FEDERAL COURT OF AUSTRALIA

Whitton v Perovich [2016] FCA 595

File number:	QUD 1088 of 2015
Judge:	**RANGIAH J**
Date of judgment:	30 May 2016
Catchwords:	**BANKRUPTCY AND INSOLVENCY** – application from trustee for directions – termination of compositions – where debtors failed to pay contributions required by compositions – whether failure to pay contributions amounts to default – whether automatic termination of compositions upon default
Legislation:	*Bankruptcy Act 1966* (Cth) ss 5, 30, 58, 73-76B, 134, 181, 187, 188A, 222, 222A, 222B, 222C, 222D, 224, 224A, Div 6 Pt IV, Pt X *Bankruptcy Amendment Act 1991* (Cth) *Bankruptcy Legislation Amendment Act 2004* (Cth) *Bankruptcy Regulations 1996* (Cth) reg 4.18
Cases cited:	*Bendigo and Adelaide Bank Limited v Clout (No 2)* [2016] FCA 561 *Commonwealth Bank of Australia v Robson* [2013] FCA 1430 *Daevys v Official Trustee in Bankruptcy* [2011] FCA 398 *Gange v Sullivan* (1966) 116 CLR 418 *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 449 *Hingston v Westpac Banking Corporation* (2012) 200 FCR 493 *Labocus Precious Metals Pty Ltd v Thomas* [2007] FCA 1154 *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2013] QCA 271 *Mango Boulevard Pty Ltd v Whitton* [2015] FCA 1169 *Mango Boulevard Pty Ltd v Whitton* [2015] FCA 1295 *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 *Musolino v Sidiropolous* (1991) 101 ALR 235 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433

	Raineri v Miles [1981] AC 1050 *Re Doukidis Ex parte Consolidated Constructions v Melson* (unreported, FCA, Toohey J, 26 June 1985) *Suttor v Gundowa Pty Ltd* (1950) 81 CLR 418 *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 Quirey M, "Part IV, Division 6 Compositions: Breathing New Life into Old Practices" (1995) 3 Insolvency Law Journal 93
Date of hearing:	5 February 2016
Date of last submissions:	11 March 2016
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	General and Personal Insolvency
Category:	Catchwords
Number of paragraphs:	127
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ORDERS

QUD 1088 of 2015

BETWEEN:	**ROBERT WILLIAM WHITTON** Applicant
AND:	**SILVANA PEROVICH** (and another named in the Schedule) Respondent

JUDGE: **RANGIAH J**

DATE OF ORDER: **30 MAY 2016**

THE COURT ORDERS THAT:

1. The applicant is directed to give the Official Receiver written notice pursuant to s 224A(3) of the *Bankruptcy Act 1966* (Cth) of the fact that compositions made between Silvana Perovich ("Perovich") and her creditors on 13 November 2015 and made between Richard William Spencer ("Spencer") and his creditors on 13 November 2015 have been terminated.

2. Perovich, her creditors and the applicant are restored to the positions they were in immediately before the making of the composition between Perovich and her creditors on 13 November 2015, such that:

(a) Perovich was bankrupt pursuant to a sequestration order made on 20 August 2007, but only until she was discharged from bankruptcy on 14 November 2015;

(b) the creditors of Perovich were and are creditors of the bankrupt estate of Perovich;

(c) the applicant was and is the trustee of the bankrupt estate of Perovich;

(d) subject to s 224 of the *Bankruptcy Act*, the property of Perovich which vested in the applicant as trustee of the bankrupt estate of Perovich pursuant to ss 58 and 181 of the *Bankruptcy Act*, again vests in the applicant.

3. Spencer, his creditors and the applicant are restored to the positions they were in immediately before the making of the composition between Spencer and his creditors on 13 November 2015, such that:

(a) Spencer was bankrupt pursuant to a sequestration order made on 24 August 2007, but only until he was discharged from bankruptcy on 14 November 2015;

(b) the creditors of Spencer were and are creditors of the bankrupt estate of Spencer;

(c) the applicant was and is the trustee of the bankrupt estate of Spencer;

(d) subject to s 224 of the *Bankruptcy Act*, the property of Spencer which vested in the applicant as trustee of the bankrupt estate of Spencer pursuant to ss 58 and 181 of the *Bankruptcy Act*, vests again in the applicant.

4. The applicant's costs of the application be paid from the bankrupt estates of Perovich and Spencer.

5. The parties have liberty to apply.

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

REASONS FOR JUDGMENT

RANGIAH J:

1 The applicant, Robert William Whitton ("the trustee"), was appointed trustee of compositions between the respondents, Silvana Perovich and Richard Spencer (together, "the debtors"), and their respective creditors made pursuant to s 73 of the *Bankruptcy Act 1966* (Cth).

2 Perovich was required to pay $1 million and Spencer was required to pay $100,000 to the trustee on or before 20 November 2015 under the terms of their respective compositions. They both failed to pay those amounts.

3 The trustee applies pursuant to s 134(4) of the *Bankruptcy Act* for directions and ancillary orders. The trustee contends that the debtors' failure to pay resulted in the automatic termination of the compositions pursuant to s 222D of the *Bankruptcy Act.* However, the debtors submit that the compositions have not terminated and remain in force.

4 There is a substantial history of litigation underlying the present application. I will describe that history before considering the terms of the compositions and the statutory scheme.

Background

5 There has been a lengthy series of litigation between Perovich and Spencer, on one side, and two of their creditors, Mango Boulevard Pty Ltd ("Mango Boulevard") and BMD Holdings Pty Ltd ("BMD"), on the other. That litigation is part of a strategic battle for a valuable parcel of land owned by Kinsella Heights Developments Pty Ltd ("Kinsella Heights") at Mango Hill in Queensland. Some of the litigation is described in my judgments in *Mango Boulevard Pty Ltd v Whitton* [2015] FCA 1169 and *Mango Boulevard Pty Ltd v Whitton* [2015] FCA 1295. For present purposes, the following summary is sufficient.

6 On 20 August 2007 and 24 August 2007, sequestration orders were made against the estates of Perovich and Spencer respectively. Paul Sweeney and Terry van der Velde ("the former trustees") were appointed trustees of the bankrupt estates. Perovich's assets which vested in the trustees included 25 shares in Kinsella Heights.

7 Perovich and Spencer proposed compositions with their creditors so that their bankruptcies would be annulled and so that Perovich could regain ownership of the shares. It

became clear that the former trustees would not recommend acceptance of the proposed compositions and were prepared to sell the shares to Mango Boulevard and BMD. Mango Boulevard and BMD opposed any compositions so that they could continue to negotiate the purchase of the shares from the former trustees.

8 This part of the tactical battle was won by Perovich and Spencer. They persuaded their creditors to appoint Whitton as trustee of their estates in place of the former trustees. Two days before Perovich and Spencer were due to be automatically discharged from bankruptcy, Whitton lodged objections to their discharge. Whitton's motivation for objecting was, in part, to allow Perovich and Spencer to propose compositions and have those proposals considered before their bankruptcies expired. The consequence of the objections was that the bankruptcies were extended by five years to 14 November 2015.

9 Mango Boulevard and BMD commenced proceedings in the Court seeking review of Whitton's decisions to object and the creditor's resolutions to appoint Whitton trustee in place of Sweeney and van der Velde.

10 Perovich and Spencer lodged proposals for compositions under s 73 of the *Bankruptcy Act* with Whitton, who then applied to the Court for directions. Logan J directed Whitton not to hold a meeting of the creditors to consider the proposals pending the determination of the proceedings brought by Mango Boulevard and BMD. On 2 November 2015, I dismissed those proceedings and set aside the order restraining Whitton from holding a meeting of creditors.

11 Any creditors' meeting had to be held before the bankruptcies ended on 14 November 2015. Otherwise, any resolutions accepting the proposals for compositions would not be valid. Whitton required Perovich and Spencer to pay $55,000 for his costs before he called a meeting, but they were tardy in paying the amount. Whitton eventually called a concurrent meeting of the creditors for 13 November 2015, but had to apply for abridgement of the time prescribed under reg 4.18 of the *Bankruptcy Regulations 1996* (Cth) for the provision of the proposals for compositions and reports to the creditors. I granted that abridgement on 10 November 2015.

12 The concurrent meeting of creditors proceeded on 13 November 2015. The creditors, by special resolutions, accepted both proposals for compositions. The creditors appointed Whitton as trustee of the compositions.

13 The terms of the composition for Perovich include the following:

B. The contribution of the Bankrupt that is to be available to pay Creditors' Claims	A Composition fund will be established to meet the expenses and remuneration of the Trustee The Bankrupt or her nominee will be required to make contributions to the fund totalling at least $5,000,000.00 plus contribution from the SSA Price as follows: i. Within 7 days of creditor approval of this proposed Composition, the sum of $1,000,000.00 ii. Within 14 days of the delivery of the Award, the further sum of $4,000,000.00 iii. Upon payment of the SSA Price, twenty-five percent (25%) of the SSA Price iv. Plus the amount (if any) of Income contributions properly assessed by the Trustee for the period of bankruptcy.
C. The nature and duration of any Moratorium Period for which the Composition provides	… b) During the Composition period, no creditor will be able to sue, wind up, or otherwise initiate or continue legal proceedings against the Bankrupt in respect of a debt being subject to the Composition. c) The Composition period will last until the final contribution has been made by the Bankrupt or by either a breach of the Composition, or until all admitted creditors are paid their entitlements subject to the Composition's terms. ...
D. To what extent the Bankrupt is to be released from his debts	In full, upon payment of admitted claims in accordance with the arrangement.

E. The conditions (if any) for the Composition to come into arrangement	The Composition will come into operation and take effect upon the passing of a resolution at a meeting of creditors. Upon creditors passing the resolution to accept the Composition, the bankrupt is annulled from his or her bankruptcy.
F. The conditions (if any) for the Composition to continue in operation	The Composition shall continue until the full payment of contributions as per the arrangement. Should there be a default of contribution, a fresh application to the Court will need to be made to make the former bankrupt a bankrupt again.
G. The circumstances in which the Composition terminates	The Composition will terminate: (a) When full payment of contributions is made. (b) In circumstances where there is a default of the contributions payable. (c) The Trustee of Composition, at his discretion, may convene a meeting of creditors to consider the variation or termination of the Composition, should in his opinion, the Composition become unworkable.

14 It may be seen that by cl B, a fund is established into which the contributions are to be made by or on behalf of Perovich. The costs of administration of the compositions and distributions to creditors are to be paid from that fund.

15 Under cl D, Perovich is released from her debts upon full payment of her contributions and payment of the admitted claims of the creditors.

16 Clause E reflects the effect of s 74(5) of the *Bankruptcy Act*: that her bankruptcy is annulled upon the passing of the special resolution accepting the composition.

17 Under cl B, Perovich is required to make contributions totalling at least $5 million. The initial contribution was to be $1 million no later than 20 November 2015, but Perovich failed to pay any part of that amount.

18 Clause C deals with the nature and duration of the moratorium period for which the composition provides. The "Composition period" will last until, relevantly, there is a breach of the composition.

19 Under cl G, the composition "will terminate… [i]n circumstances where there is a default of the contributions payable".

20 The composition for Spencer is expressed in almost identical terms, except for one major difference. That difference is that Spencer is required to make contributions totalling at least $300,000. These contributions include the following initial contribution:

> Within 7 days of creditor approval of this proposed composition, the sum of $100,000.00.

21 Spencer was required to pay the initial contribution of $100,000 no later than 20 November 2015, but he failed to pay any part of that amount.

The procedural history and the submissions

22 On 23 November 2015, solicitors acting for the trustee wrote to the debtors stating that unless the contributions were paid by 12 noon on 24 November 2015, the trustee would file an application in the Federal Court seeking orders that the compositions be terminated.

23 On 23 November 2015, solicitors acting for Mango Boulevard and BMD notified the trustee that their position was that the compositions had been terminated upon the default of the debtors, and threatened legal proceedings and an application for indemnity costs if he purported to act pursuant to the compositions. On the same day, the solicitors for the debtors indicated that the initial contributions would be made shortly, and stated that mere failure to make contributions in a timely way did not amount to a default under the terms of the compositions.

24 Faced with these competing positions, the trustee filed the current proceedings seeking the directions of the Court and ancillary orders. The trustee has not applied for the termination of the compositions by the Court pursuant to s 222C of the *Bankruptcy Act.*

25 I directed that the creditors be served with the application and supporting material. Mango Boulevard and one of the former trustees, van de Velde, notified the Court that they wished to be heard on the application.

26 The trustee submits that the compositions have terminated and that the parties should be restored to the positions they were in before the compositions were made. The trustee argues that upon the failure of Perovich and Spencer to pay the required contributions by 20 November 2015, there was "default" within the meaning of cl G of the compositions. The argument continues that under the terms of cl G and by the operation of s 222D of the *Bankruptcy Act* there was an automatic termination of the compositions upon such default. Those submissions are supported by Mango Boulevard and van der Velde.

27 The debtors submit that the compositions have not terminated and remain in force. The argument has several layers. First, the debtors argue that there has merely been delay in paying the initial contributions and this delay does not amount to default under cl G of the compositions. Second, the debtors submit that even if there has been default, s 222D of the *Bankruptcy Act* does not apply to default – instead, termination for default is solely governed by ss 222A, 222B and 222C. Third, they argue that even if s 222D is capable of applying to a default, it does not apply in this case, as cl G of the compositions merely creates a right in the trustee or creditors to elect to terminate a composition pursuant to ss 222A or 222B, rather than attracting automatic termination under s 222D. Fourth, the debtors submit that the trustee or creditors have made no election to terminate and, accordingly, the compositions remain in force.

28 There are two further issues to be decided. The trustee seeks leave to file an amended originating application, but the debtors oppose the grant of leave.

29 The debtors submit that Mango Boulevard is not a creditor and has no right to be heard. I permitted a solicitor for van de Velde to make submissions at the hearing and provisionally allowed counsel for Mango Boulevard to make submissions.

The statutory scheme

30 Division 6 Part IV of the *Bankruptcy Act* consists of ss 73 to 76B. Division 6 deals with the process of making a composition or scheme of arrangement between a bankrupt and his or her creditors and the legal effect of such agreements.

31 Section 73 provides a mechanism for a bankrupt and his or her creditors to enter a composition in satisfaction of the bankrupt's debts. The section provides, relevantly:

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

32 Section 73(4) of the *Bankruptcy Act* refers to a "special resolution". That expression is defined in s 5 to mean a resolution passed by a majority in number and at least three-fourths in value of the creditors present and vesting personally at a meeting of creditors or by proxy.

33 The term "composition" is not defined in the *Bankruptcy Act*, save that s 73(1) describes a composition as being in satisfaction of the bankrupt's debts. The meaning of that expression may be ascertained by reference to the common law and the legislative history.

34 The term "composition" was previously defined in s 187 in Part X. The *Bankruptcy Act* provided for two types of composition – a pre-bankruptcy composition under Part X and a post-bankruptcy composition under Division 6 Part IV. The *Bankruptcy Legislation Amendment Act 2004* (Cth) abolished pre-bankruptcy compositions and removed the definitions of "composition" from Part X. The definition was not re-enacted in Division 6 Part IV, presumably through oversight.

35 In "Part IV, Division 6 Compositions: Breathing New Life into Old Practices" (1995) 3 Insolvency Law Journal 93, Dr Quirey writes:

> A composition "is an agreement between the compounding debtor and all or some of the creditors by which the compounding creditors agree with the debtor, and, expressly or impliedly, with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims". This is the accepted common law definition of composition to be applied for the purposes of ss 73-75 of the Act, and is more or less in accord with the statutory definition of a

> composition under Pt X of the Act, as defined in s 187 of the Act.
>
> (Citations omitted.)

36 Accordingly, the term "composition" in s 73 can be seen as taking its meaning from the common law.

37 Sections 74(5) and 75(1) of the *Bankruptcy Act* describe the consequences of the acceptance of a proposal for a composition by the creditors. Section 74(5) provides:

> 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.

38 Section 75 provides, relevantly:

> (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.
>
> …
>
> (3) The provisions of a composition or scheme of arrangement that has been accepted in accordance with this Division may be enforced by the Court on application by a person interested, and disobedience of an order of the Court made on the application is a contempt of the Court and is punishable accordingly.

39 There is a relationship between Division 6 Part IV and Part X of the *Bankruptcy Act*. Part X deals with personal insolvency agreements between debtors and creditors entered to allow the debtor to avoid bankruptcy. The relationship is that some of the provisions of Part X dealing with termination of a personal insolvency agreement also apply to the termination of compositions.

40 Section 76B of the *Bankruptcy Act* states:

> Sections 222 to 222D, 224 and 224A apply, with such modifications (if any) as are prescribed by the regulations, in relation to a composition or scheme of arrangement under this Division as if:
>
> (a) the composition or scheme were a personal insolvency agreement executed by the debtor; and
>
> (b) the trustee of the composition or scheme were the trustee of the personal insolvency agreement.

41 There are no modifications prescribed by the *Bankruptcy Regulations 1966* (Cth) for the purposes of s 76B of the *Bankruptcy Act.*

42 Sections 222 to 222D are in Part X of the *Bankruptcy Act*. Those sections deal with how a personal insolvency agreement, and a composition or scheme of arrangement, may be set aside or terminated.

43 Section 222 allows the Court to set aside a composition in certain circumstances. Section 222(1) applies where the terms of the agreement are unreasonable, or not calculated to benefit the creditors generally, or for any other reason. Section 222(2) applies where the agreement was not entered into in accordance with, or does not comply with, Part X. Under s 222(5), the Court may set aside a composition if, in certain circumstances, the debtor or trustee has given false or misleading information or omitted a material particular.

44 There are four mechanisms available under Part X for the termination of a composition.

45 Firstly, s 222A allows a trustee to terminate the composition if the trustee is satisfied that the debtor is in default. The section provides:

> **222A Termination of personal insolvency agreement by trustee**
>
> (1) The trustee of a personal insolvency agreement may, in writing, propose the termination of the agreement if the trustee is satisfied that the debtor is in default.
>
> (2) The trustee must give notice of the proposed termination to all the creditors who would be entitled under section 64A (as that section applies in accordance with section 223A) to receive notice of a meeting of creditors.
>
> (3) The notice must:
>
> (a) include a statement of the reasons for the termination and the likely impact it will have on creditors (if it takes effect); and
>
> (b) specify a date (at least 14 days after the notice is given) from which it is proposed that the termination will take effect; and
>
> (c) state that any creditor may, by written notice to the trustee at least 2 days before the specified date, object to the termination taking effect without there being a meeting of creditors.
>
> (4) If:
>
> (a) the debtor is in default; and
>
> (b) no creditor lodges a written notice of objection with the trustee at least 2 days before the specified date;
>
> then the proposed termination takes effect on the date specified in the notice.
>
> (5) For the purposes of this section, the debtor is ***in default*** if, and only if:
>
> (a) the debtor has failed to carry out or comply with a term of the

personal insolvency agreement; or

(b) if the debtor has died—the debtor or the person administering the estate of the debtor has failed to carry out or comply with a term of the agreement.

(6) A certificate signed by the trustee stating any matter relating to a proposed termination under this section is prima facie evidence of the matter.

46 It may be noted that s 222A(4) allows any single creditor to veto the trustee's proposal to terminate a composition.

47 Secondly, s 222B allows the creditors, by resolution at a meeting called for the purpose, to terminate a composition if the debtor is in default and the trustee has tabled at the meeting a written declaration to the effect that the trustee is satisfied that the debtor is in default. The expression "in default" is defined in the same way as it is under s 222A(5).

48 Thirdly, s 222C gives the Court a discretion to set aside or terminate a composition in certain circumstances. Section 222C(1) allows the Court to make an order terminating the composition if the Court is satisfied:

(e) that:

(i) the debtor; or

(ii) if the debtor has died—the debtor or the person administering the estate of the debtor;

has failed to carry out or comply with a term of the agreement; or

(f) that the agreement cannot be proceeded with without injustice or undue delay to:

(i) the creditors; or

(ii) the debtor; or

(iii) if the debtor has died—the estate of the debtor; or

(g) that, for any other reason, the agreement ought to be terminated.

49 Fourthly, s 222D provides for the automatic termination of a composition in circumstances defined by the composition. The section states:

222D Termination of personal insolvency agreement by occurrence of terminating event

A personal insolvency agreement is terminated by the occurrence of any circumstance or event on the occurrence of which the agreement provides that it is to terminate.

50 The proper construction of s 222D is central to the determination of this proceeding.

Consideration

51 The principal issue is whether the compositions remain in force or whether they have been terminated. The significance of the dispute is that if the compositions remain in force, it may still be open to the debtors to pay their initial contributions. If the compositions have terminated, it is too late for them to pay; and the natural consequential order would then be to return the debtors and the creditors to the positions they were in before the compositions. The property of the bankrupts, including the shares in Kinsella Heights, would then vest in the trustee again.

52 It is necessary to consider:

(a) whether there has been "default" by the debtors within the meaning of cl G of the compositions;

(b) what are the consequences of any such default and, in particular, whether s 222D of the *Bankruptcy Act* applied to effect the termination of the compositions upon default in payment of the initial contributions;

(c) whether the trustee should be granted leave to read and file his proposed amended originating application;

(d) whether Mango Boulevard has standing to be heard in the application.

53 The second of these issues requires consideration of:

(a) whether, on the proper construction of Part X, s 222D has any application to default; or whether, as the debtors submit, ss 222A, 222B and 222C are the only mechanisms by which compositions may be terminated for default;

(b) in any event, whether there has occurred any "circumstance or event on the occurrence of which the [composition] provides that it is to terminate" within s 222D;

(c) if the compositions have terminated, what orders should be made.

54 I will proceed to consider each of these issues.

Whether there has been "default" by the debtors

55 Clause B of the composition for Perovich provides that:

> The bankrupt or her nominee will be required to make contributions to the fund…as follows…[w]ithin seven days of creditor approval of this proposed Composition, the sum of $1,000,000.00.

56 Clause B of the composition for Spencer is the same except that the amount of the initial contribution is $100,000.

57 Each clause of the compositions has a side-note which functions as a heading. For cl G the side-note is, "The circumstances in which the Composition terminates". Clause G itself provides that "the composition will terminate…[i]n circumstances where there is a default of the contributions payable."

58 The debtors submit that the failure of the debtors to pay on time does not constitute a "default of the contributions payable" within cl G – it is merely a default in the timely payment of contributions. They submit that the failure to pay on time may constitute a default for the purpose of ss 222A or 222B of the *Bankruptcy Act*, but the definition of "default" in those sections is not incorporated into cl G. They submit that cl G is not to be construed as making time of the essence, as the parties have not expressly provided that the term must be strictly complied with, and the nature of the subject matter and the surrounding circumstances does not indicate that time was intended to be of the essence. In this respect they cited *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, *Raineri v Miles* [1981] AC 1050 at 1089, *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2013] QCA 271 at [36]-[37], [71]-[85].

59 The term "default" is defined, relevantly, in the *Macquarie Dictionary* as "failure to perform an act or obligation legally required". It is in this sense that the word "default" is used in cl G of the compositions. The phrase "default of the contributions payable" in cl G refers to a failure to pay any contribution in accordance with cl B. The debtors did not advance any argument that there must be a failure to pay all of the contributions before there can be a "default of the contributions payable".

60 Clause B of the composition for Perovich required her or her nominee to pay a contribution of $1 million on or before 20 November 2015. When that date passed without payment of the contribution, there was "a default of the contributions payable". Similarly, there was a "default of the contributions payable" under cl G of the composition for Spencer when he or his nominee failed to pay $100,000 on or before 20 November 2015.

61 The debtors' submission that under cl G there cannot be any "default" until a reasonable time has passed after the date for the first contribution without that contribution being made conflates the question of whether there is default with the consequences of that

default. In each of the authorities that the debtors rely on, the Court was concerned with the consequences of a party failing to comply with an obligation under a contract or failing to exercise a right under a contract. The initial question in the present case is whether there has been "default" within cl G. Then there is a separate question as to whether a consequence of any such default is that the compositions have automatically terminated.

62 For the reasons I have given, there was default when seven days after creditors approved the contributions passed without the debtors paying their respective contributions. The consequences of that default will be examined later in these reasons.

63 Although I have rejected the debtors' submission that there is no "default" until a reasonable time after the date for the first contributions, I will proceed to consider whether a reasonable time has passed in case I am wrong.

64 The first contributions were due to be paid within seven days after the creditors accepted the proposals for the compositions, but the timing for payment of the remainder of the contributions is uncertain. One purpose of the initial contributions was to meet the expenses and remuneration of the trustee and, if there was any excess, to be available to pay part of the creditors' claims. It may be inferred that there was also a second purpose. Under cl C, the creditors cannot sue the bankrupts in respect of any debt the subject of the composition during the "Composition period". The "Composition period" is to last until, relevantly, there is "a breach of the Composition". In light of the restriction upon the creditors suing, the term requiring the initial contribution to be paid within seven days can be seen to have been included as an indicator of good faith on the part of the debtors. If they breached that term, the composition would be at an end (or, on the debtors' argument, could come to an end at the election of the trustee or creditors) and the creditors would then be free to sue, rather than waiting indefinitely on the speculative possibility that the debtors might make the remaining contributions.

65 In these circumstances, a reasonable period for the payment of the initial contributions was no more than a week or so after 20 November 2015. At the hearing on 5 February 2016, more than two months after the date for payment, counsel for the debtors informed the Court that the initial contributions had not yet been made. A reasonable time had passed by then.

66 At the hearing, counsel indicated that "if anything happens about payment we would wish to be able to tell the Court about that." The Court has not been informed that the

payments have been made, nor has there been any application by the debtors to reopen their case to adduce evidence of any such payment. I infer that no payments have been made. Even if a reasonable time had not passed at the time of the hearing, it has by now.

67 Having concluded that there was "a default of the contributions payable" within cl G of each of the compositions, the next question is as to the consequences of such default.

Whether s 222D is capable of applying to default by a debtor

68 The trustee, supported by Mango Boulevard and van der Velde, submits that s 222D operated to effect the automatic termination of the compositions upon the defaults of the debtors. They submit that the provision applies to any circumstance or event, including default, upon the occurrence of which the composition provides that it is to terminate.

69 The debtors submit that s 222D, on the proper construction of the section, does not have any application to default by a debtor in complying with a term of the composition. The debtors argue that default is not a "circumstance" or "event" within s 222D; the relevant definition of "circumstance" in the *Merriam-Webster Dictionary* being "an event or situation that you cannot control". The debtors also submit that if s 222D is construed to apply to default, it would be open to a debtor to deliberately default and thereby bring the composition to an end if it is to the advantage of the debtor to do so. They argue that the legislature could not have intended to allow a debtor to profit by his or her own default. Instead, if only ss 222A, 222B and 222C apply to default, the decision as to whether to terminate the composition is taken out of the hands of the debtor.

70 There are four mechanisms in Part X of the *Bankruptcy Act* by which a composition can be terminated. They are:

(a) under s 222A – by the trustee;

(b) under s 222B – by the creditors;

(c) under s 222C – by the Court;

(d) under s 222D – by the occurrence of a circumstance or event provided for in the composition.

71 Three of these provisions, ss 222A, 222B and 222C, specifically apply to default. Sections 222A and 222B define "in default" as requiring that "the debtor has failed to carry out or comply with a term of the [composition]". While s 222C(1) does not use the term

"default", it provides that the Court may make an order terminating a composition if satisfied that the debtor has "failed to carry out or comply with a term of the [composition]".

72 Section 222D of the *Bankruptcy Act* states that:

> A [composition] is terminated by the occurrence of any circumstance or event on the occurrence of which the [composition] provides that it is to terminate.

73 Section 222D does not use the term "default", nor does it repeat the words of s 222C(1). The provision certainly has a field of operation outside default.

74 The first question is whether "default" can also be regarded as a "circumstance" or "event" within s 222D. The *Merriam-Webster Dictionary* gives a "simple definition" and a "full definition" of "circumstance". In the "simple definition" the first meaning given is "a condition or fact that affects a situation". In my opinion, that is the ordinary meaning of the word in the sense in which it is used in s 222D. It is consistent with the definition of "circumstance" in the *Macquarie Dictionary* and the *Shorter Oxford Dictionary*.

75 The "simple definition" in the *Merriam-Webster Dictionary* goes on to refer to "circumstances" as "the way something happens: the specific details of an event: an event or situation you cannot control". These seem to be examples of the use of "circumstances" (e.g. "circumstances beyond your control"), rather than definition of the word. I do not accept the debtors' submission that an ordinary meaning of "circumstance" is "an event you cannot control".

76 The *Merriam-Webster Dictionary* defines "event", relevantly, as "something (especially something important or notable) that happens". This is consistent with the definition of "event" in the *Macquarie Dictionary* and the *Shorter Oxford Dictionary*.

77 As I have said, the ordinary meaning of "default" is "failure to perform an act or obligation legally required". In the context, the ordinary meaning of "default" also encompasses the words a debtor "has failed to carry out or comply with a term of the [composition]" within ss 222A, 222B and 222C. The occurrence of a default by the debtor is capable of being a "circumstance" or "event" within the ordinary meaning of those words.

78 The next question is whether there is any adequate reason to interpret s 222D as excluding default or giving the words "default", "circumstance" or "event" meanings other than their ordinary meanings. This requires consideration of the purpose and design of statutory scheme for termination of compositions and personal insolvency agreements. The

evolution of Division 6 of Part IV and Part X of the *Bankruptcy Act* is relevant to these issues.

79 Division 6 Part IV of the *Bankruptcy Act* provides for post-bankruptcy compositions, such as those in the present case. The *Bankruptcy Amendment Act 1991* (Cth) made several significant amendments to Division 6 Part IV, including to s 74. Previously, an application had to be made to the Court for approval of a composition; and the Court had a discretion to approve or refuse to approve the composition, and to make or refuse an order annulling the bankruptcy. Following the amendment to s 74(5), the Court has no role in approving the composition. The creditors and the bankrupt are solely responsible for deciding whether there is to be a composition. In addition, the bankruptcy is now annulled by force of s 74(5) upon the creditors passing the special resolution, rather than by an order of the Court. Section 75 provides that a composition is binding on the creditors and that its terms may be enforced by the Court. While ss 74 and 75 specify the major consequences of every composition, it is left to the creditors and the bankrupt to decide upon the other terms of the particular composition.

80 Before the commencement of the *Bankruptcy Legislation Amendment Act 2004*, Part X provided for three types of agreement which a debtor could enter with his or her creditors in order to avoid bankruptcy – deeds of arrangement, deeds of assignment and compositions. The *Bankruptcy Legislation Amendment Act 2004* introduced four amendments of relevance to this case. First, it replaced the three types of agreement with a single type of agreement – personal insolvency agreements – under Part X. Second, it removed s 75(4) which had given the Court a discretion to annul a composition for default by the debtor from Division 6 Part IV. Third, it added s 76B to Division 6 Part IV, which provides, relevantly, that ss 222 to 222D in Part X apply to post-bankruptcy compositions. Fourth, it introduced s 222D to Part X – previously s 235(d) was worded similarly, but applied only to deeds of agreement, whereas s 222D applies both to post-bankruptcy compositions and personal insolvency agreements.

81 Section 188A(2)(g) of the *Bankruptcy Act* provides that a personal insolvency agreement "must…specify the circumstances in which, or events on which, the agreement terminates", substantially reflecting the words of s 222D. The provisions of Division 6 Part IV contain no such explicit connection between the terms of a composition and s 222D. However, s 73 does not expressly place any limitation on what terms may be included in a

composition and it is apparent that a composition may specify circumstances or events which will cause a composition to terminate.

82 Section 222D of the *Bankruptcy Act* gives effect to a decision of the creditors and debtor about the circumstances and events that will result in the termination of the composition or personal insolvency agreement.

83 The freedom given to the creditors to decide the circumstances and events that will result in termination by force of s 222D is consistent with the amendments brought about by the *Bankruptcy Amendment Act 1991* which give primacy to the creditors' decision as to whether to accept a composition and as to the terms of the composition. In *Labocus Precious Metals Pty Ltd v Thomas* [2007] FCA 1154, Allsop J (as the Chief Justice was then), speaking of the procedures under s 73 for calling a creditors' meeting to consider a proposal for a composition, 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…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…
>
> 56 Relevant also, in addition to the interests of the parties, is the interest of the public… 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…

84 The same approach should be followed in the construction of the provisions of Part X of the *Bankruptcy Act*. In particular, the provisions should be construed against the background of a legislative intention "to allow creditors to make up their own minds as to what they wish to do".

85 The debtors submit that s 222D should be construed as excluding default because the contrary construction would mean that a debtor could deliberately default and thereby bring about the termination of the composition. It is certainly a realistic possibility that such a situation could occur. The creditors need not specify any default as a circumstance or event that will bring about termination of the agreement – the creditors would then maintain control over any termination through ss 222A, 222B or 222C. However, a choice by the creditors to accept a composition or personal insolvency agreement which provides that it is to terminate upon the occurrence of a default reflects a commercial decision by the creditors to take the risk of deliberate default. The possibility that a debtor may profit from deliberate default is not an adequate reason to construe s 222D as excluding default.

86 The ordinary meaning of the language used in s 222D is wide enough to encompass default. It is likely that the legislature intended that the creditors should be free to decide that default is a circumstance or event that would result in the termination of a composition or personal insolvency agreement under s 222D. That mechanism allows the creditors to avoid the risk that the trustee may not give a notice under s 222A, or that the trustee's proposal to terminate will be vetoed by a creditor. It avoids the cost and inconvenience associated with the holding of a creditor's meeting under s 222B, or an application to the Court under s 222C. There is no sufficient reason to construe s 222D in such a way as to exclude default. Neither is there any sufficient reason to construe "circumstance" and "event" as having meanings other than their ordinary meanings.

87 I reject the debtors' argument that default under the terms of a composition is not a circumstance or event that can fall within s 222D of the *Bankruptcy Act.*

Whether there has been any circumstance or event on the occurrence of which the compositions provide that they are to terminate

88 The debtors submit that even if s 222D of the *Bankruptcy Act* is capable of applying to default, it does not apply in this case. They argue that default in the payment of a contribution is not "the occurrence of any circumstance or event on the occurrence of which the [composition] provides that it is to terminate" within s 222D. They submit that, properly construed, cl G of the composition merely reflects a right in the trustee or creditors (they have not said which) to elect to terminate the compositions. No such election has been made.

89 The debtors rely upon the judgment of the High Court in *Suttor v Gundowa Pty Ltd* (1950) 81 CLR 418. In that case, a contract for the sale of land provided that if government

consent to the sale was not obtained in two months "this contract shall be deemed to be cancelled". The consent was not obtained within the two months. The High Court held at 441:

> The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends on what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on either side, then either party may avoid the contract.

90 In *Gange v Sullivan* (1966) 116 CLR 418, a contract provided that if the council's approval was not obtained by a particular date "then this Contract shall be deemed to be at an end". Taylor, Menzies and Owen JJ held at 441:

> Whilst the effect of a condition must in every case depend upon the language in which it is expressed and a decision upon the meaning of one condition cannot determine the meaning of a different condition, the authorities cited do show a disposition on the part of courts to treat non-fulfilment of a condition such as that here under consideration as rendering a contract voidable rather than void in order to forestall a party to a contract from gaining some advantage from his own conduct in securing, or contributing to, the non-fulfilment of a condition bringing the contract to an end.

91 In *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 449, the contract provided that "If such proposal plan is not satisfactory to both parties by the 12th (Twelfth) December, 1972 then this sale shall be cancelled and all moneys shall be refunded to the Purchaser". The High Court said at 456:

> [I]f the purchaser, so as to avoid the contract, were intentionally to refrain from having a survey plan prepared it should not be permitted to take advantage of its own default by then treating the contract as at an end; instead "void" is treated as "voidable" for all purposes despite the fact that this will require even an innocent party to evince an intention to avoid. That is, we think, the proper interpretation of the present provision; non-fulfilment of the condition that the plan should be satisfactory to both parties by the given date renders the contract voidable rather than void.
>
> (Citations omitted.)

92 In *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, a contract provided that if "the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the…deposits already made". Mason J said at 553-554:

> The provision is not one which on non-fulfilment works a termination of the contract of its own force without notice. If the clause were a self-executing provision its operation might cause very great confusion. It is preferable to view it as a provision which entitles the party to terminate by notice in the event of non-fulfilment, so that

> it has an operation similar to that of the clause discussed in *Gundowa*. The consequence is that, if on non-fulfilment neither party exercises the right to terminate, the contract continues on foot.

93 In *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39, Hodgson JA (with whom Beazley and Ipp JJA agreed) held at [47] in a passage which the debtors seek to apply to the present case:

> In my opinion, the *Suttor* principle of construction applies most powerfully if the invalidating event can *only* occur through a breach of contract by one or other party. The lesser the likelihood that the disabling event occur through the breach of one or the other party, as distinct from some cause outside the control the parties, the less powerfully does the principle apply.

94 However, in *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433, Cullinane J (with whom McMurdo P and Holmes JA agreed) expressed doubt at [50] about this passage. In any event, the passage is not decisive in the present case.

95 Paragraph (b) of cl G of each composition in the present case provides that:

> The Composition will terminate…in circumstances where there is a default of the contributions payable.

96 If the compositions were common law contracts, I would have little hesitation in accepting the debtor's submission that upon default by the debtors they may be terminated at the election of the trustee or the creditors, and remain on foot unless and until they are terminated. But, the compositions are not common law contracts, and the statutory regime regulating compositions cannot be ignored.

97 A composition is a *sui generis* creature of the *Bankruptcy Act*. The parties must be taken to have entered the compositions aware of the statutory regime governing compositions, including the provisions dealing with their termination. In particular, the parties must have been aware that they could take advantage of s 222D by nominating "any circumstance or event on the occurrence of which the agreement provides that it is to terminate".

98 Clause G uses language which is not identical with, but similar to, the language used in s 222D. The side-note to cl G refers to "The circumstances in which the Composition terminates". Paragraph (b) of cl G says that "The Composition will terminate…[i]n circumstances where there is a default". The language suggests that termination is to be automatic, and taken with the use of the word "circumstances", indicates that the parties intended to engage s 222D.

99 Support for this view is obtained from para (a) of cl G which provides that "The Composition will terminate…[w]hen full payment of contributions is made". In addition, para (c) contemplates that cl G will operate where the trustee is of the opinion that the composition has become unworkable and creditors have decided to terminate the composition. The circumstances in paras (a) and (c) of cl G are not circumstances of default which come within ss 222A or 222B, and the parties must have intended that s 222D apply to avoid an application having to be made to the Court under s 222C. As the parties intended that the circumstances in paras (a) and (c) of cl G should attract s 222D, consistently, they are also likely to have intended that s 222D apply where there is a default within para (b).

100 The *Suttor v Gundowa* line of authorities proceeds on the tacit assumption that it is a simple matter, not productive of inconvenience or expense, for the innocent party to give notice terminating the contract to the defaulting party. In contrast, it is potentially difficult and expensive for creditors to effect a termination of a composition upon the debtor's default using the mechanisms for termination in ss 222A, 222B and 222C of the *Bankruptcy Act.* In addition, while there are usually few parties to a contract, there may be many creditors involved in a composition, compounding the difficulty and expense of terminating it. The reasoning underlying the *Suttor v Gundowa* line of cases has less force when applied to a composition. In this case, it is likely that the creditors wished to avoid the potential inconvenience and expense by engaging the mechanism of automatic termination under s 222D of the *Bankruptcy Act*.

101 In *Gange v Sullivan*, the High Court said at 441 that the effect of a term must depend on its language. I consider that by the language and context of cl G of the compositions, the creditors and the debtors demonstrated their intention that s 222D should apply where there is a default.

102 The debtors' position may also be taken to be that as time is not of the essence under cl G, s 222D is only engaged to terminate the compositions a reasonable time after default. That position is an arguable one, but was not directly the subject of submissions. It is unnecessary for me to express a view upon it because, even if it is correct, a reasonable time has passed without the initial contributions having been made, and s 222D has operated to terminate the compositions.

103 In summary, the termination of the compositions does not depend upon the trustee or creditors making an election to terminate. The compositions have terminated by the operation of s 222D of the *Bankruptcy Act*.

Leave to file the proposed amended application

104 At the hearing on 5 February 2016, the trustee sought leave to read and file an amended application. Counsel for the debtors reserved his position on that application, on the basis that he was taken by surprise. Counsel's concern appeared to be about the further orders sought in the proposed amended application. I gave the debtors leave to provide further written submissions after the hearing, confined to the question of the appropriate orders.

105 The debtors' further written submissions go much further than addressing the appropriate orders. I propose to ignore these submissions except to the extent that they deal with the appropriate orders and whether leave to amend should be granted: cf *Bendigo and Adelaide Bank Limited v Clout (No 2)* [2016] FCA 561 at [32] (per White J).

106 The debtors contend that leave should not be granted to file the amended application without notice to the creditors of the directions and orders now being sought. The trustee and Mango Boulevard argue that such notice is unnecessary.

107 At a directions hearing on 7 December 2015, I ordered that the trustee serve the creditors with a copy of the originating application, the supporting affidavit of Whitton and the orders made on that day. I also ordered that the creditors be served with a notice indicating that any creditor who wished to be joined as a party or wished to be heard on the application should file specified documents. It is not in dispute that the creditors were served. The only creditors who indicated that they wished to be heard are Mango Boulevard and van de Velde.

108 The orders sought in the proposed amended application are as follows:

> 1. Directions from the Court as follows:
>
> (a) Whether Mr Whitton as trustee of the respective compositions of Silvana Perovich and Richard William Spencer accepted by creditors on 13 November 2015 (**Compositions**) is justified in proceeding with the Compositions despite non-payment of the amount prescribed in clause B.i of the respective Compositions; ~~accepting payment of contributions under the Compositions~~;
>
> (b) In the alternative to subparagraph (a), whether Mr Whitton is

justified in giving a written notice pursuant to s 224A(3) and (5) of the *Bankruptcy Act 1966* (Cth) that the Compositions have terminated;

(c) Consequential upon the direction, if any, made pursuant to sub-paragraph (a) or in the alternative to sub-paragraph (b).

2. Further to paragraph 1(b) and (c), such further orders that Silvana Perovich and the creditors of Silvana Perovich are restored to the positions they were in before the making by Silvana Perovich, and the subsequent acceptance by her creditors by special resolution on 13 November 2015 of, Silvana Perovich's composition proposal under section 73 of the *Bankruptcy Act 1966* (Cth) with:

(a) Silvana Perovich, on the one hand, having been bankrupt pursuant to the making of a sequestration order on 20 August 2007, which bankruptcy is deemed to have commenced on 27 March 2007;

(b) the creditors of Silvana Perovich on the other hand, are and have been on and from 20 August 2007 creditors of the bankrupt estate of Silvana Perovich;

(c) the bankruptcy of Silvana Perovich being discharged on 14 November 2015; and

(d) the trustee of the property of Silvana Perovich (A Bankrupt) is Robert William Whitton.

3. Further to paragraph 1(b) and (c), such further orders that Richard William Spencer and the creditors of Richard William Spencer are restored to the positions they were in before the making by Richard William Spencer, and the subsequent acceptance by his creditors by special resolution on 13 November 2015 of, Richard William Spencer's composition proposal under section 73 of the *Bankruptcy Act 1966* (Cth) with:

(a) Richard William Spencer, on the one hand, having been bankrupt pursuant to the making of a sequestration order on 20 (sic) August 2007, which bankruptcy is deemed to have commenced on 27 March 2007;

(b) the creditors of Richard William Spencer on the other hand, are and have been on and from 20 August 2007 creditors of the bankrupt estate of Richard William Spencer;

(c) the bankruptcy of Richard William Spencer being discharged on 14 November 2015; and

(d) the trustee of the property of Richard William Spencer (A Bankrupt) is Robert William Whitton.

~~2~~4. Such further or other directions as the Court deems fit.

~~3~~5. Costs.

46. Such further or other orders as the Court deems fit.

109 The proposed amended originating application has not been served on the creditors, other than Mango Boulevard and van de Velde. It is necessary to consider whether the

debtors are, or the creditors would be, surprised by the proposed amendments and prejudiced as a result.

110 At the time the originating application was filed, and even at the directions hearing on 7 December 2015, the debtors maintained that they intended to pay the initial contribution. The originating application had evidently been drafted on that basis. The proposed amendment to paragraph 1(a) reflects the fact that no payment had been made by the date of the final hearing. It is a minor amendment designed to address the existing factual position. The amendment cannot cause the debtors any prejudice, nor is it plausible to say that the trustee seeking an order reflecting the failure to pay would have taken the creditors by surprise. In any event, I consider that the appropriate direction to give is one derived from the alternative order set out in paragraph 1(b).

111 The trustee also proposes to amend the originating application by adding the new paragraphs 2 and 3. Those paragraphs particularise the consequential directions foreshadowed in paragraph 1(c), or the further orders referred to in paragraph 4 of the originating application. Similar orders were set out in an agreed statement of factual and legal issues filed 15 January 2016 and dealt with in the trustee's written submissions filed on 3 February 2016. Accordingly, the proposed amendments cannot have been a surprise to the debtors.

112 The affidavit served on the creditors pursuant to my order of 7 December 2015 annexed correspondence between the trustee and Mango Boulevard and the trustee and the debtors. In that correspondence, Mango Boulevard's position was that the compositions had terminated and were no longer in force. The debtors' position was that the compositions remained in force and that the initial contributions would be paid. The trustee's initial position seemed to be that the compositions remained in force, but then he said that it appeared that the compositions had terminated.

113 Having been served with the application and affidavit, the creditors could see that there was a range of positions that could or might be taken by the parties and any non-parties who appeared at the hearing. In light of the history of litigation and the correspondence, Mango Boulevard was obviously likely to appear and submit that the compositions had terminated. If that position were accepted, then the Court might, in accordance with paragraph 4 of the originating application, make "Such further or other orders as the Court deems fit." It was predictable that such orders could include orders dealing with the legal

status of the debtors and their property if the compositions were terminated. Despite this, the creditors, apart from Mango Boulevard and van der Velde, were not moved to apply to become parties or to be heard on the application.

114 In these circumstances, I do not accept the debtors' claim that they have been taken by surprise by paragraphs 2 and 3 of the proposed amended application. Nor do I accept their submission that the creditors may be taken by surprise if they are not served with the proposed amended application. Those submissions, coming after the hearing, in circumstances where they were not foreshadowed during the hearing, seem opportunistic. I will grant the trustee leave to read and file the amended application.

Standing

115 The debtors submit that Mango Boulevard is not a creditor and, therefore, has no standing to make submissions in this proceeding. Mango Boulevard claims that it is a creditor.

116 In correspondence, the trustee raised doubts about whether Mango Boulevard was a creditor. However at the creditors' meeting held on 13 November 2015 to consider the proposals for compositions, the trustee permitted Mango Boulevard to vote as a creditor with debts totalling $11. The trustee's assessment that Mango Boulevard was then a creditor is relevant. The evidence does not indicate that Mango Boulevard has ceased to be a creditor since then.

117 I am satisfied, on the evidence available, that Mango Boulevard is a creditor and has the standing to make submissions in this proceeding.

The appropriate orders

118 Section 224 is the only provision of the *Bankruptcy Act* which expressly set out consequences of the termination of a composition. Section 224(2) provides:

> (2) All payments made, acts and things done and transactions entered into in good faith under, or for the purposes of, the agreement by:
>
> (a) the trustee; or
>
> (b) any other person;
>
> before he or she had notice of the order of the Court or of the termination of the agreement, as the case may be, are valid and effectual and are not liable to be set aside by the trustee of a later [composition] or in a subsequent bankruptcy.

119 There are no other provisions of the *Bankruptcy Act* which expressly deal with the effect of the termination of a composition on the powers of the trustee or how any property of the debtor is to be dealt with (s 76B operates to apply only some of the provisions of Part X to compositions).

120 Section 222(8) of the *Bankruptcy Act* provides that if the Court makes an order setting aside a composition, the Court may make such other orders as the Court thinks fit. There is a similar power under s 222C(3) where the Court makes an order terminating a composition. However, there is no equivalent provision where the composition has been terminated pursuant to ss 222A, 222B or 222D.

121 In *Hingston v Westpac Banking Corporation* (2012) 200 FCR 493, the Full Court was concerned with the appropriate order to make when a composition was set aside under s 222(5) of the *Bankruptcy Act*. The Full Court accepted that when the Court sets aside a composition under ss 222(1) or 222(5), it has power under both ss 30(1) and 222(8) of the *Bankruptcy Act* to make remedial orders reversing the effects of the annulment of a bankruptcy pursuant to s 74(5).

122 Section 30(1) of the *Bankruptcy Act* provides:

> **30 General powers of Courts in bankruptcy**
>
> (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.

123 It may be accepted that the setting aside of a composition is distinct from the termination of a composition. In *Musolino v Sidiropolous* (1991) 101 ALR 235, the Full Court cited with approval the statement of Toohey J in *Re Doukidis Ex parte Consolidated Constructions v Melson* (unreported, FCA, 26 June 1985) that:

> The use of the expression terminated is not consistent with setting aside a composition; rather it suggests bringing to an end a composition because it cannot be carried into final effect.

124 In *Hingston*, the Full Court stated that the setting aside of a composition under ss 222(1) or 222(5) involves setting aside the constituent elements of the composition,

namely the proposal for a composition and the acceptance of the proposal by special resolution of the creditors. Termination does not involve setting aside the proposal for the composition or the creditors' special resolution. However, the opinion of the Full Court in *Hingston* that "s 74(5) operates subject to remedial orders serving the purpose of the *Bankruptcy Act*" must apply with equal force where a composition is terminated. No submission to the contrary was made by the debtors. When a composition is terminated under s 222D of the *Bankruptcy* Act, the Court has power under s 30(1) to make remedial orders reversing the effects of the annulment of the bankruptcy.

125 The debtors defaulted in their obligations to make contributions under the compositions. If their bankruptcies had not been annulled, their property would have remained vested in the trustee in bankruptcy, even after their discharge from bankruptcy: *Daevys v Official Trustee in Bankruptcy* [2011] FCA 398 at [7] (Flick J). They should not benefit from their default by being permitted to retain such property. There is no evidence of change in the positions of the debtors or any creditors making it unjust to make orders which have that effect. The property should again vest in their trustee in bankruptcy and be available to be realised for the benefit of the creditors.

126 The draft orders provided by the trustee do not seek a sequestration order against the estates of the debtors: cf *Commonwealth Bank of Australia v Robson* [2013] FCA 1430 (Rares J); *Bendigo and Adelaide Bank Limited v Clout (No 2)* at [49]. The orders sought by the trustee are based on those made in *Hingston*. There is a complication in the present case that was not present in *Hingston*. It is that the debtors would have been discharged from bankruptcy on 14 November 2015 if their bankruptcies had not been annulled on the day before. The fact that they are to be treated as discharged from bankruptcy on 14 November 2015 should be recognised in the orders. In addition, it should be made clear that the property of the debtors which previously vested in the trustee will do so again, even though the bankrupts have been discharged from bankruptcy.

127 In summary, the compositions terminated by the operation of s 222D of the *Bankruptcy Act* when the debtors or their nominees failed to pay the initial contributions on or before 20 November 2015. The orders are intended to restore the debtors, their creditors and the trustee to the positions they would have been in if the proposals for compositions had not been accepted.

I certify that the preceding one hundred and twenty-seven (127) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 30 May 2016

SCHEDULE OF PARTIES

QUD 1088 of 2015

Respondents

Second Respondent	RICHARD WILLIAM SPENCER

Others

Supporting Creditor	MANGO BOULEVARD PTY LTD
Supporting Creditor	TERRY GRANT VAN DER VELDE