

Episode 75: Summary

Episode name: Debased and Abused: Improper Uses of Part 5.3A of the *Corporations Act*

Guest(s): Paulina Fishman

What area(s) of law does this episode consider?

The concept of abuse in Part 5.3A of the *Corporations Act 2001* (Cth).

Why is this topic relevant?

Part 5.3A of the *Corporations Act* has a long and arguably sordid history. After all, it's the most popular corporate reorganisation regime in Australia.

Located in the Part is section 447A. That section provides the Court with a general power to make orders, including where the Court is satisfied that the Part is being abused. But what is abuse? And how should practitioners go about spotting and dealing with abuse when they see it?

What legislation is considered in this episode?

Corporations Act 2001 (Cth)

What cases are considered in this episode?

[*Blacktown City Council v MacArthur Telecommunications Pty Ltd* \(2003\) NSWSC 883](#)
(Jade link)

- The directors of MacArthur appointed a voluntary administrator the night before a two-week hearing. This would've given them the benefit of the moratorium on claims against the company to delay that hearing. Justice Barrett found that the directors attempting to prevent the hearing of a District Court matter going ahead was improper. Therefore, the commencement of the administration was for improper purposes.

[*In the Matter of New Bounty Pty Ltd; Winpar Holdings Ltd v Baron Corporation Pty Ltd* \[2015\] NSWSC 1060](#) (Jade link)

- A director of New Bounty resigned, and three days later caused Baron (a company which he controlled) to issue a written demand. This caused New Bounty to become insolvent. At which point, its remaining director placed it into administration. The creditors resolved that the company enter into a DOCA proposed by Baron - with shares flowing to Baron. After this was completed, Mr Bart was reinstated on the board. Winpar brought proceedings, arguing that the voluntary administration was for improper purposes. The court held that if the dominant purpose of the administration was to dilute the minority shareholdings this would be an abuse of Part 5.3A.

[*Aloridge Pty Ltd v Western Australia Gem Explorers Pty Ltd* \[1995\] FCA 3: 127 ALR 410](#) (Jade link)

- A director had sought and obtained the appointment of a provisional liquidator. Disputes started arising between this director and the provisional liquidator. The director then sought to commence administration because at that time

section 436C was such that the director could still appoint an administrator despite being in liquidation. This also meant that once an administrator was appointed, the powers of the provisional liquidator were suspended. The court found that the director did not appoint the administrator for the right purposes, instead the appointment was made to take control away from the provisional liquidator in the hope that perhaps the administrator would be more compliant. As the director made an appointment for some ulterior purpose other than the purposes of the regime found in section 435A, it amounted to abuse.

[Emperor Investment Group Pty Ltd v Delta Law Pty Ltd and Anor \[2019\] QSC 307](#)

(Jade link)

- Delta Law, an incorporated legal practice, was placed into administration by the sole director. Emperor, a shareholder in Delta Law, alleged that the director appointed an administrator to avoid being removed from office by dissatisfied shareholders and the company was not insolvent. In pre-appointment meetings with the administrator, the director's primary concern was to appoint the administrator before a shareholders' meeting at which a resolution was proposed to remove him as director. The court ultimately held that despite the director potentially holding a genuine and reasonable belief that Delta Law was insolvent, his primary motivation for placing Delta into administration was to ensure that the shareholders did not gain control of Delta.

[Re Condor Blanco Mines Ltd \[2016\] NSWSC 1196](#) (Jade link)

- A resolution proposed for an upcoming general meeting of shareholders was the removal of a director. The day before this meeting, it became clear that the shareholders intended to vote in favour of the resolution. Certain directors met with the proposed administrator in a bar in Kings Cross, where the directors passed a resolution that the company was insolvent or likely to become insolvent and appointed the administrator. The court found that the first director was motivated by the improper purpose of attempting to maintain directorship and because the second director followed blindly and unquestioningly in the first director's footsteps, his agreement was considered to be for the same improper purpose.

What are the main points?

- Section 447A(1) of the *Corporations Act* provides the Court with power to use its discretion to make an order that is appropriate in the circumstances. Subsection (2) is a "for example" clause. It is non-exhaustive.
- Subsection 447A(2)(b) provides the court with the "for example" relevant to s 447A(1); "because the provisions of this Part are being abused".
- *Blacktown* lays out the similarities of abuse in the context of Part 5.3A to abuse of process under common law. *New Bounty* warns against simply importing the common law abuse of process doctrine for use in Part 5.3A.
- Section 435A provides the objects of the regime. An improper purpose is one that does not fall within 435A.
- Paulina prefers the interpretation that the Court has the power to end an administration if the improper purpose is the *predominant* purpose.

What are the practical takeaways?

- Be aware that Part 5.3A can be - and is being - abused and be vigilant about it.
- If a creditor of a company seeks advice with the belief that a company has entered into voluntary administration for an improper purpose, first consider any proper purposes the company may have entered into administration. If there are none, then determine the actual and predominant purpose.
- Parties are able to seek either a declaration of invalidity for the administration under section 447C or an order to end the administration under section 447A.
- If Part 5.3A abuse is established, remember that the court has discretion and will be looking at what's in the interest of creditors, what's in the interest of the business and the company. Under 447A, the Court is not limited to ordering the administration to end with control simply reverting to directors.