JUDGMENT BARRETT J : Supreme Court, New South Wales, Equity Division, Corporations List 7th December 2007

The proceedings

1 The plaintiff, being a creditor of the defendant (which I shall call "SSM"), seeks an order that SSM be wound up in insolvency and an order for the appointment of a liquidator.

2 When the winding up application came on for hearing on 25 September 2007, SSM conceded that the case based on insolvency had been made out. It maintained, however, that the winding up application should be dismissed because the proceedings are an abuse of the process of the court. An alternative submission was that the court should in the exercise of its discretion, decline to make a winding up order. It was these contentions that caused the hearing of the winding up application to extend over no less than six days.

3 SSM's case, briefly stated, is that the plaintiff acquired by assignment the debt which caused it to have standing as a creditor of SSM necessary for the initiation of these proceedings, issued a statutory demand under s 459E of the *Corporations Act* 2001 (Cth) in respect of that debt and commenced and pursued the winding up application for the purpose of supplanting the controller of SSM. The plaintiff's purpose, according to SSM, was to gain an advantage for SSM's opponent in long-running disputes between SSM and another company, Abel Point Marina (Whitsundays) Pty Ltd (which I shall call "APM"). Furthermore, SSM says, the plaintiff engaged in this course of conduct not in furtherance of its own interests as a creditor by assignment or to protect its own position, but to promote and further the interests of APM. It is significant that the plaintiff and APM shared common ownership and control at the time of the commencement of the proceedings.

The chronology in brief

4 It is necessary to traverse briefly a series of events that began in December 2004 when a contract was entered into between SSM and APM under which SSM was to undertake construction works for APM in relation to a marina project at Airlie Beach in Queensland. Tensions later developed. A progress claim made in June 2006 was disputed and SSM, in an attempt to obtain a progress payment from APM, resorted to the adjudication process under the *Building and Construction Industry Payments Act* 2004 (Qld).

5 There had been disputes between SSM and APM over earlier progress claims. There had also been disputes about SSM's performance under the construction contract. Resort to the adjudication process in respect of progress claims was already an established feature of the relationship between SSM and APM.

6 The plaintiff was not involved in any way in the construction project or the disputes arising from it. Nor did it have any business dealings or other relationship with SSM. Rather, the plaintiff was a dormant company controlled by Mr Andrew Robinson. Mr Robinson is also the principal and controller of APM. He is a solicitor as well as a businessman. His wife, Mrs Dominique Robinson, is the sole equity proprietor of the firm Robinson Legal which conducts its practice in Sydney. There are non-equity partners in the firm, including Ms Margaret Olsen. Ms Tatiana Mijic is an employed solicitor. Mr Robinson, admitted to practice in 1979, is himself a consultant to the firm and maintains an office in its premises.

7 Mr Robinson gave evidence that he sold the shares in the plaintiff and ceased being a director in December 2006. The buyer was Mr Phillip Sharkey. I shall return to this matter.

8 This is not the first occasion on which the plaintiff has applied to the court for a winding up order in respect of SSM. An earlier application was dismissed by consent on 1 November 2006 in circumstances which it is relevant to refer.

9 On 11 September 2006, the plaintiff took an assignment of a debt of $198,414.70 owing, due and payable by SSM to Waterway Constructions Pty Ltd ("Waterway"). The plaintiff paid $50,000.00 to the assignor. On 12 September 2006, the plaintiff gave to SSM written notice by the assignor of the assignment of the debt. On the same day, the plaintiff served on SSM a statutory demand under s 459E of the *Corporations Act* in respect of the debt of $198,414.70. The statutory demand was served under cover of a letter from the plaintiff's solicitors, Robinson Legal.

10 On 28 September 2006 (that is, before the end of the period for compliance with the statutory demand served on 12 September 2006), the plaintiff filed in this court an originating process claiming an order for the winding up of SSM in insolvency.

11 That winding up application was fixed for hearing on 7 and 8 November 2006. White J appointed the hearing on 1 November 2006. When the matter came before his Honour later that same day, however, it was announced that the proceedings had been settled. By consent, the plaintiff's winding up application was dismissed with no order as to costs and the court noted certain agreements and undertakings. These included an agreement between APM (not, of course, a party to the winding up proceedings) and SSM to put an end to proceedings in the Queensland Court of Appeal (which would see the release to SSM of $435,431.84 paid into court by APM) and an undertaking by SSM that the $435,431.84 would be applied in paying $198,414.70 to the plaintiff, with the balance being "paid out to trade creditors of SSM other than related entities of SSM". There was also an undertaking by SSM to cease trading "except to pursue its rights against Abel Point Marina (Whitsunday) Pty Limited or as otherwise permitted by further order of this court". The Queensland Court of Appeal proceedings concerned a progress claim adjudication.

12 Eight days later, on 9 November 2006, the plaintiff took an assignment of another quite separate debt owing, due and payable by SSM. This was a debt in the sum of $233,277.25 owing to Engwirda Marine Pty Ltd ("Engwirda"). The plaintiff paid Engwirda $200,000.00 for the debt.

13 The very next day, 10 November 2006, the plaintiff gave to SSM written notice by Engwirda of the assignment of the debt. Also on 10 November 2006, a statutory demand in respect of this debt was executed on behalf of the plaintiff. The demand was served on 13 November 2006.

14 Two days after service of this statutory demand, the plaintiff commenced these proceedings by originating process filed on 15 November 2006. Orders under s 459R(2) have extended until 31 December 2007 the period within which that application is to be determined.

SSM's contentions

15 It is SSM's contention that, at the time of the hearing, APM owed it some $342,000 in connection with the marina project, being $100,000 retention moneys already due, $50,000 as a contribution to adjudicators' fees and $192,000 as a result of an adjudication decision. SSM also said at the hearing that a further $100,000 retention moneys would become due on or about 7 December 2007. This total of $442,000 would, it is said, cover all SSM's debts to non-related creditors (I suspect the expenses associated with these proceedings are not included in that assessment).

16 SSM also maintains that it has significant further claims against APM, related to the construction contract.

17 The contention of SSM with respect to the present proceedings is, in essence, that the plaintiff wishes to have SSM wound up and a liquidator appointed so that APM will be freed from the attentions of SSM. SSM is being supported financially by its controller, Mrs Brighton, or, at least other entities controlled by her and her family. Mrs Brighton may be considered to have some motive or incentive to pursue APM. She might also be minded to devote further financial resources to the task. A liquidator, by contrast, would, in SSM's view, have only SSM's own funds with which to pursue SSM's claims against APM. And incentives for Mrs Brighton to support a liquidator financially are not necessarily obvious.

18 Written submissions of Mr C M Harris SC, who appeared for SSM, put the matter thus in stating the basis of SSM's abuse of process case:

> *"In the present case the defendant asserts that the Court ought infer that the predominant purpose in the plaintiff's application is to obtain an advantage for Abel Point Marina (Whitsundays) Pty Limited in its defence of claims which have been made, and which may be made, against it by the defendant. Because the defendant has no funds with which to pursue those claims against APM, and because of the nature of those claims, it is extremely unlikely that any liquidator would do so, and thus the appointment of a liquidator to the defendant will stultify the pursuit by the defendant of its rights against APM, and will relieve APM from any contractual liability which it owes to the defendant."*

19 These, together with additional considerations, are said by SSM to be relevant to the separate submission that the court's discretion should, in any event, be exercised against the making of a winding up order.

20 Assessment of SSM's contentions regarding the plaintiff's purpose requires an examination of several aspects of the evidence.

Mr Robinson's approaches to SSM's sub contractors

21 It is Mr Robinson's evidence that, from about May 2006, he developed concerns about the welfare of subcontractors working on the marina project. They, of course, were sub-contractors retained by SSM for the purpose of supplying components of the work that SSM was required to do by its contract with APM, the marina proprietor. APM had no direct contractual relationship with the subcontractors but their efforts were important to the completion of the work SSM was performing for APM.

22 Late in May 2006, Mr Robinson spoke to Mr Engwirda (the principal of the company from which the plaintiff was later to take an assignment of the debt which enabled it to pursue the present proceedings). Mr Engwirda's company was a sub-contractor to SSM. Its tasks were related to piles and pontoons. Mr Engwirda had, on 29 May 2006, faxed to one of Mr Robinson's colleagues a statement of the elements of the debt owing to his company by SSM, amounting to $222,377.25. According to Mr Robinson, Mr Engwirda expressed concern about delay in payment by SSM and asked, "Are you able to pay me direct?" Mr Robinson's response was that he believed he had already paid SSM for the relevant work and could not "pay the same debt twice". Mr Robinson suggested that Mr Engwirda serve a statutory demand or lodge a claim under the security of payments legislation. He said he was prepared to have someone at his legal practice prepare a statutory demand. Soon afterwards, however, Mr Engwirda told Mr Robinson that he had come to an arrangement with SSM and did not wish to pursue these possibilities.

23 On 30 May 2006, Mr Robinson spoke to another sub-contractor, Mr Chisholm of Airlie Crane Hire. Mr Chisholm confirmed that $80,000.00 was outstanding and expressed concern about delay in payment by SSM. Mr Robinson spoke of the need to apply pressure and referred to the possibility of serving a statutory demand. Again, he suggested that his firm could provide legal services in that direction. On Mr Chisholm's instructions, Robinson Legal in fact wrote to SSM on that same day, 30 May 2006, demanding payment of $80,540.92 and foreshadowing service of a statutory demand. A few days later, however, Mr Chisholm told Robinson Legal that he did not wish to continue with any legal action.

24 Mr Robinson's evidence is to the effect that he was concerned for the financial welfare of the sub-contractors because of the vital role they had to play in bringing the marina project to completion. The danger that they might leave the site if not paid by SSM was seen by him as rebounding significantly to the detriment of APM as the marina proprietor anxious to see the project brought to completion by SSM. SSM points out, however, that Mr Robinson's apparent concern for the sub-contractors manifested itself (in the approaches just mentioned) within a short time after SSM had served on APM progress claim 10 in the sum of $205,785.00. This progress claim was dated 16 May 2006.

25 Having become aware of Mr Robinson's contact with sub-contractors, Mrs Brighton, the principal of SSM, wrote a letter dated 31 May 2006 to Mr Grounds, a third party who was playing a mediating role between APM and SSM pursuant to an agreement into which they had entered in December 2005. Mrs Brighton said that progress claim 10 appeared to have been "rejected without formal notice" and that "the only way these moneys will be paid is direct to sub-contractors". She said that she was astounded that "the principal" (obviously referring to Mr Robinson) had offered "free legal assistance to recover the debts". She then asked (or directed) that $106,615.06 out of the total progress claim of $205,785.00 be paid direct to named sub-contractors in nominated amounts. Engwirda and Airlie Crane Hire were among them.

26 Correspondence in evidence shows that Mrs Brighton had been diligent in seeking the concurrence of unpaid sub-contractors in arrangements that would see them receive part-payment out of the proceeds of progress claim 10. Many had agreed to such arrangements. It is clear, I think, that the decisions of Engwirda and Airlie Crane Hire not to continue with statutory demands through Robinson Legal was prompted by some assurance from Mrs Brighton that they could expect payment (albeit only part payment) directly out of the proceeds of progress claim 10.

Mrs Brighton's attempts to see the subcontractors paid

27 On 23 August 2006, Mrs Brighton wrote to Mr Robinson, referring to progress claim 11. She also said:

"With reference to the Adjudications Decision 1057877 172 (attached) regarding the compliance with the provision of Clause 43.1 of the contract please find attached relevant documentation to satisfy this requirement. The documents supplied are from all of the subcontract Companies that supplied labour for works under the contract to which Progress Claim No 11 relates and for works up to and including 31st June 2006.

We advise you that we have been informed that your Superintendent has again been in contact with our suppliers and subcontractors today advising them that you have no intention of paying our claim and that they should be submitting a subcontractors claim direct to the Principal for the initiation of 'winding up procedures' of Sea-Slip Marinas (Aust) Pty Ltd. in an attempt to recover any outstanding monies.

Your Superintendent is quoting financial information regarding Sea-Slip Marinas to these Companies, telling these Companies that even if you were to pay, that there is no way that they would receive any monies because of the alleged financial situation of Sea-Slip Marinas. I find this offensive, unfair and unethical behaviour for any Contract Superintendent or Principal. If you have a financial problem with paying the claim by 25th August as dictated in the Adjudication decision then you should talk to me direct and not allow your superintendent to contact our subcontractors and suppliers in an attempt to defame and financially destroy our Company's credibility.

It would appear that these attempts are only being made to avoid having to pay a long outstanding claim.

I look forward to receiving your payment by COB Friday 25th August 2006."

28 Mr Robinson, in the course of cross-examination, referred to the arrangement that had seen Mr Grounds cast in the role of "mediator". It is not clear that he was a mediator in the generally accepted sense. Rather, it seems that APM and SSM adopted an arrangement under which Mr Grounds and a Mr Thompson – neither of whom was directly connected with either party – should have access to a bank account into which APM had deposited money and from which moneys accepted by Mr Grounds and Mr Thompson as payable by APM to SSM could be drawn by them and paid. The agreement embodying this arrangement is dated 14 December 2005 and was referred to in evidence as "the DVA" ("December Variation Agreement").

29 Mr Robinson accepted that the payments direct to sub-contractors envisaged by SSM's direction as to payment in respect of progress payment 10 were not made. The explanation appears from the passage in his cross-examination:

"*Q. And if you go to the next letter in the group, which is a letter from Sea-Slip to Mr Grounds on 2 June, and go to the second page, you will see that Miss Brighton actually provides you with the bank account details of these various creditors so that payments can be made direct into their accounts?*

A. Mr Harris, understand this is a letter addressed to Mr Grounds and at that stage he was in possession of the account, which was under his sole control, that had half a million dollars in it. If he had been satisfied in accordance with the DVA that these moneys were payable, he was authorised, without reference to me, to make the payment. The problem was by May 2006 that one of the parties - your Honour, I'm sorry, could I have a copy of part of the DVA back for a moment?

Q. I have got a copy I can provide you with (shown).

A. The whole point of the December variation agreement was for me to effectively remove my ability to stop any legitimate payment in Miss Brighton's eyes and so I put half a million dollars into a trust account, for which the only two signatories were Mr Grounds and Mr Coleman, and if you look at--

HIS HONOUR: Q. Who is Mr Coleman?

A. Sorry, Mr Coleman was Carl Coleman, who was an executive director of the Waterways Corporation. If you go to clause 6, it says, M Palmer and B Thomson, so the concept was we would have a milestone set of payments. If there was any disagreement about whether a milestone had been satisfied, Matthew Palmer and Bob Thomson, had to authorise payment when milestones were complete. I had no input. In the event the agreement could not be reached, it was agreed that Mr Grounds should mediate and then the percentage was set out.

So, the concept was that if Palmer and Thomson agreed, Grounds and Coleman had the right without - had the obligation, without reference to me, to pay the bill immediately. Now, of course, the difficulty is that by May 2006 your client hadn't paid Bob Thomson, and so he then refused to participate in this mediation procedure. But the bottom line is the request was made in accordance with the mediator, Mr Grounds. If he had been satisfied that the amount was payable, he had not just the right, but the obligation to pay the cheque. It wasn't for me to pay the cheque."

Progress claim 11 and subsequent events

30 The next series of events to be examined followed delivery of progress claim 11 by SSM to APM. That claim was dated 30 June 2005 and was in the sum of $729,249.08. APM disputed the claim, which then went to adjudication under the Queensland legislation. The adjudicator determined that APM should pay $435,431.84. An application for review under the *Judicial Review Act* 1991 (Qld) was made by APM to the Supreme Court of Queensland. That application was dismissed by White J on 11 October 2006 (***APM Point Marina (Whitsundays) Pty Ltd v Uher*** [2006] QSC 295). APM subsequently appealed to the Queensland Court of Appeal. It is this course of litigation that became involved in the settlement of the earlier winding up proceedings in this court reached between APM and SSM on 1 November 2006 (see paragraph [11] above).

31 After delivery of progress claim 11, Mr Palmer, APM's contract superintendent, approached at least one sub-contractor (Brown Transport) by telephone saying that APM was making an application to court to stop SSM receiving any money. This is referred to in a letter of 28 August 2006 from Mr Brown to Mrs Brighton.

32 In the following month, Mr Robinson made the arrangements which saw the plaintiff take an assignment of the Waterway debt, give notice of the assignment to SSM and immediately issue and serve the statutory demand. Without waiting for the expiration of the period of 21 days specified in the statutory demand, the plaintiff filed and served a winding up application. It was that application that came before this court on 1 November 2006 and was, by consent, dismissed in the context of the agreement referred to at paragraph [11] above.

33 It should be noted, in this connection, that Waterway, the assignor of the debt to the plaintiff, was one of the sub-contractors named in Mrs Brighton's letter of 31 May 2006 to Mr Grounds. That letter asked that $99,170.00, out of the progress claim 10 moneys, be paid by APM to Waterway. In circumstances already mentioned, that request did not bear fruit. Waterway therefore remained unpaid and must be presumed accordingly to have been the more willing to entertain the plaintiff's proposal to acquire its debt.

Mr Robinson's undertaking in the first winding up proceedings

34 For the purposes of the plaintiff's winding up proceedings initiated by reference to the Waterway debt, Mr Robinson was the plaintiff's principal witness. He swore an affidavit on 25 October 2006 in which he referred to a transcript of 13 October 2006 in which Mrs Brighton had said to this court, "I signed an affidavit in the Queensland court to say that I would pay the money to the subcontractors the moment I got it". Mr Robinson annexed to his affidavit a copy of SSM's submissions in the Queensland Court of Appeal in which was said:

"SSM has a number of subcontractors currently pressing for payment and has previously undertaken to the Court that if the monies were paid out, those moneys would be used to pay subcontractors first, before any of the proceeds are used by SSM in its own business."

35 Mr Robinson then deposed in the affidavit of 25 October 2006:

"If a liquidator is appointed to the Defendant I undertake to this court to join with the liquidator in withdrawing the Queensland appeal and procuring the funds paid into the Brisbane Supreme Court by APM [sic; scil: to be paid] to the liquidator without prejudice to APM's right to prove in the liquidation of the Defendant for any justifiable liquidated and/or unliquidated amounts."

36 Mr Robinson explained in cross-examination that APM was not prepared to make the moneys in court in Queensland available to SSM to pay its creditors unless SSM had been subjected to winding up. Mr Robinson was unwilling, in the absence of a liquidator of SSM, for the moneys paid into court by APM to be paid out with a view to on-payment by the defendant to its creditors was stated by him in re-examination:

"I had no confidence that any money paid to Miss Brighton, without an agreement as to its destination, would be paid fairly between creditors or indeed not simply removed by Miss Brighton as she'd removed 3.5 million worth of funds from the company by then anyway."

The plaintiff acquires the Engwirda debt

37 The plaintiff's first winding up application was dismissed by consent on 1 November 2006. This occurred as part of the settlement reached on that day which saw the release of the sum of $435,431.84 paid into court in Queensland in such a way that $198,414.70 went to the plaintiff and the balance went to other creditors of SSM.

38 One might wonder why, within two weeks, the plaintiff had acquired another debt and initiated new winding up proceedings. Mr Robinson's explanation of the reason centres upon needs he anticipated in connection with the sale of the marina by APM under an agreement which had been entered into in September 2006. Things remained to be done in connection with the construction before the sale could be completed in accordance with

the contract. Delay would very likely be costly to APM in terms of liquidated damages, inability to perform defects rectification promises and even termination of the contract.

39 Part of the remaining work involved piles and pontoons, an area involving Engwirda. In late October or early November 2006, Mr Robinson spoke to Mr Engwirda. Engwirda had departed the site some time beforehand because it had not been paid by SSM. Mr Robinson asked Mr Engwirda to assist with the remaining work, being of the view that to bring in someone new from Mackay or Brisbane would be very expensive in terms of both time and money. According to Mr Robinson, the conversation between him and Mr Engwirda was as follows:

"*Mr Engwirda said to me words to the effect:*

'*As you know I left the site several months ago on the basis that I had not been paid for my work. I don't want to get involved in any dispute between you and Lyn Brighton and I don't care who pays me, but unless I am paid my debt I will not be going back on the marina site.*'

I said to him:

'*But I have already paid Lyn for your work in the progress claims she has lodged and been paid for to date. What you are asking me to do is to pay you twice. If I just give you money I will have no hope of recovering it from Lyn. We have just had a successful recovery of the Waterway debt by taking an assignment. Would you be prepared to at least assign your debt so that I have some chance of getting it back?*'

He said:

'*I don't care how I'm paid so long as I am paid.*'"

40 Mr Engwirda thereafter performed significant work on the marina.

41 Mr Robinson's rationale was further explained in cross-examination:

"*I mean my affidavit talks about the need to get Mr Engwirda back on site because I had a deadline for practical completion, which if I hadn't met by 7 December 2006 the marina would have been incurring about $15,000 a week in liquidated damages. If we hadn't reached practical completion on that week, which was a step that then triggered the issue of the government lease for the whole marina, the conversion from a development lease to a term lease, if that hadn't occurred during that week I was told by the Queensland Government that they would be on holidays until February. From the documents that I have attached to that affidavit you can see that would have put the marina in breach of both the development agreements, and also raised the possibility of the sale of the entire marina being terminated.*"

42 Mr Robinson further gave evidence that he had expected that the plaintiff would have no real trouble in collecting the Engwirda debt which had been assigned to it. Mrs Brighton had admitted the debt on oath. On the earlier occasion on which the plaintiff had taken an assignment of a debt and initiated winding up proceedings, a favourable settlement had been achieved on the first day of the hearing. Also, Mr Robinson's experience with SSM over a period of eighteen months was that it had always managed to find funds when it really needed to do so. All this led Mr Robinson to think that a worthwhile recovery could be expected, bearing in mind that, on his understanding, the debt carried interest.

The introduction and role of Mr Sharkey

43 These present proceedings were commenced only fourteen days after the parties had settled the earlier winding up proceedings. The originating process was filed on 15 November 2006. Mr Robinson, at that point, continued as the controller of the plaintiff.

44 Mr Phillip Sharkey is a long-standing client of Mr Robinson. They have known one another for some 23 years. Mr Sharkey is semi-retired but previously owned and operated businesses of purchasing book debts at a discount and seeking to recover them.

45 Early in December 2006, Mr Robinson raised with Mr Sharkey the possibility that Mr Sharkey might acquire from him the issued share capital of the plaintiff, explaining that there "appears to be an issue with me continuing to be a director of TS Recoveries, given that there are adjudication proceedings currently taking place involving APM and Sea-Slip in respect of progress claims lodged by Sea-Slip" and referring to the possibility of "a perceived difficulty with me being a plaintiff and a defendant". These quotes are taken from Mr Sharkey's affidavit.

46 Mr Sharkey gave evidence of having met with Mr Robinson soon afterwards and having inspected relevant documents, including financial statements of SSM, the orders in the first winding up proceedings and documents related to the Engwirda debt (which was the only real asset of the plaintiff). Mr Sharkey says that, based on these documents and discussions with Mr Robinson, he decided that it would be worthwhile to acquire the shares in the plaintiff on the footing Mr Robinson proposed, namely, that the price would be $1.00, that the first $200,000.00 recovered by the plaintiff would go to Mr Robinson on account of the money he had provided for the plaintiff's purchase of the Engwirda debt, that the balance of any recoveries (including costs) would be for Mr Sharkey's benefit and that Mr Sharkey would, from that point, be responsible for pursuing the winding up proceedings and for the costs of the proceedings.

47 There was no written agreement between Mr Robinson and Mr Sharkey. Documents to transfer the shares and to appoint Mr Sharkey as a director in place of Mr Robinson were, Mr Sharkey says, signed on 15 December 2006.

48 Mr Sharkey noted in writing at the time a statement by Mr Robinson he "needs to distance himself from debt collection re debt purchased from subcontractor Engwirda".

49 Mr Robinson's basic evidence on these matters is consistent with the evidence given by Mr Sharkey. Mr Robinson said in his affidavit that he had not made the decisions or given instructions concerning this case since 15 December 2006. He decided at that time that he should cease to be involved as the plaintiff's legal adviser.

50 It has been submitted on behalf of SSM that Mr Robinson's withdrawal or "distancing" was a sham and that, as a factual matter, he continued as the decision-maker for the plaintiff after 15 December 2006. So far as the immediate matter of acquisition of the plaintiff is concerned, SSM draws attention to three matters.

51 First, there are apparent factual discrepancies. On 20 November 2006 – almost four weeks before the supposed handover by Mr Robinson to Mr Sharkey – Robinson Legal (Ms Olsen) said to Mrs Brighton in a letter about these proceedings:

"For your information, Mr and Mrs Robinson resigned as directors of our client last week. However, you should note that we continue to hold instructions in this matter."

52 Mr Robinson could not explain this. It is inconsistent with the evidence given by both Mr Robinson and Mr Sharkey.

53 SSM also draws attention to the fact that, according to Mr Robinson, Mr Kellaway, an accountant in private practice who does work for Robinson Legal, became a director of the plaintiff at the same time as Mr Sharkey. This, according to Mr Robinson, was at his suggestion so that "compliance issues" could be attended to and "accounts and returns fixed up". Mr Kellaway had no connection with Mr Sharkey. It was Mr Sharkey's evidence that he had never met Mr Kellaway and has still not met him. Ms Olsen knows Mr Kellaway but said that she had never spoken to him about these proceedings.

54 The third matter is the informality of the acquisition transaction, with nothing being reduced to writing. In addition, Mr Sharkey testified that he did not ask to see accounts of the plaintiff and made no inquiry about them. Nor did he inquire whether the plaintiff had assets other than the debt acquired by Engwirda.

55 SSM's contention that Mr Robinson's withdrawal or "distancing" was a sham makes it necessary to consider matters arising in the course of the conduct of these proceedings. It is to those matters that I now turn.

Billing by Robinson Legal

56 Mr Robinson and Mr Sharkey both testified that the arrangement between them was that Mr Sharkey would be responsible for the plaintiff's legal expenses after 15 December 2006. There was a subsequent qualification to that. When it became clear to Mr Robinson that abuse of process allegations potentially damaging to his reputation would be advanced, he arranged with Mr Sharkey that senior counsel should be briefed, with senior counsel's fee being met by Mr Robinson.

57 Mr Robinson said that he had never indicated to Mr Sharkey that a contingency fee basis would apply (that is, "no win no fee") or that billing of fees would be delayed until the end of the matter. In fact, however, the normal fee basis originally set by Robinson Legal's fee disclosure letter was afterwards ostensibly modified by a new fee disclosure letter, sent to the plaintiff after the advent of Mr Sharkey, setting out a contingency fee basis. This subsequent letter was sent by Ms Olsen. Mr Robinson says that he did not say anything to Ms Olsen which could have been interpreted as a basis for substitution of a contingency fee arrangement. Mr Sharkey did not read the fee disclosure letters (except perhaps to note the charge out rates). Ms Olsen says that she had little experience of contingency arrangements and had sent the revised letter thinking that it reflected the arrangement with Mr Sharkey, as hastily relayed to her by Mr Robinson.

58 But Robinson Legal continued to charge on a basis inconsistent with a contingency arrangement. Fees were rendered regularly, generally on a monthly basis.

59 Not only did Robinson Legal render fees to the plaintiff regularly after 15 December 2006 but, until just before Mr Robinson went into the witness box, the bills were being paid by Vanepe Pty Ltd, a family company of Mr Robinson.

60 Mr Robinson gave evidence that he had instructed his secretary at Robinson Legal to cause fees rendered by the firm to the plaintiff to be paid by Vanepe on an ongoing basis. He said that this instruction had probably been given during the first winding up proceedings. He had not cancelled the instruction as at 15 December 2006 or, for that matter, at all – at least until his attention was drawn to the matter shortly before he gave evidence on 29 October 2007.

61 Meanwhile, Mr Sharkey was, after 15 December 2006, receiving the bills that Robinson Legal was sending out (and Vanepe, unknown to him, was paying). Mr Sharkey, however, was not paying the bills. His evidence was that he did not have the ready cash to do so and that, in any event, he virtually never paid Robinson Legal bills promptly, although he always did so eventually. His general approach was summed up in one of his answers in cross-examination:

"I didn't particularly feel like coughing up with money unless someone was pushing me for it."

62 Mr Sharkey also gave evidence that, at some point he cannot precisely recall, someone from Robinson Legal asked him for a payment of $50,000.00 on account. He made such a payment by means of a cheque which was banked on 28 September 2007, the day after the second day of the hearing before me. He says that he borrowed the $50,000.00 from a friend, Mr Morris. Ms Olsen did not ask Mr Sharkey for funds on account.

63 Mr Robinson accepted that it was he who had spoken to Mr Sharkey about "the level of outstanding debtors" and "asked that something be done about it". It is Mr Robinson's recollection that he received the cheque from Mr Sharkey shortly before the hearing began on 26 September 2007 and that he then handed it to the Robinson Legal accounts department for banking.

The ANZ documents

64 A particular procedural aspect of the present winding up proceedings must now be noticed. In the course of those proceedings, the plaintiff obtained the issue of a subpoena for the production of documents directed to the ANZ Bank. The documents were related to the banking arrangements of SSM. Ms Olsen of Robinson Legal had carriage of the proceedings. After access to the subpoenaed documents had been granted on or about 18 July 2007, those documents were inspected not only by Ms Olsen and her assistant, Ms Mijic, but also by Mr Robinson.

65 Mr Robinson gave evidence that he inspected the documents because he was a witness of fact in these proceedings. He conceded, however, that he may also have inspected them as a consultant to Robinson Legal, that is, as part of the legal team advising the plaintiff. In the light of evidence given by Ms Olsen, that seems the more plausible explanation. She testified that there were many documents and she was short of time. She therefore "asked Mr Robinson to inspect them and flag what I needed to look at". Ms Olsen said that Mr Robinson inspected the documents in the first instance but that she ended up looking at them anyway and asked Ms Mijic to help her because there were too many to get through on her own.

66 Ms Olsen further testified that, by the time she looked at the documents, Mr Robinson had flagged those he considered relevant or useful for the purposes of the present winding up proceedings. Mr Robinson also pointed out to Ms Olsen that some of the documents produced by ANZ could be useful for the purposes of proceedings in Queensland between APM and SSM related to progress claim 20. Ms Olsen was familiar with progress claim 20. She agreed with Mr Robinson that documents produced by the bank appeared to be inconsistent with evidence given or foreshadowed for SSM in the Queensland proceedings. The position described by Ms Olsen is summarised in this part of her cross-examination:

"*Q. So, is this correct, the documents came into the office, he looked at them, and he then spoke to you about using the documents for the APM Point Marina proceedings?*

A. He brought documents to me that were flagged, as I asked him to, and he said, look at all these inconsistencies. I previously looked at progress claim 20, the inconsistencies were obvious to me. And he said: Do you think we should be using these for progress claims 20? And said I thought they would definitely help progress claim 20."

67 Thereafter, an application was made in these proceedings for leave to use certain of the subpoenaed documents for the purposes of the Queensland proceedings concerning progress claim 20. That leave was granted by orders made on 23 and 24 August 2007 upon an application supported by an affidavit of Mr Robinson.

68 It was put to Ms Olsen that use of the particular documents by APM and against SSM in the Queensland proceedings concerning progress claim 20 would be directly contrary to the interests of the plaintiff – in that, whereas augmentation of SSM's assets would be beneficial to the plaintiff as a creditor of SSM, use of the documents against SSM in the other proceedings would be directed towards preventing augmentation of SSM's assets by defeating SSM's claim to be paid money by APM. Ms Olsen's explanation of the benefit to the plaintiff was as follows:

"*Well, the benefit was that progress claim 20 was probably, if it was successful, was going to result in another adjournment of these proceedings, because APM Point would have appealed the adjudicator's decision. That would mean that the relation back date would have been stretching out even further. Any money in the defendant was, you know, wasn't still there, with other creditors popping up that we don't know about. Phillip had agreed to a number of adjournments because of progress claims, in the hope that he would get paid of out of them. It became clear to him after months that he wasn't going to be paid and getting these proceedings over with was in his best interests, instead of letting them go on and on and on, on the defendant's application to adjourn.*"

69 Ms Olsen added in re-examination that she considered progress claim 20 to have no merit. This was because it was "basically the same as progress claim 15 which had previously been knocked out". She regarded an appeal by APM as virtually inevitable. Such an appeal was in due course initiated following an adjudication determination of $192,830.74 in favour of SSM.

70 It is Mr Starkey's evidence that someone from Robinson Legal spoke to him about obtaining documents from the ANZ Bank, but whether it was Mr Robinson, Ms Olsen or Ms Mijic he could not recall. Mr Sharkey has no recollection of anyone discussing with him an application for leave to use the subpoenaed documents in other proceedings. But Ms Olsen says that she did discuss this matter with him. I quote from her cross-examination:

"*Q. And you say you then telephoned Mr Sharkey and you say that you said to him that documents had been produced by the ANZ Bank which could be helpful to APM in the other proceedings; is that right?*

A. Yes.

Q. You told Mr Sharkey that?

A. Yes."

71 After Ms Olsen had been asked a number of questions about inconsistencies between the interests of the plaintiff and those of APM, the cross-examination continued:

"Q. Then coming back to the application to use ANZ documents for APM's purposes, your evidence to this Court is that you did not consider that that was rather to the plaintiff's interest in this case; is that right?

A. Yes.

Q. Your evidence is that you had discussed that at some length with Mr Sharkey; is that right?

A. Yes.

Q. And you give that evidence to his Honour on your oath?

A. I do.

Q. You say that even though at first blush it might appear to be against the plaintiff's interests to be releasing documents from this case for APM Point to use against Sea-Slip Marine, because you knew APM Point Marina would appeal against any loss that it had in those claims, you considered it was in fact in the plaintiff's interest in these proceedings that those documents be released for use in APM Point's claims. Is that right?

A. I considered it to be a double edged sword and I gave Phillip all his options and I asked him to make a decision and he made the decision."

Findings – the plaintiff's decision-making

72 It is clear that, despite the sale of the shares in the plaintiff to Mr Sharkey, Mr Robinson continued to play a role in the affairs of the plaintiff going beyond that of an arm's length legal adviser. The sale to Mr Sharkey cannot be said to have been a sham: he became the owner of the shares and a director of the plaintiff. But it is odd that he never met his co-director. It also seems that he was content to leave conduct of the present proceedings very much in the hands of Robinson Legal, although I accept that that firm took instructions from Mr Sharkey and sought such instructions at appropriate times.

73 I have referred to the Robinson Legal letter of 20 November 2006 (written by Ms Olsen) saying that Mr Robinson and Mrs Robinson had resigned as directors of the plaintiff "last week". The evidence does not allow me to make any firm finding about how this came to be said. I can only infer that Mr Robinson had told Ms Olsen that he and his wife were withdrawing and that she took to be established something that was in fact only in prospect and accomplished on 15 December 2007. It may well be that Mr Robinson had discussed the matter already with Mr Sharkey before Ms Olsen wrote the letter.

74 The matter of the ANZ subpoenaed documents illustrates the way in which decisions were made. The idea that SSM's bank records should be subpoenaed represented quite conventional thinking in a case such as this. Robinson Legal properly and understandably suggested that step to Mr Sharkey and he agreed. But when the documents were produced and access was granted, it was Mr Robinson who first inspected the documents. He was not the solicitor acting for the plaintiff in the proceedings. The matter was in the hands of Ms Olsen, assisted by Ms Mijic. Ms Olsen gave evidence that she was busy and short of time and that it was for that reason that she asked Mr Robinson to look at the documents. Mr Robinson accepted that he may have inspected the documents as a consultant to Robinson Legal, having first said that he inspected them because he was a witness of fact in the proceedings (just why that status or capacity should have warranted his inspecting subpoenaed bank documents was not explained). But Mr Robinson obviously had a personal interest, related to his proprietorship of APM and the problems with the marina project, in gaining a deeper insight into the financial affairs of SSM. That interest was, to some extent, behind the decision that he should inspect the documents.

75 It was Mr Robinson who pointed out to Ms Olsen that some of the subpoenaed documents might be useful to APM in its Queensland proceedings. And it was Mr Robinson who, in August 2007, swore the affidavit in support of the application in these proceedings for leave to use the documents in the Queensland proceedings. At that time, he had not been an officer or shareholder of the plaintiff for some eight months. Nor was he the plaintiff's solicitor. That he rather than Mr Sharkey or Ms Olsen should have sworn the affidavit shows that he was active in the proceedings in a way that was inconsistent with the role he had, in a formal sense, come to occupy as of 15 December 2006. Certainly, if, as Mr Robinson initially said, his inspection of the documents was because he was a witness of fact in the winding up proceedings, his swearing of the particular affidavit was anomalous.

76 I should add that I am satisfied that Ms Olsen did discuss the subpoena and the use of the subpoenaed documents with Mr Sharkey. Her evidence of what passed between her and Mr Sharkey is corroborated to the extent that Mr Sharkey recalls someone from Robinson Legal having spoken to him about obtaining documents from the ANZ Bank. Mr Sharkey did not recall anyone speaking to him about an application for permission to use subpoenaed documents in other proceedings. In the absence of denial by Mr Sharkey that such a conversation occurred, I accept Ms Olsen's evidence that it did.

77 I am bound to say, however, that I find Ms Olsen's explanation of the benefits to the plaintiff of allowing the documents to be used in APM's Queensland proceedings unconvincing. I am also bound to say that I consider it significant that, only a little more than a year later, Mr Sharkey recalled neither Ms Olsen giving him "all his options" in relation to the matter of the application concerning the ANZ documents nor his own decision among those options. This indicates, to my mind, that Mr Sharkey did not attach to the matter anything like the significance that it was accorded by Ms Olsen and, no doubt, Mr Robinson. The likelihood is that Mr Sharkey did not mind if the projected course of action was taken in relation to the documents and did not form any particular view about the benefits of such a course of action from the plaintiff's viewpoint. Ms Olsen and Mr Robinson must, in my view, be seen as the main decision makers on the matter.

78 In relation to billing by Robinson Legal and the payment of Robinson Legal bills, I do not think that there is any basis for a finding that Mr Robinson was financing Mr Sharkey. It is true that Vanepe, Mr Robinson's family company, was paying the bills as they issued. But that was a product of an arrangement put in place before the transfer to Mr Sharkey and not thereafter discontinued. The failure to discontinue it was, in my opinion, an oversight. Ms Olsen did not know that the arrangement was in place. After 15 December 2007, she sent bills to Mr Sharkey on a roughly monthly basis, having been told by Mr Robinson that that was what should be done. This shows, I think, that the fee disclosure letter stating a contingency fee basis was a genuine mistake. And when the need to obtain funds on account arose at the time the hearing was about to begin, it was Mr Robinson who raised the matter with Mr Sharkey. He would not have done this had the true arrangement been that Mr Robinson was to meet the legal expenses.

79 In summary, therefore, Mr Robinson did take steps – and effective steps – to "distance" himself from the plaintiff and these proceedings as from 15 December 2006, but the "distancing" was by no means complete. Before 15 December 2006, Mr Robinson had been effectively the sole directing mind and will of the plaintiff. Thereafter, Mr Sharkey became the directing mind and will but in a context where Mr Robinson maintained a close interest and an influence beyond that which would be expected of a consultant to the firm a partner of which was the solicitor for the plaintiff.

80 It follows that the purpose of the plaintiff in commencing and pursuing these proceedings was, before 15 December 2006, solely the purpose of Mr Robinson and that, on and after that date, the purpose of the plaintiff must be regarded as influenced by Mr Robinson despite the transfer to Mr Sharkey.

Findings – the plaintiff's purpose

81 I turn now to the question of the plaintiff's purpose in acquiring the Engwirda debt, issuing a statutory demand based on that debt and initiating the present winding up proceedings. For reasons just discussed, that inquiry centres mainly on the purpose that Mr Robinson had.

82 No corporate or commercial objective of the plaintiff was served by the acquisition of the Engwirda debt. The plaintiff was a dormant company without any business. The plaintiff initiated the acquisition of the debt because Mr Robinson caused it to do so; and his purpose was related wholly to the welfare of APM and the commercial interests of APM in bringing the marina project to a point where the contract for sale could be completed. Engwirda would not go back on to the site unless it received a substantial payment. Mr Robinson, through the plaintiff, provided the substantial payment that Engwirda required, thereby causing Engwirda to be willing to perform further work.

83 The plaintiff, having acquired the debt for an outlay of $200,000.00, faced the need to do what it could to recoup that outlay. From the plaintiff's own separate perspective, proceedings of one kind or another directed towards recouping money represented the only course consistent with its welfare. Issue of a statutory demand and commencement of winding up proceedings were consistent with this. But, of course, the plaintiff would not have been in the position of needing to seek recoupment had Mr Robinson not committed it in the first place to the debt acquisition transaction which, as I have said, was prompted wholly by considerations going to the welfare of APM, as distinct from the separate and independent welfare of the plaintiff.

84 The objective of furthering the interests of APM must therefore be seen to have been the moving force which put the plaintiff into a position where its own separate interests required that it engage in litigation of the kind unpaid creditors commonly undertake with a view to obtaining payment – whether by pre-trial capitulation by the debtor, by compromise before or during trial or as a consequence of the making of a winding up order.

85 Because the debt acquisition and the making of the winding up application (both matters resulting from decisions of Mr Robinson alone) are thus so closely related, I find irresistible the conclusion that the plaintiff's action in applying for winding up of SSM formed part of Mr Robinson's plan, implemented through the plaintiff, to obtain commercial advantage for APM in relation to the marina project. That might be significant, at least at a theoretical level, if this case were about due discharge of the duties owed by Mr Robinson as a director of the plaintiff. But that is not an issue here; nor is the question whether shareholders of the plaintiff gave the kind of informed consent that would have condoned conduct by the director or directors which would otherwise have been questionable because not conducive to the separate interests of the particular company.

86 As Mr Robinson pointed out in evidence, there could be no certainty that the winding up application would be pursued to a final hearing. He was confident that the debt would be paid. Mrs Brighton had admitted the debt on oath. An earlier exercise along the same lines, based on the Waterway debt, had resulted in an early settlement – added to which, Mr Robinson had observed that SSM always managed to find funds when it really needed to do so. But short of payment or satisfactory settlement, pursuit of the proceedings to the end was envisaged.

87 When the hearing of the winding up proceedings began, it was Mr Sharkey who was in control of the plaintiff. There was a vigorous defence. If Mr Sharkey was to see the plaintiff recover anything, it was necessary that the matter be pursued to the end. That course obviously suited Mr Robinson and APM as well. APM continued to be in dispute with SSM over progress claims and contract matters. Mrs Brighton was diligent in her attempts to press home progress claims, with adjudications emerging in many cases and litigation in some. Her failure to see creditors paid by SSM jeopardised the marina project, as Mr Robinson saw it. Mr Robinson and APM would be happy to see SSM's business terminated and Mrs Brighton supplanted by a liquidator; and for future decisions by

SSM about pursuit of claims and resolution of disputes to be in the hands of a liquidator, particularly if the financial resources available to a liquidator were limited.

88 In summary, while it may be accepted that the plaintiff initiated and pursued the winding up proceedings with a view to obtaining payment of the assigned Engwirda debt (as it had succeeded in doing earlier in the case of the assigned Waterway debt), it was also very mindful of perceived benefits to APM from the replacement of Mrs Brighton by a liquidator of SSM and termination accordingly of SSM's business. I am satisfied that pursuit of those benefits was a substantial purpose of the plaintiff, even after Mr Sharkey came on the scene. It was not, however, the main purpose.

89 The plaintiff may have reasoned that the pressing of a winding up application and the threat that Mrs Brighton might be supplanted by a liquidator (coupled with the plaintiff's ability to remove that threat at any time by discontinuing) could influence, to the advantage of APM, Mrs Brighton's behaviour (or, more precisely, that of SSM) in relation to contract claims and adjudications. But there is no evidence that could ground a finding that the exerting of such influence formed any part of the purpose of Mr Robinson, Mr Sharkey or the plaintiff in initiating and pursuing the winding up proceedings. Short of payment of the whole debt (or a compromise involving part payment), there was no reason why the plaintiff would not press on to obtain the benefits of a winding up order – including Mrs Brighton's removal from decision-making within SSM. It was the potential for Mrs Brighton's ultimate removal, rather than any potential for intermediate harrying, that constituted a purpose of the plaintiff supplementary to its purpose of securing satisfaction of the assigned debt.

The abuse of process concept in context

90 The relevance of abuse of process in the field of company winding up under the current statutory scheme was the subject of comment by Gummow J (with whom Brennan CJ, Dawson J, Gaudron J and McHugh J agreed) in ***David Grant & Co Pty Ltd v Westpac Banking Corporation*** [1995] HCA 43; (1995) 184 CLR 265. His Honour said at [40]:

"No doubt, in some circumstances, the new Pt 5.4 may appear to operate harshly. But that is a consequence of the legislative scheme which has been adopted to deal with perceived defects in the pre-existing procedure in relation to notices of demand. It also may transpire that a winding up application in respect of a solvent company is threatened or made for an improper purpose which amounts to an abuse of process in the technical sense of that term, as explained in ***Williams v Spautz*** *[(1992) [1992] HCA 34; 174 CLR 509]. However, in an appropriate case, injunctive relief may then be available to the company in a court of general equity jurisdiction."*

91 This comment is confined to the possibility that a winding up application may be an abuse of process where the company is solvent. That, of course, is not the possibility at present under consideration. SSM is, on its own admission, an insolvent company. In the ordinary course of events, it is a "clear axiom that insolvent companies should be wound up and that they should stay in liquidation unless solvency can be demonstrated": *Re Skay Fashions Pty Ltd* (1986) 10 ACLR 743 at 746 per Tadgell J. The scope for the application of principles of abuse of process in such a case must therefore be limited. But the possibility cannot be discarded.

92 Any legal proceeding brought with a predominant intent or purpose that is improper may be restrained or dismissed as an abuse of process. The relevant principle was explained by Mason CJ, Dawson J, Toohey J and McHugh J in ***Williams v Spautz*** *[1992] HCA 34;* (1992) 174 CLR 509 at 527-7:

"The observations of the Privy Council in King v Henderson [[1898] AC at p731] and those of Isaacs J in Dowling [(1915) 20 CLR at pp521-522] to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.

Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

*It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed [****In re Majory*** *[1955] Ch 600 at pp 623-624] or some collateral advantage beyond what the law offers [****Goldsmith v Sperrings Ltd*** *[1977] 1 WLR at pp498-499; [1977] 2 All ER at pp581-582; see also* ***Varawa*** *(1911) 13 CLR at p91]. So, in Dowling [(1915) 20 CLR at p524], Isaacs J pointed out that 'if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process'. However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process."*

93 This does not mean that there is an abuse of process whenever the moving party has a purpose or intention that goes beyond the results the proceeding can achieve. In ***Van Der Lee v State of New South Wales*** [2002] NSWCA 286, it was contended that it was an abuse of process to bring a cross-claim against former employees of a

deregistered company which, if still in existence, would have been vicariously liable for the acts of those employees and liable to indemnify them. The case before the Court of Appeal was argued on the footing that the cross-claimant's predominant purpose or intent in taking such a course was to put pressure on the substantial corporation that had been the holding company of the employer company to indemnify the former employees of that company. As Mason P put it:

"The purpose is to obtain a monetary award against the claimants [former employees] and then to stare down LLC, the ultimate holding company that profited by their labours in its corporate enterprise, to see if it is prepared to risk the general opprobrium or industrial backlash that might ensue from leaving its former subsidiary's employees in the lurch."

94 Obtaining judgment against the former employees was thus the objective of the proceedings – with the judgment and its impact on those individuals then envisaged as the means by which the holding company might be subjected to opprobrium or industrial backlash. The situation was thus similar to that considered by the High Court in ***Dowling v Colonial Mutual Life Assurance Society Ltd*** [1915] HCA 56; (1915) 20 CLR 509 where an insurance company, having taken an assignment of a debt owing by a person who had distributed pamphlets critical of it, used its status as creditor to bring bankruptcy proceedings with a view to using the resultant examination process as a means of inquiring into the identities of the persons behind the pamphlets. It was held by majority that there was no abuse of process. Isaacs J said (at CLR 524):

'"Now, in the present case, there is no doubt the petitioning creditor wishes to use the process – that is, to attain by its means the very object for which it is designed by law, namely, sequestration, and this, notwithstanding there is a desire to use the sequestration afterwards for a certain purpose. But that subsequent purpose can only be reached, and is only intended by the creditor to be reached, if reached at all, by the act of the Court itself in compelling an answer to the questions put. ... If the facts had been different, if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process.

But nothing of that kind took place. ... All that can be said is, at most, that the power to inquire as to any persons behind him with respect to the pamphlet is not contemplated by the Insolvency Act. If so, they would not obtain the information. But the desire to get the information is no breach of law or equity.'"

95 In ***Williams v Spautz***, the principle thus stated by Isaacs J was described (at CLR 526) as:

" ... an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. To say that the purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event."

96 In ***William v Spautz*** itself, the litigant's purpose was not to gain access to an entitlement or benefit made available by the law as the result of successful prosecution of the proceedings. He had initiated criminal prosecutions against persons in authority within the university from which he had been dismissed. His predominant purpose was to use the threat of the proceedings and the maintenance of them as a means of obtaining his reinstatement. The proceedings, if successfully prosecuted to a conclusion, could have secured no more than criminal punishment of the several defendants. That was not an outcome directed towards or productive of any entitlement to or benefit of restoration of employment. The proceedings were being used in order to exert pressure towards a result that the proceedings could not secure.

97 In the context of winding up proceedings, the impermissibility of collateral pressure adds a particular dimension to the relevant concept of abuse of process. In ***Australian Beverage Distributors Pty Ltd v Evans and Tate Premium Wines Pty Ltd*** [2007] NSWCA 57; (2007) 61 ACSR 441, the Court of Appeal confirmed that a winding up application advanced on the basis of a disputed debt will be regarded as an abuse of process where some more suitable means of determining the dispute is available and unutilised. It seems clear, however, that there will be no abuse of process if the disputed debt was the subject of a statutory demand and either an application under s.459G to have the demand set aside because of the existence of the dispute was unsuccessful or no such application was made within the period allowed by that section: see, for example, ***Braams Group Pty Ltd v Miric*** [2002] NSWCA 417; 44 ACSR 124. That is the whole tenor of the decision of the High Court in the *David Grant* case (above).

98 In the present case, there is no dispute about the existence or amount of the debt on which the plaintiff relies to sustain its character as a creditor of SSM and which was the subject of the statutory demand it served on SSM. I refer, of course, to the debt assigned to the plaintiff by Engwirda. The general concept of abuse of process as they emerge from the other cases I have mentioned is therefore the only one requiring attention.

99 A decision of particular relevance to the present case is that of White J in ***Australian Beverage Distributors Pty Ltd v The Redrock Co Pty Ltd*** [2007] NSWSC 966 (31 August 2007). His Honour had before him an application for a stay or summary dismissal of winding up proceedings on the ground that they constituted an abuse of process. The facts were distinctly similar to those now before me. The plaintiff in that case ("ABD") had the same shareholders and directors of a company referred to as "Liquor National". The defendant ("Redrock") was also the defendant in quite separate proceedings, being proceedings brought by Liquor National in which it was alleged, in essence,

that Redrock had misappropriated the goodwill and business name of Liquor National. An application for interlocutory orders restraining Redrock from continuing the relevant business was dismissed. One week later, ABD took an assignment of a small debt owed by Redrock to an unrelated party. ABD then gave notice of the assignment and immediately initiated winding up proceedings. Redrock tendered payment of the debt but the tender was refused on the ground that Redrock was insolvent. ABD then took steps to proceed with the winding up application in respect of Redrock.

100 White J made the following finding about the purpose for which the winding up application was initiated and pursued:

"I accept that it is Mr James' intention to pursue the winding-up application to a conclusion. One of his purposes is also to create difficulty for Redrock by embroiling it in litigation, thereby causing it to incur costs and use up executive time. Mr James is motivated to do that by the dispute between Redrock and Liquor National. However, I do not find that the dominant purpose of ABD's bringing the winding-up proceeding is to embroil Redrock in litigation. Mr James perceives that the dispute between Liquor National and Redrock will be resolved favourably to Liquor National if Redrock is wound up. In Mr James' view, this would 'protect my asset'. He did not elaborate on that evidence. I can infer that he considered that Liquor National's 'asset' would be protected by Redrock being wound up because it would be required to cease to carry on the business to which Liquor National lays claim, except as may be necessary for the beneficial disposal of that business. Liquor National would also be in a good position to negotiate a resolution of the existing proceedings with a liquidator. It is consistent with this objective that Mr James wishes to pursue the winding-up proceedings to a conclusion.

101 Later (at [42]), White J reiterated that the predominant purpose of the controller of ABD was "*to crush Redrock by putting it into liquidation*". His Honour continued:

"If he is successful in that course, he considers that Liquor National will be able to achieve its goal of running the business currently being conducted by the defendant, but which Liquor National contends properly belongs to it. The company will not be able to continue in business and the liquidator may be unable or unwilling to continue to contest the proceedings against Liquor National. In this way, his 'asset' will be secured."

102 Having isolated and identified, by reference to the two outcomes sought, the purpose of ABD in pursuing the winding up proceedings, White J said:

"43. The first of these outcomes, namely that Redrock cease to carry on its sales and distribution business, except so far as necessary for the beneficial disposal or winding-up of that business, would be the outcome which the law prescribes as a result of an order being made for the winding-up of a company (Corporations Act, s 477(1)(a)). It is not an abuse of process to seek a winding-up order to achieve that outcome.

*44. The second of these outcomes, namely that Redrock may cease to contest the proceedings against Liquor National, is not an outcome which a winding-up order is intended to secure. The practical effect of making a winding-up order may be to stultify a company's pursuit of an arguable claim, but that is not its purpose. If a winding-up order were made against Redrock, Liquor National's proceedings against it would be stayed unless leave to proceed were given. Without pre-empting any such application, it would be at least arguable that the nature of the proceeding, involving, as it does, a claim for a constructive trust over the business and assets of the company, may be a claim in respect of which a grant of leave is likely. Whether a liquidator could or would defend the proceedings is another matter. The tactical advantage which a winding-up order could give ABD is not within the intended scope of such an order. But **Spautz v Williams and Dowling v Colonial Mutual Life Assurance Society Ltd** show that that does not make the proceeding an abuse of process."*

103 In the result, White J declined to order either a stay or summary dismissal.

Applying the principles in this case

104 The case that SSM advances is that SSM's lack of funds with which to pursue claims against APM, coupled with the nature and complexity of those claims, means that it is, in the words of SSM's counsel, already quoted (see paragraph [18] above), "extremely unlikely that any liquidator would do so, and thus the appointment of a liquidator to the defendant will stultify the pursuit by the defendant of its rights against [APM] and will relieve [APM] from any contractual liability which it owes to the defendant".

105 The submission is that, for this reason, the winding proceedings are an abuse of process. That submission cannot be accepted when one has regard to the legal principles.

106 As I have already said, supplanting of Mrs Brighton by a liquidator must be accepted as one of the results the plaintiff seeks through these proceedings. The rationale for desiring that result is that, because of lack of funds or the complexity of the matter or for some other reason, a liquidator will quite possibly not pursue attacks against APM that SSM might be minded to pursue under the auspices of Mrs Brighton. But the installation of a liquidator whose duty it is to discontinue SSM's business except to the extent conducive to its orderly winding up is a natural and legitimate outcome of winding up proceedings. The position must therefore be seen as one in which the plaintiff prosecutes the proceedings precisely in order to obtain the result the law awards to a successful plaintiff. True it may be that the result leads on to a situation of control and decision making within SSM with respect to APM that may be more favourable to APM. But that cannot change the fact that prosecution of the proceedings to a conclusion has been undertaken to obtain the very result that such prosecution is designed to produce.

107 Applicable to the present case, in my opinion, is the following observation of Gibbs J (with whom Stephen J and Jacobs J agreed) in ***IOC Australia Pty Ltd v Mobil Oil Australia Ltd*** (1975) 49 ALJR 176 at 182:

"Nor is there any evidence that Mobil's decision to seek a winding-up order against the appellant was actuated by any motive other than a desire to avail itself of one of the remedies open to a creditor of a company which cannot pay its debts; if it be surmised that Mobil was pleased at the prospect that the appellant might have to cease business, that is immaterial, for it is not the law that only a creditor who feels goodwill towards his debtor is entitled to a winding-up order."

108 A purpose of seeing a liquidator supplant the incumbent management is a purpose entirely consistent with the proper pursuit of winding up proceedings. Appointment of a liquidator and cessation of business are results for which the law allows – more precisely, they are results that are part and parcel of the winding up regime. It follows that, even if supplanting of Mrs Brighton had been the plaintiff's sole or predominant purpose (I have found only that it was supplementary to the purpose of securing satisfaction of the assigned debt), the proceedings would not have been an abuse of process.

109 SSM's contention that the winding up application of the plaintiff is an abuse of process and ought to be dismissed accordingly cannot succeed.

The discretion to refuse a winding up order

110 In view of the conclusion just stated and the concession by SSM that it is insolvent, it is clearly open to the court to make the winding up order that the plaintiff seeks. The question is whether it should do so.

111 Mr Harris pointed out on behalf of SSM that the discretion to decline to make a winding up order is, in the present legislation, expressed to be available even where a ground for the making of an order has been established. Section 467(1)(a) says that, subject to qualifications not relevant to this case, the court may, on hearing a winding up application, "dismiss the application with or without costs, *even if a ground has been proved on which the Court may order the company to be wound up on the application*" [emphasis added].

112 As Mr Harris observed, the italicised words are a relatively recent addition to the statutory language. They were included in the revised provision which resulted from the *Corporate Law Reform Act* 1992 (Cth). The relevant report of the Law Reform Commission (ALRC 45, General Insolvency Inquiry 1988) said (at Volume 1, Chapter 4, paragraph 178, page 82):

"The Commission does not recommend any significant changes to the existing powers of the court when hearing a winding up application. They should include:

- *the power to make the order if the court is satisfied that the company is insolvent*
- *the requirement to appoint a registered insolvency practitioner as liquidator of the company*
- *the power to dismiss the application if it is satisfied that the company is not insolvent or that for some other sufficient reason an order for winding up ought not be made (for example, if the company has embarked upon a voluntary administration or abuse of the procedure by an applicant)*
- *the power to give all necessary directions as to the conduct of proceedings."*

113 I do not think that the addition of the italicised words made any real change to the law. There was, at most, an explicit statement of that which had long been recognised in any event. In ***Expile Pty Ltd v Jabb's Excavations Pty Ltd*** [2003] NSWSC 699; (2003) 46 ACSR 446, for example, Campbell J said (at [57]):

*"It is well established that a finding of insolvency can result in there being an entitlement to a winding-up order ex debito justitiae: **IOC Australia Pty Ltd v Mobil Oil (Aust) Ltd** (1975) 11 ALR 417; 2 ACLR 122. There always has been, however, a residual discretion in the court. That discretion is one which is now found in s 467 of the Corporations Law ..."*

114 Campbell J's statement is consistent with authorities on the earlier legislation: see, for example, ***FAI Insurances Ltd v Goldleaf Interior Decorators Pty Ltd (No 2)*** (1988) 14 NSWLR 643 at 660 per McHugh JA.

115 My finding of absence of abuse of process raises the question whether some negative – even malicious - motivation of a plaintiff, falling short of abuse of process warrants withholding of a winding up order where grounds for making the order exist. The answer must be "no". I quote again from the judgment of Gibbs J in ***IOC Australia Pty Ltd v Mobil Oil Australia Ltd*** (above) at 182:

*"[T]he question whether Mobil's treatment of the appellant was harsh or grievous is not material. The authorities show that as a general rule a creditor who cannot obtain payment is, as between himself and the company that owes the debt, entitled to a winding-up order as a matter of right: **Re K L Tractors Ltd** [1954] VLR 505 at 511–12; **Re Leonard Spencer Pty Ltd** [1963] Qd R 230 at 232–3 Halsbury 4th ed, vol 7, par 1033."*

116 To the same effect are observations of Buckley LJ in ***Bryanston Finance Ltd v De Vries (No 2)*** [1976] Ch 63 at 75 :

"The judge, rightly in my opinion, thought that a petition could not be an abuse simply because the petitioner was actuated by malice. If a petitioner has a sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, may be antagonism to some person or persons cannot, it seems to me, render that ground less sufficient."

117 The last part of the passage from Gibbs J's judgment in the *IOC* case just quoted emphasises the prima facie right of an undisputed and unsatisfied creditor to obtain a winding up order. I call it a "prima facie right" because of the need to accommodate the undoubted discretion now explicitly recognised in s 467(1)(a).

118 Where, as here, the application is advanced on the basis of insolvency and insolvency is conceded, the discretion to dismiss the application will be exercised only if some good reason is shown for allowing the admittedly

insolvent company to continue in the mainstream of commercial life. That course may be indicated where winding up is opposed on rational grounds by other creditors, or where the applicant's conduct precipitated the company's liability: see, for example, *Re Wildtrek Ltd* (1987) 12 ACLR 398. No such factors are at work here.

119 Apart from the matters grounding the abuse of process allegation (and matters of animus which are irrelevant), the grounds put forward on behalf of SSM in support of the proposition that the court should not make a winding up order are:

(a) that SSM is not trading and has not traded since November 2006;

(b) that SSM is not incurring further debts;

(c) that SSM has proffered to the court an undertaking that it will not trade;

(d) that SSM has made a significant reduction in the amount of its unsecured debts over the last eleven months even though not trading (the funds have come mainly from associated entities);

(e) that, in the absence of winding up, it may be expected that unsecured debts will continue to be repaid within a further three months from these other sources;

(f) that SSM stands to recover substantial moneys from APM (see paragraph [15] above).

120 Mr R G Forster SC, in submissions advanced on behalf of the plaintiff, subjected each of these propositions to critical scrutiny. In relation to the related items (a) and (b), he referred to certain aspects of the documentary evidence and the evidence given by Mrs Brighton. At 15 June 2007, SSM's account with the ANZ Bank was $547,655.27 in debit. Mrs Brighton accepted that it is accruing interest at the rate of about $7,000.00 per month. Mrs Brighton also gave evidence that SSM and other entities controlled by her are parties to a cross-guarantee arrangement with the ANZ Bank. Full details of this were not given but the description Mrs Brighton provided was sufficient to make it clear that drawings by other entities on overdraft account will result in contingent liabilities of SSM. There is no assurance that those other entities will not make such drawings.

121 Mr Forster also pointed out, in relation to items (a) and (b), that SSM continues to be engaged in legal proceedings and that future proceedings in relation to the marina contract are contemplated. SSM cannot but incur debts for legal fees and related outgoings. In addition, Mrs Brighton said in evidence that SSM continues to employ internal and external accountants, as well as a financial planner and other consultants. It must be incurring debts for their fees.

122 In relation to items (d) and (e) and access by SSM to financial support provided by associated entities, the reality is, as Mr Forster pointed out, that recourse to that support necessarily increases the indebtedness of SSM, unless the support takes the form of subscripiton for share capital. There is no suggestion that that form of funding has been adopted or is intended. In any event and as the Court of Appeal emphasised in ***Expile Pty Ltd v Jabb's Excavations Pty Ltd*** [2003] NSWCA 163; (2005) 45 ACSR 711, contentions as to the availability of financial support from external sources need to be supported by evidence of what is actually available, rather than relying on assessment of what might be feasible. This led me to say recently in ***Leveraged Equities Ltd v Finance & Equity Pty Ltd*** [2007] NSWSC 1197 at [19]:

"The evidence does not refer to any contract, agreement or arrangement under which the defendant is entitled to financial support from other companies. Nor is there anything to indicate the form that any financial support might take. Even if it is accepted that the defendant is a member of a 'group' of companies (a concept which, in the particular context, is not elaborated or explained), the court could not accept as relevant to an assessment of the defendant's solvency 'support' by other members of the 'group' unless it had evidence of what the support entailed and precisely what financial resources were available to the defendant as a result of the 'support'."

123 In the present case, of course, SSM is not attempting to prove solvency. But, to the extent that it seeks to persuade the court to dismiss the application for reasons which include the availability of financial resources from other entities, the same requirement for proof arises. Proof has not been provided.

124 I consider next item (c) at paragraph [119] above, that is, the undertaking that SSM proffers to the court that it will not trade. Three things need to be said about that. First, the meaning of "trade" is not clear: a company which has (or considers itself to have) viable claims against others and, with the assistance of lawyers, pursues those claims seems to me to be one that "trades", unless that term is understood in its narrow and traditional sense of trafficking in commodities by way of sale or exchange: *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 139. Second, there is the point already noticed that SSM will in the ordinary course incur various expenses as it continues with litigation, so that the undertaking is, in a real sense, one that cannot be honoured. Third, an undertaking given to the court is, in general, not a satisfactory foundation upon which to allow an insolvent company to continue in operation. I need not repeat here the reasons for that view I stated in ***Owners of Strata Plan 70294 v LNL Global Enterprises Pty Ltd*** [2006] NSWSC 1386; (2006) 60 ACSR 646 at [21] – [27]; see also the observation of White J in ***Deputy Commissioner of Taxation v Lencal Excavations Pty Ltd*** [2004] NSWSC 783 at [18].

125 Remaining for consideration is item (f) at paragraph [119] above and the proposition that a winding up order should not be made because SSM has substantial claims against APM. It must be said at once that, according to the plaintiff, the claims are not clearcut. Mr Forster's submissions draw attention to several aspects of the evidence, including parts of Mrs Brighton's cross-examination, showing that some of the perceived claims have been denied in earlier adjudications under the Queensland security of payments legislation or withdrawn by SSM when pursuing those earlier adjudications. Mr Forster also pointed out that the court does not have evidence which

would enable it to come to any reliable view whether the claims for damages for breach of contract that SSM considers itself to have against APM are sustainable. Mrs Brighton accepted in evidence that proceedings based on the breach of contract claims could take six months, nine months or five years.

126 Implicit in SSM's contentions based on item (f) is the proposition that SSM would be better placed to pursue its claims against APM if decision-making remained with Mrs Brighton rather than passing to a liquidator. There is, to my mind, no objective basis for any such finding. A liquidator will be duty bound to consider the strength and viability of every claim available to SSM. If reasonable prospects of success are seen, it might be expected that a liquidator would seek means to progress the claims. Because associated entities are creditors, Mrs Brighton might be minded to have them provide financial support or to do so herself. The possibility of arm's length litigation funding would no doubt also be considered.

127 I am of the opinion that none of the matters mentioned in items (a) to (f) at paragraph [119] above forms a basis for the exercise of the court's discretion to dismiss the winding up application advanced by the plaintiff in respect of SSM, an admittedly insolvent company. Nor does any combination of those matters warrant such a course. I have already referred to the "clear axiom that insolvent companies should be wound up and that they should stay in liquidation unless solvency can be demonstrated": see paragraph [91] above. That axiom applies here.

128 The subsidiary proposition advanced on behalf of SSM is that the winding up application should be adjourned for a substantial period. The aim would be to allow SSM, under its present controller, to pursue the various claims it considers itself to have, presumably with a view to re-capturing solvency by success in those endeavours. I am not persuaded that an adjournment to that end would serve any useful purpose. First and as already noted (see paragraph [125] above), the claims, to the extent assessable at this point on the evidence available, are by no means clear cut or assured of success, whether in the short term or at all. Second, pursuit of the claims would entail the incurring of debts and therefore an exacerbation of the admitted insolvency (see paragraph [121] above). Third, a liquidator can pursue any claims considered viable and likely to be fruitful (see paragraph [126] above).

Conclusion

129 SSM is an insolvent company. It has not succeeded in establishing any ground on which the making of a winding up order should be withheld or deferred. The orders of the court will therefore be as follows:

1. Order that Sea-Slip Marinas (Aust) Pty Ltd ACN 103 644 640 be wound up in insolvency.
2. Order that Geoffrey David McDonald of Level 29, 31 Market Street, Sydney, an official liquidator, be appointed liquidator of the said Sea-Slip Marinas (Aust) Pty Ltd.
3. Order that the defendant pay the plaintiff's costs of the proceedings.

Mr R G Forster SC/Mr S E Gray – Plaintiff instructed by Robinson Legal
Mr C M Harris SC – Defendant instructed by Mills Oakley Lawyers