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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST

S CI 2012 2905

IN THE MATTER of CONALPIN PTY LTD (ACN 064 718 298) (in liquidation)

- and -

IN THE MATTER of DOLMEAR PTY LTD (ACN 069 052 455) (in liquidation)

ROSS JOHN McDERMOTT — Plaintiff

v

Conalpin Pty Ltd (ACN 064 718 298) — First Defendant

Dolmear Pty Ltd (ACN 069 052 455) — Second Defendant

SUPREME COURT OF VICTORIA
24 JUL 2013
ASSOCIATE JUDGE

JUDGE:	EFTHIM As J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 April 2013
DATE OF JUDGMENT:	24 July 2013

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P. Tatti, solicitor	WMB Lawyers
For the Defendants	Mr J.D. Catlin	Mr Peterson, former director of both defendants

SC:EB

HIS HONOUR:

1 Application is made under ss 473 and 504 of the *Corporations Act 2001* (Cth) by the plaintiff, Ross John McDermott, the former liquidator of the first and second defendants, Conalpin Pty Ltd and Dolmear Pty Ltd seeking that:

- his remuneration as former liquidator of Conalpin Pty Ltd be fixed in the sum of $26,681.50; and
- his remuneration as former liquidator of Dolmear Pty Ltd be fixed in the sum of $19,706.50.

2 Mr McDermott was appointed as the liquidator to each of the defendants on 16 May 2012 and was removed on 1 June 2012 by resolution of the creditors. His remuneration was not approved at a meeting of creditors of each defendant and was not approved by the committee of inspection of each defendant.

3 On 1 June 2012, Glenn Spooner and Daniel Juratowitch of Cor Cordis were appointed as joint and several liquidators of the defendants. They have not opposed the remuneration sought by Mr McDermott, nor consented to it. However, an objection is made by Paul Anthony Peterson, who is a former director of both defendants and the majority shareholder, his wife Natalie Peterson, and a company IAMNSP Pty Ltd of which Natalie Peterson is the sole director. Mr and Mrs Peterson and IAMNSP Pty Ltd ("the objectors") are creditors of the defendant companies. Mr Peterson has deposed that collectively between himself, his wife and IAMNSP Pty Ltd, they hold a majority of the debts owed by the first defendant of almost 60% or $329,637.19 of the total $556,005.51, debts reflected in the first defendant's creditors list. They also collectively hold a majority of the debts owed to the second defendant of almost 55% or $79,936.00 of the total $144,812.00, as reflected in the second defendant's creditor list.

4 In support of his application for remuneration, Mr McDermott has sworn two affidavits. He also relies on an affidavit of Joseph Bengasino, who is the principal of Wilder Moses Bengasino Solicitors ("WMB Lawyers") and acts on behalf of Mr McDermott. The objectors rely on two affidavits sworn by Paul Peterson and affidavit of Ian Frank McBain, chartered accountant, who has been engaged by Paul

Peterson and Natalie Peterson to assist with their business and financial affairs.

5 The objectors submit that there should be no remuneration paid to Mr McDermott because the liquidator should not have accepted the appointment as there was a lack of independence. They also assert that WMB Lawyers had a conflict of interest and should not have been acting for the liquidator.

6 In his first affidavit, Mr Peterson referred to the previous relationship he had with WMB Lawyers. He also provides the background by setting out the history that led to the two companies being placed into liquidation and Mr McDermott being appointed as the liquidator. This included giving evidence of prior dealings with Mr McDermott.

7 In relation to the legal representation, Mr Peterson deposes that he was first a director of Conalpin from 3 June 1994 and of Dolmear Pty Ltd from 10 June 1995, when WMB Lawyers acted on his behalf. He did not have any other law firm representing his interests from about 1990 onwards. WMB Lawyers was the only firm from whom he sought advice on all legal issues, be it conveyancing, wills or any business issues requiring legal advice. If any legal documents needed signing, Joseph Bengasino, principal of the firm, was involved.

8 In response, Mr Bengasino deposes that he has read both affidavits of Paul Peterson. Paul Peterson has via several legal representatives, made allegations of conflict of interest against Mr Bengasino's firm. On each occasion that such allegation was made, WMB Lawyers responded in writing, outlining its position and seeking further particulars of any conflict. On no occasion did Paul Peterson take the matter further.

9 Mr Bengasino believes that he had no conflict of interest in acting for Mr McDermott. His is satisfied that there is no confidential material which has been imparted to his office that could have any bearing on the application currently before the Court, which affects the remuneration for work performed by Mr McDermott in his capacity as liquidator of Conalpin Pty Ltd and Dolmear Pty Ltd. Mr Bengasino also

deposes that Mr Paolo Tatti of his office has the care and conduct of the proceeding on behalf of Mr McDermott. He believes that Mr Tatti has never performed any work for the benefit of Paul Peterson or Natalie Peterson.

10 Paul Peterson has deposed that the liquidation of Conalpin Pty Ltd and Dolmear Pty Ltd has been brought about as a result of a family dispute between himself and Natalie Peterson and his parents, Geoff and Suzanne Peterson. This dispute started after a meeting at the offices of Pitcher Partners[1] on 7 December 2010 where Geoff Peterson, Paul Peterson and Ian Stewart and Gavin Debono (of Pitcher Partners) were present. The meeting took place to bring about the liquidation of two companies with which Geoff Peterson was associated, Trackerjack Australasia Pty Ltd and Ringwood Cove Pty Ltd, and to discuss the protection of Geoff Peterson's personal assets. Geoff Peterson resigned as director of Conalpin Pty Ltd and Paul Peterson was subsequently appointed as a director of that company. Geoff Peterson told Paul Peterson to make his own arrangement regarding funding for Conalpin Pty Ltd because he was out and wanted nothing further to do with the business. Financing was obtained from Dave and Marlene Wiltshire, the parents of Natalie Peterson.

11 Paul Peterson believed that he was a shareholder of Conalpin but later found that ASIC no longer recorded him as a shareholder even though he did not sign any share transfer documents removing him as a shareholder.

12 Trackerjack Australasia Pty Ltd was placed into administration on 27 January 2011 and Paul Peterson paid $60,000 for the Deed of Company Arrangement to Mr McDermott who was appointed administrator. Advice was given by Mr McDermott that the company should not be put into liquidation by Joseph Bengasino because the liquidation process would likely uncover things that Paul Peterson and his parents did not want to be uncovered and this could have an effect on Paul Peterson's ability to trade further with his company Conalpin Pty Ltd.

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1 Mr McDermott is a partner of Pitcher Partners.

13 Mr McDermott was appointed liquidator on 16 May 2012 of both Conalpin Pty Ltd and Dolmear Pty Ltd on the resolution of its shareholders, Geoff and Suzanne Peterson. On being appointed to the companies, Mr McDermott visited the premises where he understood and believed both companies had an office. He made demands for the books and records but was told that he would not be receiving them on that day. On 18 May 2012, an urgent ex parte application was made before Hargrave J who issued a warrant pursuant to s 530C of the *Corporations Act 2001* (Cth). On 19 May 2012 that warrant was executed. On 25 May 2012 there was a first meeting of creditors and at the second meeting of creditors, 1 June 2012, Mr McDermott was removed as liquidator.

14 At the hearing of this application, objection was made to the tender of the second affidavit of Paul Peterson, as it was out of time. That objection failed and Mr McDermott was granted leave to rely on an affidavit he had sworn in response.

15 Mr McDermott deposes that on 25 May 2012 he convened meetings of creditors of both Conalpin Pty Ltd and Dolmear Pty Ltd but for various reasons, the meetings were adjourned for a period of one week. No resolution was put on that day as to his remuneration as a liquidator.

16 The minutes taken at the meeting of Domear Pty Ltd state that the chairman, Mr McDermott, noted that the time was 11.47am, however, the advertised time for the meeting was 11.00am. Mr McDermott indicated that Corporations Regulation 5.6.16(4) required the meeting to be sufficiently constituted within 30 minutes from the advertised time and it was not. Mr McDermott, therefore, adjourned the meeting for the same time and place for the following week and indicated that he would forward further correspondence to all creditors regarding the meeting.

17 In his second affidavit, Paul Peterson describes what occurred at the first meeting. He observed that other creditors were present, namely, Natalie Peterson for IAMNSP, Ian McBain of Ian McBain Advisory, *Slang Pattern* (Graphic Artist), Michael Fung an insolvency practitioner from PricewaterhouseCoopers representing

a number of creditors, David Phillips (his lawyer at the time), Paulo Tatti (solicitor of WMB Lawyers), and Geoff Peterson.

18 Peter Peterson also deposes that Mr McBain asked Mr McDermott a number of questions in relation to points Mr McDermott had failed to disclose regarding his independence, which included the following:

- Why Mr McDermott failed to disclose that he was appointed as the liquidator to Ringwood Cove Pty Ltd, an associated company in which Paul Peterson was the director and Geoff Peterson was the shareholder;
- Why Mr McDermott had failed to disclose payments he had received from Conalpin Pty Ltd in respect of the Trackerjack Australasia Pty Ltd Deed of Company Arrangement;
- Why Mr McDermott had failed to disclose that he chaired a meeting in respect of Trackerjack Australasia Pty Ltd employees, whose entitlements were transferred from Trackerjack Australasia Pty Ltd to Conalpin Pty Ltd.

19 According to Paul Peterson, the only response Mr McDermott gave was that he received legal advice from WMB Lawyers in relation to his position regarding Trackerjack Australasia Pty Ltd and believed that he was okay in respect of Ringwood Cove Pty.

20 Paul Peterson heard Mr Fung ask Mr McDermott about his lack of independence and referred to Mr McDermott having worked for Trackerjack Australasia Pty Ltd. In response, Mr McDermott stated that he had legal advice regarding Trackerjack Australasia Pty Ltd and had no concerns.

21 Mr Phillips asked Mr McDermott the following:

- who he sought legal advice from and whether he was conflicted;
- was he aware that the firm he sought advice from and acted for Paul Peterson, Natalie Peterson and Geoff Peterson;
- why would he go to the same firm that had acted for Paul Peterson, Natalie Peterson and Geoff Peterson;
- why he would take instructions from lawyers who were severely conflicted.

22 As the meeting progressed, the point of removal of liquidator was announced as a topic. There was another liquidator in the room ready to take on the appointment, Glenn Spooner of Cor Cordis. At that point in time, Mr McDermott said that he did not believe a creditors' poll could be conducted that day as he had not looked at the books and records. Mr Fung stated that he had the majority of value in votes, approximately $251,000 and seven proxies. Mr McBain stated he had 17 proxies for a total of approximately $108,000. Natalie Peterson was there in her own right with $53,000, and Paul with his $108,000. According to Mr Peterson, there was approximately 26 proxies and $521,000 in debts. At that point in time, Mr McDermott announced that Geoff Peterson was present for a $930,000 debt to himself and he was holding proxies for Suzanne Peterson for approximately $915,000 and Pitcher Partners for $30,000.

23 Mr Fung asked Mr McDermott what was the basis for the claim of $1.8 million held by Geoff Peterson. To that, Mr McDermott responded that Geoff Peterson's claim was an agreement between Paul Peterson and Conalpin Pty Ltd for payment of moneys relating to the continued operations of the business. Mr Fung and Mr McBain asked for a copy of the agreement but Mr McDermott stated he did not have it. Geoff Peterson made no comment. Mr Phillips asked Mr McDermott directly if he was aware or was not aware of this $1.8 million claim. Mr McDermott did not answer this question.

24 Mr McDermott thought it appropriate to seek an additional seven-day adjournment. There was a five-minute recess and, at recommencement, Mr Fung stated that he thought Mr McDermott was compromised in his role as liquidator. He went on to say that he knew there was another independent liquidator in the room ready to take over. The meeting was adjourned.

25 Mr McBain has also given evidence regarding the first meeting of creditors. He deposes that he observed that Mr McDermott was questioned by creditors regarding his perceived lack of independence. He had heard Mr McDermott acknowledge that he had omitted from his independence report details relating to

his prior acceptance of position as liquidator of Ringwood Cove Pty Ltd. At the meeting, Mr McDermott advised that he would amend the independence report to incorporate the matter of Ringwood Cove Pty Ltd. Mr McBain observed and heard the dissatisfaction from parties holding voting rights for majority creditors, including Michael Fung, Natalie Peterson and Paul Peterson, who found this most unsatisfactory.

26 At that meeting, the majority of creditors requested that Mr McDermott resign as liquidator. Mr McDermott responded verbally, saying he had sought legal advice regarding his independence and was satisfied the advice provided to him indicated it was appropriate that he continue acting in the position of liquidator. Mr McDermott acknowledged that WMB Lawyers provided this advice and that he was aware that WMB Lawyers acted for various family members, which he understood to mean the Peterson family members. Mr McBain heard and observed the creditors request of Mr McDermott that WMB Lawyers' services be terminated due to a perceived lack of independence and heard Mr McDermott refuse to terminate the services of WMB Lawyers.

27 Mr McBain observed that Geoff and Suzanne Peterson were recorded as having voting rights in Conalpin of approximately $1.7 million. Some creditors asked Mr McDermott of his understanding of the debt. Mr McDermott responded by saying that he had been provided with no details as to the debt.

28 Documents provided by the accountant of Conalpin Pty Ltd to Mr McDermott prior to the first creditors' meeting showed the majority of creditors, by way of a large margin, to be Paul, Natalie and IAMNSP with a collective debt of approximately $330,000. The next largest creditor was less than approximately $16,000.

29 Mr McBain states that the $1.7 million debt claimed by Geoff and Suzanne Peterson gave them authority and control over the creditors' meeting. Mr McBain, as the accountant of Conalpin Pty Ltd, had examined the balance sheet of Conalpin Pty Ltd as at the date of the liquidation and supplied it to Mr McDermott.

It listed no such debt.

30 In response to Mr McBain's affidavit regarding the first meeting of creditors, Mr McDermott deposes that there was only one meeting for Conalpin Pty Ltd and Dolmear Pty Ltd, which was adjourned. Minutes of that meeting had been lodged with ASIC. He circulated his declaration of independence, relevant relationship and indemnities to all creditors of these two companies. That declaration was prepared by Mr McDermott by telephone with his office, in between exchanges with Mr McBain. Under the difficult circumstances of that day, he omitted to mention the Ringwood Cove Pty Ltd matter but prior to reconvening of the meeting, he circulated a revised declaration of independence to all creditors, which includes the Ringwood Cove Pty Ltd matter.

31 Mr McDermott notes that there are inconsistencies between the debts claimed in Mr McBain's affidavit and the debts claimed by Mr Peterson. I note that Mr McDermott does not deny the observations made by creditors in relation to his independence. He does not contradict what has been alleged by Mr McBain and Paul Peterson.

32 The minutes from the second meeting of creditors disclosed that the liquidator's remuneration failed at a show of hands. Glenn Spooner and Daniel Juratowitch of Cor Cordis provided consent to act as joint and several liquidators. A resolution was passed that Ross McDermott be removed and Glenn Spooner and Daniel Juratowitch be appointed as liquidators. There is nothing controversial in those minutes.

33 Mr Peterson deposes that the meeting took an hour. There was debate about Mr McDermott's independence, with the same questions as last time being asked in relation to the $1.8 million. Mr McDermott did not concede the invalidity of the $1.8 million until later in the meeting. Mr McDermott said that Geoff Peterson may well have a claim as creditor as an employee. He asked the company's financial controller to evaluate a claim for both Geoff and Suzanne Peterson in relation to their unpaid wages. It was concluded that Geoff and Suzanne Peterson were able to claim

$542.37 each in unpaid salaries and Mr McDermott allowed them to vote in that amount. That is recorded in the minutes.

34 Mr McDermott approved the proof of debt from Pitcher Partners of approximately $30,000 and this proxy was held by Mr Geoff Peterson. Mr McBain asked Mr McDermott why he would include the proof of debt when it had been explained to him that the debt was in dispute by the company as Pitcher Partners had billed considerable works for Trackerjack Australasia Pty Ltd, Geoff and Suzanne Peterson, and had incorrectly billed Conalpin Pty Ltd. Mr McBain said that Paul Peterson was in the room and had been handling this dispute and could shed light on the claim. Mr McDermott said: "No, it's in the books and records and the company accountant should have raised the appropriate credit, I'm approving this proof of debt for voting."

35 Paul Peterson asserts Mr McDermott would not allow Paul Peterson and Natalie Peterson or IAMSP Pty Ltd to vote because, he stated, those claims needed further investigations like many others. Eventually, Mr McDermott said that *Scan Global* was a proof of debt that he would accept for $59,000, which was held by Mr Fung and was clearly the largest creditor he was allowing to vote. Thereafter, Mr McDermott allowed approximately four other creditors, inclusive of *Scan Global* to vote and acknowledged that those votes were held by Mr Fung and/or Mr McBain.

36 According to Paul Peterson, Mr Phillips then said that on the basis that Mr McDermott accepted these creditors, Mr McBain and Mr Fung controlled the meeting. Shortly after resolutions were passed and Mr McDermott was removed as liquidator of both Conalpin Pty Ltd and Dolmear Pty Ltd. Glenn Spooner of Cor Cordis was present again at this meeting and acknowledged that he had consented to act.

37 In response to the allegations made by Paul Peterson, Mr McDermott deposes that he does not intend to address the matters raised in the affidavits save to say that he

relies on the minutes of the meetings, which were exhibited to his affidavit. Those minutes are a true and correct record.

38 The minutes did not address many of the issues put by Paul Peterson, and matters put by Paul Peterson have not been responded to. Mr McDermott had the opportunity to respond but did not contradict the matters raised.

39 The objectors have not objected to the specific items of remuneration claimed by Mr McDermott other than the remuneration claimed by the liquidator for the work completed after he was removed. This involved administrative work such as filing and that work was performed because the liquidator had to hand over all of his material to the new liquidator who had been appointed. A liquidator will normally be entitled to be remunerated for such work.[2] That is not an issue before me. I would not disallow remuneration for such work if Mr McDermott is entitled to remuneration.

40 The objectors submit that there should be no remuneration paid to Mr McDermott because he had a conflict of interest and should not have accepted his appointment as liquidator.

41 There are three bases upon which that argument is put. First, that Mr McDermott had previously been involved with other companies in the group, which were related to Conalpin Pty Ltd and Dolmear Pty Ltd and therefore, he should not have accepted his appointment as liquidator of Conalpin Pty Ltd and Dolmear Pty Ltd. Second, Mr McDermott relied on the $1.8 million debt in the first creditors' meeting as the basis for his authority for the majority of the creditors. It is submitted that once the non-existent $1.8 million debt was taken away then the clear majority of creditors in both Conalpin Pty Ltd and Dolmear Pty Ltd would be Paul and on Natalie Peterson, the people fiercely resisting the appointment of Mr McDermott as liquidator. Finally, the conduct of Mr McDermott in obtaining the search warrant demonstrated a conflict of interest.

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2 See *Re Reiter Exploratory Drilling Pty Ltd; Ex parte Andrew Charles Robert Lee* (1994) 12 ACLC 430.

42 Embroiled in these allegations of conflict of interest is a further allegation that Mr McDermott should not have engaged WMB Lawyers to provide advice and act for him.

43 Mr McDermott submits that the objections of the objectors are generic and not specifically tailored to items claimed by Mr McDermott. That is, this is not in accordance with the orders made by Gardiner AsJ on 2 November 2012. It is said that the objectors do not assist the Court in performing the function it is required to do. I do not accept that submission. The objectors clearly informed Mr McDermott of the case that they would be raising in an affidavit in opposition filed on behalf of the defendants. Submissions in writing have also been received from Mr McDermott's legal representatives addressing these issues.

44 Mr McDermott submits that the allegations relating to the objections are misconceived and the Court need not resolve these issues to determine the application. He relies on the decision of Dodds-Streeton J in *ACN 004 323 184 Pty Ltd*[3] where her Honour stated:[4]

> 48. Save for Mr Halliday in his various capacities, no creditor appeared to object to the application for additional remuneration. I am satisfied that none of the objections or issues raised by Mr Halliday, by affidavit or in submission, displaces the liquidators' prima facie entitlement to the additional remuneration sought. It is not disputed that the work was done and that the calculations and details in the supporting schedules are correct. The objections or concerns take the form of unsubstantiated allegations or beliefs, which go to the appellant's disagreement on matters of judgment by the liquidators and dissatisfaction with the amounts realised. The legislation contains a number of avenues providing for inquiry into or complaint concerning the conduct of a liquidator. However, as a general rule, in the absence of fraud or bad faith, the Court will not interfere with the liquidator's exercise of commercial judgment and decisions on the administration of the company's property. As McLelland J in *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* observed:
>
> > [T]he Court, in considering a challenge on commercial grounds to a liquidator's decision must approach the matter on the basis that the liquidator 'is recognised as having both the qualifications and the access to the multiplicity of information which may be necessary in order to make

3 [2002] VSC 353.

4 Ibid at [48] and [49].

> ...mercial decisions and, except where bad faith is established, will treat the liquidator's decision as a proper one unless satisfied that he acted 'in a way which no reasonable liquidator should have acted' see *Re Mineral Securities Australia Ltd (in liq)* [(1971-1973) CLC 40-076 pp 27588-9].
>
> 49. While demonstrated conflict of interest or breach of duty by a liquidator may in certain circumstances disentitle him or her to remuneration the material adduced by Mr Halliday in the present case does not provide evidence of such conflicts or breaches of duty.

45 I note that when there is a conflict of interest, her Honour took the view that a liquidator in certain circumstances will be disentitled to remuneration. Courts have the ability and do deny liquidator's remuneration when they fail to exercise a reasonable degree of professional skill or care[5] or where remuneration arises from improper or misguided actions.[6]

46 Having fiduciary obligations to the company, its creditors and contributors, a liquidator should avoid taking an appointment if a liquidator may appear conflicted. In *Re Allebart Pty Ltd (in liq),*[7] Street J stated:

> It is indispensable that in point of substance the liquidator's independence should be preserved; and it is undesirable that a liquidator should permit a situation to develop in which it might appear that he has yielded up in any degree whatever his exclusive independent control in the decision-making processes and administration of a winding up.[8]

47 His Honour further stated:

> It is essential that the independence and impartiality of a liquidator should at all times exist in point of substance, and be manifestly seen to exist. In the unusual and acrimonious personal background of these windings up, the liquidator appears to have been to some extent and in some respects insensitive of the extreme personal animosity lying behind the matters and the consequential need to take particular care to avoid allowing the windings up to become or to appear to have become an instrument of pursuing these personal conflicts.[9]

48 Mr McDermott submits that the allegations raised by the objectors are unfounded and not supported by the evidence. It is said that in any event, they are irrelevant to

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5 See *Silver Valley Mines* [1882] 21 Ch D 381 at 392.
6 See *Mellor v Mellor* [1992] 4 All ER 10.
7 [1971] 1 NSWLR 24.
8 Ibid at 28.
9 Ibid at 30.

this application and do not rise to the level at which the Court ought to deny the liquidator his remuneration. That is not so. There are affidavits of Mr Peterson and Mr McBain, which are not contradicted by Mr McDermott in relation to the conflict of interest. Mr McDermott knew there was a family dispute and had acted for the family in relation to other related companies. He should have made extensive enquiries prior to even considering whether or not he should take this appointment.

49 In *Re National Safety Council of Australia Victorian Division*,[10] the Full Court of this Court, Young CJ, Murphy and Marks JJ, made it clear that:[11]

> It is of the greatest importance that there should be no possibility of criticism attaching to one of the court's own officers on the ground of a conflict of interest and duty, but in any case there would be a substantial injustice to the creditors if the relationship between Ernst & Whinney and the Company could not be fairly, promptly and independently investigated and be seen to be independently investigated.

50 It is clear from uncontradicted evidence of Paul Peterson and Mr McBain that the issue of a conflict was raised at the first meeting with Mr McDermott. At that meeting, Mr McDermott had allowed Geoff Peterson and Suzanne Peterson to vote and proceeded with that meeting on the basis that he had the authority of the majority of the creditors, which he did not. Mr McDermott was criticised for not making proper enquiries relating to this debt. In response to the objectors' submission regarding this debt, Mr McDermott submits that he was not in a position to deal with the $1.8 million debt as he did not have all of the books of the company prior to the execution of the search warrant. He did not have a chance to properly consider material before the first meeting convened and that was entirely reasonable. He should have.

51 This raises the issue of why the liquidator must be careful when he has acted for related companies in the past and knows that there is a family dispute. The fact that the debt did not exist is a matter of concern. Mr McDermott, by accepting the appointment, has put himself in a position where there is a perception of conflict.

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10 (1989) 15 ACLR 355.
11 Ibid at 360.

52 In relation to the search warrant, Mr McDermott submits that Paul Peterson did not agitate whether the search warrant was warranted on the return date of the proceedings before Hargraves J. Paul Peterson did seek to agitate the matter before Ferguson J when the matter again returned to the Practice Court but her Honour declined to deal with the issue on the basis that no application was before the Court and there was no utility to adjourning the proceeding without further evidence to be led.

53 The issue of the search warrant, in my view, has no bearing on whether Mr McDermott is entitled to his remuneration. Once he took the appointment, then he determined that a search warrant was appropriate. The issue really is whether he should have taken that appointment in the first place. By knowing the family history and acting for the family group of companies in the past, Mr McDermott should not have accepted the appointment.

54 It is said that Mr McDermott did not use any confidential information he obtained from the other administration/liquidation in which he was involved. However, that is not to the point. The point remains that there is a perception of bias and he should not have taken the appointment in those circumstances.

55 Regarding the conflict of WMB Lawyers, I was referred to *Kallinicos & Anor v Hunt & Ors*,[12] where Brereton J undertook a comprehensive review of the authorities with respect to conflict. His Honour summarised the position as follows:[13]

> The foregoing authorities establish the following:
>
> - During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests. (*Prince Jefri Bolkiah*).
>
> - Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure)

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12 [2005] 64 NSWLR 561.
13 Ibid at 582.

(*Prince Jefri Bolkiah*).

- After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer *(Prince Jefri Bolkiah; Belan v Casey; PhotoCure ASA; British American Tobacco Australia Services Ltd; Asia Pacific Telecommunications Ltd;* contra *Spincode Pty Ltd; McVeight; Sent*).

- However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice (*Everingham v Ontario; Black v Taylor; Grimwade v Meagher; Newman v Phillips Fox; Mitchell v Pattern Holdings; Spincode Pty Ltd; Holborow; Williamson v Nilant; Bowen v Stott; Law Society v Holt*). *Prince Jefri Bolkiah* does not address this jurisdiction at all. *Belan v Casey* and *British American Tobacco Australia Services Ltd* are not to be read as supposing that *Prince Jefri Bolkiah* excludes it. *Asia Pacific Telecommunications Ltd* appears to acknowledge its continued existence.

- The test to be applied in this inherent jurisdiction is whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice (*Everingham v Ontario; Black v Taylor; Grimwade v Meagher; Holborow; Bowen v Stott; Asia Pacific Telecommunications Ltd*).

- The jurisdiction is to be regarded as exceptional and is to be exercised with caution (*Black v Taylor; Grimwade v Meagher; Bowen v Stott*).

- Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause (*Black v Taylor; Grimwade v Meagher; Williamson v Nilant; Bowen Stott*).

- The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief (*Black v Taylor; Bowen v Stott*).

56 Mr McDermott again argues that no confidential information has passed, which could be possessed by WMB Lawyers that would in any way be relevant in this matter and that Paul Peterson has not pointed to any confidential material which could have any material effect on the application. Again, it is raised that Paul Peterson did not seek to agitate this when he was represented by counsel on the return date of the warrant proceedings before Hargrave J, nor when the matter was heard by Ferguson J.

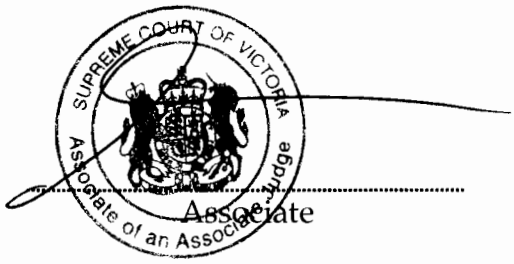
57 I note that WMB Lawyers have been acting for Paul Peterson since 1990. Mr Bengasino, partner of WMB Lawyers, makes the point in his affidavit that Mr Tatti has had the care and conduct on the proceeding on behalf of the plaintiff. He believes that Mr Tatti and his office have never acted for Paul Peterson or Natalie Peterson. In other words, there is a Chinese wall. That is not good enough. Again, WMB Lawyers knew that this was a family dispute. They had acted for the family in the past and in my view a fair minded, reasonably informed member of the public would conclude that WMB Lawyers should not be acting for Mr McDermott in this situation. It does not matter whether any confidential information has been given to the liquidator. The point that is important here is that there is a potential for confidential information to be given and the perception that it might be given.

58 The application by Mr McDermott for his remuneration will be dismissed.

CERTIFICATE

I certify that this and the 16 preceding pages are a true copy of the reasons for Judgment of Efthim AsJ of the Supreme Court of Victoria delivered on 24 July 2013.

DATED this twenty fourth day of July 2013.



Associate