FEDERAL COURT OF AUSTRALIA

Mango Boulevard Pty Ltd v Whitton [2011] FCA 1383

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| Citation: | Mango Boulevard Pty Ltd v Whitton [2011] FCA 1383 |
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| Parties: | **MANGO BOULEVARD PTY LTD ACN 101 544 601 and BMD HOLDINGS PTY LIMITED (ACN 010 093 349) v ROBERT WILLIAM WHITTON, RICHARD WILLIAM SPENCER (BANKRUPT) and SILVANA PEROVICH (BANKRUPT)** |
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| File number(s): |  |
|  |  |
| Judge: |  |
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| Date of judgment: | 6 December 2011 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – consideration of an application under s 31A(2)(b) of the *Federal Court of Australia Act* – consideration of whether the claims of the applicants in the principal proceeding have no reasonable prospects of success in the context of claims made under s 178 and s 30 of the *Bankruptcy Act* 1966 (Cth) – consideration of an application to strike out paragraphs of the Amended Statement of Claim and a cross‑application to strike out paragraphs of the Amended Defence, under the *Federal Court Rules* 2011  **BANKRUPTCY AND INSOLVENCY** – consideration of an application for summary judgment in respect of claims under s 178 of the *Bankruptcy Act* to set aside a decision of the trustee of the estates of two bankrupt persons to object under s 149B of the *Bankruptcy Act* to the automatic discharge of each bankrupt from bankruptcy – consideration of an application to set aside resolutions of a meeting of creditors to remove the trustees of each estate and replace those trustees with a new trustee – consideration of the meaning to be attributed to the term “person affected” in s 178 of the *Bankruptcy Act* – consideration of that phrase in the context of no authority on the question |
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| Legislation: | *Federal Court of Australia Act* 1976, s 31A(2)(b)  *Bankruptcy Act* 1966 (Cth), ss 27, 30, 73, 149B, 149C, 149D(1)(d) and (e), 178 and 181  *Federal Court Rules*, Rule 16.21 |
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| Cases cited: | *Spencer v The Commonwealth* (2010) 241 CLR 118 – cited and quoted  *Edwards v Santos Ltd* (2011) 242 CLR 421 – cited and quoted  *Inspector‑General in Bankruptcy v Nelson* (1998) 86 FCR 67 – cited and quoted  *Frost v Sheahan* (2008) 249 ALR 538 - cited  *Macks as Trustee of the Property of Balnaves v Ardalich* [1999] FCA 679 - cited  *Re Crawford (Deceased); Ex parte The Trustee; The Official Receiver and Autoterms Limited* (1943) 13 ABC 201 – cited and quoted  *Macchia v Nilant* (2001) 110 FCR 101 – cited and quoted  *Wharton v Official Receiver in Bankruptcy* (2001) 107 FCR 28 – cited and quoted  *Prentice v Wood* (2002) 119 FCR 296 – cited and quoted  *Minister for Aboriginal Affairs v Peko‑Wallsend Limited* (1986) 162 CLR 24 – cited  *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 - cited  *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 - cited  *Re Tyndall, Ex parte Official Receiver* (1977) 17 ALR 182 –cited and quoted  *Frost v Sheahan* [2009] [FCAFC 20]; (2009) 6 ABC (NS) 786 - cited  *Cummings v Clarmont Petroleum NL* (1996) 185 CLR 124 – cited and quoted  *Allan v Transurban City Link Limited* (2001) 208 CLR 167 – cited and quoted  *Transfield Construction Pty Ltd v Automotive Food, Metal, Engineering, Printing and Kindred Industries Union* [2002] FCA 1413 – cited and quoted  *Re McHattan and Collector of Customs (NSW)* (1977) 18 ALR 154 - cited  *Citicorp Australia Ltd v Official Trustee in Bankruptcy* (1996) 71 FCR 550 cited |
|  |  | |
| Date of hearing: | 28 September 2011 | |
|  |  | |
| Date of last submissions: | 6 October 2011 | |
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| Place: |  | |
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| Division: |  | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 184 | |
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| Counsel for the Applicants: | Mr P O’Shea SC and Ms M Luchich | |
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| Solicitor for the Applicants: | Minter Ellison Lawyers | |
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| Counsel for the Second and Third Respondents: | Mr F M Douglas QC, Mr K Connor SC and Mr D D Keane | |
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| Solicitor for the Second and Third Respondents: | Delta Law | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 1183 of 2010 |

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| BETWEEN: | MANGO BOULEVARD PTY LTD ACN 101 544 601  First Applicant  BMD HOLDINGS PTY LIMITED (ACN 010 093 349)  Second Applicant |
| AND: | ROBERT WILLIAM WHITTON  First Respondent  RICHARD WILLIAM SPENCER (BANKRUPT)  Second Respondent  SILVANA PEROVICH (BANKRUPT)  Third Respondent |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 6 DECEMBER 2011 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The amended interlocutory application of the second and third respondents filed on 30 August 2011 so far as that application concerns an application for orders under s 31A of the *Federal Court of Australia Act* 1976 (Cth), is dismissed.
2. So far as the application referred to in Order 1 concerns an application for orders for the striking out of particular paragraphs of the Amended Statement of Claim of the applicants, para 2.3 of the Amended Statement of Claim is struck out and the application is otherwise dismissed.
3. Paragraphs 28(a) to (v) and 33(a) and (b) of the Amended Defence of the second and third respondents filed 4 April 2011 are struck out.
4. The second and third respondents are granted leave to further amend their Amended Defence so as to address the matters referred to at [148] to [176] of the reasons for judgment explanatory of these orders.
5. The costs of and incidental to the application of the second and third respondents filed on 30 August 2011 and the application of the applicants filed on 5 August 2011 are reserved for determination upon the trial of the action.
6. The parties are directed to confer with a view to submitting proposed directions orders to the Court within seven days which address a timetable for further amending the Amended Defence, further amending the reply and completing all interlocutory steps with a view to the early allocation of trial dates.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| DISTRICT REGISTRY |  |
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| BETWEEN: | MANGO BOULEVARD PTY LTD ACN 101 544 601  First Applicant  BMD HOLDINGS PTY LIMITED (ACN 010 093 349)  Second Applicant |
| AND: | ROBERT WILLIAM WHITTON  First Respondent  RICHARD WILLIAM SPENCER (BANKRUPT)  Second Respondent  SILVANA PEROVICH (BANKRUPT)  Third Respondent |

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| : |  |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

## Introduction

1. These proceedings concern an application by the second and third respondents in the principal proceeding, Richard Spencer (a bankrupt) and Silvana Perovich (a bankrupt), for orders for summary dismissal under s 31A of the *Federal Court of Australia Act* 1976 and Rule 26.01(1) of the *Federal Court Rules* 2011, of all of the claims of the applicants, Mango Boulevard Pty Ltd (“Mango Boulevard”) and BMD Holdings Pty Limited (“BMD”) also collectively described as the “applicants”.
2. In the alternative, Spencer and Perovich seek orders under Rule 16.21 of the *Federal Court Rules* 2011 striking out five paragraphs of the Amended Statement of Claim filed on 18 March 2011.
3. Mango Boulevard and BMD by their interlocutory application heard together with the Spencer and Perovich application seek orders under Rule 16.21 striking out part or all of 39 paragraphs of the Amended Defence of Spencer and Perovich filed on 4 April 2011.

## The principal proceeding

1. In the principal proceeding, Mango Boulevard and BMD seek, apart from an order for costs, the following orders:

1. Pursuant to section 178 of the *Bankruptcy Act*, that the decision of the first respondent [Robert Whitton, the new trustee] to object to the discharge of [Spencer and Perovich] from their bankruptcies, be set aside.

2. Further or alternatively, that the notices dated 12 November 2010 objecting to the discharge of [Spencer and Perovich] from their bankruptcies given by [Whitton], be set aside.

3. Declarations that [Spencer and Perovich] are discharged from bankruptcy.

4. Pursuant to section 30 of the *Bankruptcy Act*, that the resolutions made on 5 November 2010 by the creditors of the bankrupt estates of [Spencer and Perovich] namely, that Terry Grant van der Velde and Paul Desmond Sweeney [the former trustees of the estates of Spencer and Perovich] be removed as the trustees of the bankrupt estates and that [Whitton] be appointed trustee in their stead, be set aside.

5. Pursuant to section 30 of the *Bankruptcy Act*, that [van der Velde and Sweeney] be restrained as the trustees of the bankrupt estates of [Spencer and Perovich].

## The Amended Statement of Claim

1. The current proceeding reflects circumstances which are a little unusual as each bankrupt supports the proposition that the trustee’s decision to object to automatic discharge is properly made and within power with the result that the period of the bankruptcy is extended. Usually, the moving party challenging the trustee’s decision, is the bankrupt. The following matters are pleaded by Mango Boulevard and BMD by the Amended Statement of Claim.
2. The estates of Spencer and Perovich were sequestrated on 24 August 2007 and 20 August 2007 respectively (3.1).
3. Mr van der Velde and Mr Sweeney were appointed trustees of each estate. Each bankrupt filed a Statement of Affairs on 13 November 2007 and would have been discharged from bankruptcy by operation of s 149(2) of the *Bankruptcy Act* 1966 (Cth) on 14 November 2010 but for an objection to discharge being filed on 12 November 2010 by Mr Whitton under s 149B of the *Bankruptcy Act*,as trustee of each estate. On 5 November 2007, separate resolutions had been passed at a concurrent meeting of creditors of the estates of Spencer and Perovich to appoint Mr Whitton as trustee of each estate in place of Mr van der Velde and Mr Sweeney (1.3, 1.4, 1.5, 3.2, 3.3, 3.4 and 3.5).
4. Mango Boulevard and BMD contend that they are creditors of each estate: Costs Order in favour of Mango Boulevard, Supreme Court of Queensland, 15 June 2007, $9,880.90 (the subject of a Proof of Debt); Costs Orders in favour of Mango Boulevard, Supreme Court of Queensland, 21 November 2006, 26 February 2007, 20 March 2007 and 3 April 2007 (the subject of Proofs of Debt of $23,258.65 although some costs not yet quantified); Costs Order in favour of Mango Boulevard, Supreme Court of Queensland, 22 September 2006 (unquantified); Costs Order in favour of BMD, Federal Court of Australia, 7 December 2006, $47,075.00 (the subject of a Proof of Debt); and, damages suffered by Mango Boulevard arising out of contended breaches of an undertaking given by Spencer and Perovich to the Supreme Court (3.5A).
5. In August 2008, Spencer and Perovich lobbied the creditors of their estates to remove the former trustees and appoint Mr Whitton. On 5 August 2008 at a meeting of creditors of the estates, resolutions to that end, however, were not passed (3.6, 3.7).
6. The former trustees formed the view that there would be no utility in lodging an objection to Spencer and Perovich’s discharge from bankruptcy and told them so in response to enquiries of the trustees (made by each of Spencer and Perovich) as to whether the former trustees intended to file an objection in each case (3.8, 3.9).
7. Spencer proposed a draft composition under s 73 of the *Bankruptcy Act* to the former trustees and sought comments. Comments were given. Nothing responsive transpired concerning Spencer’s proposal (3.10, 3.11).
8. Perovich proposed a composition under s 73 of the *Bankruptcy Act* to the former trustees on 25 September 2010 and sought the calling of a meeting of creditors to discuss the proposal (3.12). The former trustees on 30 September 2010 sought further information and required Perovich, under s 73A of the *Bankruptcy Act*, to lodge $37,250.00 as security for the anticipated expenses and fees associated with convening and conducting the meeting (3.13). Perovich did not provide the requested information. She did not lodge the requested security (3.14).
9. By letters (in substantially similar terms) dated 6, 7 and 8 October 2010 to the former trustees, persons claiming to be creditors of the estates of Spencer and Perovich, requested the former trustees to convene a joint meeting of creditors and required the joint meeting to consider resolutions for the removal of Mr van der Velde and Mr Sweeney and the appointment of Mr Whitton as trustee in their place (3.15).
10. The former trustees decided to convene a meeting of the creditors of Perovich’s estate to consider a resolution for the proposed change of trustee and Perovich’s proposed composition under s 73, and informed Perovich of that decision (3.17). On 14 October 2010, Perovich withdrew her proposal for a composition and advised the former trustees that she would place a proposal for a composition, on substantially similar terms, to a new trustee (3.18). By notices sent on 15 October 2010, the former trustees convened concurrent meetings of creditors of the estates of Perovich and Spencer to be held on 29 October 2010 to consider proposed resolutions for a change of trustee (3.19).
11. On 19 October 2010, the former trustees sent a report dated 19 October 2010 to the creditors of each of Spencer and Perovich (3.20).
12. On 25 October 2010, Spencer and Perovich sent a circular concerning the concurrent meeting to some but not all of the creditors of their respective estates (3.21). The meeting of creditors was held on 29 October 2010 and adjourned to 5 November 2010 (3.22). At the adjourned meeting resolutions were passed appointing Mr Whitton as trustee of the estates of Spencer and Perovich in place of the former trustees (3.23).
13. By a letter dated 8 November 2010 to Spencer and Perovich, Mr Whitton noted that neither Spencer nor Perovich had lodged with the former trustees sufficient details to enable the former trustees to determine Spencer and Perovich’s level of income contribution (if any) as required by s 139U of the *Bankruptcy Act*. By that letter, Mr Whitton asked Spencer and Perovich whether they were prepared to provide him within 14 days with such information so as to enable compliance with s 139U to be determined (3.25).
14. By a letter dated 10 November 2010, the solicitors for Spencer and Perovich conceded that each individual had failed to disclose, in material aspects, particulars of income required by the *Bankruptcy Act*; stated that neither Spencer nor Perovich would be able to provide the information sought by Mr Whitton within 14 days; and, invited Mr Whitton to file an objection to Spencer’s and Perovich’s discharge from bankruptcy (3.26). By notices dated 12 November 2010, Mr Whitton objected to the discharge from bankruptcy of each of Spencer and Perovich on the grounds set out in s 149D(1)(d) and (e) of the *Bankruptcy Act*, on the footing that Spencer and Perovich had failed to provide written information about property, income and expected income and had failed to disclose any particulars of income as required by the *Bankruptcy Act* (3.27).
15. On 12 November 2010, details of the Notices of Objection were entered in the National Personal Insolvency Index and by operation s 149G of the *Bankruptcy Act*, the objections took effect. But for the objections, each of Spencer and Perovich would have been discharged from bankruptcy on 14 November 2010 (3.28, 3.29).
16. At 3.30, Mango Boulevard and BMD plead that objecting to the discharge of Spencer and Perovich from bankruptcy was not *an act* on the part of Mr Whitton which would *make* Spencer or Perovich respectively *discharge a duty* that they had *not* discharged and was not the *only way* for Mr Whitton to *induce* Spencer or Perovich respectively to discharge any undischarged duty. The particulars of those matters are these: a contravention of s 139U is punishable by imprisonment for six months, and by reason of s 139WA, an assessment of income under s 139W can be made at any time including a time after the bankrupt is discharged from bankruptcy.
17. At 3.31, Mango Boulevard and BMD plead that there was *no utility* in maintaining the administration of Spencer and Perovich’s bankruptcies after 14 November 2010.
18. On or about 11 February 2011, Spencer and Perovich lodged a proposal for composition under s 73 with Mr Whitton (3.31A).
19. At 3.32, Mango Boulevard and BMD plead that the power to object conferred upon the trustee under s 149B of the *Bankruptcy Act* “was not used for [a] proper purpose”. The particulars of the exercise of the statutory power for other than a proper purpose is said to be this: the *power* to *object* to the discharge in each case was not *used* for the *purpose* of *persuading* Spencer and Perovich to *discharge their duties* under the *Bankruptcy Act* but was used to allow Spencer and Perovich to put *proposals* for the *composition* of their debts. The applicants say that they rely, in particular, on these pleaded matters: Spencer’s draft proposal for a composition which was not pursued (3.10, 3.11); Spencer and Perovich’s invitation to Whitton on 10 November 2010 to file an objection to each bankrupt’s discharge from bankruptcy (3.26(c)); Spencer and Perovich’s lodging a proposal for composition under s 73 with Mr Whitton on 11 February 2011 (3.31A) and, Mr Whitton’s objection to Spencer and Perovich’s discharge from bankruptcy would not *make* each of them discharge an undischarged duty and the act of objecting was not the *only* way to induce each of them to discharge an undischarged duty (3.30).
20. Apart from these matters, Mango Boulevard and BMD also contend that the power to object was not used for a proper purpose as a matter of inference from other facts pleaded in the Amended Statement of Claim.
21. The facts supporting the contended inference of exercising the objection power for an improper purpose are these.
22. First, Mr James Conomos (a solicitor) has previously acted for Spencer and Perovich; Mr Conomos is a creditor of each of the estates; Mr Conomos acted for Spencer in proceedings in the Federal Magistrates Court and the Federal Court of Australia in connection with aspects of Spencer’s bankruptcy; Mr Conomos similarly acted for Perovich; Mr Conomos acted for Spencer in Supreme Court proceedings (1999/2006) involving a claim by Mango Boulevard against Spencer and Perovich (3.5B).
23. Secondly, Mr Conomos at some time prior to 29 October 2010 requested Mr Whitton to lodge a consent to act as the trustee of the bankrupt estates of Spencer and Perovich, and Mr Conomos, Spencer and Perovich sent documentation on that question to Mr Whitton (3.14A).
24. Thirdly, Mr Conomos attended and participated in the meeting held on 29 October 2010 (3.22B).
25. Fourthly, prior to the passing of the resolutions on 5 November 2010, Mr Whitton had engaged Mr Conomos to act for him in relation to the bankrupt estates of Spencer and Perovich (3.24A).
26. Fifthly, Mr Conomos continues to act for Mr Whitton in relation to the bankrupt estates of Spencer and Perovich (3.24B).
27. Apart from the contention that Mr Whitton failed to exercise the statutory power to object to Spencer and Perovich’s discharge from bankruptcy for a proper purpose, the applicants contend that the resolutions of the *creditors* of the bankrupt estates of Spencer and Perovich were “not made for a proper purpose” (3.33). The particulars are these:

The resolutions [of the creditors] were made [passed] for the purpose of replacing the former trustees, who had formed the view that there would be no utility in lodging any objection to Spencer and Perovich’s discharges from bankruptcy, and thereby to achieve an objection to the discharges and an extension of the bankruptcies so as to allow Spencer and Perovich to put proposals for the composition of their debts.

1. To support that proposition, the applicants rely upon the matters set out under the first and second bullet points on p 4 of the circular dated 25 October 2010 distributed by Spencer and Perovich to some but not all creditors of each of their estates. The first and second bullet points on that page are in these terms (Annexure QGR‑49 to the affidavit of Quintin George Rozario sworn 28 September 2011):

\* The trustees [the former trustees] demonstrated a tendency to obfuscate and delay our composition proposals, requiring unrealistic fees for a report, requesting materials and information already provided, claiming lack of creditor support for the necessary meeting and delaying when such conduct might allow the assets to be retained by them post bankruptcy.

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

1. The resolutions of the creditors are also said not to have been *made* for a *proper* *purpose* as a matter of inference drawn from the same five groups of facts mentioned earlier ([26] to [30]) and pleaded at 3.5B, 3.14A, 3.22A, 3.22B, 3.24A and 3.24B.
2. The applicants assert that further particulars of the passing of the resolutions other than for a proper purpose by the creditors will be provided following discovery.
3. At 3.34, Mango Boulevard and BMD plead that they are creditors of the bankrupt estates (as particularised at 3.5A – [8] of these reasons) and they are persons *affected* within the meaning of s 178 of the *Bankruptcy Act* by Mr Whitton’s act or decision to object to the discharges of Spencer and Perovich from bankruptcy. The applicants plead that they are affected by the decision because the Notices of Objection have extended the bankruptcies and but for the Notices of Objection, Spencer and Perovich would have been discharged from bankruptcy on 14 November 2010 and their property would remain vested in their trustee, including property in respect of which Mango Boulevard and BMD have been in dispute with Spencer and Perovich, since 2005.

## The resulting claims

1. The claims arising out of these pleaded material facts are these: an order setting aside Mr Whitton’s objection decision (or the Notice of Objection of 12 November 2010) concerning Spencer (A); a declaration that Spencer is discharged from bankruptcy (B); an order setting aside Mr Whitton’s objection decision (or the Notice of 12 November 2010) concerning Perovich (C); a declaration that Perovich is discharged from bankruptcy (D); an order that the resolution of Spencer’s creditors made on 5 November 2010 removing the former trustees and appointing Mr Whitton, be set aside (E); an order that Mr Whitton be removed and the former trustees be appointed as trustee of Spencer’s bankrupt estate (F); an order that the resolution of Perovich’s creditors made on 5 November 2010 removing the former trustees and appointing Mr Whitton be set aside (G); and, an order that Mr Whitton be removed and the former trustees appointed as trustee of Perovich’s bankrupt estate (H).
2. The Amended Statement of Claim also recites *issues* likely to arise in the proceeding and at 2.1, 2.2 and 2.3, the applicants say the issues are these: Were the objections to discharge made for a proper purpose?; Were the resolutions of the creditors replacing the former trustees with Mr Whitton made for a proper purpose?; and, Did Mr Whitton *believe* that the notices of objection *would make* Spencer or Perovich discharge an undischarged duty and was the *only way* to induce Spencer and Perovich to discharge an undischarged duty?

## The matters admitted by Spencer and Perovich in the Defence filed 4 April 2011

1. On 25 September 2010, Perovich lodged a proposal under s 73 of the *Bankruptcy Act* (admitted, para 14) and sought a meeting of creditors to be convened to discuss the proposal (admitted, para 15).
2. On 30 September 2010, the former trustees sought further information about Perovich’s proposed composition and asked to be provided with security for the expenses and fees to be incurred in convening the meeting (admitted, para 16). Perovich provided neither the information nor the requested funds (admitted, para 17, although Perovich contends that the information had already been provided or was not otherwise reasonably required, and the estimate of fees by the former trustees was excessive).
3. The former trustees formed a view (set out in their Report to Creditors dated 19 October 2010) that there would be no utility in lodging any objection to Spencer and Perovich’s discharge from bankruptcy (the content of the Report is admitted (para 11(a)).
4. Spencer and Perovich made enquiries of the former trustees as to whether they intended to lodge any objection to Spencer and Perovich’s discharge from bankruptcy and were told that the trustees had no such intention (Spencer and Perovich admit they made these enquiries and the trustees conveyed views to the effect set out in the Report dated 19 October 2010, para 11(b) & (c)).
5. The former trustees received various letters dated 6, 7 and 8 October 2010 from parties claiming to be creditors of Spencer and Perovich, requesting the convening of a meeting to remove the former trustees and appoint Mr Whitton in their place (admitted, para 18A).
6. The former trustees elected to convene a meeting as requested to consider the proposed change of trustee but denied that the former trustees did so to consider Perovich’s s 73 proposal for a composition (the content of the Report of 19 October 2010 is admitted and the allegation that the trustees informed Perovich of their decision is not denied (see para 20)). Perovich withdrew her s 73 proposal for a composition on 14 October 2010 and, in the letter dated 14 October 2010, Perovich said that she intended to re‑submit her composition proposal on substantially similar terms to a new trustee of her estate (admitted, para 22).
7. The former trustees sent a Report to Creditors dated 19 October 2010 (admitted, para 23) and the Report commented in detail about Perovich’s s 73 composition proposal notwithstanding that it had been withdrawn.
8. The concurrent meetings of Spencer and Perovich’s creditors were held on 29 October 2010, adjourned to 5 November 2010 and at the 5 November 2010 meeting resolutions were passed that Mr Whitton be appointed in place of the former trustees (admitted, para 25).
9. On 8 November 2010, Mr Whitton wrote to Spencer and Perovich noting that they had not lodged sufficient details with the former trustees to enable the former trustees to determine the level of income contribution required (if any) by s 139U of the *Bankruptcy Act* and requested Spencer and Perovich to say whether they would be prepared to do so within 14 days (admitted, para 25). On 10 November 2010, the solicitors for Spencer and Perovich conceded the failure, said that Spencer and Perovich would be unable to provide the information within 14 days, and invited Mr Whitton to file an objection to the discharge of Spencer and Perovich from bankruptcy (admitted, para 25).
10. On 12 November 2010, Mr Whitton objected to the discharge of Spencer and Perovich from bankruptcy (admitted, para 25). On 11 February 2011, Spencer and Perovich submitted proposals (received by Mr Whitton on 15 February 2011) for a composition with their creditors under s 73 of the *Bankruptcy Act* (admitted, para 26A).

## Perovich’s letter of 14 October 2010 and the Circular of 25 October 2010

1. In the letter dated 14 October 2010 to the former trustees (Annexure QGR‑48 to the affidavit of Mr Rozario sworn 28 September 2011), Perovich said this (among other things):

I note that you … are proceeding with the preparation of a report with respect to the composition that I have proposed for the creditors of my estate.

I am surprised that you are proceeding with the preparation of the report and using that to delay the calling of a meeting as requested by the majority of my creditors.

There is no proposal for composition from me – that lapsed when I did not pay the funds you requested [on] 30 September 2010 to my solicitors. Therein you made it clear that such payment was an essential precondition to your required report and stated that: “Under section 73A, the security for calling the meeting is to be lodged before we call the meeting. Further it is reasonable to require the security to be lodged before we must undertake most of the work required to call the meeting”.

If there is now any doubt about the matter I advise you by this letter that my proposal for composition is withdrawn. I have confirmed this with ITSA accordingly. No report is required and I demand that you cease the cost, waste and delay associated with such a report.

Having said the above I wish to place on record a number of my concerns with your conduct here as follows:

\* You deliberately imposed a high fee for the preparation of the report which was a show of bad faith on your part towards the creditors of my estate.

\* When requested by creditors to call a meeting to remove you as trustee you have delayed the calling of the meeting most recently on the pretext of having to prepare a report which you ought not to have commenced.

\* You have refused to provide information on your dealings with Mango Boulevard again showing bad faith towards the creditors.

\* I have lost confidence in your ability to bring an impartial and fair mind to my proposal for a composition under section 73 of the Bankruptcy Act. And this is the view held by a majority of my creditors, hence their requests for a meeting to change the trustees.

\* You have shown a lack of judgement which is self‑serving and contrary to the interests of the creditors of my estate.

My proposed composition will remain withdrawn until such time as a replacement trustee can review the file and has conferred with my solicitors and counsel on your actions concerning Mango Boulevard and other matters to date. I undertake that I will resubmit a composition in substantially similar terms to my new trustee.

1. In the Circular to creditors of 25 October 2010 (QGR‑49, Rozario affidavit, 28 September 2011), Spencer and Perovich said this:

**I** …

**A. Litigation over our residual shares in Kinsella Heights**

. In July 2009 Mango Boulevard … indicated it would apply to the Court for a short trial to complete its acquisition of our remaining shares in the joint venture company Kinsella Heights.

. [Advice was taken from counsel and solicitors about these matters].

. A series of applications were heard by [McMurdo J] in June 2009 … decision on 3 December 2009. It was favourable to us.

. Mango Boulevard appealed this decision to the Court of Appeal …

. The appeal was heard in June 2010 … judgment on 6 August 2010. It was favourable to us. Costs were awarded against Mango Boulevard. Counsel has advised that we will go on to succeed in the litigation.

. … Mango Boulevard then turned their attention to the trustees to try and negotiate a favourable settlement … our counsel asked us to seek compositions for our estates so that the litigation can be concluded satisfactorily without being sold out by the trustees. We did this in August this year.

. And so we come to the events of this and the previous month.

…

**B. Determination of share price for shares sold under the share sale agreement**

. This is the main asset of the estates and one where Mango Boulevard has used all the resources of BMD and its solicitors to not pay a proper price for the shares.

. When Mango Boulevard indicated it was moving against us in July 2009 we … took steps to trigger the compulsory mediation and arbitration under the Share Sale Agreement.

. Mango Boulevard has resisted this initiative on every ground they can muster. We believe these grounds are baseless, and that Mango will be forced to pay a substantial amount of money under the Share Sale Agreement for these shares.

…

. We asked the trustees for support but they were more concerned about any adverse costs orders than progressing matters against Mango Boulevard.

…

1. As to their concerns about the conduct of the former trustees, Spencer and Perovich said this:

**II Our concerns over the current trustees**

. The trustees have shown no interest in the real assets of the estates and instead have pestered secured creditors of Neolido, who either have no funds or no liability (or both), with comparatively minor claims.

. To the extent that the trustees have been unfunded and worked within their statutory obligations we cannot complain.

. We early realised that the trustees were not going to join or support our efforts to realise the assets of the estates. After considerable delay by the trustees, a meeting of creditors to replace them with a trustee who would (Mr Rob Whitton …) was held in August 2008.

. At that meeting the trustees admitted Greener Investments Pty Ltd for voting in excess of $116M without proper investigation. That ensured the trustees were not replaced and at the same time diluted prospective claims of all legitimate creditors.

. In May this year the trustees accepted appointment as the administrators of Greener, failing to disclose their conflict as trustees of the estates in which Greener had made claim.

. When the matter became an issue in the Greener liquidation proceedings in the Federal Court in June 2010 the trustees countered by deposing that the likelihood of any distribution in the estates was remote so there was no conflict.

. The Court rejected this. Their appointment as administrators failed with Greener wound up. Justice Lander criticised the trustees as lacking candour.

. For this reason of conflict alone, identified and deliberated upon by the Federal Court, they ought not to continue as trustees of our estates. Indeed, if the liquidator of Greener wants to be admitted to vote at the meeting, how can they continue?

. We are concerned that the trustees may compromise the main assets of the estates for their fees incurred in the administrations (now that Mango Boulevard has approached them following their failures in the litigation). We understand that there have been indications of this in communications with particular creditors.

1. As to the reasons for passing resolutions to remove the former trustees, Spencer and Perovich said this (the last two dot points of Part III below being the matters relied upon by Mango Boulevard and BMD in support of the challenge to the passing of the resolutions by the creditors (improper purpose)):

**III Why change the trustees? (And why Mango Boulevard wants the current trustees to stay)**

. For the same reasons as in August 2008, only more so now.

. We are concerned that the trustees have revealed a desire to protect and pursue their fees to the disadvantage of the creditors. That orientation does not fit here where effort and resources are necessary to hew the assets from BMD.

. The trustees demonstrated a tendency to obfuscate and delay our composition proposals, requiring unrealistic fees for a report, requesting materials and information already provided, claiming lack of creditor support for the necessary meeting and delaying when such conduct might allow the assets to be retained by them post bankruptcy.

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

1. As to Mango Boulevard’s contended position and other relevant matters, Spencer and Perovich said this:

**IV Mango Boulevard’s position**

. A strong indication that this is the appropriate course is that Mango Boulevard favours the retention of the current trustees. They have contacted certain creditors (identifying themselves as a co‑creditor) and expressed that view.

. Mango Boulevard is a creditor only to the extent that the estates owe some costs ordered against us prior to our bankruptcies. This is a modest amount – and Mango Boulevard now owes us costs ordered against them in our recent successes.

. In truth Mango Boulevard is the *“mega‑debtor”* of the estates and wishes to minimise what it pays – and requires a degree of encouragement to make that payment.

. We leave you to draw your own conclusions about that.

…

**V Further information**

. We invite you and/or your solicitors or agents to speak to either of us, and/or our solicitors Delta Law if you wish … and will answer any questions on the future conduct of matters, as will Mr Rob Whitton as proposed new trustee.

Silvana Perovich Richard Spencer

25 October 2010

## Mr Whitton’s evidence

1. In his affidavit sworn 2 March 2011, Mr Whitton says this.
2. Spencer and Perovich formerly carried on business as property developers in Queensland operating through various companies. They were directors of Neo Lido Pty Ltd, Neolido Holdings Pty Ltd and Neovest Ltd.
3. A substantial part of the bankrupts’ affairs involved the development of a property located at Mango Hill on the outskirts of northern Brisbane comprising approximately 239 hectares of vacant land. Kinsella Heights Developments Pty Ltd (“Kinsella”) was incorporated as the vehicle to own the Mango Hill land.
4. On 4 July 2003, a number of agreements were entered into concerning that development including a Share Sale Agreement between Spencer as trustee for the Spencer Family Trust, Perovich and Mango Boulevard; a Shareholders Deed between Spencer (in the same capacity), Perovich, Mango Boulevard and Kinsella; and a Deed of Guarantee and Indemnity between BMD, Spencer (in the same capacity), Perovich and Neolido Holdings.
5. Until the share sale agreement was entered into on 4 July 2003, Spencer (as trustee) and Perovich owned all of the issued shares in Kinsella. The trustee of the Spencer Family Trust is now Mio Art Pty Ltd. By the Share Sale Agreement, Spencer and Perovich sold 50% of their shares in Kinsella to Mango Boulevard. The Share Sale Agreement contained a mechanism for determining the purchase price of the shares transferred to Mango Boulevard. There is presently a dispute as to the amount, if any, payable as the purchase price under the Share Sale Agreement. Issues include the application of the mechanism, valuation questions and the dispute resolution mechanism. The dispute since 2006 has been the subject of a number of proceedings in the Supreme Court of Queensland in which many issues are in controversy.
6. Mr Whitton attended the concurrent meeting of creditors of the bankrupts on 5 November 2010. Approximately 40 persons were present. The value of creditor claims (allowed) in favour of a change of trustee was $38,377,671. The value of creditor claims (not allowed but in favour) was $9,777,548 representing in the aggregate $48,155,219. The value of creditor claims against the proposed resolutions was $11,078,556. Approximately 49 creditors were represented at the meeting.
7. Presently there are no funds in the estates. Substantial fees are owing to the former trustees which Mr Whitton understands to be well in excess of $450,000 plus GST plus outlays. Mr Conomos has been retained by Mr Whitton to act on his behalf. On 15 February 2011, Mr Whitton received proposals dated 11 February 2011 for compositions from the lawyers acting for Spencer and Perovich. On 21 February 2011, Mr Whitton published a report to creditors enclosing a copy of Spencer and Perovich’s proposals for compositions.
8. Mr Whitton asked the creditors to indicate their attitude to the composition and whether the proposal ought to be put to a meeting of creditors. These proceedings have since intervened. Mr Whitton says that he must consider the interests of the creditors as a whole and is conscious that the present proceedings are brought by two ostensible creditors who together claim to be owed $57,000 in total debts of more than $50M; those two ostensible creditors may also be substantial debtors of the estates; and it appears from creditors’ responses that all but one of those creditors responding want Mr Whitton to call a meeting of creditors to consider the composition proposal.
9. On 12 November 2010, Mr Whitton objected under s 149B of the *Bankruptcy Act* to the discharge of Sylvia Perovich from bankruptcy. The Notice of Objection is Annexure SJ17 to the affidavit of Shane Jury sworn 28 September 2011. The Notice recites the “following grounds”, in these terms:

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

1. The Notice also says this:

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

* Letter to bankrupt dated 8 November 2010 (enclosed as Annexure “A”)
* Letter from bankrupt’s solicitor dated 10 November 2010 (Annexure “B”)
* Letter from unsecured creditor dated 11 November 2010 (Annexure “C”)

1. The Notice recites that the objection has the effect of extending Perovich’s bankruptcy until 14 November 2015. The Notice of Objection to Spencer’s discharge from bankruptcy recites the same grounds and records the same documentation in support of those grounds. It also records that Spencer’s bankruptcy is extended to 14 November 2015.
2. The letters in support of the grounds address these matters.
3. Mr Whitton’s letter to each bankrupt on 8 November 2010 said this:

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

Given the imminent automatic discharge of your bankruptcy would you please advise forthwith whether you are prepared to provide within 14 days such information to enable compliance with the relevant section.

1. Delta Law responded to each letter and said this:

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

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

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

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

If you agree, we have no objection to your filing an objection to discharge, and in terms of the statute, you are *obliged* to do so. As the matters are serious you can be assured that Spencer and Perovich will cooperate fully with you in the forthcoming period.

[emphasis added]

1. The third letter referred to in the Notices of Objection is a letter from a creditor dated 11 November 2010 stating that the creditor would like to see each bankruptcy extended “to the maximum possible period”.
2. On 19 October 2010, the former trustees provided a Report to Creditors for the purposes of the meeting to be held on Friday, 29 October 2010 which was then adjourned to 5 November 2010. The Report concerning the estate of Perovich is contained at Annexure SJ‑19 to the affidavit of Shane Jury sworn 28 September 2011. That Report accompanied a report in similar terms concerning the estate of Spencer. In the Report the former trustees refer to Perovich’s enquiries concerning whether the former trustees intended to lodge an objection to automatic discharge. The former trustees said this:

Whilst we had not turned our mind to a detailed review of whether a ground for objection could be made out, we had formed the view that there would be *no utility* in lodging any objection to Ms Perovich’s bankruptcy. There is *no tangible benefit* *to be gained by the bankrupt estate* in objecting to Ms Perovich’s automatic discharge from bankruptcy. This matter was conveyed to Ms Perovich in answer to her enquiry.

[emphasis added]

1. The former trustees then examined questions relating to the proposed change of trustees and contended conflicts on the part of the former trustees. The former trustees extensively consider Perovich’s proposal for a composition with her creditors even though the proposal had been withdrawn. The former trustees note that a discharged bankrupt is unable to make such a composition proposal to the creditors. The former trustees also note that discharge from bankruptcy merely releases a bankrupt from their provable debts but does not release a bankrupt from an obligation to assist in the administration of their estate and nor does it have any impact on the assets of the bankrupt which remain vested in the trustee of the bankrupt’s estate.
2. Mango Boulevard and BMD contend, as a matter of pleading, that the objection power was exercised for an improper purpose on the footing that the power was not used for the purpose of persuading Spencer and Perovich to discharge undischarged duties but was exercised in order to allow Spencer and Perovich to put proposals forward for consideration by the creditors for the composition of their debts (see 3.32 and 3.30 of the Amended Statement of Claim).
3. The applicants also say at 3.31 that there was no *utility* in maintaining the administration of Spencer and Perovich’s bankruptcies after 14 November 2010.

## The section 31A application to be determined by reference to the composition purpose

1. Spencer and Perovich by their counsel seek to have the s 31A application dealt with on the footing that the objection power conferred by s 149B(1) of the *Bankruptcy Act* was exercised by Mr Whitton for the purpose of enabling Spencer and Perovich to put forward proposals for the composition of their debts and the convening of meetings to enable the creditors to consider the merits or otherwise of the composition proposal. Spencer and Perovich say that this purpose is entirely consistent or consonant with the purpose and objects of the *Bankruptcy Act* and is consistent with the orthodoxy of the administration of the estates of persons in bankruptcy. It is thus, they say, a proper exercise of the power conferred under s 149B(1) of the *Bankruptcy Act*, which is unconstrained by the considerations relevant to the mandatory obligation arising under s 149B(2).

## The statutory provisions

### Section 31A

1. The relevant elements of s 31A of the *Federal Court of Australia Act* are in these terms:

**31A Summary judgment**

…

(2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Court has apart from this section.

…

### The Bankruptcy Act provisions

1. The relevant provisions of the *Bankruptcy Act* are these:

**27 Bankruptcy courts**

(1) The Federal Court and the Federal Magistrates Court have concurrent jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than:

(a) the jurisdiction of the High Court under section 75 of the Constitution; or

(b) the jurisdiction of the Family Court under section 35 or 35A of this Act.

**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.

…

**73 Composition or arrangement [see Table B]**

(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.

(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.

(5) A creditor who has proved his or her debt may assent to or dissent from the proposal by written notice to that effect delivered to the trustee before the meeting or sent by post to the trustee and received by him or her before the meeting, and in that case the creditor shall, for the purposes of this Division, be deemed to have been present at the meeting and to have voted according to his or her assent or dissent.

**149B Objection to discharge**

(1) Subject to the following provisions of this Subdivision, at any time before a bankrupt is discharged from bankruptcy under section 149, the trustee may file with the Official Receiver a written notice of objection to the discharge.

(2) The trustee of a bankrupt’s estate must file a notice of objection to the discharge if the trustee believes:

(a) that doing so will help make the bankrupt discharge a duty that the bankrupt has not discharged; and

(b) that there is no other way for the trustee to induce the bankrupt to discharge any duties that the bankrupt has not discharged.

**149C Form of notice of objection**

(1) A notice of objection must:

(a) set out the ground or each of the grounds of objection, being a ground or grounds set out in subsection 149D(1) but not being a ground or grounds of a previous objection to the discharge that was cancelled; and

(b) refer to the evidence or other material that, in the opinion of the trustee, establishes that ground or each of those grounds; and

(c) state the reasons of the trustee for objecting to the discharge on that ground or those grounds.

(1A) Paragraph (1)(c) does not apply to a ground specified in paragraph 149D(1)(ab), (d), (da), (e), (f), (g), (h), (ha), (k) or (ma).

(2) A notice of objection is not invalid merely because it does not state the ground or grounds of objection precisely as set out in subsection 149D(1) provided that the ground or grounds can reasonably be identified from the terms of the notice.

**149D Grounds of objection**

(1) The grounds of objection that may be set out in a notice of objection are as follows:

…

(d) the bankrupt, when requested in writing by the trustee to provide written information about the bankrupt’s property, income or expected income, failed to comply with the request;

(da) …

(e) the bankrupt failed to disclose any particulars of income or expected income as required by a provision of this Act referred to in subsection 6A(1) or by section 139U;

…

**178 Appeal to Court against trustee’s decision etc.**

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

(2) The application must be made not later than 60 days after the day on which the person became aware of the trustee’s act, omission or decision.

**181 Removal of trustee**

The creditors may, by resolution, at a meeting of which not less than 7 day’s notice has been given, remove a registered trustee appointed by them, or a registered trustee who is, by virtue of subsection 156A(3), the trustee of the estate of the bankrupt concerned, and may at the same or a subsequent meeting appoint another registered trustee to be trustee in his or her place.

1. I will address the strike‑out rules in the *Federal Court Rules* 2011, later in these reasons.
2. As to s 31A(2), French CJ and Gummow J said this at [25] in *Spencer v The Commonwealth* (2010) 241 CLR 118:

Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a “fanciful” prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success.

1. Weight must be given to the expression in s 31A(2)(b) as a whole and “the Federal Court may exercise power under s 31A if, and only if, satisfied that there is ‘no reasonable prospect’ of success” (*Spencer v The Commonwealth*, Hayne, Crennan, Kiefel and Bell JJ at [60]). In *Edwards v Santos Ltd* (2011) 242 CLR 421 at [52], Heydon J observed that the function of s 31A is “not to substitute for the resolution of real controversies at a trial a premature termination of them by summary means” (French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing, at [1]).

## The central contentions of Spencer and Perovich

1. The central contentions of Spencer and Perovich arising out of the facts contended for by Mango Boulevard and BMD in the Amended Statement of Claim and the evidence put on in support of the application, are twofold.
2. First, the right or power conferred upon the creditors by s 181 of the *Bankruptcy Act* to remove a trustee of the estate of a bankrupt (and to pass a further resolution for the appointment of another trustee in the place of the former trustee) is not a “purpose” power. The creditors, they say, are entitled to vote on the relevant resolution as they see fit informed by whatever considerations each creditor determines appropriate in the casting of a vote. It follows, they say, as a matter of law, that Mango Boulevard and BMD have no reasonable prospect of making good a challenge to the resolution of the creditors on the footing that they exercised the voting power for an “improper purpose” in removing the former trustees and then voting on the resolution to appoint Mr Whitton.
3. Further, they say that if the Court embarks upon an inquiry into the purposes informing the minds of the creditors (perhaps each of them) in the casting of their votes and an inquiry into whether Spencer and Perovich agitated with the creditors for the removal of the former trustees and the appointment of Mr Whitton, the Court will find itself, as a matter of principle, engaged in inquiries into the purposes standing behind many resolutions of creditors arising out of meetings convened in the course of the administration of many bankruptcies.
4. Because the power *to resolve* under s 181 of the *Bankruptcy Act* is not a “purpose” power, Spencer and Perovich contend that the challenge in the principal proceeding by Mango Boulevard and BMD to the resolutions of the creditors has no reasonable prospect of success as a matter of law.
5. Secondly, Spencer and Perovich contend that the challenge under s 178 of the *Bankruptcy Act* to the objection decision of Mr Whitton made under s 149B(1) is misconceived because the contentions relied upon by the applicants directed to whether Mr Whitton *believed* (or not) that objecting to the discharge in each case would help make the bankrupt discharge an undischarged duty and that there was no other way for the trustee to induce the bankrupt to discharge an undischarged duty, are relevant only to the mandatory obligation arising under s 149B(2) and have nothing to say about the exercise of the discretion by the trustee under s 149B(1).
6. Spencer and Perovich say that the discretion conferred upon the trustee under s 149B(1) is a broad one. It is not constrained by the considerations described in s 149B(2) and to the extent that it is said by Mango Boulevard and BMD that one of the issues in the principal proceeding (see 2.3 of the Amended Statement of Claim) involves an analysis of whether Mr Whitton held the relevant belief contemplated by s 149B(2), that matter is irrelevant to Mr Whitton’s exercise of the discretion under s 149B(1).
7. As to the exercise of the discretion under s 149B(1), Spencer and Perovich say that the objection decision was taken by Mr Whitton in reliance upon the grounds contained within s 149D(1)(d) and (e) to which s 149B(1) is subject; the decision was taken for the purpose of enabling Spencer and Perovich to put forward a proposal for the composition of their debts; and, the identified purpose is conformable to the purpose and objects of the *Bankruptcy Act*. Thus, it follows, they say, that the purpose is a proper purpose and nothing more need be shown than a proper ground under s 149D and a purpose conformable to the objects of the *Bankruptcy Act*.
8. Two things follow, it is said.
9. A challenge to the objection decision in the principal proceeding reliant upon the factors going to Mr Whitton’s belief or otherwise of the matters described in s 149B(2), must necessarily fail as a matter of law. Secondly, a challenge to the objection decision must necessarily fail when the evidence demonstrates (and the s 31A application proceeds on the footing) that Mr Whitton’s purpose in making the objection decision was to enable Spencer and Perovich to put forward a proposal for the composition of their debts, because that purpose is conformable to the purpose and objects of the *Bankruptcy Act*.
10. Spencer and Perovich rely upon the following observations of the Full Court of the Federal Court in *Inspector‑General in Bankruptcy v Nelson* (1998) 86 FCR 67 at p 78 per Wilcox, Lindgren and R D Nicholson JJ on the question of the proper construction of the objection provisions under the *Bankruptcy Act*:

There is no reason to be found in [the objection provisions] for thinking that the considerations relevant to the exercise of the discretion to file a notice of objection are any less extensive than those ***conformable to the purpose and objects of the Act***[*Bankruptcy Act*]. In the absence of any indication to a contrary legislative intention, we would be disposed to think that in order to “keep a person bankrupt” beyond the ordinary period, a trustee would need to *have reasons* directed to *achievement of a purpose of the law of bankruptcy*.

[emphasis added]

1. Reliance is also placed upon the observations of Besanko J in *Frost v Sheahan* (2008) 249 ALR 538 at [35]. Besanko J observes that *Inspector‑General in Bankruptcy v Nelson* stands for the proposition that in order to make an objection, a trustee would need to have reasons directed to the purposes and objects of the *Bankruptcy Act* and that the existence of a permissible ground of objection supported by sufficient evidence is a threshold matter. There must also be reasons justifying the making of the objections in the particular case. In *Frost v Sheahan*, Besanko J addresses the considerations relevant to a trustee’s decision to withdraw an objection and counsel for Spencer and Perovich say that the considerations equally apply to the exercise of the discretion to object. At [35] (5), Besanko J observes that the most important consideration in the exercise of the discretion is whether there is *utility* in the administration of the estate continuing. If there is utility, it may be appropriate for the trustee to refuse to withdraw an objection (notwithstanding that a properly based objection has been substantially complied with). Besanko J also observes that it would be appropriate to consider, in the exercise of the discretion, the interests of the bankrupt and the overall period of the bankruptcy.
2. The *Bankruptcy Act* was amended by the *Bankruptcy Legislation Amendment Act* 2002 (Cth) which commenced on 5 May 2003. By item 109 of Schedule 1, a new provision (1A) was inserted immediately after s 149C(1) of the *Bankruptcy Act*. Section 149C(1) sets out the things which must be contained in a notice of objection. In simple terms, they are the grounds of objection, the evidence that establishes the grounds, and the reasons of the trustee for objecting on each of the grounds. The new para (1A) provides that the notice of objection need not *state* the reasons of the trustee for objecting to the discharge of the bankrupt if the ground relied upon is (as here, relevantly), s 149D(1)(d) or (e). In introducing the new para (1A), the Explanatory Memorandum (“EM”) for the *Bankruptcy Legislation Amendment Bill* 2002 (Cth) describes the policy reasons for enacting the provision and at para 48, the EM observes that the decision in *Inspector‑General in Bankruptcy v Nelson* establishes that a *sufficient reason* for filing an objection under s 149B(1) is that doing so will advance the trustee’s administration of the bankrupt estate. Counsel for Spencer and Perovich contend that para 48 is necessarily a reference to the observations from p 78 of *Nelson* noted at [87] of these reasons and, more particularly, para 48 reflects an express acceptance of the proposition that a purpose directed to advancing the trustee’s administration of the bankrupt estate is a “sufficient reason” for filing an objection under the relevant provisions.
3. Apart from these two central matters, Spencer and Perovich also contend that Mango Boulevard and BMD do not have standing under s 178 of the *Bankruptcy Act* because they are substantial debtors to the estate and to the extent that they may be a creditor, the costs claims at best might be offset from the monies owed to the estate. In any event, the applicants are said not to be, whether as creditor or otherwise, a person “affected by” an act or decision of the trustee. Apart from the claims of the applicants to be creditors, Spencer and Perovich say that the applicants are not otherwise a “person affected” by the decision of the trustee to object to the discharge.

## The responsive contentions of the applicants and observations generally on the submissions of the parties

1. Mango Boulevard and BMD respond to these propositions in this way.
2. Jurisdiction is conferred upon the Federal Court *in bankruptcy* by s 27 and the *powers* of the Court are conferred by s 30 in such a way that the Court has full power to decide all questions whether of law or of fact in any case of bankruptcy and power to make such orders as the Court considers necessary for the purpose of carrying out or giving effect to the *Bankruptcy Act*. The conferral of power under s 30 in the exercise of the s 27 jurisdiction is very broad and comprehends a power to examine the validity of a resolution of a meeting of creditors. Section 30 gives the Court complete control over the administration of a bankrupt estate for the benefit of all persons interested: see *Macks as Trustee of the Property of Balnaves v Ardalich* [1999] FCA 679 (*Macks v Ardalich*) at [22] and [23].
3. The jurisprudence which establishes a proper basis for examining whether a resolution of the creditors passed at a meeting might stand or fall is best expressed in the observations of Clyne J in *Re Crawford (Deceased); Ex parte The Trustee; The Official Receiver and Autoterms Limited* (1943) 13 ABC 201 at p 202 in these terms:

There is no doubt, as a general rule, that under [the relevant provision of the *Bankruptcy Act*], the removal of a trustee is within the province of the creditors – but there is also no doubt that in an appropriate case, the Court can make such an order as is sought in paragraph (a), but in the exercise of its power to do so, the Court ought not to interfere with a proposal or resolution of the creditors that the trustee be removed, *unless good cause is shown for its interference* … It is also not inappropriate to refer to the statement … of Lord Esher M.R. in *In re Lord Thurlow; Ex parte Official Receiver* … “It is not for the creditors in the case to decide how the bankruptcy law shall be administered; the Court constantly overrules their views, if it thinks they have been *persuaded* *to agree to some course which the Court thinks an improper one*; nor is it for the official receiver to decide how the bankruptcy law shall be administered, except subject to the control of the Court”.

[emphasis added]

1. In *Re Crawford*, Clyne J examined a sequence of factual contentions concerning complaints made about the conduct of the trustee and the relationship between those matters and the *object* of making the complaints. Clyne J said this at p 202 concerning the application of the principle set out at [93] of these reasons to the relevant facts:

Many complaints have been made against the trustee and his administration by [the relevant parties - two of the principal creditors] and these complaints have, in my opinion, been made with the object of affording some excuse or justification for the removal of the trustee. In my opinion, these complaints have no foundation in fact and I regard them as flimsy pretexts put forward with the object of having the trustee removed.

1. Clyne J then examined the content of the conduct criticisms of the trustee and said this at p 205 on the point of principle:

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

1. Accordingly, Mango Boulevard and BMD contend that Spencer and Perovich by their agitations with the creditors, reflected in aspects of the Circular of 25 October 2010, sought to persuade the creditors to attend a meeting and pass a resolution for the purpose of installing a trustee to exercise a power that the trustee was not capable of exercising on a proper basis on the footing that lodging an objection to discharge on the ground of enabling the trustee to consider a composition proposal from the bankrupts is not one of the grounds provided for in s 149D(1) of the *Bankruptcy Act* and the exercise of the objection decision was not made for *reasons* related *to* the *grounds* of objection and thus the objection decision has not been made for a proper purpose.
2. Mango Boulevard and BMD accept that unless they can demonstrate that the objection decision was not made for a proper purpose the entire case fails. The challenge to the resolutions at the meeting depends upon Spencer and Perovich causing the creditors to pass resolutions to remove the former trustees and install Mr Whitton so as to enable an objection decision to be made by Mr Whitton on the ground of a consideration of a proposed composition by each bankrupt which is not a ground under s 149D(1) and is a decision not based on reasons related to the identified grounds of objection.
3. In other words, Mango Boulevard and BMD contend that it is not enough that the purpose (the composition purpose) is conformable to the objects of the *Bankruptcy Act*. The objection decision must be based upon a ground under s 149D(1) and supported by reasons *related* to the ground.
4. The applicants say that although s 149C(1A) makes it clear that the notice of objection need not state the reasons for the trustee’s objection on grounds of s 149D(1)(d) or (e), the trustee must nevertheless *have* reasons. The reasons simply need not be recited in the notice. Section 149C(1A) does not bring about the result, it is said, that the trustee need not have reasons related to the relevant ground in properly exercising the objection power.
5. As to s 149B(2), Mango Boulevard and BMD say that Spencer and Perovich have misunderstood the pleading.
6. The matters relating to any question of Mr Whitton’s belief by reference to the considerations in s 149B(2) is pleaded simply to demonstrate, it is said, that Mr Whitton was *not* *obliged* to object to the discharge in each case by reason of s 149B(2). The applicants assert that s 149B(2) is not engaged and no question arises as to the state of Mr Whitton’s belief for the purposes of s 149B(2). Spencer and Perovich can be forgiven for thinking that reliance was placed upon the state of Mr Whitton’s belief in terms of the s 149B(2) factors and could also be forgiven for thinking that the applicants sought to challenge the objection decision on the footing that the s 149B(2) factors were thought by the applicants to be relevant issues. That appears more likely from the shape of the pleading and is consistent with the issues said to arise in the principal proceeding reflected at 2.3 of the Amended Statement of Claim.
7. The contention of the applicants is simply that the exercise of the discretion under s 149B(1) was not made for a proper purpose because the consideration of a composition is not a ground of objection under s 149D(1) and since the objection decision is reliant upon the particular matters at s 149D(1)(d) and (e), the *reasons* for exercising the objection discretion must be related to the content, as a matter of substance, of those two grounds.
8. The applicants contend that there is no *utility* in extending the bankruptcy in each case, that is, no utility in the trustee *exercising* the power. The applicants say that there must be *good reason* for objecting if one of the grounds under s 149D(1) exists. The applicants say that the notion of *good reason* for exercising the power related to the ground is the real constraint upon the exercise of the power. The notion that the trustee must have good reasons related to the objection ground for exercising the power (in each case), at least as a reasonably arguable proposition, is said to be found in these authorities.
9. In *Inspector‑General in Bankruptcy v Nelson*, the Full Court at p 78 also observed (apart from the passage noted at [87] of these reasons) that the provisions (as they then applied) required a notice of objection to set out the ground or grounds of objection, refer to the evidentiary material relied upon in support of the grounds, and state the “reasons” for objecting. The Court observed that s 149C, as it then stood, made it clear that a trustee filing an objection notice “*must have reasons* for doing so, in addition to being satisfied that the evidentiary material establishes one or more permissible grounds” [original emphasis]. Although the Amending Act which introduced para (1A) makes it clear that the notice now need not *state* reasons where the ground (among others) engages s 149D(1)(d) or (e), the observations of the Full Court remain good, it is said, as to the necessity of the trustee to have reasons. However, *Nelson* makes clear that the considerations relevant to the exercise of the discretion are, broadly put, considerations conformable to the purpose and objects of the *Bankruptcy Act*. A trustee’s election to preserve the opportunity to consider a composition from each bankrupt is a purpose conformable to the purpose and objects of the *Bankruptcy Act*.
10. In *Macchia v Nilant* (2001) 110 FCR 101, French J at [55] said this:

Grounds for objection [by a trustee] are set out in s 149D. The trustee who is considering entering an objection has an obligation to apply his mind carefully to the question whether there is *sufficient reason or basis* for that objection upon one or more of the available grounds. It is not necessary that he be satisfied that the ground exist upon the basis of any absolute standard. But he must turn his mind to the problem and ought not to enter the objection unless *reasonably satisfied* of the correctness of what the *ground implies*.

[emphasis added]

1. As to the substance of the grounds and the relationship between a purpose consonant with the general duty of a trustee and the particular objection, French J said this at [58]:

The substance of the objections … may be debatable. The *purpose* they served appears to have been wider than that which was necessary to justify their lodgement. The trustee’s purpose, … was evidently directed to maximising from after acquired property, the assets available to the estate. While *that purpose* is *consonant* with the general duty of the trustee it must not be allowed to distract from the specific considerations necessary to *justify* the issue of an objection. Nor does it justify the use of the objection as a tactical tool in a battle of wits with the bankrupt.

[emphasis added]

1. In *Wharton v Official Receiver in Bankruptcy* (2001) 107 FCR 28, Weinberg J at [75] placed emphasis upon the relationship between the identified ground, namely s 149D(1)(d) and the *gravity* of the matters going to that ground as establishing (or not) a *sufficient* basis (not just a basis conformable to the objects of the *Bankruptcy Act*) for the exercise of the objection power. At [75], Weinberg J said this:

Nor would I regard the failure by the applicant to comply with the requests for information contained in that letter by the date specified, as constituting a contravention of s 149D(1)(d) of sufficient gravity to warrant being included in a notice of objection.

1. In *Prentice v Wood* (2002) 119 FCR 296, the Full Court constituted by Spender, Hely and Conti JJ said this at [20] to [22] and [24]:

20. Section 149C(1)(c) requires the notice to state the reasons for objecting to the discharge on the ground relied upon. … There must be more than a recitation of the s 149D ground. … Section 149C makes it clear that a Trustee filing a Notice of Objection to Discharge *must have reasons* for doing so, in addition to being satisfied that the evidentiary material establishes one or more permissible grounds. One of the grounds on which the Inspection‑General may cancel the objection is if the reasons given for objecting on that ground do not justify the making of the objection. … [original emphasis]

21. In *Inspector‑General in Bankruptcy v Nelson* … a Full Federal Court said that in order to “keep a person bankrupt” beyond the ordinary period, a trustee would need to have reasons directed to achievement of a purpose of the law of bankruptcy. The existence of a permissible ground supported by sufficient evidence is a threshold; there must also be reasons *justifying* the making of the objection in the particular case. [original emphasis]

22. Thus, a Trustee would not be bound to lodge a Notice of Objection on the s 149D(1)(f) ground if the failure to pay was due to some circumstances outside the control of the bankrupt or was trivial in amount. Equally, if the failure to pay was contumelious or unexplained, then a statement by the trustee that he was objecting to the discharge on the s 149D(1)(f) ground for that reason would satisfy s 149C(1)(c), inasmuch as the reason (good or bad) for objecting on that ground has been given. That would enable a review to take place of *whether* the *reasons* given for objecting on *that ground* *justify* the making of the objection. [emphasis added]

24. A notice is liable to cancellation if the reasons given for objecting on the ground specified in the notice do not justify the making of the objection, but a notice is not invalidated on that account … Section 149C(1)(c) is not a requirement that the Trustee state the reason or reasons for objecting to a bankrupt’s discharge, rather it specifies the more particular requirement that the Trustee give the *reason or reasons* for objecting to the discharge of the bankrupt *on the ground or grounds* set out in the notice. The mandatory requirement of s 149C(1)(c) is to enable the bankrupt to know the answer to the question “why are you objecting on *this ground* to my discharge?” The so‑called “reason” does not *relate* to the *ground relied upon*, hence it is not *a reason* for objecting to the discharge on that ground. [emphasis added]

1. *Prentice v Wood* was, of course, decided before the amendment to s 149C which introduced para (1A) and removed the obligation to state in the Notice of Objection the reasons for the trustee’s objection to the discharge on the identified grounds (so far as those grounds relate, as relevant here, to s 149D(1)(d) or (e)). Although the amendment to s 149C removed that obligation, an argument properly arises, that the amending provision is however *not* to be construed to mean or have the effect that the trustee no longer need (that is, from the commencement date of the amendment on 5 May 2003) have reasons for objecting to a bankrupt’s discharge which *relate* to the ground relied upon. It is at least “reasonably arguable” for the purposes of s 31A(2)(b) that it remains the position notwithstanding s 149C(1A) that *if* the *reason* relied upon by the trustee does not *relate* to the *ground* relied upon for the objection, it cannot be *a* *reason* for objecting to the discharge on *that ground* under s 149B(1) (see *Prentice v Wood* and particularly, [24]).
2. The applicants say, in effect, that *if* there is no requirement for a nexus between the particular threshold ground of objection and a reason for objecting related to that ground, it is difficult to see where the *utility* lies in extending the bankruptcy in *reliance* on *that* ground. They say that in the absence of a nexus between the ground and the reason for acting on the particular ground, it would be enough, to support a proper exercise of the discretion under s 149B(1), for a trustee to identify a ground such as a bankrupt’s failure (s 149D(1)(d)) to comply with a trustee’s request for information by a particular date (by perhaps responding some days later than the requested date) and then exercise the power on the identified ground without demonstrating any advantage to the administration of the estate arising out of an extension of the bankruptcy by reference to the *content* of the ground actually supporting the decision. In that sense, the ground is entirely disconnected from the reason and such a result is said to be absurd.
3. I am satisfied that there is at least a reasonable argument in favour of a continuing nexus as described at [24] of *Prentice v Wood*,rather than simply a ground coupled with a purpose directed at a high level to the overall objects of the *Bankruptcy Act*. The purpose of enabling Spencer and Perovich to put forward a composition proposal is at least arguably unrelated to the identified grounds (s 149D(1)(d) and (e)) and, of course, facilitating the bankrupt with an opportunity to propose a composition is not itself a discrete ground of objection to discharge under s 149D(1).
4. On the affidavit material, there is no evidence that by objecting to the discharge of each bankrupt, any steps have been taken between 12 November 2010 and now by Spencer and Perovich in cooperation with the trustee to make good, with extra time, the failures reflected in the letters of 8 November 2010 and 10 November 2010 (see [65] and [66] of these reasons). This consideration is not directed to s 149B(2). It goes to s 149B(1) in the sense of testing, on the facts, whether there is any nexus between the ground of objection and a reason related to that ground.
5. The passage at [24] from *Prentice v Wood* suggests that the obligation in s 149C(1)(c) (as it then stood unaffected by what would be the new para (1A)) to state the reasons for objecting to the discharge (on the grounds in the notice) was designed to enable the bankrupt to know the reason for the objection on that ground. The introduction of para (1A) to s 149C removed the obligation to state, in the notice, the reasons for objecting to the discharge on the ground relied upon, if the ground, as here, was s 149D(1)(d) or (e) (otherwise described as “special grounds”). Paragraph 165 of the EM said, of this matter:

… the trustee will not need to show that filing the objection will advance the administration, only that the special ground [as here] existed. Therefore, if the grounds of objection include a special ground, only the facts supporting that special ground need to be established.

1. Paragraph 165 of the EM also refers to the notion that the trustee would need to show that the filing of the objection would “advance the administration” (an apparent cross‑reference to para 48 of the EM and *Nelson*) and that by reason of the amendment the trustee need show “only that the special ground existed”. Section 149C(1A) ought not to be construed, at least arguably, in such a way that the trustee need only be satisfied that a special ground exists. Clearly, the trustee must have reasons for exercising the power under s 149B(1) and act in reliance upon identified grounds. The question of law is whether a purpose or reason directed to advancing the administration of the estate is *sufficient* or whether the reason must *relate* to the *grounds* relied upon. I entirely accept that exercising the power to object under s 149B(1) for the purpose of enabling each bankrupt to put a composition proposal to creditors is not a purpose *extraneous* to the *Bankruptcy Act*: *Minister for Aboriginal Affairs v Peko‑Wallsend Limited* (1986) 162 CLR 24; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45. However, the immediate question is whether I can be satisfied that the contention of the applicants of the need to demonstrate a purpose or reason for the decision related to the grounds relied upon, rather than a purpose (any purpose) *not extraneous* to the objects of the *Bankruptcy Act*, has no reasonable prospect of success for the purposes of s 31A(2)(b). I am not so satisfied.
2. One arguable construction is that para (1A) simply removes the obligation to state in the notice the reasons, not that no reasons are required.
3. Spencer and Perovich have prepared as part of their responsive submissions an “Annexure A” section and a revised Annexure A setting out references to the evidence supporting a range of factual propositions. I have considered both documents and I have also considered the matters at “Annexure B”. However, I am satisfied that there are mixed questions of fact and law to be resolved in determining the claims of the applicants. Section 31A is not the proper vehicle for foreclosing, without trial, the resolution of those controversies of fact and law.

## The intersection between the s 178 and s 30 claims

1. As to the intersection between the challenge to the trustee’s exercise of the objection power and the challenge to the resolutions of the creditors (in accordance with the *Re Crawford* principles), the applicants concede that if the objection power is properly exercised, the challenge to the resolutions of the creditors under s 30 on the footing that Spencer and Perovich caused (by the content of the Circular and possibly other documents arising out of discovery, and pleaded facts said to give rise to inferences) the resolutions to be passed in *aid* of an improper exercise of the objection power by the incoming trustee, falls away.
2. If, on the other hand, Spencer and Perovich agitated with the creditors (on all the evidence) to pass resolutions to remove the former trustees and appoint Mr Whitton so as to exercise the objection power in reliance upon a ground unrelated to the reason for exercising the power, the Court might at least arguably, intervene in a remedial sense, by setting aside the resolutions assuming the questions of mixed fact and law concerning the exercise of the objection power are resolved in favour of the applicants.
3. I am not satisfied that the applicants have no reasonable prospect of success on such a claim.
4. As to the factors influencing the passage of the resolutions at the meeting of creditors, the applicants rely upon the Circular and other facts said to give rise to inferences of calling the creditors in aid of replacing the former trustees and appointing Mr Whitton to enable an objection decision to be made for a reason unrelated to an s 149D(1) ground. The facts pleaded thus far are the best the applicants can do, they say. The applicants ought to have the benefit of disclosure before being foreclosed in the action. The material pleaded is sufficient, they say, to support a reasonable contention. Having regard to the conclusion that I am not satisfied that the challenge to the s 149B(1) decision has no reasonable prospect of success, and the relationship between that matter and the s 30 calling in aid case, I am not satisfied that the claims based upon s 30 have no reasonable prospect of success, for the purpose of s 31A(2)(b).

## Joining the creditors

1. I accept, for the purposes of s 31A(2)(b), that it is reasonably arguable that the applicants need not join the creditors as parties when the relief sought is the setting aside of the resolutions passed at the meeting and the restoration of the former trustees to their position: *Macks as Trustee of the Property of Balnaves v Ardalich* [1999] FCA 679.

## Section 178 and the question of standing

1. Mango Boulevard and BMD assert that they are creditors of each estate by reason of the costs orders earlier described.
2. Initially it was said on behalf of Spencer and Perovich that the amount owing by Mango Boulevard for the respective purchases of the relevant shares in Kinsella was $1,042,325.18 (see the affidavit of Mr Rozario sworn 4 August 2011 and Annexure QGR9 to that affidavit (that is, the annexed affidavit of Mr Thomson of 5 February 2007 at para 26)). The conceded debt (in 2007) however was paid into the Supreme Court of Queensland and disbursed for the benefit of the respective estates. Nevertheless, the calculation (resulting in the net debt of $1,042,325.18) asserts a deduction, as part of the net debt calculation, of a set‑off of $1,005,856.40. Spencer and Perovich assert that the amount of the set‑off is contested and remains a debt due to the respective estates. Spencer and Perovich say that the underlying position is that the applicants are, in truth, debtors to the estates in substantial sums, a proposition which may ultimately turn on where the merits lie on particular issues alive in the various Supreme Court proceedings.
3. Section 178 provides that if a bankrupt, a creditor or any other person is *affected by* an act or decision of the trustee, he or she may apply to the Court and in any such application the Court may make such order as *it thinks just and equitable* in the case.
4. The *Bankruptcy Act*, prior to the introduction of s 178 in its current form, conferred standing to apply for relief on the bankrupt, any of the creditors, or any other person *aggrieved by* any act or decision of the trustee. In *Re Tyndall, Ex parte Official Receiver* (1977) 17 ALR 182, Deane J regarded the removal of the “express requirement” (p 186) of a person “aggrieved”, and the adoption of the notion of a person “affected” by a decision of the trustee in s 178, coupled with a [power] and an [obligation] (p 186) in the Court (by operation of s 178) to make such order as the Court thinks just and equitable, as conferring upon the Court the “widest possible discretion” (p 186) which, in its exercise, should not disregard the trustee’s decision nor unduly interfere in the trustee’s day‑to‑day administration of the estate (at p 186). However, an applicant need not show under s 178 that the trustee’s decision was absurd, unreasonable or taken in bad faith (*Re Tyndall* at p 187; *Frost v Sheahan* [2009] [FCAFC 20]; (2009) 6 ABC (NS) 786 at [8].
5. By s 178, the Court exercises a “supervisory jurisdiction” over the conduct of the trustee: *Cummings v Clarmont Petroleum NL* (1996) 185 CLR 124 at 132 per Brennan CJ, Gaudron and McHugh JJ.
6. The scope of the supervisory jurisdiction conferred by the widest possible discretion means that an order may be made under s 178 even if the trustee’s decision was correct on the material before him or her if, for example, additional material is put before the Court: *Frost v Sheahan*, Full Court, at [8].
7. In *Allan v Transurban City Link Limited* (2001) 208 CLR 167, the majority (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) observed that the term “affected by” in s 119(1) of the *Development Allowance Authority Act* 1992 (Cth) would need to be determined by reference to the subject, scope and purpose of that Act rather than by the application of analogical general law principles. In *Transfield Construction Pty Ltd v Automotive Food, Metal, Engineering, Printing and Kindred Industries Union* [2002] FCA 1413, Merkel J considered the construction of s 127(2)(b) of the *Workplace Relations Act* 1996 (Cth) which conferred standing to apply for particular orders on “a person *directly affected* or … likely to be directly affected, by the industrial action” [emphasis added]. Merkel J at [19] adopted an observation of Brennan J in *Re McHattan and Collector of Customs (NSW)* (1977) 18 ALR 154 at 157 that the “ripples of affectation may widely extend” and observed however, applying *Allan v Transurban City Link Limited* that the question of “whether a person is affected [the particular term used in s 127(2)(b) however was “directly affected”] by a particular decision is to be answered by reference to the subject, scope and purpose of the statute” conferring the right to apply.
8. There seems to be no authority (and counsel for the applicants have not been able to identify any authority) expressly directed to the scope of the phrase “affected by” in s 178. The phrase “affected by” in s 178 is used in the sense of “produce an effect on” (Oxford English Reference Dictionary (OERD), 2nd Edition, “affect” (1a)) and an “effect”, as a noun, focuses upon the “result or consequence of an action” (OERD, “effect”, n, 1).
9. The effect of a sequestration order, put broadly, is to divest the bankrupt of property and vest that property (not being after‑acquired property) in the trustee. After‑acquired property vests in the trustee as soon as it is acquired by or devolves on the bankrupt (s 58). The property of the bankrupt is made available for the payment of provable debts (see s 116). The rights and interests of the bankrupt that might constitute the property of the bankrupt for this purpose (and relevant qualifications) are addressed in detail in the statutory provisions. A bankrupt may be content to see the estate administered to the point of discharge from bankruptcy and release from provable debts (coupled with ongoing obligations to assist a trustee) or may seek to propose a composition or scheme of arrangement with creditors under s 73. The creditors may, by special resolution, accept the proposal. Upon discharge, the property of the bankrupt available for payment of provable debts remains vested in the trustee (for realisation, declaration of a dividend and distribution). A composition accepted by creditors under s 73(4) results, upon the passing of the special resolution, in an annulment of the bankruptcy, under s 74(5).
10. A decision of the trustee to object to a bankrupt’s discharge prevents the discharge from taking effect automatically under s 149(1) thus altering the rights and obligations which would subsist upon discharge under the *Bankruptcy Act* but for the trustee’s decision. All creditors are necessarily affected by such a decision. The bundle of rights and obligations derived from the statutory regime applicable to the administration of the bankrupt’s estate *in bankruptcy* continues by reason of the intervention of the trustee’s decision. Had the objection decision not intervened, discharge would have effected a change in the rights, obligations and entitlements arising under the *Bankruptcy Act*.
11. Apart from creditors, debtors are also affected by such a decision. So too are persons with whom the trustee engages in respect of any relevant right, interest or claim to be advanced by or against the estate or in respect of assets (property of the bankrupt) that would remain vested in the trustee upon discharge.
12. The approach to the construction of s 178 reflected in the authorities already mentioned recognises that s 178 confers a supervisory jurisdiction in the Court engaging the widest possible discretion and although that matter goes to the *scope* of the discretion and *orders* that might be made as the Court thinks just and equitable in all the circumstances, the approach to the scope of the discretion also suggests that the notion of “any other person affected by an act, omission or decision of the trustee”, ought to be given a broad conception. The subject, scope and purpose of the *Bankruptcy Act* suggest that the “ripples of affectation” are intended to “spread widely” so as to give symmetry with the wide supervisory jurisdiction the Court is “obliged” (*Re Tyndall* per Deane J at p 186) to exercise over the trustee so as to do what might be thought by the Court to be *just and equitable* in all the circumstances of the case.
13. Spencer and Perovich say that s 178 does not mention, expressly, “debtors” and had the parliament intended to extend the reach of s 178 to persons affected in their capacity as debtors, s 178 would have expressly said so. Thus, it is said, debtors are not a class of persons contemplated as having standing to apply for relief under s 178 in respect of an act, omission or decision of the trustee. However, it seems to me that having regard to the important role that s 178 plays in the supervision of the scheme of the *Bankruptcy Act* and the administration of the estate by the trustee, it is at least arguable that a debtor may be a person capable of being “affected by an act, omission or decision of a trustee”.
14. Spencer and Perovich say that the applicants are not affected as creditors, as distinct from the general body of creditors, because they can set‑off the quantified costs orders against the retained monies ($1,005,856.40). That issue is in controversy as the applicants say that they have properly asserted an equitable set‑off which operates as a defence and no part of the above sum is a debt due to the estate against which the amounts due under the costs orders might be off‑set. Spencer and Perovich seek to put on further evidence on the issue of the contended unmeritorious set‑off of the retained monies mentioned above. However, the applications have been argued on the basis of the present material and it is not appropriate to give leave to file, serve and rely upon further material going to this question.
15. Although the applicants say that they are affected by the trustee’s decision as creditors, the case is “primarily put”, they say, on the ground that they are also “any other person affected by” the trustee’s decision to extend the bankruptcy. That follows because on their case, the decision to object was made for an improper *composition* purpose and may result in a composition that could *not* have been proposed by either bankrupt after discharge, or put to a meeting of creditors after discharge. Further, consequent upon the proposed composition, the applicants must deal with the bankrupt consequent upon annulment rather than the trustee in respect of the relevant property which would otherwise remain vested in the trustee after discharge.
16. The applicants say that discharge of the bankrupt with the trustee remaining invested with the relevant property of the bankrupt and exercising decision‑making in relation to that property on the one hand, compared with objection, extension of the bankruptcy, proposed composition followed by annulment and re‑vesting of the property of the bankrupt in each bankrupt, on the other hand, represents a significant alteration in the pre‑objection decision position. This change is most immediately expressed, they say, in the post‑objection decision possibility that the improper composition purpose will be implemented re‑engaging the applicants with each bankrupt in relation to the re‑vested property of the bankrupt.
17. Spencer and Perovich say that the circumstance that the applicants might be required to once again deal with either bankrupt is not an “affect” upon the applicants in their capacity as any other person and, in any event, until a composition is accepted by the creditors their interests are not affected by the objection decision of the trustee. Of course, upon the *passing* of the special resolution, the bankruptcy is annulled by operation of s 74(5) of the *Bankruptcy Act*. If the objection decision is shown to be made for an improper purpose in the technical sense, a statutory annulment arising on the passing of a special resolution of creditors at a meeting convened consequent upon an objection decision made in excess of the power conferred under s 149B(1) may arguably give rise to possible constraints upon the exercise of the discretion under s 178.
18. Spencer and Perovich also contend that other provisions of the *Bankruptcy Act* (s 134 and s 135) might require Mango Boulevard and BMD to continue to deal with them in any event and thus the requirement to deal with each bankrupt consequent upon a composition and an annulment is not itself a matter which gives rise to affectation: *Citicorp Australia Ltd v Official Trustee in Bankruptcy* (1996) 71 FCR 550 at 558However, even assuming that to be so, it does not alter the arguable proposition that the objection decision of the trustee has altered the interplay of rights and obligations which would have subsisted upon discharge but for the decision to extend the bankruptcy and enable the submission of a composition proposal to take place which could not occur in a post‑discharge environment.
19. Accordingly, I am not satisfied that the contention of the applicants that they are persons affected by the decision of the trustee has no reasonable prospect of success, simply on the contended footing that no affect can arise for the purposes of s 178 until the creditors accept the proposed composition by passing a special resolution.
20. I am also not satisfied that the contentions of the applicants as to their position as a creditor on the costs orders or as persons affected by the decision of the trustee, have no reasonable prospect of success for the purposes of s 31A(2)(b). I am also not satisfied that the contention of the applicants that debtors (or persons who may seek to deal with the trustee in respect of an asset of the estate) are also persons affected by a decision of the trustee (on the relevant facts), has no reasonable prospect of success for the purposes of s 31A(2)(b), especially having regard to the lack of authority directed to the question of the proper construction of “persons affected by” in s 178.
21. If the case is made good that the trustee’s decision was made for an improper purpose and the objection decision is susceptible of an order in the exercise of the s 178 supervisory jurisdiction, with the result that *but for* the decision a discharge would have taken effect, the applicants may be able to show that they are otherwise any person affected by the trustee’s decision. I am not satisfied that such a contention has no reasonable prospect of success upon a determination of all of the mixed questions of fact and law that go to that question at a trial, for the purposes of s 31A(2)(b).
22. Accordingly, the application under s 31A(2)(b) of the *Federal Court of Australia Act* must be dismissed.
23. In the alternative, Spencer and Perovich seek an order pursuant to Rule 16.21 of the *Federal Court Rules* 2011 for the striking out of paras 2.3, 3.30, 3.32, 3.33 and 3.34 of the Amended Statement of Claim as already outlined in these reasons. As to 2.3, Mango Boulevard and BMD contend that one of the issues in the proceeding is the state of Mr Whitton’s belief about the two identified matters. It seems clear enough that the applicants do not contend that s 149B(2) is engaged and therefore the state of Mr Whitton’s belief about those matters will not be an issue. The issue, they say, is simply whether the identified reason relates to the identified ground. Accordingly, para 2.3 should be struck out. Paragraph 3.30 ought to be retained simply on the footing that it represents a statement that s 149B(2) is not engaged and has no role to play. Paragraph 3.32, 3.33 and 3.34 go to the matters already discussed and I am satisfied that there is a proper basis upon which those facts are pleaded relevantly related to the grounds of relief sought in the proceedings by reference to the jurisprudence already discussed.

## The strike‑out application by Mango Boulevard and BMD

1. Rule 16.21 of the *Federal Court Rules* is in these terms:

**16.21 Application to strike out pleadings**

(1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:

(a) contains scandalous material; or

(b) contains frivolous or vexatious material; or

(c) is evasive or ambiguous; or

(d) is likely to cause prejudice, embarrassment or delay in the proceeding; or

(e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

(f) is otherwise an abuse of the process of the Court.

1. By Rule 16.02(2), a pleading must not be likely to cause prejudice, embarrassment or delay in the proceeding or fail to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading.
2. The principles to be applied in an application under Rule 16.21 having regard to Rule 16.02(2), are not in contest. They are summarised by Bowen CJ in *Brambles Holdings Ltd v Trade Practices Commission* (1979) 28 ALR 191 at 193; see also *BWK Elders (Australia) Pty Ltd v Westgate Wool Co Pty Ltd* [2002] FCA 87 at [3].

### Paragraph 10 of the Amended Defence (the “Defence”)

1. At 3.7 of the Amended Statement of Claim (“AMSOC”) the applicants plead that resolutions put at a meeting of creditors on 5 August 2008 of the bankrupt estates of Spencer and Perovich to remove the former trustees and appoint Mr Whitton were not passed. Spencer and Perovich admit 3.7 and say at para 10 of the Defence that the resolutions failed due to the former trustees admitting a defective proof of debt lodged by Greener Investments Pty Ltd (“Greener”) and had they not done so, the resolution would have passed.
2. The applicants say that the reason for the failure of the resolution is irrelevant. The primary fact pleaded, they say, is the failure of the motion at the meeting on 5 August 2008 and no further motion for removal came forward until 29 October 2010 and ultimately 5 November 2010, two years later. Those matters are said to support an inference that the real purpose of the removal resolution was to enable Mr Whitton to exercise the objection power so as to extend each bankruptcy for the composition purpose.
3. Spencer and Perovich say that paras 28(w) to (z) and 28(rr) to (vv) of the Defence plead matters going to the displacement of the former trustees as administrators of Greener in favour of the appointment of a liquidator of Greener (before Lander J). Those paragraphs plead that the liquidator on 2 November 2010 then withdrew the Greener proxy and elected not to participate in the meeting on 5 November 2010. That step is said to have led to the passage of the removal resolutions. From these facts, Spencer and Perovich say that an inference arises that “the former trustees were using a debt which had allegedly grown from $2.3m to $116m and which was allowed for $82m, for the purpose of maintaining their trusteeship of the estates”: second and third respondents’ submissions (22 September 2011) at para 17(c).
4. Paragraph 10 of the Defence therefore introduces Greener in the context of the meeting of 5 August 2008. The events relating to the Greener proof are said to be relevant to the later passage of the resolutions on 5 November 2010 in the context of the conduct allegations.
5. The criticism by the applicants is that the Defence does not plead that the withdrawal of the liquidator’s proxy determined the outcome of the meeting on 5 November 2010 and, more importantly, the Defence does not plead the conduct allegation concerning the trustees contended use of the Greener proxy (debt) to maintain their position as trustees in any relevant meeting.
6. These matters are presumably relied upon by Spencer and Perovich to provide a basis for contending that the creditors did not vote to remove the former trustees in aid of an improper purpose on the part of an incoming trustee to extend the bankruptcy, but rather because the creditors held broader concerns about the conduct of the former trustees, in part at least, related to the treatment by the former trustees of the Greener proxy and the admission of the Greener debt at $82m. An inference may be that no steps were taken after 5 August 2008 because the treatment of the Greener claim was thought to determine the outcome of any vote in any event. An alternative inference may be the one contended for by the applicants.
7. Certainly, these contentions about the conduct of the former trustees are not expressly pleaded in the terms identified in the submissions. What is now said is that the conduct allegations (which must necessarily be shown to be relevant to the relief sought in the proceeding) arise as inferences drawn from foundation facts. If that case is to be put, it ought to be pleaded. I will not strike out the references to Greener in para 10 of the Defence. I will give leave to Spencer and Perovich to amend the Defence to plead the case they describe in their submissions so that the applicants are not taken by surprise by an inferential case which is not transparently or expressly pleaded in the Defence by reference to the material foundation facts.

### Paragraph 24(a) to (i) of the Defence

1. At para 3.22 of the AMSOC, the applicants plead that the meeting of creditors held on 29 October 2010 was adjourned to 5 November 2010.
2. At paras 24(a) to (i), Spencer and Perovich plead facts relating to the adjournment. There are many of them.
3. They are: (a) reliance by the former trustees on the Greener proof (as admitted); (b) the Greener proof was admitted although defective; (c) the liquidator of Greener had told the former trustees that he would not object to a change of trustees; (d) on 1 November 2010 the former trustees applied to the Federal Magistrates Court for leave to resign noting that they had lost the confidence of the creditors; (e) the applicants attended the meeting on 29 October 2010 and did not support the former trustees; (f) the applicants appeared on the leave to withdraw application by senior and junior counsel on 4 November 2010; (g) the application was adjourned so as to allow the creditors meeting to occur on 5 November 2010 and consider the removal resolution; (h) on 5 November 2010 the creditors passed the resolutions; and (i) consequent upon the meeting of 5 November 2010, the applicants consented to discontinuance of the leave to resign application.
4. The applicants say that none of these matters are relevant to the relief sought and nothing is asserted as relevant to the exercise of the objection decision, arising out of the adjournment of the meeting from 29 October 2010 to 5 November 2010. The applicants say that they plead the *fact* of the adjournment simply to explain the voting on the resolutions on 5 November 2010 rather than the convening date of the meeting on 29 October 2010.
5. Spencer and Perovich say that the facts pleaded concerning the adjournment are relevant to the *reasons* for the adjournment and the *events* that transpired as a *result* of the adjournment. Those matters are said to be relevant to the exercise of the discretion under s 178.
6. The Defence however does not actually plead that the reasons influencing the adjournment of the meeting, or the events that transpired as a result of the adjournment, give rise to an inference (or directly go to matters) about the reasons for the creditors voting to remove the former trustees on 5 November 2010 and appoint Mr Whitton on that day. There is no pleading, for example, that by reason of particular factors relating to the adjournment of the meeting, the creditors had lost confidence in the former trustees (if that be the case contended for) or that anything related to the relief claimed is to be drawn from the facts explanatory of the adjournment.
7. If these matters are relevant to the relief claimed as factors which would cause the Court to refuse to interfere with the resolutions of the creditors, those facts ought to be pleaded in a way which demonstrates the relevant contention and the relationship between the facts as contended for and the way in which those facts answer the claim for relief. Leave will be given to amend the pleading so as to plead the facts in a way which demonstrates the relationship between the facts and the relevance of those facts in answer to the claim for relief.

### Paragraph 28(a) to (v) of the Defence

1. In answer to the *whole* of the AMSOC, Spencer and Perovich plead at para 28(a) to (v) the commercial background to their dispute with the applicants commencing with the Put and Call Option Agreement of 2003 concerning the land; the agreements made between the parties; issues in relation to the price and the price mechanism under the Share Sale Agreement; the contended non‑payment of the purchase price of the relevant shares; and many other factual matters in controversy between the applicants and Spencer and Perovich. These paragraphs also recite many aspects of the proceedings taken and applications made in the Supreme Court between the applicants, Spencer and Perovich.
2. The criticism of these paragraphs by the applicants is that these 22 subparagraphs of para 28 in large measure put in issue the history of the inter‑parties’ disputes reflected in the various proceedings and applications in the Supreme Court and otherwise. Those matters are said to be irrelevant to the challenges under s 30 and s 178 and, more particularly, the matters have been pleaded in the Defence as “material facts” to be established in the proceeding which, in effect, re‑litigates the merits of each of those contentions in this proceeding.
3. Spencer and Perovich contend that these paragraphs simply plead the *fact* of the disputes, aspects of the content of the various disputes and the history of the proceedings in the Supreme Court, because the particular history is said to be relevant to the exercise of the discretion. By pleading these matters, Spencer and Perovich do not seek to establish, they say, the truth of the fact of each matter pleaded, especially as to contentions made by Spencer and Perovich in the various controversies.
4. I accept that rather than simply plead each matter “in answer to the whole of the Statement of Claim”, as facts to be established by probative evidence in the proceeding (especially where those matters are to be determined on the merits in the various Supreme Court proceedings), the Defence ought to plead, as a fact, that the applicants and Spencer and Perovich have been engaged in controversy about particular issues in particular proceedings. The Defence ought to also plead facts which demonstrate the relevance of the history of the disputes (or issues) to the basis upon which those matters answer the claims for relief under s 178 in respect of the objection decision and answer the claim for relief under s 30 of the *Bankruptcy Act* in respect of the contention that the resolutions of the creditors on 5 November 2010 were called in aid of the improper exercise of the power conferred under s 149B(1). The present difficulty with the pleading is that each of the matters in para 28(a) to (v) are said to answer the whole of the AMSOC. Many of those matters such as the valuation issues (28(j)) and the contended failure on the part of Mango Boulevard to cooperate in a mediation of the various matters (28(n)) are contested and it is difficult to immediately see the basis upon which those matters answer the claims for relief in the present action. They may do so but the basis upon which those matters answer the claims needs to be properly identified.
5. Spencer and Perovich will be given leave to amend their Defence to plead those matters in a proper form.

### Paragraphs 28(w) to (z) of the Defence

1. Spencer and Perovich plead paras 28(w) to (z) in answer to the entirety of the Statement of Claim. The content of those paragraphs has been described briefly at [150] of these reasons. The pleaded facts are these: (w) On 30 May 2010, the former trustees assumed the role of administrators of Greener and resisted an application to wind up Greener; (x) The Greener debt arose out of a loan of $2.3m made to companies associated with Spencer and Perovich with interest compounding monthly at the rate of 12.5%; (y) On 21 June 2010, the former trustees asserted on oath that there was no conflict in their assuming the role of administrators of Greener when acting as trustees of the estates of Spencer and Perovich; (z) On 24 June 2010, Lander J made orders for the winding up of Greener and the removal of the former trustees as administrators of Greener.
2. The applicants say that the history of the role of the former trustees as voluntary administrators of Greener is irrelevant to the passing of the resolutions on 5 November 2010.
3. Spencer and Perovich say that part of the relief sought by the applicants is the reinstatement of the former trustees and it is relevant to the exercise of the powers conferred under s 30 of the *Bankruptcy Act* to have regard to the question of whether the former trustees “had put themselves in a position of conflict between their role as trustees of these estates and as administrators of [Greener] which was a company to which [the estates] allegedly owed an amount of $82 million which was used by the former trustees up until the time of the meeting on 5 November 2010 to vote in favour of their remaining as trustees of these estates”: second and third respondents’ submissions (22 September 2011) at para 17(d).
4. The applicants’ essential criticism of these paragraphs is that they are supported by Spencer and Perovich on the footing that they go to a conflict of interest on the part of the trustees, and conduct by the trustees, through the use of the debt to Greener (and the Greener proof and proxy), to ensure that the former trustees remained in their role as trustees of the estates. However, that matter has not been pleaded. No conflict of interest is actually pleaded.
5. The Defence ought to plead the material facts upon which the conflict of interest conduct rests, and the conduct of the trustees, in the way in which they are said to have used the Greener claim or their position as administrators of Greener to entrench their position as trustees of each estate.
6. Since Spencer and Perovich assert by their submissions that this is the case to be made, leave will be given to amend the Defence to plead the case reflected in their submissions.

### Paragraphs 33(a) and 33(b) of the Defence

1. Spencer and Perovich plead that these proceedings have been commenced for the improper purpose of preventing the creditors of each estate from considering compositions proposed by Spencer and Perovich as compared with offers made by the applicants, so as to gain a collateral advantage in proceedings between the applicants and Spencer and Perovich in Supreme Court proceedings BS1999 of 2006 as:

(a) [Mango Boulevard and BMD] are major debtors of the estates of Spencer and Perovich;

(b) [Mango Boulevard and BMD] are engaged in litigation in the Supreme Court of Queensland regarding the major assets of Spencer and Perovich’s estates namely BS1999 of 2006 and BS1714 of 2011;

…

1. Paragraph 33 also relies upon subparagraphs (c) to (h). The applicants do not seek to strike out the contention at para 33 introducing each of the subparagraphs. The notion that the present proceeding has been commenced for an improper purpose, supported by para 33(c) to (h), is unchallenged in the strike‑out application. The criticism of para 33(a) and (b) is that the paragraphs assert, as a fact, that Mango Boulevard and BMD are major debtors of the estates of Spencer and Perovich and that the Supreme Court litigation concerns the major assets of each estate. The applicants say that those matters must necessarily be established as facts in the present proceeding which has the effect of litigating in this action the matters which are being litigated in the Supreme Court. Plainly enough, the question of whether the present proceedings have been instituted for a collateral purpose, is relevant to the exercise of the discretion. It may be that Spencer and Perovich simply seek to establish the fact of their assertion that the applicants are major debtors of the estates; major assets of each estate are the subject of the Supreme Court proceedings; and, Mango Boulevard and BMD dispute each of those matters. Proof of the truth of the contentions, in these proceedings, seems not to be the point of the pleading.
2. I accept that the present pleading of paras 33(a) and (b) suggests assertions of fact which need to be established as a matter of probative evidence on the merits in the proceeding. That seems not to be the intention of Spencer and Perovich.
3. Spencer and Perovich will be given leave to amend the pleading to make clear whether the fact of the controversy is the matter to be established, as seems consistent with their submissions.
4. I propose to take the following course in relation to the strike‑out application. Spencer and Perovich will be given leave to file a Further Amended Defence which addresses the discussion at [148] to [176] in order to enable them to plead the case they seek to maintain. I will not strike out the paragraphs at 24(a) to (i) of the Defence on the footing that these facts may be shown to be relevant when further facts are pleaded which address the matters at [160] and [161]. I will strike out the paragraphs at 28(a) to (v) concerning the assertions of fact, in these proceedings, relating to the matters in issue in the Supreme Court proceedings. It may be that the content of the historical disputes reflected in those paragraphs is to be re‑pleaded, much in the same way, but put on the basis that the fact of the dispute is the matter of relevance. No doubt, if that is so, the matter will be pleaded in a way which makes it plain that each of the factual contests in the Supreme Court of Queensland is not to be re‑litigated in these proceedings. I will not strike out paras 28(w) to (z), on the footing that those matters might be the subject of a further pleading of further facts going to the contended conflict of interest. The further Amended Defence may demonstrate the relationship between those facts, additional facts and the relief claimed by the applicants in the proceeding.
5. As to paras 33(a) and (b), those paragraphs will be struck out with leave to re‑plead generally so as to address the matters at [175] of the reasons.
6. The costs of the application by Spencer and Perovich will be reserved. The costs in relation to the strike‑out application by Mango Boulevard and BMD will be reserved.

## The applicants’ challenges to admissibility of evidence

1. During the course of the applications I made a preliminary ruling which was to be further considered in these reasons, that the reference to a “without prejudice” communication (a letter dated 21 December 2010 annexed to the affidavit of Mr Rozario sworn 18 August 2011 described as QGR‑28), representing the sole basis supporting a challenge by Spencer and Perovich to the applicants’ action as an abuse of process, was inadmissible.
2. I confirm the preliminary ruling.
3. No abuse of process contention is pressed as part of the s 31A application. It remains as part of the Defence to the proceeding. The applicants expressed strong protest about the incorporation of the “without prejudice” material in the affidavit followed by the abandonment of the contention so far as relevant to the s 31A application on the morning of the hearing upon challenge to the use of the “without prejudice” material. That matter is simply noted.
4. As to other challenges to admissibility, I accept that those paragraphs of Mr Whitton’s affidavit that are directed to questions of the “appropriate venue” are irrelevant to the present applications. As to those paragraphs of the affidavits relied upon by Spencer and Perovich that are based upon information and belief derived from sources of information other than the knowledge of the deponent (whether expressed as information or belief or simply properly characterised in that way), none of those paragraphs are admissible on the s 31A application for final relief. Each of those paragraphs is admitted on the strike‑out applications made under the *Federal Court Rules*.
5. Apart from the orders dispositive of the applications, orders will be made addressing the future conduct of the proceeding.

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| I certify that the preceding one hundred and eighty‑four (184) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 6 December 2011