 As to the applicant's submission that the trustee's report is defective because of the lack of information it presents, it is true that it is not particularly informative. However, the report is still of assistance to creditors. The trustee explicitly indicates that he is of the opinion that the proposal would not benefit the creditors generally and recommends that the proposals are not accepted. The report highlights the areas of uncertainty for the creditors if they were to accept the proposals.

61 The applicants make a number of other criticisms of the trustee's report. The applicants complain that the report does not explain why only 25% of the proceeds of the award are being made available to the creditors rather than the entire award. The applicants complain that there is no explanation in the report of the fact that the new composition proposal radically changes the time for payment of the initial instalments. However, the proposal is what it is, and if the bankrupts are unable to explain their proposals to the satisfaction of the creditors, no doubt the creditors will take that into account.

62 The applicants submit that it is almost inevitable that if the proposals for the composition are accepted, the resolutions will be challenged and there is a very real likelihood that they will be set aside. The applicants submit that to allow the requested abridgment will only result in further litigation. The submission seems to be that the Court should attempt to avoid the applicants bringing further litigation by preventing the bankrupts from being able to put their proposals to the creditors. This is not a consideration that I would give any weight to. The application for abridgment must be assessed on its merits and in a way that is just to all parties. The merits and the justice of the case do not support refusing the abridgment on the basis that the applicants threaten future litigation.

63 Further, I do not accept that allowing the meeting to proceed will almost inevitably result in further litigation or that any such litigation is likely to succeed. The outcome of the meeting is uncertain. The basis on which future litigation may be brought is uncertain. If resolutions accepting the proposals are carried, then any litigation brought by the

applicants or other creditors may or may not succeed. The mere chance that such litigation may, if brought, succeed does not weigh in favour of refusing an abridgment of time.

Prejudice to affected parties

64 The parties who may be affected by an abridgment of time are the bankrupts and the creditors, including the applicants.

65 If the time for the provision of the material is not abridged, the bankrupts would lose the opportunity to have their proposals for compositions considered by the creditors and the chance to have their bankruptcies annulled under s 74(5). The principal application was bitterly fought. A significant issue underlying that litigation was that the applicants sought to prevent the trustee from calling a meeting of creditors to consider the bankrupts' proposals for composition. The delay in the holding of a meeting was substantially due to the litigation. The bankrupts finally succeeded. It would be a hollow victory if they could not have their proposals for compositions considered by the creditors. I accept that there would be considerable prejudice to the bankrupts if the time for the delivery of material were not abridged.

66 The question of whether there is prejudice to the creditors is important. I accept that there is likely to be some form of prejudice to many of the creditors if the abridgment of time is granted. While 63 of the creditors were served six days before the meeting, the remaining 66 will only have received the relevant material three days before the meeting. The creditors in the latter category, in particular, have a very limited time to consider, assess and decide upon the proposals and decide whether and how to participate in the meeting. Their consideration and assessment of the proposals is made more difficult by the lack of information that the trustee is able to provide.

67 However, the short time for consideration and the lack of information is likely to be a greater problem for the bankrupts than the creditors. The trustee has recommended against acceptance of the proposals. If creditors are concerned that they have had insufficient time and information to evaluate the proposals, it seems unlikely that they would be prepared to accept the proposals. Those creditors who are willing to accept the proposals are likely to feel that they have had sufficient time and information to be able to do so.

68 There are some measures which the trustee has taken to attempt to ameliorate prejudice to the creditors. One measure was to hold the meeting at 2.30 pm. That effectively

gains the creditors half a working day. Another measure is to make facilities available for creditors to attend the meeting by telephone. However, these are minor matters in the scheme of things.

69 It is relevant that the creditors are not unfamiliar with the history of the dealings and proceedings between the applicants and the bankrupts and the history of the administration of the estates. Perovich's original proposal for a composition was the subject of a report provided by the former trustees to the creditors on 15 October 2010. While it is true that the terms of the proposal have changed since then, many of the matters discussed in that report remain relevant. In addition, the current trustee issued reports to creditors on 23 December 2010, 21 February 2011 and 3 December 2013.

70 It is also relevant to consider whether the creditors may be prejudiced if the Court were to deprive them of the opportunity to consider the proposals for compositions.

71 In early 2011, creditors to the value of approximately $28 million identified to the trustee that they would like the opportunity to consider the proposals for composition that were then made. Although the proposals have changed, it is at least likely that many of the same creditors would wish to have the opportunity to consider the present proposals.

72 The judgment of Allsop J (as the Chief Justice was then) in *Labocus Precious Metals Pty Ltd v Thomas* is instructive and it is worthwhile setting out the relevant passages at some length. His Honour said:

> 54 Parliament has set out in ss 73 and 74 and Division 6 of Part IV a regime for the annulment of bankruptcy by the action of creditors. Creditors do not act judicially or quasi-judicially in this process. The procedure is placed in the Act for the efficient and timely disposal of matters without the interference of the Court. This is not preventing the bankrupt status being removed. It is a non-curial procedure for the removal of that status. One would look at the provisions accordingly, requiring a businesslike approach by the trustee informing creditors of relevant information, leaving, as far as possible, the decision to be made by practical people of business. The Court should not take any narrow or pedantic view of the structure of the Act for compliance. The procedure is to be followed against the background of the need to inform creditors of relevant matters and to allow creditors to make up their own minds as to what they wish to do.
>
> 55 It goes without saying that the procedures required should be viewed from the perspective of the interests of all creditors. In a given case, which is not this one, a Court might look very carefully at any procedure leading to a composition dominated by creditors related to the bankrupt or reflecting a lack of commercial morality or sharp practice. Parliament, however, has chosen to provide in s 74(5) for the annulment and thus for the consequences

that flow therefrom: *Oates v Commissioner of Taxation* (1990) 27 FCR 289, Re Coyle (1993) 42 FCR 72, *Theissbacher v MacGregor Garrick & Co* [1993] 2 Qd R 223, *Pascoe; in the matter of Hudson* [2005] FCA 1421, *Worrall v Westpac Banking Corporation* (1995) 51 FCR 304 and *Union Club v Battenberg* (2006) 66 NSWLR 1.

56 Relevant also, in addition to the interests of the parties, is the interest of the public, as I have said, in a discharge context: see in particular *Re Barton* 43 FLR 245. The important changes, retrospectively, to the status of the former bankrupt brought about by annulment and the operation of s 74(5), with the consequential permission of the erstwhile bankrupt to move about the community with full status, also inform the need to construe the provisions with an eye to substance over formality and not subvert the intended practical freedom sought to be given to the bankrupt by procedural issues not affecting in any given case the substance of the legitimacy of the expression of the creditors' views.

57 These considerations go not only to the construction and interpretation of the *Bankruptcy Act*, but also to assess the consequences of any breach of that which the statute provides for: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355. When a statute provides for compliance with procedures laid down therein, the consequences of an absence of such compliance upon acts performed pursuant thereto must be assessed. Those procedures, if breached in some aspect, must be examined in their context in order that the Court can understand what Parliament intended to be the consequences of such breach.

58 The question whether information put forward by the bankrupts is sufficient in detail and underlying commercial substance to amount to a proposal will generally be a judgmental decision for the trustee. It may arise at the point of refusal by the trustee to convene a meeting on the basis that there is insufficient reliable material to allow her or him to give an opinion for the purposes of s 73(2A). It may arise at the point of someone seeking to restrain a meeting on the basis that what is being put is not a proposal. In those cases, a substantial question that will arise will be whether there is a proposal of sufficient clarity and reality to permit a judgment of the trustee under s 73(2A).

59 Here, the trustee took the view that there was a proposal. An opinion purporting to be under s 73(2A) was given. Voting took place. The issues are whether there was a proposal and whether the trustee gave an opinion for the purposes of s 73(2A) and if not, whether that made the resolutions, the meeting, the composition and the annulments nullities.

60 In my view, the statute should not be construed in a way which leads to the automatic ineffectiveness of acts taken under it when there has been some failure of procedure. The reasons for my saying that are as follows. First, the trustee, as here, is an officer of the Court and under the control of the Court. Her or his judgment about the adequacy of the proposal and whether it should be put to creditors can be assessed on that basis. Secondly, review of the trustee's conduct is available under ss 178, 179 and 30. Thirdly, a composition under s 73 can be set aside or terminated under ss 222, 222A, 222B, 222C and 222D: see in particular s 76B. For instance, the Court may set aside a composition if its terms are unreasonable or not calculated to benefit the creditors generally: s 222(1)(d), or for any other reason, s

> 222(1)(e). See also s 222C(1)(f) and (g). A further sequestration order can be made: ss 222(10) and 222C(5).
>
> 61 Given the pervasive control before and after and in connection with a process under the control of an officer of the Court skilled in the kind of business judgments involved, and the participation of self-interested creditors, and given the clear intention of Parliament to remove unnecessary Court interference, I do not think an intention of Parliament can be discerned to make a nullity of all consequential acts if some part of the procedure in s 73 has not been complied with.

73 As these passages indicate, the procedure under ss 73 and 74 is largely designed to allow the creditors to make up their own minds as to what they wish to do without the interference of the Court. The creditors should not lightly be deprived of the opportunity to make their own decisions upon the proposals. While the provision of material has not occurred in accordance with reg 4.18 and there is likely to be prejudice to at least some of the creditors, the creditors are capable of making their own decisions based on what material they have. Among the decisions open to them is rejection of the proposals on the basis that they have not had enough time or information to properly consider them.

74 It is also relevant that it is the trustee who seeks the abridgment of time. The trustee has evidently decided that the bankrupts' proposals were proposals for the purposes of s 73(1). The trustee was prepared to give an opinion under s 73(2A). The trustee has made submissions in support of his application and evidently considers that the proposals can properly be considered by the creditors within the constraints of the time and information available.

75 Any prejudice to creditors can be limited by allowing them liberty to apply to set aside the orders abridging the time prescribed under reg 4.18. None of the parties submitted that it was not open to make an order giving liberty to the creditors to apply to set aside such an order. The applicants did make a faint submission that it would be too late to undo an annulment of the bankruptcy under s 74(5) if a composition is accepted by the creditors, but the submission was not developed. That submission seems inconsistent with the applicants' earlier submission that it is likely that any resolutions accepting the proposals for compositions would be set aside. I consider that an application under the liberty to apply provision can be made even after any resolution accepting the proposals is carried.

76 Even leaving aside a liberty to apply provision, as Allsop J pointed out in *Labocus Precious Metals Pty Ltd v Thomas* at [60], there are a number of provisions in the

Bankruptcy Act allowing the Court to set aside or terminate a composition. For example, a Court may set aside a composition "for any other reason" under s 222(1)(e). It would be open to creditors to apply to set aside any composition on the basis that there was an inadequate opportunity to consider the proposals and the trustee's report.

77 While there is likely to be prejudice to many of the creditors if the abridgment of time is granted, such prejudice can be limited by allowing creditors liberty to apply to set aside the order for abridgment; and is, in any event, limited by the provisions of the Bankruptcy Act that allow creditors to apply to set aside a composition.

CONCLUSION

78 A matter of particular significance is that if the time under reg 4.18 is not abridged, the creditors will be deprived of the opportunity to consider the bankrupts' proposals and to make up their own minds. In addition, the bankrupts will be deprived of the opportunity to have their proposals considered by the creditors in circumstances where the main factor delaying the holding of a creditors' meeting was the unsuccessful principal application brought by the applicants.

79 There are substantial factors against an abridgment of time. Of particular importance is that reg 4.18 prescribes a minimum period of seven days before the meeting of creditors for the provision of the material. The bankrupts' delay in providing funds and their income details to the trustee, and the absence of any explanation for their failure to provide the income details is significant. The limited information which the trustee has been able to provide to creditors and the piecemeal way in which further information is to be provided is relevant.

80 However, the prejudice to creditors would be limited by giving the creditors liberty to apply to set aside the order abridging time. There are, in any event, mechanisms under the Bankruptcy Act, which would allow creditors to apply to set aside any compositions.

81 On balance, the appropriate decision was for the Court to exercise its discretion to grant the abridgment of time sought by the trustee.

82 On 10 November 2015, I made orders abridging the time prescribed under reg 4.18 and ancillary orders. I propose to make a further order requiring the trustee to provide a copy of these reasons to each of the creditors.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 24 November 2015