IN THE MATTER of an Application by the Australian Securities and Investments Commission to the Companies Auditors and Liquidators Disciplinary Board pursuant to section 1292 of the Corporations Act 2001

MATTER NO: 02/VIC13

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

AVITUS THOMAS FERNANDEZ
Respondent

DECISION of the Board to exercise its powers under s1292 of the Corporations Act. Notice of this decision will be given to the Respondent under s1296(1)(a) of the Corporations Act and a copy of that notice will be lodged with ASIC under s1296(1)(b) of the Corporations Act.

29 October 2013

Panel:

Howard Insall SC (Panel Chairperson)

David Barnett

Robert Ferguson

Companies Auditors and Liquidators Disciplinary Board
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DECISION AND REASONS

A. Introduction

1. This is an Application under s 1292 of the Corporations Act 2001 ("the Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC") on 15 January 2013. By the Application, ASIC asks the Board to cancel, alternatively suspend, the registration of the Respondent, Avitus Thomas Fernandez ("Mr Fernandez") (a registered liquidator and official liquidator).

2. In essence, ASIC alleges

   (a) That Mr Fernandez has failed to carry out or perform adequately and properly duties or functions to be carried out or performed by him in his capacity as the administrator, and (once he was removed and replaced as administrator) as the past administrator, of Willmott Forests Limited ("Willmott Forests Ltd"), (see sub-section 1292(2)(d)(ii) of the Act) (see Contentions 1 to 9);

   (b) Further, or alternatively, that Mr Fernandez is otherwise not a fit and proper person to remain registered as a liquidator (see section 1292(2)(d) of the Act (see Contention 10)).

3. The allegations arise from an alleged failure by Mr Fernandez to disclose or deliver-up to relevant persons the sum of $200,000 transferred by Willmott Forests Ltd from its bank account number 083-004 47843-2873 with the National Australia Bank ("the NAB Account") to the Fernandez Partners trust account at or around 2.16pm on 6 September 2010 for the purpose of securing his costs of the proposed administration of Willmott Forests Ltd and its subsidiaries ("the $200,000 Payment"[1]).

4. ASIC alleges that Mr Fernandez's failures can be categorised in three areas as follows:

   (a) First, that he failed to disclose to creditors the $200,000 Payment in any of three DIRRIs[2] that he prepared dated 7, 17 and 28 September 2010;

   (a) Secondly, that he failed to disclose the $200,000 Payment to:

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[1] We note Mr Fernandez's concern in relation to the word "Payment" (Ex A par A1) but we do not consider that the term is inappropriate and, in any event, in using the term, we make no assumptions regarding ASIC's case.

[2] By "DIRRI", we mean Declarations made by the administrator to creditors. We note Mr Fernandez's concern about the use of this abbreviation (Ex A, par A2) but we use it as a convenient abbreviation without, of course, assuming the correctness of ASIC's allegations concerning disclosure. We note, however, that Mr Fernandez himself described the declaration which he sent to creditors as a "Declaration of *Independence*, Relevant Relationships and Indemnities" (emphasis added), see Ex 1 Tab 34.

(i) the receivers and managers of Willmott Forests Ltd, who were appointed prior to Mr Fernandez being appointed administrator and prior to the $200,000 Payment being made, in circumstances where the receivers and managers were appointed to assets of Willmott Forests Ltd including the bank account from which the $200,000 Payment was made; and

(ii) the administrators that replaced him as administrators of Willmott Forests Ltd on 26 October 2010; and

(b) Thirdly, that he retained and failed to deliver-up the $200,000 Payment in circumstances where he was required to deliver-up those funds to the receivers and managers who were appointed over the assets of Willmott Forests Ltd.

5. In essence, Mr Fernandez responds to these allegations by saying that he received the $200,000 Transfer in the belief the monies were carved out from monies under the control of the Receivers and he believed that he was entitled to a lien over the funds in respect of his fees. Whilst he accepted that his disclosures and the extent of transparency concerning his dealings with the property were not adequate, he submitted that his actions did not warrant a finding that he had not adequately and properly performed the duties or functions of an administrator, (or was not fit and proper) because the matters relied upon by ASIC did not establish levels of adequate and proper performance that a registered liquidator must attain "at the peril of enlivening the criteria in s 1292"[3].

6. The matter was heard over two days commencing 2 July 2013.

7. Mr Liondas of counsel appeared for ASIC and Ms Folie of counsel appeared for Mr Fernandez.

B. Procedural history

8. We should note that the matter was originally set down to be heard on 29 April 2013. However, on 9 April 2013, solicitors then acting for Mr Fernandez, Messrs Hunt & Hunt, Lawyers, wrote to the Board stating that a potential conflict of interest had been identified which might require them to cease to act. They made application for vacation of the hearing date on the basis that Mr Fernandez would need to obtain independent legal advice about the matter and that such advice could not be obtained in sufficient time to prepare the matter for hearing.

9. A Pre-Hearing Conference took place on 10 April 2013 to consider the application to vacate the Hearing. The Chairperson refused to vacate the Hearing in view of the requirement for matters before the Board to be dealt with expeditiously and on the basis that independent advice could and

[3] Cf *Gould v Companies Auditors and Liquidators Disciplinary Board & Anor* (2009) 71 ACSR 648 at [104].

should be obtained in time to avoid vacation of the hearing date. The matter was stood over to a further Pre-Hearing conference to be held on 16 April 2013.

10. On 15 April 2013, Hunt & Hunt, Lawyers informed the Board that their instructions had been withdrawn. On the same day, Mr Foster, solicitor, of Foster Nicholson Jones Lawyers, wrote to the Board to say that he was now instructed to act for Mr Fernandez and that he intended to retain counsel previously briefed, but such retainer was subject to that counsel seeking a ruling from the Ethics Committee of the Victorian Bar.

11. At the Pre-Hearing Conference on 16 April 2013, the Chairperson was informed by Mr Foster that counsel previously briefed would not be able to act in the matter. As a result, the Chairperson formed the view that there was a real potential for prejudice to Mr Fernandez if the hearing date was maintained and, accordingly, the Chairperson vacated the Hearing date. Fresh pre-hearing directions were subsequently made and the hearing was fixed for 2 July 2013, the next mutually convenient date.

12. Amongst the pre-hearing directions made was a direction that the parties serve on the other party a bundle of any additional documents (not otherwise attached to statements or other filed documents) on which the party intended to rely by 10 June 2013.

13. The parties were also required to sign and lodge a certificate of readiness for hearing by 19 June 2013, which required them to confirm that all documents to be relied upon had been filed and served.

14. We should note that Mr Fernandez only filed and served one statement. He did not file or serve any bundle of additional documents as required by the directions and gave no notice of any additional documents to be relied upon.

15. Just prior to the close of evidence at the Hearing on 3 July, Mr Fernandez sought to tender an ASIC report of a review undertaken in 2011 showing the levels of compliance by voluntary administrators with declarations of relevant relationships and indemnities. ASIC objected to this on the basis that it was taken by surprise because no notice had been given of this document in accordance with the Board's directions and that ASIC was prejudiced by the tender in that it would need to consider whether to seek to adduce expert evidence to deal with any matter in the report and it might need to consider an adjournment. Mr Fernandez's counsel accepted that it was not appropriate for the matter to be adjourned but sought to press the tender on the basis that the Board should deal with the matter in terms of weight and that ASIC could be given an opportunity to make written submissions about the matter. The Panel rejected the tender on the basis of the failure to comply with directions, and that this was not simply a technical issue. The report raised issues which ASIC was entitled to take time to consider and deal with. There was clearly a basis for thinking that the

information in the report would need to be analysed and explained before meaningful conclusions could be drawn impacting the present matter. A document of this type cannot be tendered without notice, particularly at a very late stage in the proceedings.

16. We specifically note this matter because we wish to confirm the importance of compliance with pre-hearing directions. The Board is obliged by statute to conduct hearings expeditiously and to comply with the rules of natural justice at and in connection with the hearing[4]. Pre-hearing directions are made to assist in achieving these outcomes. Whilst there will obviously be particular circumstances when non-compliance with directions may be excused, the parties must recognise that pre-hearing directions have a real function, namely to ensure that adequate notice is given of any matters to be raised so that parties can properly prepare. It is not consistent with the terms of the legislation governing procedure before the Board to expect that parties must deal with matters of substance raised late in the hearing, without adequate prior notice.

17. We handed down our Determination on 20 August 2013 and fixed 20 September as the date for submissions on sanctions, publicity and costs. Mr Fernandez subsequently applied to vacate that hearing date on the basis that he needed more time to adduce evidence relevant to sanctions. The Panel granted that application and the sanctions hearing was ultimately held on 9 October 2013.

C. The construction of s1292(2)(d) and the role of the Board.

(a) The parties' submissions

18. As stated above, ASIC's first nine Contentions allege that Mr Fernandez has failed to carry out or perform adequately and properly "duties or functions required by an Australian law to be carried out or performed by a registered liquidator" within s 1292(2)(d)(ii).

19. Mr Liondas, on behalf of ASIC, made the following submissions in relation to the Board's task under s 1292(2)(d)(ii):

    (a) The relevant duties and functions, here, were the duties and functions of an administrator. Those duties were caught by s 1292(2) because they are duties which are "required by an Australian law to be carried out or performed by a registered liquidator";

    (b) The Board's task was, thus, to determine whether Mr Fernandez had failed to carry out or perform adequately and properly any of his duties or functions as an administrator;

[4] ASIC Act s 218.

(c) Section 1292(2)(d)(ii) is concerned with the manner and sufficiency of a registered liquidator's performance of the office (in this case) of administrator: *Dean-Willcocks v CALDB* (2006) 59 ACSR 698 at [12], [36]. The words "*required by an Australian law*" in s 1292(2)(d)(ii) do not confine the meaning of the word "duties", but rather serve to identify the relevant duties and functions as being those which attach to an office (such as administrator) required by Australian law to be performed and observed by a registered liquidator;

(d) A "duty" for the purposes of s 1292(2)(d) need not be a specific duty independently imposed by legislation: *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 at [25] - [26]. Accordingly, it is possible for someone to fail to carry out or perform adequately and properly the duties and functions of being an administrator, even if it is not possible to point to some particular statutory provision which has been breached: *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; (2003) 47 ACSR 155 at [100]. For example, proper practice might call for the provision of information or advice to creditors even if no specific provision of the Act says so;

(e) Section 1292(2)(d)(ii) of the Act is designed to enable the Board, being representative of the commercial and accounting communities, to consider whether a function or duty of a registered liquidator has been adequately and properly carried out. To assess this, it is permissible to have regard to the professional standards operative in the relevant sphere of activity: *Dean-Willcocks v CALDB* (2006) 59 ACSR 698 at [26] - [27] as well as the Board's view of what they believe a reasonably competent practitioner would have done in similar circumstances in the adequate and proper performance of the duties or functions of administrator *ASIC v McVeigh* (Determination of the Board, Matter No 10/VIC08) at [3.1(d)];

(f) Whether there has been a contravention of any particular statutory provision, or an offence committed, is not a matter relevantly for the Board to decide. The exercise of the Board's power under s 1292 does not turn on it being satisfied as to a legal standard. Rather, the words "adequate and proper" invite the Board to test the administrator's performance against generally accepted standards of performance. The question for the Board in such circumstances is the adequacy and propriety of the carrying out or performance of the office of administrator: *ASIC v McVeigh* at [3.1(c) – (d)];

(g) There is no concept of reasonableness imported through the use of the words "failed" and "adequately" in the Act: *Davies v ASC* (1995) 59 FCR 221 at 240; *Re Young and Companies Auditors and Liquidators Disciplinary Board* (2000) 34 ACSR 425 at [8], [24];

(h) Ultimately, the issue for the Board is to form a view about what proper professional practice required should be done or not done in the circumstances of the application before it.

20. ASIC submitted, in its SOFAC, that in determining whether Mr Fernandez had adequately and properly performed his duties or functions as an administrator, the Board should have regard to:

(a) What the Act requires;

(b) The general law;

(c) Professional standards endorsed by relevant professional bodies (being the Insolvency Practitioners Association of Australia ("IPA"), the ICAA and CPA Australia); and

(d) Generally accepted standards of professional conduct, including what the CALDB believes a reasonably competent practitioner would have done in similar circumstances in the proper and adequate performance of relevant professional duties[5].

21. The submission in the last paragraph was accepted by Mr Fernandez.

22. ASIC submitted that the published professional standards to which the CALDB should have regard in the present application were:

(a) The IPA Code of Professional Practice for Insolvency Practitioners effective from 21 May 2008 to 1 January 2011; ASIC relied upon the fact that this Code had, as one of its purposes, to set standards of conduct for insolvency professionals;

(b) Professional standard APES 330 Insolvency Standards ("APES 330") published by the Accounting Professional & Ethical Standards Board ("APESB"), effective for insolvency services commencing on or after 1 April 2010; ASIC relied upon the fact that APES 330 had at all relevant times been adopted by the ICAA and CPA Australia;

(c) APES 110, *Code of Ethics for Professional Accountants* ("APES 110") published by the APESB and operative from 1 July 2006 incorporating relevant amendments up to and including 15 February 2008 which, ASIC contended, established the fundamental principles of professional ethics and provided a conceptual framework to apply those principles; ASIC relied upon the fact that APES 110 has at all relevant times been adopted by the ICAA and CPA Australia.

[5] Relying upon *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698; [2006] FCA 1438 at [24], [26], [37] and [42]; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; [2007] HCA 23 at [18]-[24]; *ASIC v McVeigh* at [3.1].

23. Mr Fernandez did not admit the contention in the last paragraph, to the extent that it implied that the IPA Code and APES 330 and APES 110 in themselves established professional standards, without the need for ASIC to prove the existence of a particular professional standard arising from those publications: *Gould v Companies, Auditors and Liquidators Disciplinary Board & Anor* (2009) 71 ACSR 648. Mr Fernandez contended that whilst the Board could consider relevant parts of those codes in considering the conduct of Mr Fernandez, those codes did not of themselves impose a mandatory standard or standards that related to a duty or function of a person as an administrator.

24. Ms Folie, on behalf of Mr Fernandez, made the following submissions in response to ASIC's submissions on this aspect of the case:

    (a) Mr Fernandez generally agreed with the propositions put forward by ASIC as to the Board's task and the law as summarised by ASIC;

    (b) The task for the Board was that it needed to be satisfied in respect of each contention and sub-contention:

        (i) First that ASIC has established to the Board's satisfaction that Mr Fernandez had a particular duty as either an administrator or a liquidator: *Australian Securities and Investments Commission v. McVeigh* at paragraph 3.1*ff*. (It was accepted that whilst that decision referred to "duty", "functions" were also relevant under s 1292);

        (ii) Secondly, that ASIC had proved that the relevant contention or sub-contention has been established;

    (c) In relation to contentions 1-9, ASIC must satisfy the Board that the duties and functions on which ASIC relies are duties and functions of a registered liquidator acting as a voluntary administrator under Part 5.3A of the Corporations Act;

    (d) Mr Fernandez did not submit that a voluntary administrator did not have duties regarding handling of company property;

    (e) It was important to have an overall understanding of the purposes which the administration provisions of the Corporations Act were trying to achieve and what proper professional practice required to be done to enable those purposes to be achieved when assessing a particular duty or function: *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; (2003) 47 ACSR 155 at [100];

    (f) The Board needed to be "comfortably satisfied" on the balance of probabilities that any particular contention or sub-contention had

been established and the burden lay on ASIC (citing *McVeigh* and relying on the *Briginshaw*[6] approach);

(g) Mr Fernandez accepted ASIC's general contentions about the roles that professional codes of conduct can play in the Board's task of determining duties and functions of a liquidator (including the particular references made by ASIC to *Dean-Willcocks*). However Mr Fernandez made the following submissions in this regard:

(i) the published codes or standards did not actually constitute duties for the purpose of s 1292 nor were accepted professional standards actually defined or confined by the codes or standards, nor was it the role of the Board to enforce published codes or standards: *McVeigh* at [3.1(e)];

(ii) while the Board could consider relevant parts of the codes in the review of Mr Fernandez's conduct, the codes did not of themselves impose a mandatory standard or standards that related to a duty or function of an administrator; there must be something more established by ASIC;

(iii) the codes may be indicative of practice but in relation to each contention and duty, it was for ASIC in each case to show that they established professional standards;

(iv) any codes or standards of conduct are not to be interpreted like a statute; they should be given consideration as a matter of substance, having regard to the purpose which is intended to be achieved by those codes;

(v) the codes of conduct and norms of practice necessarily evolve over time. Accordingly, any duties articulated or reflected by published guidance can change as changes occur in what is regarded as proper professional practice;

(vi) Mr Fernandez did not press the submission that the codes cannot go beyond the terms of the legislation for the purpose of section 1292;

(vii) Any weight to be given to the codes was a matter for the Board's discretion and it was up to the Board to determine what was appropriate in the context of the guides and the particular duty: *Dean-Willcocks* at [37];

(viii) The question whether identified provisions were "professional standards" depended on whether they purported to establish levels of adequate and proper performance that a registered

[6] (1938) 60 CLR 336.

liquidator must attain at the peril of enlivening criteria in section 1292(2)(d)(i) and (ii) – a serious matter: *Gould* at [104].

25. In reply on the *Briginshaw* issue, Mr Liondas submitted that whilst the *Briginshaw* test had been applied by the Board in other matters, attention was drawn to the terms of s 1292, which required that the Board be satisfied of the matters that enliven its jurisdiction. In any event, given the limited factual disputes between the parties, there appeared to be little room for *Briginshaw* to operate in the present matter.

26. In relation to the *Briginshaw* issue, the authorities suggest that the *Briginshaw* approach applies in disciplinary proceedings, particularly where allegations of a serious nature are made where serious consequences may follow: *Jackson (Previously Known As Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338; *Bannister v Walton* (1993) 30 NSWLR 699 at 711–712. We proceed on the basis that the *Briginshaw* test applies in the present case, although we agree with Mr Liondas that it has limited relevance in light of the limited factual disputes.

(b) Application of s 1292 to duties and functions of administrators

27. As explained above, ASIC's first proposition was that duties and functions in s 1292(2)(d)(ii) include duties and functions of an administrator. Ms Folie did not appear to challenge this proposition. We consider, both on principle, and on the basis of authority, that it is correct.

28. On its face, sub-paragraph 1292(2)(d)(i) would appear to include all things which could properly be regarded as a duties or functions of "a liquidator". Against that background, there would appear to be two potential constructions of sub-paragraph (ii):

    (a) Duties and functions which, pursuant to an Australian statute[7], are explicitly required to be performed by a "registered liquidator" acting as a liquidator;

    (b) Duties and functions which, pursuant to an Australian statute, are required to be performed by a registered liquidator, regardless of the capacity in which he or she acts (for example, when acting as an administrator).

29. In our view, the second alternative is clearly the preferred construction. The first construction would add little to the scope of sub-paragraph (i), beyond the addition of "functions". The second would permit sub-paragraph (ii) to embrace duties and functions which, whilst not properly characterised as

[7] The phrase as defined ("a law of the Commonwealth or of a State or Territory") contemplates a statutory law. It would be odd to describe a requirement under the general law as a requirement of "a *law* of the Commonwealth or of a State or Territory" particularly as there is but one common law of Australia: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at [99]. Perhaps more prosaically, it seems most unlikely that any non-statutory law would require a duty or function to be performed by "a *registered* liquidator".

"duties or functions of liquidators" are duties and functions which, by virtue of an Australian law, are required to be performed by a registered liquidator, eg duties and functions of administrators and receivers (see s 418 and 448B of the Corporations Act).

30. This approach makes good sense. The Act provides that certain important offices (such as the offices of administrator or receiver) can only be performed by registered liquidators. Section 1292 bestows jurisdiction on the Board to cancel the registration of registered liquidators. It would seem most odd if the Board could only do so when the liquidator had failed to perform duties or functions which are strictly those of a liquidator but could never do so when the failure related to the duties or functions of an administrator or receiver, notwithstanding that those duties can only be performed by a person who is a registered liquidator.

31. The authorities support this view.

32. In *Re Vouris; Epromotions Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; 47 ACSR 155 at [99], Campbell J said:

> "[99] As I read the charge, the "duties or functions required by an Australian law to be carried out or performed by a registered liquidator" referred to in the charge are intended to be the duties and functions connected with being an administrator. The charge alleges that in eight respects those duties or functions were not adequately and properly carried out or performed.
>
> [100] It is possible for someone to fail to carry out or perform adequately and properly the duties and functions of being an administrator, even if it is not possible to point to some particular statutory provision which has been breached. … "

33. This decision was approved by Tamberlin J in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 at 710[8].

34. Similar views were expressed, *obiter*, by Carr J in *Bride v Australian Securities Commission* (1997) 74 FCR 1, in dealing with the distinctions between the functions of a liquidator and receiver, at page 5:

> "The legal functions of a receiver on the one hand and a liquidator on the other hand are separate and distinct. … Parliament has, in the context of cancellation or suspension of the registration of a liquidator, distinguished between a person carrying out or *performing adequately and properly* (the similarity of that phrase to the language of reg 9.2.05(1) is striking) the duties of a liquidator as such, as distinct from any duties or functions required by an Australian law to be carried out or performed by a registered liquidator: see s 1292(2)(d).

[8] And see also *Re Young and Companies Auditors and Liquidators Disciplinary Board* (2000) 35 ACSR 83 (AAT) at [4].

> Where parliament wants to refer to both the duties of a liquidator and other duties required by law to be carried out or performed by a registered liquidator, it refers expressly to the two sets of duties." (emphasis in original).

35. In *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) 71 ACSR 648 at 651, Lindgren J accepted that sub-paragraph (ii) applied to the duties and functions of administrators appointed under Part 5.3A. His Honour said:

> "Paragraph (d)(i) refers to the duties of the office of liquidator occupied by the person. Paragraph (d)(ii) refers to the duties or functions of other offices that, under Australian law, may only be carried out or performed by a registered liquidator. The offices of the latter class that are of present relevance are those of an administrator and of an administrator of a deed of company arrangement (DOCA), in each case under Pt 5.3A of the Law (or of the Act).
>
> **[5]** Only a registered liquidator may consent to be appointed, and act, as:
>
> - liquidator of a company: s 532(1) of the Act;
> - administrator of a company under Pt 5.3A of the Act: s 448B of the Act;
> - administrator of a deed of company arrangement under Pt 5.3A of the Act: s 448B of the Act."

36. We note that a different construction was adopted by the Administrative Appeals Tribunal in *Re Australian Securities Commission and Companies Auditors and Liquidators Disciplinary Board* (1994) 13 ACSR 373 (at 377) albeit in relation to the equivalent sub-paragraphs of s 1292 relating to auditors. The Tribunal held that s 1292(1)(d)(i) (failure to carry out or perform "the duties of an auditor") related to the *general law* duties of an auditor and that s 1292(1)(d)(ii) (failure to carry out or perform "any duties or functions required by an Australian law to be carried out or performed by a registered company auditor") related to the *statutory* duties of an auditor. On appeal, (*Davies v Australian Securities Commission*, (1995) 59 FCR 221) it appears that neither party challenged the finding, but there was no express endorsement of the finding in the decision of Hill J in that case.

37. We do not think, with respect, that this construction is correct. If this had been intended, the legislature could have said so, in terms. We note that in *Coopers & Lybrand v Australian Securities Commission* (1994) 53 FCR 599 Von Doussa J adopted a construction of s 1292(1)(d), (ie the provision dealing with auditors) consistent with the approach in *Re Vouris*, *Dean-Willcocks* and *Bride*.

38. Accordingly, there seems little doubt that the Board has jurisdiction under s 1292(2)(d)(ii) to consider whether Mr Fernandez, being a person registered as a liquidator, has failed to carry out or perform adequately and properly any duties or functions of an administrator.

(c) Determining whether a person has failed to carry out or perform adequately and properly the duties and functions of an administrator

39. The main issue arising from the parties' submissions referred to above concerned the nature of the assessment to be performed on an application under s 1292(d)(ii) and the role of published standards or codes.

40. In addressing this issue, we believe it is important to state with some precision the nature of the question to be determined by the Board on an application under s 1292(2)(d)(ii) and the role of the Board considering that question.

41. As the parties noted, the decision of Tamberlin J in *Dean-Willcocks*, is centrally important in this area. His Honour there considered an argument that professional standards were not "duties or functions" within s 1292(2)(d)(i) because such standards were not required to be performed by an Australian law[9]. At [24] Tamberlin J said:

> "[24] The language of s 1292(2)(d)(ii) directs attention to the question of whether there has been a failure to *adequately* and *properly* carry out or perform the duties or functions required to be performed by a registered liquidator. The emphasis is on the adequacy level or sufficiency of performance of the function or role by the registered liquidator. In this case, the function to be performed is that of an administrator. To evaluate the level of performance is a question of fact and degree which calls for the application of a standard. It is not a qualitative consideration whether there has been performance, but rather calls for consideration as to the sufficiency of the acts or omissions of the administration. This is a task which calls for some acquaintance with professional standards applicable to the role of an administrator. (emphasis in original)
>
> [25] Upon and after accepting appointment of the office of an administrator, the liquidator must perform the functions and tasks of that office in a proper and adequate way. This obligation to meet a standard is attracted by the terms of s 1292(2)(d) itself. It is not necessary, in my view, to identify a specific legislative duty independently imposed by legislation. When a person assumes the office of an administrator, he or she is then bound to perform adequately and properly the *functions of the office*. The focus of the provision concerns the sufficiency and quality of *the performance of the*

[9] We should note that Mr Fernandez did not maintain such an argument, but the discussion in *Dean-Willcocks* is nonetheless instructive.

office that must be carried out by a registered liquidator." (emphasis added)

[26] There is nothing in the language of s 1292(2)(d)(ii) which excludes regard to professional standards and codes when deciding whether the performance is a proper and adequate exercise of the office. The reference to "proper" and "adequate" invites the testing of performance against a relevant standard or benchmark of performance. The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of "adequacy." The standard is that the duty must be performed "properly". The provision is designed to enable a Board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out. To assess this, it is permissible, in my view, to have regard to the standards operative in the relevant sphere of activity."

42. Tamberlin J referred to and approved the discussion of a similar issue in *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; (2003) 47 ACSR 155 and *Goodman v Australian Securities and Investments Commission*(2004) 50 ACSR 1.

43. In *Vouris*, proceedings had been commenced against a liquidator before the Board. Prior to the determination before the Board, the liquidator sought declarations in the Supreme Court of New South Wales concerning the adequacy of his conduct. Campbell J refused to make such declarations and, in the course of his judgment, considered the operation of s 1292(2)(d)(ii), and said (at [100]):

"It would be a breach of s 1292(2)(d)(ii) if an administrator had taken a bribe for making a particular recommendation, even though nothing in Pt 5.3A said administrators were not to take bribes. Whether the duties and functions of being an administrator have been performed adequately and properly can depend to some extent on having an intelligent understanding of the purposes which the administration provisions of the Corporations Law were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved. It is for that reason that I have set out the overview of the provisions for administration of a company earlier in this judgment. In particular, sometimes proper practice might have called for the provision of information or advice to creditors even if no specific provision of the Corporations Law said so.

…

[103] Whether Mr Vouris fell below acceptable professional standards … is not solely a matter of law. It is a question the answer

to which is influenced by evidence about appropriate professional standards. If this court were to seek to answer the question, it would undermine the exercise by CALDB, a specialist tribunal, of the functions which parliament has conferred upon CALDB. ”

44. In *Goodman* at [26], Branson J said:

> “The question of whether the applicant failed to carry out or perform adequately and properly that duty or function is not a pure question of law. The words “adequately” and “properly” incorporate notions of judgment. The relevant judgments call for consideration to be given to accepted professional standards: see *Re Vouris; Epromotions Pty Ltd and Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; 47ACSR 155 at [103]. The task of determining the relevant accepted professional standards is a task within the expertise of the board. The accepted professional standards may be found by the board to be set by, or alternatively reflected in, published Auditing Standards — notwithstanding that the Auditing Standards have no direct statutory significance.”

45. In *Albarran v Members of the Companies Auditors and Liquidators Board* (2007) 231 CLR 350; [2007] HCA 23, the plurality in the High Court said (at [18]):

> “[18] In construing par (d) of s 1292(2), weight must be given to the introductory but controlling words “to carry out or perform adequately and properly”. Of the words “proper” and “adequate” as they appear here, Tamberlin J said in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* that they invite:
>
> > … the testing of performance against a relevant standard or benchmark of performance. The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of “adequacy”. The standard is that the duty must be performed “properly”.
>
> [19] Section 203 of the ASIC Act, in dealing with the composition of the board, requires that it include members appointed by the Minister from panels nominated by professional accountancy bodies. The section also now requires the appointment of “business members” from among persons the Minister is satisfied are suitable as representatives of the business community by reason of qualifications, knowledge or experience in fields including business or commerce, the administration of companies, financial markets, and financial products and financial services.
>
> [20] Against that background, in *Dean-Willcocks*, Tamberlin J went on to observe that par (d)(ii) of s 1292(2):

> '… is designed to enable a board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out. To assess this, it is permissible, in my view, to have regard to the standards operative in the relevant sphere of activity.'

[21] That reasoning of Tamberlin J should be accepted as indicative that the function performed by the Board in the present cases was not the ascertainment or enforcement of any existing right or liability in respect of an offence and the punishment for an offence. So, also, should the conclusion expressed by the Full Court in the judgment here under appeal. Their Honours said:

> 'The function of the Board is not, as was submitted, to find (as an exercise of deciding present rights and obligations in the above sense) whether an offence has been committed and, if so, to inflict a punishment therefor. It is, as we have said, to assess whether someone should continue to occupy a statutory position involving skill and probity, in circumstances where (not merely because) the Board is satisfied that the person has failed in the performance of his or her professional duties in the past. Messrs Gould and Albarran say that punishment or a penal or harmful consequence is finally inflicted on the person consequent upon the finding of the committal of an offence prescribed by law. That is not what s 1292(2) says the function of the Board is. It is not, in substance, what the Board does.'

[22] This construction of par (d) of s 1292(2) is not qualified or displaced by any considerations flowing from the final words in that paragraph "or is otherwise not a fit and proper person to remain registered as a liquidator".

…

[24] Counsel for the Attorney-General in the present appeals correctly submitted that the words "adequately and properly" import *notions of judgment by reference to professional standards rather than pure questions of law* and that the concluding expression containing the words "otherwise not a fit and proper person" expands or adds to what precedes it but does not draw in a discrete subject-matter." (emphasis added- citations omitted)

46. The plurality in *Albarran* continued (at [29]):

> "[29] Further, the Full Court put the matter correctly when it said:
>
> > 'If one takes the exercise of power here — that is to terminate or suspend a right or status, created by statute, by reference, in

part, to past conduct — it can be readily accepted that a court might do this or an administrative tribunal might do this. This is not a power which is inherently judicial. The character of the board, *the undoubted bringing to bear by the board of professional standards (with the knowledge of which its members can be taken to be imbued),* an absence of an assigned task of deciding a controversy between parties as to the existence or not of present mutual rights and obligations of those parties upon the application of the law to past events, the exercise of an evaluative and discretionary power in the protection of the public as to whether a person is fit and proper to continue to hold a position of importance provided for by the statute, all combine to give the conclusion that the conferral on the board of the power in s 1292 is not judicial'." (emphasis added - citations omitted)

47. Kirby J agreed with the decision of the plurality. At [52], he said:

> "[52] *The legislation*: The provisions of s 1292(2) of the Corporations Act are also set out in the joint reasons. So too is a description of the provisions of s 203 of the ASIC Act, explaining the past and present requirements for the composition of the board so that it includes persons with relevant accounting and business experience.
>
> [53] Self-evidently, the object of constituting the Board in this way was to ensure that the body determining the contentions of ASIC, presented by its applications to the Board, could do so with full knowledge of ordinary practice and with sensitivity to proper professional standards. Inferentially, the object included the avoidance of the necessity to prove all the details of such practice and standards that might have been required in the case of a non-expert generalist court.
>
> [54] Once again, provisions of this kind cut both ways. On the one hand, they ensure that the decision-maker is aware of any relevant practicalities that may arise in company liquidations, so that attention is not solely paid to the letter of the law. On the other hand, the common assumptions and expectations of specialists can sometimes demand standards not readily apparent to an untutored eye, informed only by a legislative text. Occasionally, they may be more demanding although not spelt out in a normative way."

48. We seek to encapsulate a series of relevant propositions from these cases as follows:

    (a) First, whilst sub-paragraph (2)(d)(ii) requires assessment of the level and standard of performance of "duties or functions", the latter phrase, (particularly "functions") is broad. Tamberlin J referred to the assessment as relating to the sufficiency of "the acts or omissions

of the administration", of "the functions of the office" and of "the quality of the performance of the office". It must follow that it is not necessary, in every case under s 1292, for ASIC to identify a specific "duty" required to be performed by a registered liquidator. See also *Vouris* at [100];

(b) Secondly, the level and standard of performance of the duty or function needs to be tested against a relevant benchmark. The benchmark is "professional standards";

(c) Thirdly, the assessment calls for acquaintance with professional standards, which is why the task is entrusted to the Board. The Board can be taken to be imbued with knowledge of professional standards. The task of determining the relevant accepted professional standards is a task within the expertise of the Board[10];

(d) Fourthly, the level of performance called for is that of "adequacy"; the standard is that the duty or function must be performed "properly";

(e) Fifthly, in making its assessment, the Board is entitled to have regard to published codes or standards of the professional bodies. The accepted professional standards may be found by the Board to be set by, or alternatively reflected in published standards or codes;

(f) Sixthly, the assessment will also involve having an intelligent understanding of the purposes which the provisions of the Corporations Act were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved.

(d) Is the standard in 1292(2)(d)(i) and (ii) equivalent to not being fit and proper?

49. As indicated above, Ms Folie relied upon *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) 71 ACSR 648 at [104] as authority for the proposition that the question whether particular professional codes are "professional standards" depended on whether they purported to establish levels of adequate and proper performance that a registered liquidator must attain at the peril of enlivening criteria in section 1292(2)(d)(i) and (ii) – a serious matter: *Gould* at [104].

50. With respect, we doubt whether the discussion of the issue in *Gould* at [101] to [104] can stand with the authority, most importantly, the views of the High Court in *Albarran*.

[10] However, if the matter is being determined before other non-expert bodies or courts, evidence of the accepted professional standards would be required: *Vouris* at [103], *Gould* at [50], [75], *Albarran* at [29] and [53].

51. In *Davies v Australian* Securities *Commission*, (1995) 59 FCR 221, Hill J considered a submission that s 1292(1)(d) of the Law, (the predecessor to the present s 1292(1)(d)), did not permit a finding only of failure to carry out or perform the duties referred to in sub-paras (i) and (ii) without a finding that the failure was such as to bring about the conclusion that the person so failing was not a fit and proper person to remain registered as an auditor.

52. In rejecting the argument at page 233, he said[11]:

> "there is an obvious difficulty in the construction which is urged on his behalf. Had the legislature intended that it be necessary before s 1292(1)(d) was attracted that it be shown that a registered person was not a fit and proper person to be an auditor, it would have been easy for the legislature to have merely stipulated in s 1292(1)(d) that the person be found not to have been a fit and proper person to remain registered. It would have been unnecessary to have mentioned the specific matters in cll (i) and (ii) of the sub-clause. This is a difficulty in the way of the construction urged by counsel for Mr Davies at least as great as the difficulty thrown up by the use of the words 'or is otherwise' for the construction adopted by the tribunal.
>
> I think the better interpretation is that for s 1292(1)(d) to be attracted *there are three separate and independent alternatives*. The first is a failure to carry out or perform adequately and properly the duties of an auditor. The second is a failure to carry or perform adequately and properly the duties or functions referred to in sub-para (ii) and the third and alternative requirement is that it be shown that the registered person is not a fit and proper person to remain registered. If the words 'or is otherwise' have any significance at all it is to express a legislative view that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered as an auditor. To the extent that there are cases which do not warrant cancellation or suspension, these may be dealt with either by the general discretion conferred upon the board in s 1292(1) or the power to impose a lesser disciplinary punishment contained in s 1292(9)." (emphasis added).

53. We consider that the High Court in Albarran applied the same approach in stating that the words "otherwise not a fit and proper person" in s 1292(2)(d) "expanded or added to" sub-paragraphs (i) and (ii).

54. In other words, a failure to carry out or perform adequately and properly the duties of a liquidator or the duties and functions of an administrator within s 1292(d)(i) and (ii) may be established whether or not such failure is

[11] See also *Re Young and Companies Auditors and Liquidators Disciplinary Board* (2000) 35 ACSR 83 (AAT) at [5]-[7].

sufficiently serious to establish that the person is not a fit and proper person to remain registered.

55. In contrast, in Lindgren J, in *Gould* held that a failure within sub-paragraph (d)(ii) will "without more, demonstrate that the person is not a fit and proper person to remain registered". His Honour stated (at [102]):

> "[102] The words 'or is otherwise not a fit and proper person to remain registered as a liquidator' provide an alternative to the criteria that precede in sub-paras (i) and (ii). Paragraph (d) must, however, be read as a whole. Its criteria can be analysed as follows (I will refer only to para (i) but the same analysis applies to para (ii)):
>
> > (1) failure to perform adequately and properly the duties of a liquidator; or
> >
> > (2) being otherwise not a fit and proper person to remain registered as a liquidator.
>
> The word 'otherwise' shows that the provision takes it for granted that a failure of the kind described in (1) will, without more, demonstrate that the person is not a fit and proper person to remain registered as a liquidator."

56. Lindgren J proceeded from this premise to consider whether certain Capping provisions in an IPAA guide were "professional standards". His Honour stated (at [104]):

> "[104] Whether the Capping provisions in the Guide and the Statement were "professional standards" of the kind to which Tamberlin J was referring in *Dean-Willcocks*, depends on whether they purported to establish levels of "adequate" and "proper" performance that a registered liquidator must attain at peril of enlivening criterion (1) or criterion (2) above — a serious matter."

57. In other words, Lindgren J appears to proceed on the assumption that the Capping provisions could not be professional standards unless a failure to comply would equate to the liquidator not being a fit and proper person to remain registered. If this is the effect of his Honour's decision, we believe it is inconsistent with the authorities already cited above.

58. We respectfully adopt the views of Hill J in *Davies*, namely, that to the extent that the phrase "or is otherwise" has any significance at all, it is to express a legislative view that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered. But circumstances may well occur where a person has failed to carry out or perform adequately or properly the duties or functions of a registered liquidator without that failure demonstrating that he or she is not a fit and

proper person. In such a case, the Board may decide not to exercise its powers. After all, the Board has a discretion. Where it is satisfied of the requisite matters, it "may" cancel or suspend. However, it may not (cf s 1292(7)). Alternatively, if the Board considers that the failure does not warrant cancellation or suspension, the Board may impose a lesser disciplinary sanction contained in s 1292(9).

59. On this basis, professional standards may be found to be reflected in, or set by, professional codes and a failure to perform duties or functions adequately or properly may be established, (by reference to such standards and having regard to such codes), notwithstanding that this would not justify a finding that the respondent is not a fit and proper person to remain registered as a liquidator. Nevertheless, nothing we say should be interpreted as a conclusion that a finding that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will not ordinarily be a serious matter. As Hill J indicated in *Davies*, the wording of the section probably reflects a legislative view that such a person will ordinarily not be a fit and proper person to remain registered as a liquidator.

D. The witnesses

60. As things ultimately turned out, Mr Fernandez did not seek to cross-examine any of the witnesses put forward by ASIC.

61. The only witness cross-examined at the hearing was Mr Fernandez himself.

62. We were concerned by the evidence given by Mr Fernandez in the witness box. Our concerns were not limited to the normal concerns of cogency and credibility of the evidence. Our concerns extended to the fact that many of his answers raised real questions as to his ability to understand some fairly basic commercial concepts and as to his ability to understand some fairly straightforward questions[12]. We will deal with this aspect of his evidence later in these reasons, when considering Contention 10.

63. Leaving aside that question, we found Mr Fernandez to be a very unsatisfactory witness. His answers were repeatedly non-responsive, even after he was reminded to focus on and address the questions being asked[13]. He prevaricated[14]. We consider that, on a number of occasions, his evidence was a spontaneous creation in the witness box[15].

64. For these reasons, we have treated Mr Fernandez's evidence with great circumspection. In a number of instances, we have rejected the evidence. We will deal with the specifics during the course of these reasons.

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[12] See eg T107-110, 118, 122.

[13] Eg T106.8, 109, 110, 127, 131.

[14] Eg T155.25-159.12

[15] Eg T156.

E. The facts

(a) Introduction

65. There is not a great deal of dispute about the basic facts. Many of the facts were admitted in the Response and, in any event, are supported by uncontradicted evidence.

66. There was some disparity between the evidence put forward by Mr Fernandez and the evidence of the witnesses relied upon by ASIC. Mr Fernandez did not seek to cross-examine any of the ASIC witnesses. Ms Folie appeared to accept that, in these circumstances, the Board was entitled to accept the evidence of the ASIC witnesses. As a general matter, we consider that this is correct.

67. A particular issue of fact with which we must deal is Mr Fernandez's beliefs or state of mind at various times. Mr Fernandez has asserted that he had particular beliefs. ASIC also alleges from time to time that Mr Fernandez either (a) knew, (b) ought to have been aware of, or (c) had reasonable grounds to suspect various things. We treat this as an allegation, that Mr Fernandez had (a) actual knowledge of the fact (b) knowledge of circumstances which would have caused a reasonable person in his position to become aware the fact or (c) knowledge of circumstances which would have caused a reasonable person in his position to suspect the fact.

(b) Willmott Forests Ltd and subsidiaries

68. Willmott Forests Limited was registered on 16 March 1994 and remains registered.

69. As at 6 September 2010, the directors of Willmott Forests Limited were Messrs Jonathan Madgwick, Marcus Derham, Hugh Davies, James Higgins and Raymond Smith. The secretary of Willmott Forests Ltd as at 6 September 2010 was John Rutledge. Mr Derham was also the chief executive officer as at 6 September 2010.

70. At all relevant times the companies listed in Schedule A were subsidiaries of Willmott Forests Ltd ("the Subsidiaries").

71. As at September 2010, Willmott Forests Ltd and the Subsidiaries were indebted to the Commonwealth Bank and CBA Corporate Services (NSW) Pty Ltd under a Syndicated Facility Agreement dated 17 March 2009 and a Note Sale Deed dated 17 March 2009. That indebtedness was secured by a number of charges, referred to below.

(c) Appointment of Receivers and Managers on 6 September 2010

72. On 6 September 2010 at about 10.45am, the head of specialised lending at the Commonwealth Bank of Australia informed Mr Derham that the bank

intended to appoint receivers and managers to Willmott Forests Ltd and the Subsidiaries.

73. On 6 September 2010 at 11.15am, by a deed of appointment, Mr Bryan Webster ("Mr Webster") and Mr Mark Korda ("Mr Korda") of KordaMentha were appointed joint and several receivers and managers by CBA Corporate Services (NSW) Pty Ltd ("CBA") of all of the assets charged by Willmott Forests Ltd under the following charges:

    (a) Deed of charge (Bilateral) dated 17 March 2009, ASIC registered no. 1767770;

    (b) Deed of charge (non NSW & SA) dated 17 March 2009, ASIC registered no. 1767711;

    (c) Deed of charge (SA) dated 17 March 2009, ASIC registered no. 1767741;

    (collectively referred to as "the Deeds of Charge").

74. On 6 September 2010 at 12.29pm, by a deed of appointment, Mr Webster and Mr Mark Mentha were appointed joint and several receivers and managers by CBA (in its capacity as trustee of the Secondary Security Trust Deed dated 17 March 2009) of all of the assets charged by Willmott Forests Ltd under the Deed of charge (Secondary) dated 17 March 2009, ASIC registered no. 1767723.

75. (Messrs. Webster, Korda and Mentha jointly are hereafter referred to as "the Receivers").

76. On 6 September 2010 at 12.33pm, Mr Webster telephoned Mr Derham and informed him of the appointment of the Receivers, and confirmed to him that the Receivers were now in control of the assets of Willmott Forests Ltd subject to the Deeds of Charge referred to in paragraph 73 above.

(d) Appointment of Mr Fernandez as administrator on 6 September 2010

77. On 6 September 2010 between 11.00am and 12.00pm, Mr Derham and Mr Madgwick telephoned Mr Fernandez. During this telephone call (or, possibly, during the course of two calls):

    (a) Messrs Derham and Madgwick informed Mr Fernandez that the Receivers were going to be appointed to Willmott Forests Ltd and the Subsidiaries[16];

[16] There is an issue about whether he was told at this point that receivers already *had* been appointed, see paragraph 141 below. We find that he was not told that they *had been* appointed in the morning conversations, but that he was informed of this and the timing of the appointment at least by the afternoon of 6 September (see paragraph 94).

(b) Messrs Derham and Madgwick said that they were proposing to appoint Mr Fernandez as administrator of Willmott Forests Ltd and the Subsidiaries;

(c) Mr Fernandez said that he would consent to being appointed as administrator if either an indemnity for his costs was provided by the directors or Willmott Forests Ltd provided security for the costs and expenses of the administration;

(d) Mr Madgwick said that there were no guarantees or indemnities available, that there was unencumbered land and proceeds from the sale of that land that could be available to meet his costs. Mr Madgwick said that a sum of money ($200,000) could be transferred to Mr Fernandez's trust account, on account of his costs and expenses of conducting the administration.

78. Mr Fernandez's evidence concerning this conversation was that it occurred over two calls in mid to late morning on 6 September 2010. His evidence (which did not appear to be challenged on this issue) included the following:

> "…, they [Messrs Madgwick and Derham] said that the group had unencumbered funds which were not part of the property charged to the group's banks. They told me that the company could make payments to me from those funds. The sum offered by Mr Madgwick and Mr Derham toward the costs of the administration was $200,000.
>
> 9. During that conversation, Mr Madgwick and Mr Derham also told me that the Groups banking syndicate had contacted Mr Derham, stating that they intended appointing receivers and managers to WFL. At the time of this discussion, I was not aware whether receivers had been appointed.
>
> 10. At the end of the conversation I said that I would accept the appointment if the company could make arrangements for the payment of the $200,000 into my firm's trust account. The payment needed to be made into my firm's trust account rather than an administrator's account because I had not been formally appointed as administrator (and, as such, an administrator's account could not yet be established)."

79. Mr Derham's evidence as to this conversation included the following:

> "Madgwick said that there was unencumbered land, and proceeds from the sale of that land that could be available to meet his costs. A sum of $200,000 was mentioned as being available to Fernandez on account of his future costs. Fernandez said he would agree to be

appointed administrator, and that the $200,000 should be transferred to his trust account."

80. Mr Madgwick's evidence as to this conversation was to similar effect:

> "I told Fernandez that Willmot Forests had some unencumbered assets in the form of land situated in Bombala, New South Wales, and funds which had been sourced from the sale of some of the land in Bombala. I said that this Bombala land was carved out from the banking syndicate's charges and, hence, was unencumbered and would not be under the control of the receiver and manager. I told Fernandez that a sum of money could be transferred to his firm's trust account as provision for his future costs and expenses of conducting the administration. I suggested that an amount of $200,000 may be insufficient amount for the total future cost and expenses. However, this amount could be transferred to his account today. Fernandez agreed to be appointed administrator and for the $200,000 to be transferred to his trust account."

81. We accept Mr Fernandez's evidence that, at this stage, he assumed that there were unencumbered *funds* (in addition to unencumbered land). His evidence to this effect was corroborated by the evidence of Mr Madgwick. There is no reason why, at this early stage in the proceedings, Mr Fernandez was not entitled to make that assumption. As a matter of fact, however, there is no evidence that such unencumbered funds existed.

82. On 6 September 2010 at or around 1.00pm, Board meetings took place for Willmott Forests Ltd and each of the Subsidiaries. At the end of the Board meetings each company resolved to appoint Mr Fernandez as administrator.

83. Prior to the commencement of the Board meetings, Messrs Derham and/or Madgwick instructed Mr Stephen Mr Arrowsmith ("Mr Arrowsmith"), the Chief Financial Officer of Willmott Forests Ltd, to transfer the amount of $200,000 to the Fernandez Partners trust account ("Fernandez Partners Trust Account").

84. On 6 September 2010 at 1.06pm, Mr Arrowsmith sent a request to the National Australia Bank (NAB) for it to transfer the sum of $200,000 from the NAB account to the Fernandez Partners Trust Account in respect of "Insolvency Advice fees".

85. On 6 September 2010 at 1.17pm, formal notices of the Receivers' appointment were delivered to Willmott Forests Ltd.

86. On 6 September 2010 at 2.16pm, the sum of $200,000 was transferred from the NAB Account to the Fernandez Partners Trust Account. Mr Fernandez asserts that he received the $200,000 sum "as monies towards the costs of the administration".

87. At around this time on 6 September 2010, Willmott Forests Ltd and each of the Subsidiaries had prepared for it an Instrument of Appointment of Voluntary Administrator and Mr Derham, or Messrs Derham and Madgwick, signed each Instrument on behalf of the relevant company.

88. It appears that there were at least two meetings at the offices of Willmott Forests Ltd in the afternoon of 6 September: one with the Receivers and one with Mr Fernandez. The sequence is not entirely clear. The meeting with the Receivers was at 3 pm. Mr Madgwick said that he had a memory that Mr Fernandez may have attended the Willmott Forests offices "late in the afternoon of 6 September 2010." Mr Derham recalls meeting the Receivers' staff but not Mr Fernandez. Mr Fernandez says that he met in the early afternoon. Nothing much turns on the sequence of the meetings, but it seems more likely that Mr Madgwick's recollection of the timing of the meeting with Mr Fernandez is correct. There was a lot going on at the Willmot Forest offices in the early afternoon prior to the Receivers attending at 3 pm (including the holding of meetings, preparation of documents etc) and it would appear to be unlikely that Messrs Madgwick and Derham would have had time to hold a meeting with Mr Fernandez during that period. Also, Mr Fernandez only submitted his Form 505 with ASIC at 5.19 pm (see para 98 below). If his meeting had been in the early afternoon, prior to the Receivers arriving at 3 pm, it seems likely that he would have submitted the Form earlier than 5.19 pm.

89. When Mr Fernandez attended the Willmott Forests offices, he provided Consents to Act as administrator of Willmott Forests Ltd and the Subsidiaries. Mr Fernandez's evidence of this meeting includes the following:

> "12. In the early afternoon on 6 September 2010, I attended the offices of WFL at Park Street, South Melbourne and met with Mr Derham and Mr Madgwick.
>
> 13. During that meeting, I discussed further with Mr Madgwick and Mr Derham the companies' unencumbered funds which were to be advanced to my firm's trust account. They said that a significant proportion of land that owned by WFL, (sic) called the Bombala land, was not subject to the banks' charges. They told me that WFL had commenced a sales process in relation to some of that land, and the sale proceeds were not encumbered in favour of the secured lenders.
>
> 14. I asked Mr Derham and Mr Madgwick to provide me copies of the charge documents, so I could be sure that the land was excluded from the banks' security. They did not have copies of the charges or the loan documents. They showed me copies of other documents, including annual reports, which identified the Bombala land as carved out from the charged property. I was satisfied by seeing those documents that the Bombala land was excluded from the banks' security.

> 15. While at that meeting, the documents appointing me as the administrator of WFL and subsidiary companies were signed.
>
> 16. Whether it was said directly or whether I inferred it, I believed that the funds that were to be advanced to me were from funds in respect of which the receivers would have no claim under the charges in respect of which they were to be appointed. It was mentioned that the funds would be paid to my firm's trust account from an account held by WFL with National Australia Bank (NAB), but I wasn't given any other details."

90. It was a key aspect of Mr Fernandez's case that he received the $200,000 "in the belief the monies were carved out from monies under the control of the Receivers".

91. We accept that this meeting took place and that Mr Fernandez discussed with Mr Madgwick and Mr Derham the question of the funds to be advanced. We accept that Messrs Madgwick and Derham said the things set out in paragraph 13 of Mr Fernandez's statement. There is no evidence to the contrary and the evidence is not dissimilar to the evidence given by Messrs Madgwick and Derham about what they said to Mr Fernandez earlier.

92. We accept that the events took place as described in paragraph 14 of Mr Fernandez's statement. But we conclude from this evidence that, as at the time of this meeting, Mr Fernandez was very much alive to the question whether the funds which were to be used to make the payment of $200,000 were unencumbered. He was told that the Bombala land *and the sale proceeds* were not encumbered. He then attempted to seek verification. He wanted to see the charges but was told that they were unavailable. He said that his review of other documents satisfied him that the *land* was excluded from the banks' security. Even if these documents satisfied him of that matter, there is nothing to show that he concluded from his review of the documents, (or if he did, why he was justified in concluding), that (a) the sale proceeds were unencumbered (b) the funds in the account from which he was to be paid were unencumbered.

93. As to the latter question, he knew that he was to be paid from a company bank account. He knew that there was "a fixed charge over plantation land excluding the Bombala land" and otherwise "a floating charge over all of the assets of WFL and its wholly owned subsidiaries". He knew that the Charges covered moneys in bank accounts.

94. We also conclude, on the basis of the evidence as a whole, that Mr Fernandez must have been aware, at least by the time of this meeting, that the Receivers had been appointed and had been appointed prior to his appointment. He gave evidence in cross-examination that he could not say exactly when he became aware, although he appeared to accept that he became aware on 6 September. However, by the time of this meeting, the

Receivers had informed Mr Derham (at 12.33 pm) of the appointment by telephone and the formal notices of appointment had been delivered to Willmott Forests Ltd (at 1.17 pm). In our view, it is inconceivable, in the light of the events taking place and the importance of the timing of the appointment of receivers and administrator, that the appointments and timing would not have been discussed. There was no reason why Messrs Derham and Madgwick would not have informed Mr Fernandez of the timing of the appointments – and any number of reasons why they would have.

95. It follows, that, by the time of the afternoon meeting, Mr Fernandez either believed that the floating charge had crystallised prior to his appointment or, at the very least, was aware of the circumstances from which any reasonably competent administrator in his position would have concluded that it had.

96. Accordingly, all of the circumstances known by Mr Fernandez, by late afternoon on 6 September 2010, meant that he was either aware that there was a real question as to his entitlement to receive the $200,000 payment from the NAB account or, at the very least, a reasonable person in his position would have recognised that issue.

(e) Subsequent events on 6 September 2010

97. On 6 September 2010 at 4.15pm, the Receivers sent a facsimile to the NAB requesting that any monies held with the NAB by Willmott Forests Ltd and the Subsidiaries be held in trust for the benefit of the respective company.

98. On 6 September 2010 at 5.19pm, Mr Fernandez submitted to ASIC the ASIC Form 505 (External Administration: Appointment of an external administrator) with respect to his appointment as administrator of Willmott Forests Ltd.

99. On 6 September 2010 at 5.31pm, Mr Arrowsmith sent an email to Mr Fernandez which attached a list of the bank accounts held by Willmott Forests Ltd and the Subsidiaries with Commonwealth Bank of Australia and the NAB, including the NAB Account.

100. On 6 September 2010 at 5.35pm, Mr Fernandez sent an email to Mr Arrowsmith which stated "can you pls [sic] let me know which Nab a/cc has the 3m in it. Also are you able to confirm whether the $200k has been transferred to the Fernandez Partners Trust Account".

101. On 6 September 2010 at 5.54pm, Mr Arrowsmith sent an email to Mr Fernandez which responded to Mr Fernandez's email at 5.35pm and stated:

> "[T]he NAB account with the $2.8 m ($3m, less $200K transferred today to yourselves) is the account number 083-004 47843-2873. …

We requested NAB transfer funds to your nominated account this afternoon".

102. This was an important communication. On reading this email, Mr Fernandez was aware that the NAB account was the source of the $200,000 payment to him, and that $2.8m remained in the account. We make a number of observations. *First*, Mr Fernandez was concerned about whether he (or someone else) was entitled to control of the funds in the NAB account. He must have realised that if the funds in the NAB account were caught by the Charges, the Receivers would have been entitled to control of the funds. *Secondly*, he knew that the $200,000 payment had been made out of the NAB account. He must have believed that the sum was paid *after* the appointment of the receivers, having regard to the timing of events on 6 September. At the very least, he could not have had any confidence that the sum had been paid *prior* to the appointment of the Receivers. Thus, he was aware of circumstances indicating that there was a real possibility that funds in the NAB account had been caught by the Charges prior to the $200,000 payment.

103. Mr Fernandez was cross-examined about this issue. He was taken to the statements made by Mr Madgwick about the sale proceeds not being encumbered and was then asked:

> "Other than being told this, you saw no documents at this time that confirmed that the moneys in the NAB account were not encumbered?---Funds in the NAB account weren't encumbered? No, other than the representation of what I was told, that those funds were sourced from the Bombala sale proceeds.
>
> You saw no documents to suggest those funds were actually sourced from the Bombala sale proceeds?---No, I didn't have any documents.
>
> You undertook no investigations to determine whether that was correct or not?---I asked questions. Never got any answers."

104. He was subsequently asked to clarify this:

> "What questions did you ask?---In relation to the banking transactions of the company, the pre-appointment banking transactions, to trace - because that's the only way I knew I could satisfy any party, any interested party and the creditors of the company themselves, that the tracing of those sale proceeds will clearly identify that these are proceeds which were of - of property which were never the subject of the bank's charge. The questions that I asked were of the receivers. Well, at the time they were the only ones who had control of the books and records. It went on for a period.
>
> Do you say you asked questions of the receivers?---Yes.

> You say you never got any answers?---No. The answers I received were copies of correspondence, the e-mails that were sent to me by Mr Arrowsmith and perhaps Mr Ian Smith, I think is the name, as to the sales which were or had taken place, or were in train. They were the documents I saw. I could not get any independent verification. I could not get control or access to the books and records of the company to satisfy me that that was the case.
>
> So you weren't satisfied that that was the case?---No. I couldn't be satisfied."

105. Mr Fernandez's statement contained no evidence of any questions being asked of the Receivers about whether the funds in the NAB account were sourced from the Bombala land. But regardless of whether Mr Fernandez asked such questions, the above passage suggests, at the very least, that Mr Fernandez failed to obtain verification of something which he considered required verification.

106. It should be noted, at this stage, that before Mr Fernandez could be satisfied that he was entitled to retain the $200,000, he had to obtain verification about a number of matters, not the least of which was whether any proceeds from the sale of the Bombala land had actually been paid into the NAB account. As things turned out, the sale proceeds had been paid into an entirely different account (see paragraph 175 below). There was simply no basis, in fact, for claiming that the NAB funds were unencumbered.

107. On 6 September 2010 at 6.17pm, Mr Fernandez sent an email to Mr Arrowsmith which responded to Mr Arrowsmith's email.

(f) Mr Fernandez's investigation of charges and abandonment of claim to funds in the NAB account

108. On 7 September 2010 at 5.40am, Mr Fernandez sent an email to Mr Arrowsmith asking for clarification in relation to the various charges referred to in the deeds of appointment by which the Receivers were appointed, and asking for Mr Arrowsmith's thoughts on the best way of getting copies of the charges. This indicated that Mr Fernandez was concerned (and properly concerned) to ascertain the scope of the Charges.

109. On 7 September 2010 at 9.41am, Mr Arrowsmith sent an email to Mr Fernandez which responded to Mr Fernandez's email sent at 5.40am, and stated that Mr Arrowsmith would send to Mr Fernandez what he had in relation to the charges, and recommended that Mr Fernandez contact Mallesons Stephen Jaques for further information in relation to the charges.

110. On 7 September 2010, Mr Fernandez's solicitors (Mr John Sinisgalli ("Mr Sinisgalli") of Hunt & Hunt) spoke with Mr Hal Bolitho of Mallesons Stephen Jaques and requested a copy of the charges relevant to Willmott

Forests Ltd and the Subsidiaries. Mr Sinisgalli confirmed this request in an email at 3.03pm on the same date.

111. A CD containing the Deeds of Charge and an index of the documents contained on the CD was sent by Mallesons Stephen Jaques by courier to Hunt & Hunt and delivered on 7 or 8 September 2010.

112. On 7 September 2010 and 8 September 2010 Mr Fernandez and his solicitors, Hunt & Hunt, sought to have the balance of the NAB Account transferred to a bank account that Mr Fernandez had opened for the administration of Willmott Forests Ltd. During this period the Receivers also made requests to NAB that the funds be transferred to their bank account.

113. On 8 September 2010 at 6.42pm, Tim Allen of the NAB sent an email to Mr Sinisgalli of Hunt & Hunt stating, in part, that NAB proposed to transfer the funds to the Receivers' bank account within twenty-four hours.

114. On 9 September 2010 at 8.33am, Mr Sinisgalli sent an email to the NAB stating:

> "It will be necessary for NAB to satisfy itself that the charge upon which the Receiver relies to seek transfer of funds in fact extends to the funds retained in the NAB Account.
>
> Please advise the result of your further inquiries in due course".

115. On 9 September 2010 at 2.10pm, Allens Arthur Robinson ("AAR") acting for the Receivers, sent a letter to Hunt & Hunt by email regarding monies held in the NAB Account. In that letter AAR advised that

(a) The Receivers were appointed on 6 September 2010 prior to Mr Fernandez's appointment as administrator;

(b) The Receivers were appointed as receivers and manager of all of the "Charged Property" as defined in the Deeds of Charge;

(c) The "Charged Property" clearly included the NAB Account and all other bank accounts held by Willmott Forests Ltd and the Subsidiaries;

(d) Pursuant to section 441B and 442D(3) of the Act, Mr Fernandez's functions and powers as administrator were subject to the functions and powers of the Receivers;

(e) Accordingly, the Receivers had the right to take control of the NAB Account and all other "Charged Property".

116. Mr Fernandez did not seek to challenge the assertion in this letter that the Receivers were appointed on 6 September 2010 prior to Mr Fernandez's

appointment as administrator (or, indeed, any other assertion in this letter). Mr Fernandez prevaricated when cross-examined as to his awareness of this fact. We find that Mr Fernandez was aware, at least by the time of the receipt of this letter, that the Receivers were appointed prior to Mr Fernandez's appointment as administrator.

117. On 9 September 2010 at 4.44pm, Hunt & Hunt responded to AAR by letter. That letter stated:

> "Our correspondence to the National Australia Bank Limited sought to ensure that the NAB made proper enquiries as to the extent of Charges held by your clients' Appointors.
>
> We are instructed that Mr Fernandez will write to the NAB advising *that he is satisfied by the information provided under cover of your letter of today*.
>
> He will instruct the bank to release the claimed funds to your clients." (emphasis added)

118. On 10 September 2010 at 11.38am, Mr Fernandez wrote to the NAB by email and stated that he was satisfied with the information provided on behalf of the Receivers and that he agreed to the release of the balance of the NAB Account to the Receivers.

119. Mr Fernandez gave evidence that after receiving the letter from AAR on 9 September, he did not turn his mind to returning the $200,000 because he believed (from verbal advice from Mr Derham) that those funds formed part of the proceeds of sale from the Bombala land which was not subject to the banks' security. He also said that he believed that he had an administrator's lien over those funds.

120. We do not accept that Mr Fernandez believed, as at 9 September, that the $200,000 formed part of funds which were not subject to the banks' security. We refer to our observations at paragraphs 93-96 and 102-106 above. On 9 September, Mr Fernandez relinquished any claim to the balance of the funds in the NAB account. A letter was written on that day to AAR on Mr Fernandez's instructions stating that *he was satisfied by the information contained in AAR's letter of 9 September*. AAR's letter had stated that the Receivers had been appointed prior to Mr Fernandez's appointment. Mr Fernandez was satisfied that this was the case.

121. He must have believed that there was no arguable basis to assert a claim to the funds in the NAB account. He could not have believed, in these circumstances, that $200,000 payment had come from unencumbered funds. Indeed, Mr Fernandez apparently achieved sufficient satisfaction that the funds in the NAB account were not sourced from the Bombala land by deciding to relinquish any claim to the balance of the funds in the NAB account.

122. On the face of things, the claim that the funds in the account were unencumbered was implausible. The Charges caught all assets other than the Bombala land. Thus, they caught funds in bank accounts. Mr Fernandez had no evidence that the proceeds of sale of the Bombala land had been paid into the NAB account. Even if they were, this did not mean that the funds in the NAB account were not caught by the charge. Reference was made to a Quistclose trust, but this is a refined concept which requires a very specific factual underpinning. There is no evidence that anyone had carried out any proper analysis of the circumstances and formed a view that there was an arguable basis for maintaining a Quistclose trust – or any other mechanism which would prevent the Charges from operating in accordance with their terms on the funds in the NAB account.

123. Even if Fernandez held the belief that the funds in the NAB account were unencumbered, it was not a rational belief in the circumstances. The circumstances known to him required him to return the $200,000 or, at the very least, to raise the issue with the Receivers. Having regard to the correspondence with Receivers which had just taken place, one can imagine that the Receiver's reaction to any claim by Mr Fernandez would have been immediate and forceful. It is hard to conceive what basis Mr Fernandez could have put forward as a justification for retaining the $200,000. Mr Fernandez subsequently made reference to a claimed lien. But he had no entitlement to claim a lien over property which was wrongly transferred to him, as demonstrated by the fact that he was ultimately required to repay the $200,000. And in any event, by 4 pm on 9 September, Mr Fernandez had been Administrator for about 3 days. He accepted that his fees could not have been more than $10,000 or $20,000 for that period.

124. In cross-examination, Mr Fernandez said that the most important thing on 9 September was someone to take control of the Bank account. That was not consistent with the terms of the correspondence and, in any event, the obligation of receivers or administrators is not simply to ensure that "someone" is in control of company bank accounts, but that the person *entitled* to control is, in fact, in control.

125. Mr Fernandez relied upon "additional relevant facts" in his Response. These included:

    (a) On 6 September 2010 Mr Webster met with Mr Derham. They did not discuss the $200,000 Transfer, but Mr Derham was to provide him with Mr Fernandez's details (which he did at 6.20pm on 6 September 2010). Mr Webster did not at any time request Mr Fernandez provide him with a report setting out specific information about the affairs of WFL;

    (b) The $200,000 Transfer from Willmott Forests Ltd to Mr Fernandez's trust account on 6 September 2010 was not well known to Willmott Forests Ltd staff and the receivers and managers appointed on 6 September 2010, because, among other reasons:

(i) Mr Arrowsmith, who caused the $200,000 Transfer to be made, went on holiday from 13 September 2010 "for two and a half weeks" (ie until early October 2010);

(ii) Mr Agostini was on leave between 29 August 2010 and 14 September 2010;

(iii) the $200,000 Transfer was not recorded in WFL's accounting system.

(c) Mr Fernandez had no access to the banking or financial books and records of Willmott Forests Ltd prior to his removal on 26 October 2010 or thereafter.

126. The relevance of these matters was not explained in submissions. We do not consider that these matters impact the validity of our observations set out above.

(g) Other events following Mr Fernandez's appointment as administrator

127. On 7 September 2010, Mr Fernandez prepared and signed a "Declaration of independence, relevant relationships and indemnities" (the "First DIRRI") and provided it to creditors as part of the Notice of First Meeting of Creditors of Willmott Forests Ltd and the Subsidiaries. The First DIRRI did not disclose the $200,000 Payment.

128. On 15 September 2010 the first meeting of Willmott Forests Ltd creditors was held and adjourned to a date to be advised. Mr Fernandez noted in his Response, that Mr Derham attended the first creditor's meeting but no one asked about any money transfers to Mr Fernandez. This matter was not elaborated in submissions and we do not regard it as having any real significance in the scheme of things.

129. On 17 September 2010, Mr Fernandez signed a second DIRRI and provided it to creditors as part of the Notice of Adjourned First Meetings of Creditors of Willmott Forests Ltd and the Subsidiaries dated 17 September 2010 ("the Second DIRRI"). The Second DIRRI did not disclose the $200,000 Payment.

130. On 20 September 2010, Mr Paul Davine and Mr Ben Conrad of ASIC met with Mr Fernandez and his counsel, Mr Joshua Kohn, to discuss concerns that ASIC held about the administration of Willmott Forests Ltd and the Subsidiaries.

131. On 20 September 2010, Messrs Webster and Ryan of KordaMentha met with Mr Fernandez in relation to the administration of Willmott Forests Ltd and the Subsidiaries. Mr Webster told Mr Fernandez that the Receivers were intending to resign part of the receivership appointment over the assets and undertaking of Willmott Forests Ltd insofar as the appointment extended to the Responsible Entity that managed the interests of the plantation growers

and other unsecured creditors. Mr Webster asked Mr Fernandez how Mr Fernandez was going to fund the extended administration. Mr Fernandez did not disclose that he had received the $200,000 Payment.

132. Mr Webster's evidence about this meeting was as follows:

> "15. On 20 September 2010, along with Andrew Ryan (**Ryan**) of KordaMentha I attended a meeting with Fernandez at the Willmott Forests group South Melbourne offices. A number of issues were discussed at the meeting. One issue that Ryan and I raised with Fernandez was how he, in his capacity as the voluntary administrator, was intending to fund the work that he needed to undertake with respect to his external administration. I also explained to Fernandez that due to the potentially extensive liabilities associated with the Managed Investment Schemes, I was considering resigning from my appointment as Receiver insofar as it related to WFL in its capacity as the responsible entity and manager of the various Managed Investment Schemes.
>
> 16. On the basis of my discussions with Fernandez that day I was of the view that he did not understand the impact of growers' rights on the Companies' assets. The plan he disclosed at the meeting centred around seeking expressions of interest of the assets as soon as possible. I advised Fernandez that I did not agree with this strategy as it was unknown what he would actually be selling and that he first needed to understand the impact of growers' rights on any sales campaign. Fernandez did not provide me with any details as to what funding arrangements he had in place. Given I was considering resigning as Receiver of Willmott Forests Limited in its capacity as responsible entity, this concerned me greatly because all scheme related matters would be for his attention, not mine."

133. Mr Fernandez's evidence was that when Mr Webster asked him about funding he said:

> "that I had the unencumbered Bombala land, and I raised the possibility of borrowing from a bank to fund the administration. I did not mention the funds in my firm's trust account because I thought that, as the receiver of the companies in possession of the financial books and records of WFL, he knew about the transfer of the funds. I expected the transfer would have been recorded in the company's books and records, which the receivers would have seen."

134. Whilst it is not of great moment, we do not accept that Mr Fernandez said anything to Mr Webster about funding in view of the fact that Mr Webster was not cross-examined to challenge his evidence on this issue.

135. As to Mr Fernandez's statement that the reason he did not disclose the funds was because he thought that the receiver knew about it, we find this hard to believe. In our view, it was entirely possible that the Receivers might not have been aware of the matter (as, in fact, was the case). In any event, we do not consider that a belief that the Receivers ought to know about the matter was a good reason for not disclosing the matter.

136. By letter dated 23 September 2010, ASIC wrote to Mr Fernandez raising concerns about his appointment as administrator of the Willmott Forest companies. A primary concern related to the size and complexity of the administrations and whether Mr Fernandez had the requisite expertise and resources to manage the administrations. ASIC expressly stated: "In that regard ASIC is concerned that your ability to fund the administrations of the Willmott Companies is not clear." The letter also raised concerns about the nature and extent of Mr Fernandez's dealings with the directors. ASIC required Mr Fernandez to table an amended DIRRI at the reconvened first meeting of creditors to deal with this. ASIC requested that Mr Fernandez advise ASIC as to certain matters including "How you intend to fund the administrations".

137. On 27 September 2010, Mr Fernandez replied to ASIC. Insofar as he dealt with the question of funding and the DIRRI in the letter, he said:

> "We believe we have adequate resources to conduct the administration...
>
> At the commencement of the administration funding was considered. This was subsequently reviewed and continues to be reviewed.
>
> We note that an unencumbered assets (sic) exists which will be sufficient to secure the fees and expenses of the administration. This will need to be reviewed in due course.
>
> …
>
> **FURTHER CONCERN – DIRRI**
>
> We believe all appropriate disclosures have been made. We advise this issue will be further dealt with at the adjourned first meeting of creditors. In the meantime, we are able to further expand on this issue if requested."

138. Mr Fernandez did not deal with this letter in his statement. The letter was far from a straightforward response to a straightforward question about how he intended to fund the administrations.

139. On 24 September 2010 at approximately 6.05pm, Mr Webster telephoned Mr Fernandez and told him that there had been a partial termination of the

Receivers' appointment, and that as a consequence Mr Fernandez would, in his capacity as administrator of Willmott Forests Ltd and the Subsidiaries, assume control of Willmott Forests Ltd's role as responsible entity of the registered managed investment schemes operated by Willmott Forests Ltd and the Subsidiaries. Mr Webster told Mr Fernandez that the appointment of the Receivers over the remainder of the Charged Property continued unaffected. Mr Webster then sent a letter to Mr Fernandez by email at 6.15pm regarding the partial termination of the Receivers' appointment.

140. On 28 September 2010, at the adjourned first creditors meeting (which meeting Mr Fernandez chaired ("the 28 September Meeting")), Mr Fernandez tabled an amended DIRRI of the same date ("the Third DIRRI"). The Third DIRRI did not disclose the $200,000 Payment.

141. At the 28 September Meeting, Mr Fernandez advised the meeting that on 6 September 2010 he received a telephone call from Jonathan Madgwick and Marcus Derham of Willmott Forests Ltd at which time they advised him that Receivers and Managers had been appointed to Willmott Forests Ltd. That Mr Fernandez so advised the meeting is confirmed by:

(a) The minutes of meeting which were confirmed by Mr Fernandez as a true and correct record of the meeting;

(b) Paragraph 49 of Mr Fernandez's affidavit of 4 October 2010 (referred to in paragraph 146-7 below).

142. At the 28 September Meeting, Mr Derham read out a statement of the trading history and events leading up to the appointment of Mr Fernandez, in which Mr Derham stated that:

> "[On 6 September 2010] The Company was issued notices of default by the banking syndicate … and KordaMentha were immediately appointed as Receivers and Managers.
>
> Later that day the Board of Directors of Willmott Forests Limited appointed Mr A Thomas Mr Fernandez as Administrator of the Company and its wholly owned subsidiaries."

143. The Third DIRRI signed by Mr Fernandez stated that the circumstances of his appointment as Administrator of the Willmott Forests Companies on 6 September 2010 included:

> "A telephone call on the morning of 6 September from Mr Jonathan Madgwick and Mr Marcus Derham who were at a board meeting advising me that Receivers & Managers had been appointed and that the board were proposing to appoint me as Administrator of the Willmott Forests Companies subject to my consent to do so. My consent was provided later that day after making the usual

assessments regarding my independent and potential conflicts in accepting the appointments."

144. Mr Fernandez gave evidence that on 29 September, he spoke to Mr Webster and asked him when the receivers might make the books and records of the Willmott Forests Companies available to him "so that I could, among other things, make an assessment of the value of the Bombala assets". Mr Webster told him that he could have access to the books and records once the receivers had completed their reviews. Mr Fernandez did not suggest that he made inquiries in relation to whether the funds in the NAB account were unencumbered.

145. Mr Fernandez noted in his Response, as an additional relevant fact, that on 30 September 2010, Mr Derham signed a statement of affairs which made no mention of the $200,000 Transfer to Mr Fernandez. This matter was not elaborated in submissions and we do not think that it has any real significance in terms of the issues which we have to consider.

146. On 30 September 2010, the Commonwealth Bank of Australia applied to the Federal Court to have Mr Fernandez removed as administrator under section 449B of the Act on grounds that included his lack of expertise and resources to conduct the administration of Willmott Forests Ltd and the Subsidiaries. ASIC appeared as amicus curiae.

147. On 4 October 2010, Mr Fernandez swore an affidavit in those proceedings. In that affidavit, Mr Fernandez stated that to his knowledge "*the Receivers took possession of all of the assets of the Willmott Forests Companies*". The affidavit did not make any mention of the $200,000 Payment.

148. On 26 October 2010, Finkelstein J ordered that Mr Fernandez be removed as administrator of Willmott Forests Ltd and the Subsidiaries. Justice Finkelstein appointed Ian Carson and Craig Crosbie of PPB Advisory ("the Replacement Administrators") as the joint and several administrators of Willmott Forests Ltd and the Subsidiaries, effective on that date. In doing so, Finkelstein J summarised his real concerns were that Mr Fernandez did not appreciate the scale of the task confronting an administrator of Willmott Forests Ltd and that there was little (probably no) possibility that Mr Fernandez and his staff would have the capacity to carry out the tasks that would need to be performed as administrator.

(h) Events following Mr Fernandez's removal as administrator of Willmott Forests Ltd and the Subsidiaries

149. On 26 October 2010 at around 5.00pm, Mr Fernandez had a brief telephone conversation with Mr Crosbie about the handover of the administration of Willmott Forests Ltd and the Subsidiaries. During this conversation Mr Fernandez said that the "sale and settlement of land" had to be followed up but did not mention the $200,000 Payment.

150. Mr Fernandez gave evidence in his statement that he had a conversation with Mr Crosbie on 26 October which involved the following:

> "41. …
>
> (g) … In the course of this discussion, I mentioned I had $200,000 which I was informed by the directors formed part of the sale proceeds of carved out property. I had not been able to verify that without the books and records, and that he needed to follow that up. If that could be traced/established, I believed that it could form part of property available (under a Quistclose trust) to the Administrator, but as we weren't lawyers, it would most likely require the lawyers to sort it out ... I cannot specifically recall saying that I had that money in my firm's trust account."

151. This is directly inconsistent with Mr Crosbie's evidence. It is an important issue. The entire thrust of ASIC's case is that Mr Fernandez said nothing about the $200,000 transfer prior to it being discovered in January 2011. Mr Fernandez did not seek to cross-examine Mr Crosbie about his evidence that Mr Fernandez did not mention to the $200,000. In the circumstances, and also having regard to our assessment of the reliability of Mr Fernandez's evidence generally, we reject Mr Fernandez's evidence in paragraph 41(g) of his statement.

152. On 27 October 2010 at 10.43am, Mr Fernandez sent an email and timetable spreadsheet to the Replacement Administrators. That email referred to his conversation the previous day with Mr Crosbie and attached a preliminary timetable for the handover of matters relating to the administration of Willmott Forests Ltd and the Subsidiaries. The email did not refer to the $200,000 Payment.

153. On 28 October 2010 at 9.53am, the Replacement Administrators sent an email and letter to Mr Fernandez asking for "the books and records of the Willmott group" and requesting a number of items. The letter stated that "The above list is not intended to be exhaustive". Mr Crosbie, one of the Replacement Administrators, said that he did not say anything about handing over funds because he had read the DIRRI prepared by Mr Fernandez and it had not made any reference to an Indemnity or funds received on account of costs and he also assumed that Mr Fernandez would have told him about any such funds.

154. On 3 November 2010 at 1.44pm, Mr Fernandez replied, by way of letter attached to an email, to the Replacement Administrators' letter dated 28 October 2010. Mr Fernandez's reply letter did not mention the $200,000 Payment.

155. Mr Fernandez referred to additional facts, in his Response, that:

(a) When, Mr Derham met with the Replacement Administrators, he was "surprised how little involvement they wanted from me going forward with the administration";

(b) Mr Derham always made himself available to the Replacement Administrators, but no-one asked him about the $200,000 Transfer.

156. We note these matters but do not consider that they have great significance in terms of the issues we are called upon to determine.

157. On 15 November 2010 Mr Fernandez lodged with ASIC, pursuant to section 438E of the Act, accounts purporting to show his receipts and payments during the period from the date of his appointment as administrator. The accounts, lodged with ASIC as a Form 524, did not refer to the $200,000 Payment.

158. Mr Fernandez said, in his statement, that at that time, the $200,000 transfer was held in his firm's trust account and not in the administration account for Willmott Forests Ltd so that he considered that that transfer did not need to be recorded in the Form 524. However, in section 7 of the Form 524, the Administrator is required to provide a declaration that the account of receipts and payments contains "a full and true account" of the Administrator's receipts and payments in the period covered by the Form 524 and that the Administrator has "not ... received ... any money on account of the company other than and except the items mentioned and specified in that account". We consider that Mr Fernandez was required to disclose the $200,000 transfer in the Form 524.

159. On 22 November 2010 at 12.11pm, the Replacement Administrators sent an email and letter to Mr Fernandez which included the following:

> "In addition to the above, please confirm by close of business on 23 November 2010 details of:
>
> - any Willmott Group funds or other assets held by you;
> - details of any liens you or others (e.g. your solicitor) may be seeking to enforce;".

160. Mr Crosbie said that he sent this letter, even though he understood that Mr Fernandez did not hold property, to cover himself by making sure that there was a formal written request in relation to any property of the company.

161. On 24 November 2010 at 2.11pm, Mr Fernandez sent an email and letter in reply to the Replacement Administrators' letter dated 22 November 2010. That reply letter did not refer to the $200,000 Payment. The only thing which Mr Fernandez said, relevant to the above request was:

> "3. Until such time as my remuneration and expenses are paid, I maintain my lien over the assets of the WFC."

162. On the basis of this letter, the Replacement Administrators would reasonably have understood that Mr Fernandez did not hold any Willmott Forest companies funds or other assets.

163. In his statement, Mr Fernandez dealt with this issue as follows:

> "48. I did not provide information about the $200,000 held in my firm's trust account in that letter, because I distinguished between transactions in the administration account (which I believed the replacement administrators needed to be informed about), and the funds held on trust, which was property of the company. I also believed that Mr Crosbie and Mr Carson would be able to access WFL's books and records, which would record the transfer.
>
> 49. At that time, I intended to deal with the $200,000 held in my firm's trust account at the time of lodging my remuneration claim. I contemplated that I would make my remuneration claim at the second creditor's meeting, which at the time I expected to be in around three months' time.
>
> 50. I was not aware that neither the Receivers and Managers nor the Replacement Administrators knew that $200,000 was held in my firm's trust account. I assumed the transfer was recorded in the books of WFL and would have been well known to the Receivers and Managers and Replacement Administrators."

164. Mr Fernandez said, in cross-examination, that he consciously turned his mind to the question and decided not to provide the information about the payment for the reasons described above.

165. In cross-examination about this, Mr Fernandez said:

> "The only thing which wasn't evident at that point was the details of these transactions which went through the administrator's bank account which is finally reflected in the form 524 or the statement of receipts and payments. The reference to the $200,000 is not highlighted here, no, but I reiterated the lien which I held over the property of the company."

166. We consider that Mr Fernandez's asserted reasons for not making a reference to the $200,000, having consciously considered whether he should do so, lack cogency. By this stage, he had been replaced as administrator. The Replacement Administrator had asked him for details of any assets he was holding and details of any lien he was claiming. The natural and straightforward answer to that question (even assuming he believed he was

entitled to the funds) was to say that he held $200,000 in his trust account and that he was claiming a lien over those funds.

(i) Discovery by the Receivers and the Replacement Administrators of the $200,000 Payment

167. In or around mid-January 2011 staff working for the Replacement Administrators and the Receivers first became aware of the $200,000 Payment made by Willmott Forests Ltd to Mr Fernandez on 6 September 2010 in the following circumstances:

(a) In mid-January 2011, staff working for the Replacement Administrators were attempting to reconcile discrepancies in the cash at bank held by Willmott Forests Ltd;

(b) On 18 January 2011 at 2.50pm, Mr Robbie Gold ("Mr Gold") of PPB sent an email to Bruno Agostini ("Mr Agostini"), who was a financial accountant at Willmott Forests Ltd, seeking assistance in reconciling Willmott Forests Ltd's cash at bank as at 6 September 2010;

(c) On 19 January 2011 at 3.02pm, Mr Agostini emailed Mr Gold and stated: "[A]n amount of $200,000 from the NAB bank account was transferred to Mr Fernandez on the 6 Sept, and this has not been recorded in the accounting system. This explains part of the variance";

(d) On 19 January 2011 at 7.42pm, Mr Gold sent an email to Mr Agostini which asked for transaction details in relation to the $200,000 transferred to Mr Fernandez;

(e) On 20 January 2011 at 11.26am, Mr Agostini sent an email to Gold in reply to the email referred to above which stated that he was away on the day that the payment was made and did not have any further details;

(f) On 20 January 2011 at 4.40pm, Mr Andrew Knight ("Mr Knight") of KordaMentha sent an email to Mr Tim Allen ("Mr Allen") at the NAB and requested a copy of the instruction to transfer the $200,000 from the NAB Account on 6 September 2010;

(g) On 20 January 2011 at 4.56pm, Mr Allen sent an email to Mr Knight which attached a copy of the RTGS Request Form.

168. The Replacement Administrators did not seek to recover the $200,000 amount because the funds had been paid out of an account that was subject to the secured creditor's charge.

169. On 31 January 2011 at 7.07pm, AAR (on behalf of the Receivers) sent a letter by way of email to Hunt & Hunt demanding that the $200,000 Payment be repaid to the Receivers by 3 February 2011. In that letter AAR noted:

(a) The advice in their 9 September 2010 letter (see paragraph 115 above), which advice had been accepted and acted on by Mr Fernandez (see paragraphs 117 and 118 above), that the NAB Account formed part of the "Charged Property" to which the Receivers had been appointed;

(b) The charges crystallised over all of the "Charged Property" immediately upon the Receivers' appointment;

(c) The $200,000 Payment was made after the appointment of the Receivers and the crystallisation of the charges;

(d) The transfer was made without the knowledge or approval of the Receivers;

(e) The $200,000 Payment had never been disclosed to the Receivers.

170. On 7 February 2011 at 12.47pm, Hunt & Hunt sent a letter by way of email which responded to AAR's letter of 31 January 2011. The letter included:

> "Our client retains a sum of $200,000 paid into his trust account by the Company on 6 September 2010.
>
> Our client exercises his right of lien over the funds for his remuneration and expenses incurred in performing his duties as Administrator of Willmott Forests Limited and related companies.
>
> Further, our client is informed that the funds were not secured by your clients' Appointor's Charge as the funds were sourced for (sic) the sale of a parcel of land at Bombala which was not subject to the Charge under which your clients were appointed."

171. We consider that the contents of this letter are, to say the least, a little surprising in the light of the events which had occurred in early September, (see paragraphs 92-96 and 100-124 above) in particular, the dispute over control of the NAB account and the fact that Mr Fernandez "was not satisfied" as to the directors' assertion that the funds in the account were not subject to the Charges. On the evidence before us, the only indication that the funds in the NAB account were not encumbered was the unsupported assertion by the directors on the very first day. The assertion had not been verified.

172. On 9 February 2011, Mr Vijay Subra (an employee of Mr Fernandez) sent an email to Mr Agostini requesting information about the sale of part of the Bombala land. The email included:

> "Dear Bruno
>
> I refer to our phone discussion re the sale of the property at Hobbs Road, Delicknora.

It would be appreciated, if you could furnish us with the following information on the above sale:

(a) Details of the account of which (sic) the sale proceeds were deposited into;

(b) The reasons for the sale of the property; and

(c) Was the Chargee notified of the sale?".

173. The fact that this inquiry was sent – and the very terms of the inquiry – is inconsistent with Mr Fernandez having a belief, (or, at least, evidence of the tenuous basis of any such belief) that the funds in the NAB account or the $200,000 payment were not caught by the Charges.

174. Between 8 February 2011 and 16 February 2011, AAR and Hunt & Hunt engaged in further correspondence in relation to the Receivers' demand for repayment of the $200,000 Payment.

175. On 16 February 2011, the Receivers commenced a proceeding against Mr Fernandez seeking, amongst other things, a direction that the $200,000 be paid to them. In support of their application the Receivers filed an affidavit from Mr Webster sworn on 16 February 2011. In his affidavit Mr Webster stated that, having reviewed the business records of Willmott Forests Ltd, he believed that the proceeds of sale of the Bombala land were paid into Willmott Forests Ltd's operating account held with the Commonwealth Bank of Australia, not the NAB Account.

176. We have seen no evidence to support the proposition that Mr Fernandez had any evidence to show that any proceeds of sale of the Bombala land were paid into the NAB Account.

177. On 16 February 2011, Mr Fernandez sent an email to Mr Madgwick requesting that he assist Mr Fernandez in resisting the Receivers' application by providing an affidavit. In his email, Mr Fernandez stated:

"In short, and in my opinion:

- the funds transferred secure a (statutory) lien for my costs and expenses as Administrator which are usually paid from the Company's assets;

- the Company's assets include the unencumbered Bombala properties;

- $480k of sale proceeds from the unencumbered Bombala properties were received by Korda Mentha;

- as there is [sic] good argument that the $480k was received under a special purpose/Quistclose trust for Willmott Forests

Ltd & not covered by the CBA charge it should be repaid to the Administrator;

- whilst there may be/are separate issues, my lien is enforceable albeit subject to any further order which may be made."

178. No attempt was made to support this reasoning process before us. We have serious reservations about its merit, but in any event, we fail to see how this argument would have provided any support for an entitlement to retain the $200,000 payment as from 6 September.

179. On 1 March 2011, Mr Fernandez filed an affidavit sworn by Mr Madgwick for the purposes of resisting the Receivers' application to be paid the $200,000 held by Mr Fernandez. In his affidavit, Mr Madgwick confirmed that the proceeds of sale of part of the Bombala land was paid into an account held by Willmott Forests Ltd with the Commonwealth Bank of Australia and not into the NAB Account.

180. On 23 August 2011, ASIC commenced an investigation under section 13(1) of the *Australian Securities and Investments Commission Act* 2001 ("the ASIC Act") in relation to the receipt, disclosure and use by Mr Fernandez of the $200,000 Payment.

181. On 22 September 2011, ASIC sent a notice to Mr Fernandez requiring him, pursuant to section 33 of the ASIC Act, to produce various documents relating to the administration of the Willmott Forest Group and, in particular, the $200,000 Payment.

182. On 28 September 2011, Mr Fernandez sent a letter to ASIC which stated:

> "With particular reference to the sum of $200,000 referred to in the notice I had taken the view that the funds were an asset of the company but held in my trust account and would be reported on in my comments to the RATA and the Section 439A report, which did not come to pass following my removal. In the DIRI, I disclosed that there were no indemnities given in relation to my appointment".

183. On 21 December 2011, Mr Fernandez was examined by Mr Greg McLeod, Ms Hanna Kaiser and Mr Paul Davine of ASIC pursuant to section 19 of the ASIC Act.

184. On 13 February 2012, Dodds-Streeton J held that there was no lawful basis for Mr Fernandez to retain the $200,000 Payment, and her Honour directed that the Receivers were lawfully entitled to possession of the $200,000. Relevantly, Dodds-Streeton J held that:

(a) The $200,000 paid from the NAB Account constituted property of Willmott Forests Ltd subject to a floating charge under the Deeds of

Charge, which upon appointment of the Receivers crystallised and became a fixed charge;

(b) There was no evidence to support a submission that the proceeds of sale of the Bombala land could be traced to the NAB Account;

(c) As at the time of their appointment on 6 September 2010, the Receivers were entitled to possession of the NAB Account;

(d) Mr Fernandez had no interest in the $200,000 that could have priority over the Receivers' right to possession.

185. On 14 February 2012, Mr Fernandez arranged for the $200,000 (plus accrued interest) to be paid into an account operated by the Receivers.

(j) Summary of key factual findings

186. It is appropriate to summarise the key factual findings we have made above:

(a) The Receivers were appointed at 11.15 am and 12.29 pm on 6 September 2010;

(b) On the morning of 6 September 2010, Messrs Derham and Madgwick informed Mr Fernandez that receivers were going to be appointed and they wanted to appoint him administrator. Mr Fernandez was told there were unencumbered funds, $200,000 of which could be transferred to Mr Fernandez's trust account, on account of his costs and expenses of conducting the administration. Mr Fernandez was entitled to accept this statement at face value, at this point;

(c) At 12.33pm on 6 September, Mr Derham was informed of the appointment of the Receivers, and that the Receivers were now in control of the assets of Willmott Forests Ltd under the Charges. Formal notices of the appointment were delivered to Willmott Forests offices at 1.17 pm;

(d) Some time in the next hour or so, Mr Fernandez was appointed administrator by notice in writing (the Board of the companies having met and resolved to appoint him at about 1.00pm);

(e) At 2.16 pm, the sum of $200,000 was transferred from the NAB Account to the Mr Fernandez's Partners Trust Account. Those funds were covered by the Charges. No proceeds of sale from any unencumbered asset had been paid into the NAB account;

(f) Later, Mr Fernandez met Messrs Derham and Madgwick. Mr Fernandez must have been informed of the timing of the appointment of the Receivers in this meeting. Mr Fernandez attempted to investigate the claims as to unencumbered property. By

the end of this meeting Mr Fernandez was either aware that there was a real question as to his entitlement to receive the $200,000 payment or, at the very least, a reasonably competent administrator in his position would have recognised this or suspected it;

(g) At 5.35pm, Mr Fernandez inquired about which NAB account had the $3m in it and whether the $200,000 has been transferred;

(h) At 5.54pm, Mr Fernandez was informed that the account with the $3m was account number 083-004 47843-2873, (ie the NAB Account the subject of these proceedings), and that the $200,000 amount had been paid to him from that. Mr Fernandez was informed that this amount had been transferred "this afternoon";

(i) On 7 September 2010, Mr Fernandez prepared and signed the First DIRRI and provided it to creditors as part of the Notice of First Meeting of Creditors of Willmott Forests Ltd and the Subsidiaries. The First DIRRI did not disclose the $200,000 Payment;

(j) On 9 September, Mr Fernandez was informed by AAR:

(i) the Receivers were appointed on 6 September 2010 prior to Mr Fernandez's appointment as administrator;

(ii) the Receivers were appointed as receivers and manager of all of the "Charged Property" as defined in the Deeds of Charge;

(iii) the "Charged Property" clearly included the NAB Account and all other bank accounts held by Willmott Forests Ltd and the Subsidiaries;

(iv) pursuant to section 441B and 442D(3) of the Act, Mr Fernandez's functions and powers as administrator were subject to the functions and powers of the Receivers;

(v) accordingly, the Receivers had the right to take control of the NAB Account and all other "Charged Property".

(k) Mr Fernandez did not challenge these assertions and, on 10 September, wrote to the NAB agreeing to the release of the balance of the funds in the NAB Account to the Receivers;

(l) Accordingly, by at least 9 September, Mr Fernandez was aware :

(i) the Receivers were appointed prior to his appointment as administrator;

(ii) from the time of their appointment, the Receivers were entitled to the immediate possession of all monies in the NAB Account;

(iii) the $200,000 Payment was made after the Receivers were appointed; and

(iv) the $200,000 Payment was made from the NAB Account.

(m) Alternatively, by at least 9 September, Mr Fernandez was aware of circumstances which would have caused a reasonable person in his position to appreciate or suspect the matters in the last paragraph;

(n) On 17 September 2010, Mr Fernandez signed the Second DIRRI and provided it to creditors as part of the Notice of Adjourned First Meetings of Creditors of Willmott Forests Ltd and the Subsidiaries dated 17 September 2010. The Second DIRRI did not disclose the $200,000 Payment;

(o) On 20 September 2010, Messrs Webster and Ryan of KordaMentha met with Mr Fernandez in relation to the Receiver's intention to resign insofar as the appointment extended to the Responsible Entity and asked Mr Fernandez how he was going to fund the administration. Mr Fernandez did not disclose that he had received the $200,000 Payment;

(p) On 23 September 2010, ASIC wrote to Mr Fernandez raising concerns about the nature and extent of Mr Fernandez's dealing with directors, requiring Mr Fernandez to table an amended DIRRI and asking for an explanation as to "How you intend to fund the administrations". Mr Fernandez's response to ASIC was not straightforward or accurate and did not refer to the $200,000;

(q) On 28 September 2010, at the adjourned first creditors meeting Mr Fernandez tabled an amended DIRRI of the same date ("the Third DIRRI"). Notwithstanding the concerns raised by ASIC in relation to the earlier DIRRI, the Third DIRRI did not disclose the $200,000 Payment;

(r) On 30 September 2010, the Commonwealth Bank of Australia applied to have Mr Fernandez removed as administrator. On 4 October 2010, Mr Fernandez swore an affidavit in those proceedings stating that the Receivers had been appointed on 6 September and "to my knowledge the Receivers took possession of all of the assets of the Willmott Forests Companies". The affidavit did not make any mention of the $200,000 Payment;

(s) On 26 October 2010, Finkelstein J ordered that Mr Fernandez be removed as administrator of Willmott Forests Ltd and the Subsidiaries;

(t) Mr Fernandez failed to inform the Replacement Administrators of the $200,000 Payment in his communications by phone on 26

October, by email on 27 October, by letter on 3 November and by letter on 28 November. The last letter was a response to a letter from the Replacement Administrators which had expressly asked for details of any Willmott Group funds or other assets held by Mr Fernandez. Mr Fernandez consciously decided not to refer to the $200,000 payment;

(u) On 15 November 2010 Mr Fernandez lodged with ASIC, pursuant to section 438E of the Act, accounts purporting to show his receipts and payments during the period from the date of his appointment as administrator. The accounts did not refer to the $200,000 Payment;

(v) In mid January 2011, the Replacement Administrators and the Receivers became aware of the $200,000 payment and on 31 January 2011, the Receivers demanded repayment of the $200,000;

(w) On 7 February 2011, Mr Fernandez's solicitors refused to repay the sum asserting "our client is informed" that the funds were not secured by the Charges and claiming a lien;

(x) On 9 February 2011, Mr Fernandez's staff emailed Mr Agostini making inquiries in relation to the sale of the Bombala land and the details of the account into which the sale proceeds were deposited;

(y) On 16 February 2011, Mr Fernandez emailed Mr Madgwick setting out a theory as to a basis for claiming a Quistclose trust, which was not supported before us and appeared to have no merit;

(z) On 13 February 2012, Dodds-Streeton J held that Mr Fernandez had no entitlement to the $200,000 or claim which could take priority over the Receiver's right to possession.

F. The Contentions

(a) Contention 1 – Disclosure in DIRRI dated 7 September 2010 (the First DIRRI)

(i) Introduction

187. ASIC's first contention is that Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions required by an Australian law to be carried out or performed by a registered liquidator (by reason of his appointment as administrator of Willmott Forests Ltd) in not disclosing in his DIRRI dated 7 September 2010 (the First DIRRI) that he had received the $200,000 Payment to meet the cost of the administration ("Contention 1").

188. It is not in dispute that Mr Fernandez did not disclose the receipt of the $200,000 payment.

189. The question for us is whether the non-disclosure in the DIRRI means that Mr Fernandez failed to perform adequately and properly the duties or functions of an administrator, measured by reference to professional standards.

(ii) The context

190. In answering this question, it is appropriate to consider the purposes of relevant provisions of the Corporations Act, and what proper professional practice required to be done to enable those purposes to be achieved. We are also entitled to have regard to published codes of the professional bodies as we may find that professional standards are set by, or alternatively reflect in such codes.

191. Whilst the precise provision involved in Contention 1 was the obligation under s 436DA to make the declaration of relationships and indemnities, this needs to be understood within the broader provisions of the Corporations Act including provisions dealing with:

(a) The appointment of the administrator,

(b) The nature of the administrator's role and duties and

(c) The administrator's relationship with creditors, (in particular, provisions for meetings of creditors and the mechanisms for removal by creditors).

192. Without purporting to be exhaustive, these provisions include sections 435A, 435C, 436A, 436DA, 436E, 437A, 437B, 437C, 437D, and Part 5.3A Division 4.

193. The status of the administrator as an officer of the corporation, and the impact of the general law is also relevant. As Barrett J (as he then was) observed in *Re Krejci as liquidator of Eaton Electrical Services Pty Ltd* (2006) 58 ACSR 403 at [9]:

> "a Pt 5.3A [administrator - sic] is both a fiduciary and an "officer" within the s 9 definition of that term. The latter status attracts the statutory duties in Pt 2D.1.
>
> [10] A Pt 5.3A administrator occupies a position in which there arises an obligation to act in the interests of others. The administrator supplants the other decision making organs of the company while the administration continues and obtains sole jurisdiction over the company's property: ss 437A–437F. The administrator's task is to promote the object stated in s 435A, that is, to maximise the chances of the company, or as much as possible of its business, continuing in existence; or, if that is not possible, to produce a better return for creditors and members than would result from an immediate

winding up. The task is thus one of administering and applying the company's property for the benefit of others. This generates duties of the kind referred to by Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR 71 at 113; [1995] HCA 63 in these terms:

> 'In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations — not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict'."

194. The duties in Part 2D.1 of the Act include, in particular, the duty to exercise powers and discharge duties in good faith in the best interests of the corporation (s 181) and not improperly to use his or her position to gain an advantage for themselves or cause detriment to the corporation (s 182).

195. Moreover, as the High Court said in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)*(1998) 195 CLR 1 at 38:

> "The administrator must act impartially as among all parties having or claiming to have an interest in the present or future assets of the company and must make those decisions which, in the light of contemporary circumstances, best serve those interests."

196. Allanson J recently summarised the position regarding the requirement for administrators to be independent and impartial in *Cote v Devine* [2013] WASC 79 at [53]:

> "the principles regarding independence and impartiality which have been developed and applied to liquidators are applied also to voluntary administrators under Pt 5.3A of the Corporations Act: see, for example, *Commonwealth v Irving* (1996) 19 ACSR 459, 462. An administrator must be both independent and impartial, and the impartiality and independence of the administrator must be manifest: *Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24, 30. That does not preclude all prior contact with the company under administration, or those associated with it: see *National Australia Bank Ltd v Market Holdings Pty Ltd (in liq)* [2001] NSWSC 253 ; (2001) 37 ACSR 629 [194]. But there should not be any involvement that is likely to impede or inhibit the administrator from acting impartially and in the interests of all creditors, or that would give rise to a reasonable apprehension that the administrator might be so impeded or inhibited."

197. The obligation of an administrator to be independent and impartial has recently been confirmed by the New South Wales Court of Appeal: *Correa v Whittingham* [2013] NSWCA 263 at [153].

198. Taking all these matters together, an administrator is an agent and an officer of the corporation, obliged to act in the interests of, and administer and apply the company's property for the benefit of, others. The administrator is subject to statutory duties in Pt 2D.1 and fiduciary duties. The administrator obtains sole jurisdiction over the company's property, with the task of promoting the object stated in s 435A and is obliged to act impartially as among all relevant parties. The administrator must be both independent and impartial and that independence and impartiality must be manifest. Specific functions and duties, including the obligation to make the declaration of relevant relationship and indemnities (s 436DA) and to convene the first creditors meeting (s 436E), need to be understood in that context.

(iii) Section 436DA and its purpose

199. Section 436DA provides:

> "(2) As soon as practicable after being appointed, the administrator must make:
>
> (a) a declaration of relevant relationships; and
>
> (b) a declaration of indemnities."

200. Section 436DA(3) and (4) goes on to provide that the administrator must provide a copy of each declaration to as many creditors as is reasonably possible, at the same time as the administrator gives those creditors notice of the first meeting and that the administrator must also table a copy of the declaration at the meeting.

201. Section 9 of the Act includes the following definition:

> "**declaration of relevant relationships** has the meaning given by section 60."

202. Section 60(1)(a) of the Act provided (as at September 2010):

> "In this Act, a **declaration of relevant relationships**, in relation to an administrator of a company under administration, means a written declaration:
>
> (a) stating whether any of the following:
>
> (i) the administrator;
>
> (ii) if the administrator's firm (if any) is a partnership — a partner in that partnership;
>
> (iii) if the administrator's firm (if any) is a body corporate — that body corporate or an associate of that body corporate;

has, or has had within the preceding 24 months, a relationship with:

(iv) the company; or

(v) an associate of the company; or

(vi) a former liquidator, or former provisional liquidator, of the company; or

(vii) a person who is entitled to enforce a charge on the whole, or substantially the whole, of the company's property; and

(b) if so, stating the administrator's reasons for believing that none of the relevant relationships result in the administrator having a conflict of interest or duty."

203. Section 9 of the Act provides:

"declaration **of indemnities,** in relation to an administrator of a company under administration, means a written declaration:

(a) stating whether the administrator has, to any extent, been indemnified (otherwise than under section 443D), in relation to that administration, for:

(i) any debts for which the administrator is, or may become, liable under Subdivision A of Division 9 of Part 5.3A; or

(ii) any debts for which the administrator is, or may become, liable under a remittance provision as defined in section 443BA; or

(iii) his or her remuneration as determined under section 449E; and

(b) if so, stating:

(i) the identity of each indemnifier; and

(ii) the extent and nature of each indemnity."

204. (It is by no means clear to us that a payment into a trust account of an amount on account of future costs or expenses could not be regarded as an "indemnity" for the purposes of this provision. However, ASIC did not contend that s 436DA imposed an explicit statutory obligation upon Mr Fernandez to declare the $200,000 payment).

205. Ms Folie submitted that the purpose of the requirements in s 436DA(2) is to ensure that the creditors are properly informed about any matters which

may affect the independence of the administrator, so that at the creditors' first meeting they can make an informed decision about replacement of the appointed administrator.

206. We agree.

207. Section 436DA was introduced into the Corporations Act by the Corporations Act (Insolvency) Act 2007. Paragraph 4.70 of the Explanatory Memorandum noted that Recommendation 1 of the 2004 Parliamentary Joint Committee Report on Corporate Insolvency ("the PJC Report") and recommendation 36 of the 1998 CAMAC Report on Corporate Voluntary Administration both stated the Government should consider introducing new disclosure requirements to address concerns about the independence of administrators.

208. The PJC Report noted that there were already general law requirements and professional codes which imposed obligations in relation to independence. However, the PJC Report saw merit in submissions that despite the existing checks and balances, additional safeguards were needed to enhance the independence of the administrator (para 3.32, 3.36, 3.38, 3.54-3.59).

209. The PJC Report noted, in paragraph 3.54, that the Harmer Report (which recommended the voluntary administration procedure) originally proposed that administrators must declare "associations with the company and any circumstances which may make it difficult for the administrator to act impartially".

210. The PJC Report concluded (para 3.57) that a statement of independence was an important factor in reinforcing for creditors and administrators the need to safeguard the independence of administrators and that the statement would alert creditors to any possible conflict of interests and assist them at their first meeting in considering whether or not to remove the administrator.

211. The Explanatory Memorandum confirmed that the purpose of the introduction of the provisions was to address concerns about the independence of administrators by providing creditors with better information and allowing creditors to make a more informed decision about whether to replace the administrator (see paragraphs 4.71*ff*).

212. Thus, the purpose of the introduction of s 436D is clear. But it is also important to note that the disclosure requirements were introduced against a background of existing obligations regarding independence. The provisions were intended to reinforce the need for independence, rather than to create entirely new stand-alone obligations.

213. A key step in the administration process is the opportunity, at the first meeting of creditors, to consider whether to remove an administrator and substitute another. Creditors will often have limited information relevant to

that decision. The provision will not be meaningful if information relevant to the decision is withheld from those empowered to make the decision. If the company, at the behest of directors, provides an administrator with an amount on account of costs, the administrator may be (or may be seen to be) beholden to the directors. Creditors might see this as part of an attempt on the part of directors to secure the involvement of a particular administrator. Creditors are entitled, at the very least, to be aware of information of this type prior to considering whether or not to seek to substitute an administrator.

214. In our view, having regard to the nature of an administrator's role and obligations (as discussed in paragraphs 193-8 above), it was not an adequate and proper performance of Mr Fernandez's duties and functions to provide the declaration and convene the meeting without creditors being provided with proper information about any matters which may affect his independence, so that they could make an informed decision about replacement of the appointed administrator at the creditors' first meeting. A material piece of information in that regard, was the fact that Mr Fernandez had been provided with an up-front payment on account of costs of $200,000.

(iv) The professional codes

215. Against that background, we turn to consider the professional codes.

216. The relevant IPA code is the Code of Professional Practice for Insolvency Practitioners in force as at 2010. The Sections of the Code dealing with Independence and Remuneration came into effect on 31 December 2007 and the balance of the Code came into effect on 21 May 2008.

217. Relevant provisions of the Code include:

(a) Section 1, stating that the primary purposes of the Code include "to set standards of conduct for insolvency professionals";

(b) Section 1.1 which states that "The Code is not a simple restatement of laws, regulations and judicial pronouncements, rather it is a set of principles and guidance built on established precedent. The Code does not override the law, but where the law is silent, or ambiguous, the Code introduces principles to clarify understanding of the desired behaviour";

(c) Section 1.3, explaining that the use of the word "must" in the code signified a mandatory requirement;

(d) Section 1.6 providing that the Code is applicable to practitioners, not only to members of the IPA;

(e) Section 4.2 containing definitions. Interestingly, "Indemnity" is defined as "*any payment made* as well as arrangement whereby payments are promised" (emphasis added);

(f) Section 6, dealing with independence and including the following:

(i) "When accepting or retaining an appointment, the Practitioner must at all times during the administration be, and be seen to be, independent" (section 6.1);

(ii) "Up-front fees. … Practitioners may accept monies to meet the costs of the administration, prior to the acceptance of the appointment, provided that … the monies are held on trust … and full disclosure is made to the creditors in the DIRRI" (section 6.10(a));

(iii) Section 6.14, requiring that Practitioners must, in all corporate insolvency appointments, provide to creditors a Declaration of Independence and Relevant Relationships and Indemnities, (DIRRI) which is to include "a declaration of indemnities disclosing, … any payment made by or for the insolvent on account of the Practitioner's remuneration and disbursements". It is specifically noted that the requirement in the Code is intended to meet and go beyond statutory requirements;

(iv) Section 19 provides a template DIRRI (with associated practice notes) that "must be completed for all formal insolvency appointments except for appointments as Receiver, Receiver and Manager or some other form of Controller" and confirms the requirement to disclose the matters referred to in section 6.14.

218. ASIC also relied upon APES 330 "Insolvency Services" issued as at September 2009 by the Accounting Professional & Ethical Standards Board which includes, relevantly:

(a) section 1.2, which provides that APES 330 sets standards for Members "in the provision of quality and ethical Insolvency Services" and provides that mandatory requirements of the Standard "are in bold-type (black lettering), preceded or followed by discussions or explanations in normal type (grey lettering)";

(b) Section 8.16 of APES 330 states:

"Where a Member in Public Practice receives monies prior to acceptance of an Appointment to meet the cost of the proposed Administration, the Member shall ensure:

(a) the monies are held on trust;

(b) there are no conditions on the conduct or outcome of the Administration attached to the monies;

(c) full disclosure is made to creditors in the Declaration of Independence and Relevant Relationships and Indemnities; and

(d) approval of Professional Fees is obtained prior to them being withdrawn from the trust account";

(c) Section 8.16 is in bold-type so the requirements set out in section 8.16 are mandatory requirements.

219. Ms Folie submitted, on behalf of Mr Fernandez, that Mr Fernandez fully understood that his disclosures and the extent of transparency about his dealings with the property were not adequate. Ms Folie relied upon Lindgren J's statements in *Gould* in support of a submission that the provisions of the Codes referred to above do not purport to establish levels of adequate and proper performance that must be obtained at peril of enlivening the criteria this section 1292. She said this was the case for the following reasons:

(a) the extent of compliance with an alleged professional standard within the profession can be relevant to whether or not a particular requirement is in fact a mandatory professional standard;

(b) the subsequent expansion and clarification of treatment of up front payments in the post 2011 Code of Conduct can be used to infer that before that time there was not a consistent and accepted practice in the profession about treatment such payments;

(c) Mr Fernandez gave evidence that his view was that a change occurred between the IPA code in force prior to 2011 and the Code which succeeded it, in that post-2011 it was a requirement to include in the DIRRIs up front payments that have been received.

220. As to the reliance on the approach in *Gould*, for reasons already explained, we consider that we are bound to apply the approach in *Albarran* and *Davies* referred to above.

221. As to the first point, (the extent of compliance), there was no evidence about this. In any event, if there is a proper basis for concluding that professional standards require particular behaviour, non-compliance, even wide spread, whilst possibly regrettable, does not invalidate the standard.

222. As to the second point, we simply could not see any meaningful distinction between the terms of the IPA code in force as at 2010 and the subsequent version.

223. As to the third point, we disagree with Mr Fernandez's view that any meaningful change occurred between the IPA code in force prior to 2011 and the subsequent Code.

224. In our view, adequate and proper performance of the duties and functions of an administrator require that an administrator disclose to creditors by the time of the first meeting, the receipt by the administrator of an amount to meet the costs of administration including his or her remuneration.

225. In our view, the provisions of the professional codes requiring disclosure of such payments reflect professional standards[17]. They embody a fundamental principle governing the role and position of administrators, as referred to in paragraphs 193-8 above, namely, the requirement for administrators to be independent and be seen to be independent. In effect, the requirement to disclose up-front payment of fees in the codes is a particular, albeit an important one, of the requirement for manifest impartiality and independence in the context of the first meeting of creditors, which provides an opportunity for creditors to assess whether to retain or replace the appointed administrator.

226. In our view, a reasonably competent liquidator proposing to accept an appointment as an administrator in September 2010 would have appreciated the importance of making disclosure of a payment such as that received by Mr Fernandez, even if the specific requirements of s 436DA were satisfied[18]. Moreover, such liquidator is likely to have been familiar with (or at least to have consulted) the IPA Code and APES 330, which spell out the requirements in chapter and verse.

227. Mr Fernandez accepts that his disclosure was not adequate. This was not elaborated but presumably he considered that his disclosure was not adequate because he did not disclose something which should have been disclosed – in the context of important issues of independence and transparency of information. It is hard to see how that the inadequacy can be seen as anything less than inadequate performance of the duties or functions of an administrator.

228. In our view, Mr Fernandez did not adequately and properly perform his duties and functions as an administrator in preparing and presenting the DIRRI to creditors, without disclosing the $200,000 payment.

229. In all the circumstances, we find that Contention 1 is established.

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[17] See *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612 at [163]; *Re Monarch Gold Mining Co Ltd; Ex Parte Hughes* [2008] WASC 201 as to the relevance of the Code.

[18] Cf the observations of Cohen J in another context in *Hagenvale Pty Ltd v Depela Pty Ltd* (1995) 17 ACSR 139 at [148].

(b) Contention 2 – Disclosure in DIRRI dated 17 September 2010 (the Second DIRRI)

230. ASIC's second contention is the same as Contention 1 except that it relates to the DIRRI dated 17 September 2010 (the Second DIRRI) ("Contention 2").

231. In our view, the above reasoning relating to Contention 1 applies in relation to Contention 2. We find that Contention 2 is established.

(c) Contention 3 – Disclosure in DIRRI dated 28 September 2010 (the Third DIRRI)

232. ASIC's third contention is the same as Contention 1 except that it relates to the DIRRI dated 28 September 2010 (the Third DIRRI) ("Contention 3").

233. In our view, the above reasoning relating to Contention 1 applies in relation to Contention 3.

234. Moreover, there was an additional feature of Mr Fernandez's failure of performance by the time of the third DIRRI. By this time, Mr Fernandez's attention had been drawn by the ASIC to ASIC's concern in relation to the first and second DIRRIs, albeit in relation to matters of conflict. Mr Fernandez had received a request by the ASIC to "table an amended DIRRI". We consider that, in these circumstances, a reasonably competent insolvency practitioner would have carefully read the IPA Code in relation to preparation of a DIRRI before preparing a third DIRRI and would have included the disclosure of receipt of upfront fees of $200,000, in accordance with the provisions of the IPA Code.

235. We find that Contention 3 is established.

(d) Contention 4 – Disclosure to Receivers

236. ASIC's fourth contention is that Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions required by an Australian law to be carried out or performed by a registered liquidator (by reason of his appointment as administrator of Willmott Forests Ltd) in failing to disclose to the Receivers property of Willmott Forests Ltd to which they were appointed, where such disclosure should have been made:

(a) By no later than 6 September 2010 and at all times thereafter until disclosure was made (Contention 4(a)); further or alternatively

(b) As soon as practicable after 9 September 2010 when Mr Fernandez knew that:

(i) the Receivers were appointed prior to his appointment as administrator;

(ii) from the time of their appointment, the Receivers were entitled to the immediate possession of all monies in the NAB Account;

(iii) the $200,000 Payment was made after the Receivers were appointed; and

(iv) the $200,000 Payment was made from the NAB Account. (these four matters are referred to as the "Relevant Matters") (Contention 4(b)); further or alternatively

(c) As soon as practicable after 9 September 2010 when Mr Fernandez ought to have been aware of, or had reasonable grounds to suspect, the Relevant Matters (Contention 4(c)); further or alternatively

(d) Following his removal as administrator of Willmott Forests Ltd on 26 October 2010 and at all times thereafter (Contention 4(d)).

237. In support of Contention 4, Mr Liondas submitted that

(a) The Board should find that proper professional practice required an administrator to disclose to a receiver all of the property of the company to which the receiver is appointed. He submitted that this finding was justified having regard to:

(i) common sense or the professional norms of a chartered accountant acting as an administrator, which require that such an administrator handles corporate funds with transparency;

(ii) the fact that Mr Fernandez's power as an administrator to control property of the company (pursuant to s 437A of the Act) was subject to the functions and powers of the Receivers (s 442D(3) of the Act), including their power to take control of the company's property (s 420(a) of the Act);

(iii) the fact that it is a contravention of s 590(1)(a) of the Act for an administrator to fail to disclose to a receiver all of the property of the company to which they are appointed;

(b) Handling, or dealing with, property of a company is a function or duty attaching to the office of administrator: that is, the function of the office of administrator includes handling and dealing with property received by the administrator as a result of or in connection with being appointed administrator. The alleged failure to disclose, therefore, relates to a duty or function of Mr Fernandez as administrator within the meaning of s 1292(2)(d);

(c) The Receivers were, from the time of their appointment, entitled to the immediate possession of all monies in the NAB Account;

(d) The $200,000 transferred to Fernandez from the NAB Account was transferred after the Receivers had been appointed;

(e) Mr Fernandez was aware, by no later than 9 September 2010, of the fact that: (i) the Receivers were entitled to possession of all monies in the NAB Account; (ii) the $200,000 payment came from the NAB Account; and (iii) the Receivers were appointed prior to his appointment.

238. Ms Folie submitted on behalf of Mr Fernandez that ASIC needed to satisfy the Board that disclosure to the replacement administrators and receivers was a duty and function of Mr Fernandez as an administrator. Apart from this, Ms Folie's submissions concerning Contentions 4 and 5 were limited. In essence, it was submitted, *first*, that Mr Fernandez's conduct did not amount to a breach of s 590 as a matter of construction of the section and *secondly*, given that section 590(1)(a) is an offence provision, given the seriousness of an allegation of breaching that provision, even putting to one side that the Board is not making findings about whether an offence is being committed[19], that the lack of certainty in ASIC's contended construction of that section means that the Board should be reluctant to base its findings about the content of any particular duty regarding disclosure on that section.

239. Otherwise, Mr Fernandez conceded that he was bound by obligations of transparency and probity (and did not seek to contest the observations of Dodds-Streeton J in *Australian Securities and Investments Commission v. Edge* in that regard) and submitted that it was a matter for the Board to determine whether they rose to the level of section 1292.

240. The passage in *Edge* at [637] includes the following:

> "It is self-evident that legislation cannot exhaustively prescribe all the duties incumbent on a liquidator or an administrator, which are frequently dictated by common sense or the professional norms of a chartered accountant holding special qualifications, training and experience, who is acting for remuneration and profit. …The creditors, members and the public are entitled to total assurance that such officers will handle corporate funds with probity and transparency and will not exploit their power to benefit or enrich themselves. The direct payment of corporate funds to the practitioner's creditors obscures, and (particularly when coupled with the failure to create and preserve appropriate records), may permanently disguise the transfer of moneys to the liquidator or for his or her benefit."

[19] We did not understand Mr Fernandez to be pressing a submission that ASIC was subject, here, to the same burden as fell upon ASIC in an application under s 206E (see *ASIC v Australian Investors Forum Pty Ltd (No 2)* (2005) 53 ACSR 305). In any event, we consider that the process involved in an application under s 206E is quite different: "…the Court may disqualify a person … if … the person … has at least twice contravened this Act", ie the Court must find that there has actually been a contravention.

241. In our view, subject to what follows, Contentions 4(a) to (d) are established. Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions of an administrator in failing to disclose to the Receivers property of Willmott Forests Ltd to which they were appointed, where such disclosure should have been made on the occasions set out in Contention 4. It may be the case that Mr Fernandez could not have been expected to make the disclosure on 6 September itself. That was a busy day and information was emerging progressively. Nevertheless, by the end of that day, Mr Fernandez was aware of circumstances which should have caused him, at least, to have real doubts about whether the funds were wrongly transferred to his trust account because they were subject to the Charges. His own evidence indicated that he regarded it as important to verify what he had been told by the directors about the unencumbered status of the funds. By the end of 6 September, he had obtained no verification and, in the circumstances known to him, he should have disclosed the existence of the funds to the Receivers as soon as practicable.

242. This was certainly the case by 9 September, in view of the matters known to Mr Fernandez at that time.

243. In our view, it is not necessary to rely upon s 590 of the Corporations Act to reach this conclusion. Administrators (and liquidators, for that matter) are in the business of handling and properly accounting for property on behalf of companies, often when the property is encumbered by third party interests or subject to competing claims. As a general matter of propriety and fair dealing, an administrator cannot remain mute about the existence of property to the appropriate controller of property (or the controller reasonably claiming to be entitled to control property) when the administrator, being in possession of the property, knows or suspects that he or she is not or may not be entitled to possession, and knows or suspects that another controller is or may be entitled to possession and that a third party is or may be beneficially entitled to the property. Here, Mr Fernandez knew or had reasonable grounds to know or suspect that the property which had been paid into his trust account was charged to the secured creditors and that control thereof was a matter for the Receivers.

244. It may be said that this requirement stems from common sense or professional norms. It may be regarded as inherent in the office and arises by reason of the nature of the role and duties of administrations (see our discussion in paragraphs 193-8 above).

245. Unlike the situation with Contentions 1 to 3, the focus of Contention 4 is not on disclosure to creditors, but, rather, on disclosure to persons entitled to, or claiming to be entitled to, control of the company's property.

246. As already discussed, administrators are agents of the corporation (s 437B) and officers of the corporation (s 9). As officers of the corporation, administrators must exercise their powers and discharge their duties with

care and diligence (s 180), in good faith in the best interests of the corporation (s 181) and must not improperly use their position to gain an advantage for themselves or cause detriment to the corporation (s 182). Where a corporation has charged its assets to a third party and a receiver has been appointed, crystallising the charge, an administrator has no right to take possession of those assets. If an administrator has acquired possession of such assets and is, or becomes aware of the receiver's entitlement, he or she must inform the receiver and account for the property. To do otherwise would be to act contrary to the interests of the corporation. This is particularly so where, as here, the administrator intended to utilise the payment as a source for the costs of the administration, including his fees to be incurred.

247. No doubt, there may be circumstances where an administrator or liquidators may briefly defer disclosure pending receipt of legal advice. That was not the position here. Mr Fernandez explicitly disavowed reliance on legal advice. Here, despite the fact that Mr Fernandez knew that he needed to verify the position, despite the fact that he was not satisfied of the position, and despite the fact that he *was* satisfied that the Receivers were entitled to the balance of the NAB account, he simply remained mute in relation to the $200,000 payment. In our view, this constituted a failure to perform adequately and properly the duties or functions of an administrator, measured against accepted professional standards.

248. In addition, we consider that s 590 either provides support for the above conclusion, alternatively, constitutes an independent duty, which was breached by Mr Fernandez, and this constitutes an independent basis for upholding Contention 4.

249. As we understand Mr Fernandez's position on s 590, it was:

(a) That s 590 did not establish a duty (unlike, for example, s 439A – see the decision of the Board in *McVeigh*);

(b) The section was not contravened here because it only related to disclosure of the property in the 10 years prior to the relevant day, here, 6 September. In other words, the section only required disclosure in the period 5 September 2000 to 5 September 2010.

250. In our view, the obligation which is inherent in s 590 is a "duty" within the meaning of that concept in s 1292(2)(d)(ii). In our view, the concept of "duty" in s 1292(2)(d)(ii) is not confined to a statutory obligation explicitly described as a "duty", nor is it confined to duties owed to particular persons or to actionable duties. The concept is wide enough to encompass that type of obligation which is embodied in a statutory proscription of conduct or activities, such as s 590.

251. As to the construction question, s 590 provides:

> "590(1) A person who, being a past or present officer or employee of a company to which this section applies:
>
> (a) does not disclose to the appropriate officer all the property of the company, and how and to whom and for what consideration and when any part of the property of the company was disposed of within 10 years next before the relevant day, except such part as has been disposed of in the ordinary course of the business of the company; or
>
> …
>
> contravenes this subsection".

252. We consider that Mr Fernandez's submission concerning the construction of the section is incorrect for the following reasons:

(a) The 10 year period is concerned with "disposal". The relevant phrase is "and how and to whom and for what consideration and when any part of the property of the company was disposed of within 10 years next before the relevant day";

(b) The placement of commas in para (1)(a) is significant and strongly suggests that the 10 year limitation applies only to disposal;

(c) To suggest that the 10 year period applies to disclosure of the property results in a very awkward reading of the section, ie "A person who, being a past or present officer … of a company to which this section applies … does not disclose to the appropriate officer all the property of the company … within 10 years next before the relevant day … contravenes this section". We cannot understand how the section would ever operate on this basis. For example, in the present case, the section would only oblige a relevant officer to disclose property to the receivers before they had been appointed;

(d) Most importantly, there appears to be no rational reason for construing the section as *not* requiring a past or present officer of the company to disclose, to appropriate officer, the property of the company, at a time *after* the appointment of the appropriate officer.

253. Mr Liondas submitted, (and no submission to the contrary was put) that s 590 required disclosure within a reasonable time: *R v Skurray* [1967] 2 NSWR 611 at 612; *BTR plc v Westinghouse Brake & Signal Co (Australia) Ltd* (1992) 34 FCR 246 at 272-3. We agree.

254. Accordingly, for the above reasons, we consider that the obligation not to act in the way proscribed by s 590 was a "duty" for the purposes of s 1292, and that Mr Fernandez acted in a way that was proscribed by s 590, by not

disclosing property of Willmott Forests Limited to the Receivers some reasonable time after 6 September 2010, alternatively, at least some reasonable time after 9 September 2010. However, as already stated, it is not necessary for us to rely upon s 590 in deciding that Contention 4 has been established.

255. In all the circumstances, we find that Contention 4 is established. We find that Contention 4 is established regardless of the existence of s 590 and further, we find that s 590 is an independent basis for upholding Contention 4.

256. Dealing with the specific Contentions (a) to (d):

(a) We find that Contention 4(a) is established in that Mr Fernandez failed to disclose to the Receivers property as from 7 September 2010 and at all material times thereafter;

(b) Further, we find that Contention 4(b) is established in that Mr Fernandez failed to disclose to the Receivers property after 9 September 2010 when he knew the Relevant Matters set out in Contention 4(b);

(c) Further, we find that Contention 4(c) is established, in that Mr Fernandez failed to disclose to the Receivers property after 9 September 2010 when, even if he did not know the Relevant Matters, he had knowledge of circumstances which would have caused a reasonable person in his position to become aware of or to suspect those matters;

(d) Further, we find that Contention 4(d) is established, in that Mr Fernandez failed to disclose to the Receivers property following his removal as administrator of Willmott Forests Ltd on 26 October 2010 and at all material times thereafter.

(e) Contention 5 – disclosure to Replacement Administrators

257. ASIC's fifth contention is similar to Contention 4 except that it relates to an alleged failure to disclose to the Replacement Administrators property of Willmott Forests Ltd (namely, the $200,000 Payment):

(a) Upon their appointment as administrators of Willmott Forests Ltd and at all times thereafter (Contention 5(a)); further or alternatively

(b) In his letter of 3 November 2010 in response to the Replacement Administrator's letter of 28 October 2010 (Contention 5(b)); further or alternatively

(c) In his letter of 24 November 2010 in response to the Replacement Administrator's letter of 22 November 2010 (Contention 5(c)).

258. In our view, Contentions 5(a), 5(b) and 5(c) are made out for similar reasons as those applying to Contention 4. As at the time of the appointment of the Replacement Administrators, Mr Fernandez was in control of $200,000 of company funds. Whatever his belief about encumbrances, liens or otherwise in relation to the funds, he was obliged, as the past administrator, to disclose the company's funds to the Replacement Administrators. We rely upon our reasoning process referred in relation to Contention 4.

(f) Contention 6 – failure to take care to ensure communications were free from false or misleading statements and/or did not omit required information

(i) Introduction

259. ASIC's sixth contention is that Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions of an administrator by failing to take care to ensure that communications issued by him, or on his behalf, were free from false or misleading statements and/or did not omit information required to be included.

260. This Contention related to two matters:

(a) A statement in an affidavit sworn by Mr Fernandez on 4 October 2010 in the proceedings seeking to remove him as administrator, as follows:

"11. I refer to paragraph 8 of Mr James' affidavit and note that the Receivers were appointed on 6 September 2010 by CBA Corporate Services (NSW) Pty Ltd acting in its capacity as security trustee for CBA and St George. *To my knowledge, the Receivers took possession of all of the assets of the Wilmott Forests Companies,* including all of the books and records and other documents of the company..." (emphasis added)

(b) Mr Fernandez's communications with the Replacement Administrators, namely, his 26 October 2010 telephone call with Mr Crosbie; his 27 October 2010 email to Mr Crosbie; his 3 November 2010 letter to Mr Crosbie; and his 24 November 2010 letter to Mr Crosbie (see paragraphs 149-166 above).

261. Contentions 6 and 7 were based upon the same facts. Contention 6 relied upon Part B Section 5 of the IPA Code. Contention 7 relied upon APES 330 and APES 110.

262. Mr Liondas submitted:

(a) The relevant "duty" for the purposes of s 1292(2)(d)(ii) of the Act is one to take care to ensure that a communication does not contain a false or misleading statement. That duty is evidenced by the

requirements of the IPA Code. Further and in any case, the proper performance of the "functions" of an administrator is sufficiently wide to include the act of swearing an affidavit for the purpose of seeking to avoid being removed as administrator of the company;

(b) Section 5 of the Code provided:

"Members **must** exhibit the highest levels of integrity, objectivity and impartiality in all aspects of administrations and practice management.

Members are required to be:

- straightforward;
- honest;
- truthful; and
- adhere to high moral and ethical principles in the conduct of their practices and appointments.

…

Integrity also requires Members to take care to ensure that all communications, including reports, whether issued personally, or by delegation:

- are free from false or misleading statements;
- are not prepared recklessly;
- do not omit, or obscure information required to be included; and
- preserve confidential information."

(c) These were mandatory requirements (having regard also to the Foreword, Section 1, 1.4, and the mandatory terms of Section 5) which constitute or identify a professional standard;

(d) The affidavit was plainly false and misleading;

(e) Given that Mr Fernandez knew that he held the $200,000, knew that this constituted property of the company, and knew (or must have known) that the statement in his affidavit was false or misleading (because it stated that the Receivers took possession of all property of WFL), it is submitted that the clear and available inference is that Fernandez failed to take care to ensure that the statement in his affidavit in this regard was accurate (that is, not false or misleading);

(f) In response to Mr Fernandez's Response, the codes were not so limited as to be inapplicable to statements in affidavits. In any event the IPA was intended to apply to communications to "stakeholders" which expressly included the Courts. In any event the affidavits were provided to other parties to the proceedings;

(g) As to the other communications, Mr Fernandez was required to refer to the $200,000, (in at least one of them) and his failure to do so supports a finding that he failed to take care to ensure that his communications did not contain a false or misleading statement.

263. Ms Folie submitted that there were three reasons why Contention 6 (and 7) were not made out:

(a) Reliance upon the IPA code and APES 330 and 110 was misplaced because those codes governed communications in dealings with practitioners or "stakeholders" in connection with the administration they are conducting, (i.e. communications at creditors meetings, written correspondence, answering telephone queries about administration) not to affidavits sworn in court proceedings; it was not appropriate for the codes or the Board in exercising its powers to govern the conduct of liquidators in court proceedings;

(b) That the scope of any duty based upon the provisions was too vague and ambiguous to give rise to a mandatory standard for the purpose of section 1292;

(c) The affidavit was not false or misleading as a matter of fact, having regard to the purpose for which the affidavit was made and the issues in the proceedings in connection with which it was prepared.

264. Whilst the Response and Mr Fernandez's submissions dealt with the question of the affidavit, nothing appears to have been said by Mr Fernandez in relation to Mr Fernandez's replies to the inquiries made by the Replacement Administrators.

(ii) Questions of principle

265. At the outset, it needs to be made clear that Contention 6 does not involve an assertion by ASIC that Mr Fernandez was dishonest or that he deliberately made a false or misleading statement. The allegation is that Mr Fernandez failed to take care to ensure that communications issued by him, or on his behalf, were free from false or misleading statements and/or did not omit information required to be included.

266. Thus the question for the Board is whether, by making the affidavit and communicating to the Replacement Administrators in the way he did, Mr Fernandez failed adequately and properly to carry out the duties or functions of an administrator, by reason of a failure to take care to ensure

that those statements were free from false or misleading statements and/or did not omit information required to be included.

267. The way the matter was put by ASIC, relying upon the IPA code Section 5, the requirement "to take care" was advanced as an aspect of the overarching requirement for integrity in dealings. Section 5 propounds three essential requirements of practice and conduct: Integrity, objectivity and impartiality. Section 5 goes on to elaborate each of these. As to "Integrity", this is said to require Members to be straightforward, honest, truthful and to adhere to high moral and ethical principles, and, "also", to take care to ensure that all communications are free from false and misleading statements and do not omit information required to be included.

268. In other words, "integrity" requires not only honesty but also care or diligence, in certain respects, when communicating. It is apparent that the intention is to ensure that communications themselves have integrity, for example, by proscribing the careless dissemination of inaccuracies or half-truths.

269. We make these observations to delineate the issue from one concerned with some general duty of care and diligence.

270. In our view, professional standards do require that administrators take care to ensure that their professional communications do not contain false or misleading information or omit information required to be included, so that persons dealing with administrators can rely upon the integrity of their communications.

271. In *ASIC v Edge* (2007) 211 FLR 137; [2007] VSC 170, Dodd-Streeton J said (at [44]

> "The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith."

272. We have already referred to the role and function performed by an administrator - a fiduciary and paid professional who controls a corporation's affairs and property in the interests of others. As such, in our view, the obligations to act with honesty, probity, care and diligence inevitably must require an administrator to take care to ensure that his or her communications do not contain false or misleading information or omit information required to be included.

273. We reject the submission that the Section 5 of the IPA Code and, implicitly, professional standards embodied in Section 5 are too vague and ambiguous to give rise to a mandatory standard for the purpose of section 1292. The

obligation is clear, albeit expressed in relatively general terms, (as with many obligations to which liquidators or administrators are subject).

274. In our view, Section 5 of the IPA code embodies these professional standards.

(iii) The affidavit

275. We reject Mr Fernandez's submission that Section 5 of the IPA Code and, implicitly, professional standards are restricted to communications with creditors, and the like, in the course of an administration, and do not apply to affidavits prepared by an administrator in court proceedings. In our view, administrators are subject to the obligation whenever they communicate or disseminate information in any formal or serious dealings in their professional capacity. Administrators deal with a wide variety of "stakeholders", for want of a better word, in the course of their professional role. There is no meaningful basis for excluding dealings with courts from the reach of the present obligation. No doubt, a failure to take care to ensure that an affidavit is not false or misleading may have peculiar and more severe consequences than may be the case in other dealings. But it does not follow that affidavits are not subject to the general rule. Apart from anything else, an affidavit may be used to influence an opposing party in court proceedings, without it ever being deployed in court.

276. Paragraph 11 of the affidavit clearly contains an incorrect statement of fact. (We think that such statement amounts to a "false" or "misleading" statement for these purposes). Mr Fernandez stated that the Receivers were appointed on 6 September 2010 and "To my knowledge, the Receivers took possession of all of the assets of the Wilmott Forests Companies" including all of the books and records and other documents of the company. To Mr Fernandez's knowledge, the Receivers had not taken possession of all of the assets, because, Mr Fernandez knew that there was an asset belonging to the companies in his trust account.

277. We think there is something to be said for Mr Fernandez's submission that the statement in his affidavit was directed to dealing with his access to the Respondent's books and records. However, at the end of the day, the statement was an unequivocal assertion as to Mr Fernandez's state of knowledge. It was a statement made on oath on a serious occasion about a serious matter, namely, possession of the assets of the companies, even if this was not a matter to which the affidavit was primarily directed. The statement was made less than a month after Mr Fernandez had received the $200,000 and had had dealings and disputation with the Receivers over control of the NAB account.

278. In our view, Mr Fernandez did not perform adequately and properly the duties or functions of an administrator in swearing the affidavit because he failed to take care to ensure that it was free from a false or misleading statement.

(iv) The communications to the Replacement Administrators.

279. As indicated above, no submissions were made by Mr Fernandez concerning the communications to the Replacement Administrators. The explanation provided by Mr Fernandez as to why he did not disclose the $200,000 in his Response was that he:

(a) "distinguished between transactions in the administration account (which I believed the replacement administrators needed to be informed about), and the funds held on trust, which was property of the company"; and

(b) "also believed that Mr Crosbie and Mr Carson would be able to access WFL's books and records, which would record the transfer".

280. We do not accept that the distinction as set out in (a) was meaningful in this context.

281. The matter in (b) provides no justification for Mr Fernandez failing to disclose the existence of the $200,000. Mr Fernandez's reply of 24 November was not correct. It was certainly misleading.

282. In our view, Mr Fernandez did not perform adequately and properly the duties or functions of an administrator in failing to take care to ensure that his communications to the Replacement Administrators (particularly the 24 November 2010 letter) did not omit information required to be included.

283. Accordingly, we find that Contention 6 is established.

(g) Contention 7 - Association with communications which omitted information required to be included

284. ASIC's seventh contention is that Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions of an administrator because Mr Fernandez was associated with communications where those communications omitted information required to be included where such omissions were misleading (Contention 7).

285. In this regard, ASIC relied upon the same factual matters as in Contention 6 but based the allegation on the provisions of APES 330 and APES 110 rather than those found in the IPA Code.

286. APES 330, section 1.5, provides that members shall comply with the fundamental principles outlined in the APES 110.

287. APES 110 relevantly provides:

"Fundamental Principles

100.4 A Member is required to comply with the following fundamental principles:

(a) Integrity

(b) Objectivity

(c) Professional competence and due care

(d) Confidentiality

(e) Professional behaviour.

Each of these fundamental principles is discussed in more detail in Sections 110 - 150."

288. The principle of "Integrity" is discussed in Section 110 in the following terms:

"110.1 The principle of integrity imposes an obligation on all Members to be straightforward and honest in professional and business relationships. Integrity also implies fair dealing and truthfulness.

110.2 A Member should not be associated with reports, returns, communications or other information where they believe that the information:

(a) Contains a materially false or misleading statement;

(b) Contains statements or information furnished recklessly; or

(c) Omits or obscures information required to be included where such omission or obscurity would be misleading.

110.3 A Member will not be considered to be in breach of paragraph 110.2 if the Member provides a modified report in respect of a matter contained in paragraph 110.2."

289. Mr Liondas relied largely upon the submissions made in relation to Contention 6. He submitted that the primary difference between the two Contentions was that for Contention 7 to be established it must be shown that the administrator "believes" that the information that they provide "omits or obscures information required to be included where such omission or obscurity would be misleading." He submitted that given the fact that Mr Fernandez repeatedly failed to disclose the $200,000, including instances where he was specifically asked to disclose property of the company held by him, there could be no credible argument that he did not know that his communications omitted information that was required to be included.

290. Ms Folie did not specifically address Contention 7 separately from Contention 6 save to submit that it was not appropriate for separate

contentions to be founded on each of the codes where in essence what is being complained of is the same communications.

291. We are not prepared to make a finding against Mr Fernandez in relation to Contention 7. Unlike the allegation in Contention 6, this requires a finding that Mr Fernandez had a particular belief, namely a belief that his affidavit and statements omitted information required to be included where such omission or obscurity would be misleading. Whilst Mr Fernandez did not specifically address this matter in his statement, this was a positive allegation in the SOFAC and a matter about which we need to be satisfied on the *Briginshaw* approach. We also consider that it was a matter which needed to be put to Mr Fernandez in cross-examination. We appreciate that the rule in *Brown v Dunn* has limited application where parties are required to exchange witness statements, but where, as here, a serious allegation of state of mind is made, we believe it is inappropriate to make the finding when the matter has not been put to the witness. There is a clear difference between a finding that Mr Fernandez failed to take care to ensure that his affidavit (and other communications) omitted information and a finding that he actually believed that this was the case.

(h) Contention 8 - failure to avoid actions or omissions that may bring discredit to the profession.

292. ASIC's eighth contention is that Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions of an administrator because he failed to avoid actions or omissions that may bring discredit to the profession because a reasonable and informed third party, having knowledge of all relevant information, would conclude that the omissions negatively affect the good reputation of the profession (Contention 8).

293. Contention 8 is based upon provisions of APES 330 and APES 110.

294. APES 330 section 1.5 provides that members shall comply with the fundamental principles outlined in the APES 110.

295. APES 110 relevantly provides:

> "Fundamental Principles
>
> 100.4 A Member is required to comply with the following fundamental principles:
>
> (a) Integrity
>
> (b) Objectivity
>
> (c) Professional competence and due care
>
> (d) Confidentiality

(e) Professional behaviour.

Each of these fundamental principles is discussed in more detail in Sections 110 - 150."

296. The principle of "Professional Behaviour" is discussed in Section 150 in the following terms:

> "150.1 The principle of professional behaviour imposes an obligation on Members to comply with relevant laws and regulations and avoid any action or omission that may bring discredit to the profession. This includes actions or omissions which a reasonable and informed third party, having knowledge of all relevant information, would conclude negatively affects the good reputation of the profession."

297. In support of Contention 8, ASIC relied upon the cumulative effect of the factual matters already referred to above.

298. Mr Liondas submitted that over the course of an extended period of several months, Mr Fernandez failed to disclose to creditors in the DIRRIs, to the Receivers, to the Replacement Administrators, to the Court and in the accounts filed with ASIC that he held the $200,000. He had multiple opportunities to make such disclosure and proper professional practice required him to do so. Mr Liondas submitted that no credible reason had been put forward as to why he did not disclose the $200,000.

299. Further, Mr Liondas submitted, when Mr Fernandez was subsequently requested to deliver up the $200,000 to the Receivers he refused to do so. It was submitted that it ought to have been plain at this time that he had no right to retain the $200,000, especially in light of the affidavits of both Messrs Webster and Madgwick which indicated that any belief that Mr Fernandez may have had as to the $200,000 being "sourced" from property excluded from the scope of the charges was incorrect. Notwithstanding this, he continued to refuse to return the $200,000.

300. Mr Liondas submitted that a reasonable and informed third party, having knowledge of all of these matters, would likely have serious questions about the Respondent's motivations in not disclosing the $200,000. It was submitted that this, in itself, negatively affected the good reputation of the profession.

301. Ms Folie submitted that the asserted principle of professional behaviour identified in APES 110 did not amount to a duty or function which would enliven the Board's powers. She submitted that this Contention was simply another way to allege a breach of duty by the respondent for the same conduct, and that the Board should be reluctant to find that this was a separate and identifiable duty which can be enforced.

302. In our view, for the reasons set out in paragraph 48 above, the question is not so much whether APES 110 amounts to a duty or function which Mr Fernandez was required to perform. Rather the question seems to be whether APES 110 sets or reflects a professional standard, against which the performance by Mr Fernandez of his duties and functions may be measured.

303. We do not consider that Contention 8, in substance, adds to the case, or that it is appropriate to make an assessment under s 1292 in the present case by reference to the notion of "bringing discredit to the profession". Essentially, ASIC is relying upon the cumulative effect of the failures already referred to above. In our view, it is not appropriate to seek to characterise such failures as being conduct "bringing discredit to the profession" and therefore to suggest that there is another basis for a finding of failure to perform adequately and properly under s 1292(2)(d). In a sense, it may be said whenever it is established that a respondent has failed to perform adequately and properly the duties and functions of an administrator, such failures bring discredit to the profession.

304. No doubt, where the Board finds that a respondent has failed in a number of respects to perform adequately and properly the duties and functions of an administrator, the cumulative effect of the series of failures may be relied upon in relation either in connection with a "fit and proper" finding or alternatively in relation to sanctions.

305. It may well be the case that there are acts or omissions of a particular character which are appropriately tested against a requirement not to bring discredit to the profession, particularly if a more nuanced interpretation of that phrase is applied. But we do not think it is appropriate to make findings by reference to that concept in the circumstances of the present case.

(i) Contention 9 – failure to deliver up property of Willmott Forests Ltd to Receivers or Replacement Administrators

306. ASIC's ninth contention is that Mr Fernandez failed within the meaning of section 1292(2)(d)(ii) of the Act, to carry out or perform adequately and properly the duties or functions of an administrator in that he failed to deliver up:

(a) To the Receivers, as soon as practicable after becoming aware of the Relevant Matters, property of Willmott Forests Ltd to which they had been appointed (Contention 9(a)); further or alternatively

(b) To the Receivers, as soon as practicable after Mr Fernandez ought to have been aware of, alternatively had reasonable grounds to suspect, the Relevant Matters, property of Willmott Forests Ltd to which they had been appointed (Contention 9(b)); further or alternatively

(c) To the Replacement Administrators, as soon as practicable after he ceased to be the administrator of Willmott Forests Ltd, property of Willmott Forests Ltd which he held (namely, the $200,000 Payment) (Contention 9(c)).

307. ASIC relied on three matters in support of its contention that a failure to deliver up the $200,000 to the Receivers within a reasonable period of time represented a failure to carry out or perform adequately and properly the duties or functions of an administrator.

(a) First, the fact that the failure amounted to a contravention of s 590(4) of the Act was a relevant matter for the Board to take into account in assessing what proper professional practice required;

(b) Secondly, common sense or the professional norms of an accountant acting as an administrator required that such an officer handles corporate funds with probity and transparency: *Australian Securities and Investments Commission v Edge* (2007) 211 FLR 137 at [637].

(c) Thirdly, the duties or functions of an administrator, which include controlling or dealing with a company's property (s 437A), are subject to the functions and powers of a receiver (including a receiver's power (s 420(a)) to take control of the property of the company) where before the beginning of the administration the secured party or receiver enters into possession or assumes control of property of the company or exercises any other power in relation to the company's property (s 441B). These matters are also relevant to the Board in assessing what proper professional practice requires.

308. Mr Fernandez's relied upon the following matters in relation to Contention 9 (see paragraph 24 of the Response):

(a) The Bombala Land was excluded from the Charges;

(b) He was told that the $200,000 was money not under the control of the Receivers;

(c) On or around 6 or 7 September 2010 he was aware that the $200,000 Transfer had been made from an account held by WFL with NAB, but he believed that it was monies not subject to the control of the Receivers.

309. In addition, Ms Folie submitted that Mr Fernandez did not breach any duty or function of an administrator when he retained property in circumstances where he held a genuine, albeit mistaken belief, that he had a right to claim a lien over it. While it was subsequently found that he did not have an entitlement to claim a lien, he was entitled to have that question determined or tested where he held that genuine belief. Ms Folie stated that she did not propose to make any submissions about the reasonableness of the belief and

submitted that it was sufficient that he held that belief on a genuine basis whether or not that belief was well-founded or had a legal basis.

310. Ms Folie expressly disavowed any claim that Mr Fernandez relied upon legal advice.

311. We find that Contentions 9(a) and 9(b) are made out. In our view, this follows from our reasoning in relation to Contention 4 above. It is not necessary to rely upon s 590(4). In our view the obligation to account for the property arose by reason of the facts which occurred and the nature of the role and duties of administrators (particularly the duty to act with reasonable care and diligence and in good faith in the best interests of the corporation), alternatively by reason of "common sense or professional norms".

312. For reasons explained above, we do not accept that Mr Fernandez believed, as at 9 September, that the $200,000 formed part of funds which were not subject to the banks' security alternatively, even if he had such a belief, that it was a rational belief. In our view, Mr Fernandez knew or had reasonable grounds to know or suspect (by 9 September at the latest) that the property which had been paid into his trust account was charged to the secured creditors and that the Receivers were entitled to possession thereof. He was obliged to account to the receivers for the property.

313. Mr Fernandez could not be entitled to a lien over the funds when he had no right to obtain or retain them. By 9 September, at the latest, he knew or had reasonable grounds to know or suspect this. Even if he believed that he had a lien, this was not a rational belief in the circumstances. At the very least, he knew or had reasonable grounds to know or suspect that he was obliged to account for the property as at 9 September. Thus, even if he had a belief that he was entitled to a lien at that point, his belief could not have extended beyond an amount equal to his fees up to that point. At the very least, he had no basis for retaining any amount other than $10,000 or $20,000.

314. For the reasons set out in relation to Contention 4 above, we consider that s 590(4) provides support for the above conclusion, and further, constitutes an independent duty, which was breached by Mr Fernandez, and thus an independent basis for supporting Contention 9. Section 590(4) provides:

> "A person who, being a past or present officer or employee of a company to which this section applies, does not deliver up to, or in accordance with the directions of, the appropriate officer:
>
> (a) all the property of the company in the person's possession; or

(b) all books in the person's possession belonging to the company (except books of which the person is entitled, as against the company and the appropriate officer, to retain possession);

contravenes this subsection."

315. In our view, as from (relevantly) 9 September 2010, Mr Fernandez being an officer of the companies, did not deliver up to the appropriate officers, namely the Receivers, property of the companies which was in his possession, namely the $200,000. We do not consider Mr Fernandez was obliged to deliver the property to the Replacement Administrators where there was an extant and overriding obligation to deliver the property to the Receivers.

316. However, as already stated, it is not necessary for us to rely upon s 590(4) in deciding that Contention 9 has been established.

317. We find that sub-Contentions 9(a) and (b) are established. More particularly:

(a) We find that sub-Contention 9(a) is established in that Mr Fernandez failed to deliver up to the Receivers, as soon as practicable after becoming aware of the Relevant Matters, property of Willmott Forests Ltd to which they had been appointed;

(b) Further, we find that sub-Contention 9(b) is established, in that Mr Fernandez failed to deliver up to the Receivers when, even if he did not know the Relevant Matters, he had knowledge of circumstances which would have caused a reasonable person in his position to become aware of or to suspect those matters;

(c) We find that sub-Contention 9(c) is not made out.

(j) Contention 10 – Whether Mr Fernandez is otherwise not a fit and proper person to remain registered as a liquidator

318. ASIC's tenth contention is that Mr Fernandez is otherwise not a fit and proper person to remain registered as a liquidator within the meaning of section 1292(2) of the Act (Contention 10). This Contention was pressed if any one or more of the other Contentions was not made out. As is apparent, not all of the other Contentions have been made out.

319. The pre-eminent authority on the meaning of "fit and proper person" is *Hughes and Vale Pty Ltd v. The State of New South Wales (No. 2)* (1955) 93 CLR 127 ("*Hughes*"), particularly the following passage in the judgment of Dixon CJ, McTiernan and Webb JJ at 156-7:

> "The expression "fit and proper person" is of course familiar enough as traditional words when used with reference to offices and perhaps

> vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty, knowledge and ability: "honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it" - *Coke.* When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances: *R. v. Hyde Justices* (1912) 1 KB 645, at p 664"

320. The expression is employed as a test for capacity to perform an office or role in widely differing contexts. Whilst there are three facets to the test - "honesty, knowledge and ability" - these are flexible concepts. The "honesty, knowledge and ability" required will be informed by the nature of the office concerned.

321. Here, we are concerned with whether Mr Fernandez is a fit and proper person to remain registered as a liquidator. The requirements for "honesty, knowledge and ability" need to be considered in the light of the nature and obligations of that office.

322. We have considered this question in paragraphs 193-8 above, with a particular emphasis on the nature and obligations of administrators and the question of independence. A more complete description of the role and obligations of a liquidator is contained in *ASIC v Edge* (2007) 211 FLR 137; [2007] VSC 170, where Dodd-Streeton J said (at [44]*ff*):

> "[44] The extensive powers vested exclusively in the liquidator entail a corresponding vulnerability in the creditors, members and the public. The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith.
>
> [45] In *Harvey*, Marks J stated that the liquidator's fundamental duty is to:
>
> > 'administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act and its Rules. It is obvious that everything to be done in a competent administration is not and cannot be specifically prescribed. Preserving the assets, giving proper attention to the administration, acting with due despatch and ensuring adequate knowledge and understanding of the affairs of the companies are matters of common sense.'

[46] It is recognised that a liquidator must meet high standards of skill and competence. As "a chartered accountant skilled and versed in the performance of the duties of such an office" and acting "for remuneration and for profit to himself", the liquidator properly bears the burden and risks of decision-making in that capacity and "common sense and judgment" may reasonably be expected of such an officer.

[47] In *Pace v Antlers Pty Ltd (in liq)* Lindgren J stated that:

> 'The liquidator's duty to exercise reasonable care and skill has been the subject of some debate. The following propositions, however, appear to have gained acceptance in Australia:
>
> - The court should not be quick to condemn a person in the difficult position of a liquidator, and, in particular, should not judge his or her conduct with wisdom born of hindsight: *Re Windsor Stream Coal Co Ltd* [1929] 1 Ch 151 (*Windsor Steam Coal*); *Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith* (1989) 54 SASR 285 (Olsson J) (*Maelor Jones*) at 287; it is not every error of judgment that will be accounted negligence: *Re George Bond & Co Ltd* (1932) 32 SR (NSW) 301 at 306.
>
> - At the same time, a high standard of care and diligence is to be expected of a liquidator as a professional person who is being paid for his or her services: *Windsor Steam Coal* at 165, per Lawrence LJ; *Maelor Jones* at 288–9; McPherson's *The Law of Company Liquidation*, p 218;
>
> - A liquidator is under a duty to complete the administration of the assets within a reasonable time and not to protract the liquidation unduly: *Re House Property & Investment Co* [1954] Ch 576 at 612; McPherson's *The Law of Company Liquidation*, p 218; he or she must act with 'due despatch': *Cmr for Corporate Affairs v Harvey* [1980] VR 669 (*CCA v Harvey*) at 691; *Maelor Jones* at 288;
>
> - If there is a difficulty at any stage of the administration, it is the liquidator's clear duty to inform the court and seek directions: *CCA v Harvey* at 691; *Windsor Steam Coal* at 159, 161; *Maelor Jones* at 288.'

[48] His Honour further observed:

> 'a liquidator must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. 'All the circumstances' will include the facts that a liquidator is a person practising a profession, that a liquidator holds himself

> or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work. 'All the circumstances' will also include the fact that some decisions and courses of action which a liquidator is called upon to consider will be of a business or commercial character, as to which competent liquidators acting with due care, but always without the benefit of hindsight, may have differences of opinion'." (citations omitted)

323. Thus, the role of a liquidator (and administrator) is one which involves a high degree of responsibility and trust, a high level of integrity and ethical insight and also a high degree of training, experience, skill and competence. Liquidators and administrators are routinely invested with control of a corporation and its property, often at a time when the corporation' finances are precarious, when there are urgent, ever increasing and often conflicting claims upon its property. A liquidator or administrator must have the judgment, insight, expertise and ability to be able to analyse, understand and deal appropriately with the issues thrown up in this volatile environment. A specific aspect of this (relevant to the present case) is the need to have an understanding of the interaction of various claims over, or interests in property and the operation of securities over property. A liquidator needs to be diligent in investigating issues concerning ownership or interests in property and, where he or she is not satisfied with answers, or where matters of doubt or complexity arise, to seek legal advice or directions. As the Master of the Rolls, Lord Hanworth, said in *In Re Windsor Steam Coal Co* [1929] 1 Ch 151 at 159: "One does not wish to attribute to a liquidator the knowledge or the experience of the lawyer, but I think that one may reasonably ask from him the exercise of some common sense and judgment when he is placed in a difficulty."

324. There was no allegation in the present case that Mr Fernandez acted dishonestly. Nevertheless, he retained and failed to disclose to various different parties the existence of property in circumstances where he either had no belief that he was entitled to act this way, or any belief which he had was irrational. Either way, we regard his conduct as inexplicable, unacceptable and inconsistent with the expertise, judgment, insight, care and diligence required of a registered liquidator. Without discounting the other aspects of the complaints against Mr Fernandez, we find it particularly troubling:

    (a) that he retained and did not disclose the existence of the property as from 9 September, when he really knew all that he needed to know to conclude that he was obliged to account for the funds to the Receivers forthwith – or, at the very least, that there was an issue crying out for verification;

(b) that he failed to disclose the payment in his third DIRRI after concerns about independence had been specifically drawn to his attention by ASIC and when he should have had a heightened awareness of his obligations;

(c) that he made no reference, in his letter dated 24 November to the Replacement Administrators, to the fact that he held the property, having been expressly asked whether he held any property of the companies;

(d) that he claimed a lien over the funds without any rational basis and persisted in the claim after the Receivers claimed the funds.

325. Mr Fernandez's conduct in retaining and failing to disclose the funds continued over a period of more than four months. During that time, there were a number of occasions where he was obliged to disclose the payment to a variety of persons with different concerns, ie the creditors, (who needed to know about the payment because it might affect their decision as to whether it was desirable to appoint a replacement administrator), the Receivers, (because they were entitled to control of the funds), the Replacement Administrators, (because they had an entitlement, at least, to be informed of the extent of the company's property) and ASIC, (because there was a statutory obligation to file accurate accounts with ASIC).

326. Moreover, Mr Fernandez retained the funds when the Receivers became aware of their existence in January and demanded repayment. Again, we find Mr Fernandez's conduct in retaining the funds at this point inexplicable. Mr Fernandez's refusal to return the moneys had no proper basis. In these proceedings, Mr Fernandez expressly disavowed reliance upon any legal advice as a reason justifying his retention of the funds.

327. Mr Fernandez's evidence in the witness box added to our concerns. Mr Fernandez gave evidence in chief dealing with his current practice and present understanding of the issues (which was relied upon in relation to the fit and proper person issue). However, in our view, it became quickly apparent in cross-examination that he still had no real understanding of some of the fundamental issues in this case and also that his ability and expertise in this area was extremely suspect. (It was accepted that these answers could be relied upon in relation to the fit and proper person issue)[20].

328. By way of example, we refer to the provisions of Section 6.1 of the IPA Code concerning up-front payments referred to in paragraphs 217 above. Mr Fernandez was asked some questions by Ms Folie concerning up-front payments in examination in chief. The following exchange occurred[21]:

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[20] T267.

[21] T98*ff*.

"What is your current practice in the event that you receive an up front payment for an administration now?---It is disclosed.

How?---As an up front payment. If it's an up front payment of fees, particularly from a third party, it needs to be disclosed in the DIRRI. That's clear to me now.

Whereabouts in the DIRRI do you disclose it?---Under the heading of, 'Up front payments', I would say.

Why is that now your practice?---Previously in the 2010 regime the declarations, as far as I was aware, was for independence, relationships and indemnities. Up front payments weren't disclosed at that stage in relation to payments from third parties.

What has changed since that time?---There's been a new requirement in terms of up front payments and that has been in operation since 2011, as far as I am aware, and if the same situation were to occur today, it would be disclosed as part of the DIRRI."

329. (As we have indicated above, we disagree that there was any meaningful change in the requirements since 2011).

330. During Mr Fernandez's cross–examination, the following exchange occurred[22]:

"Can you have a look at paragraph 16.3 in the SOFAC. It says that: 'The IPA Code requires an administrator who accepts moneys to meet the costs of an administration prior to acceptance of an appointment to provide full disclosure of that fact to creditors in the DIRRI.' If you turn to paragraph 16.3 of your response, you will see that you don' t admit to that allegation. You have had a chance to re-read that relevant sect ion of the DIRRI and paragraph 16.3 of ASIC's SOFAC. Do you agree with me, having re-read that section, that in fact it does require an administrator who accepts moneys to meet the costs of an administration prior to acceptance of an appointment to provide full disclosure of that fact to creditors in the DIRRI?---I accept that to the extent if it's for an up front payment of fees and not if it is property of the company.

I don't understand the last part of your answer, 'not if it's property of the company'. Can you explain that to me please?---The disclosure of property or the reporting of property in an administration is more properly done, in my mind, in my opinion, in the report as to affairs or the comments in the report as to affairs or the 439A report and in relation - particularly in relation to fees.

[22] T103*ff*.

Your position sitting here before the Board today, having had as much time as you want to re-read section 6.10A, is that that does not require the disclosure by an administrator who accepts moneys prior to the acceptance of an appointment to provide full disclosure of that to creditors in a DIRRI?---I think I have answered the question.

You will see in bullet point 1 of 6.10A that moneys accepted to meet the cost of an administration must always be held on trust. Would you agree with that?---Yes.

That means they will always remain property of the company?- - - Yes .

Do you still maintain that the fact they remain property of a company means it's not appropriate to disclose them in a DIRRI but rather, at some later time?---That was my position on 6 September or whenever I signed the DIRRI. Today my position is different.

I am asking you about what you understand the IPA Code to be providing for and whether or not you maintain the non-admission in your response that that was what was required by the IPA Code force at the time?---I think I have stated answer to that. If I am able to answer it these lines: the up front payment of fees which would not come from the company, it comes from a third party, must and has to be disclosed. Property of the company which is sourced, which is in the books and records of the company is dealt with elsewhere, at the time.

…

Do you consider that what you got from Willmott Forests was an up front payment of fees?---What I disclose in the DIRRI which I said was a declaration of indemnities - independence, relationships and indemnities, the independence aspect was addressed, the relationship aspect was addressed, the indemnities was addressed. Property of the company at that time on 7 September or whenever I signed the DIRRI, that payment or the transfer of property to me which would be included in the reporting of property of the company at some subsequent date would be the appropriate time to do it. If you ask me the same question today, I would include it in the DIRRI.

In your mind, it 's some change in the IPA Code that would lead to a change in your practice?---Well, and the recent events, I guess, arising out of the Willmott Forests - - -

…

Do you continue to maintain that the IPA Code at the time did not require you to disclose in your DIRRI the $200,000 payment?---I maintain - if I could answer the question in this way. I maintain that property of the company is not disclosed in a DIRRI if it is an up front payment of fees to meet the costs of administration. Prior to the acceptance - I am not sure. On the same day would mean prior to acceptance and the moneys are held in trust, whatever else. When I completed the DIRRI, my belief was there was no requirement to include the $200,000 property transferred to my trust account in the DIRRI and I didn't. In hindsight and perhaps improved transparency today, I would include that in the DIRRI today.

THE CHAIRMAN: Mr Fernandez, at the time you received the $200,000 payment on 6 September 2010, did you believe it was an up front payment of fees?---No, I did not. I clearly received funds, property of the company, to which I was advised was not subject to the charges held by the Commonwealth Bank or St George. They were clearly carved out property. Mr Chairman, assuming you are a lender and you have secured overall of the furniture in the room and this has been carved out (pointing to witness box) and if I were to sell a drawer out of this desk on eBay the proceeds of sale of the drawer are clearly not subject to your security. That was my state of understanding of the position; that $200,000 were proceeds of sale of the Bombala land.

Why was it being paid to you?---I needed and I requested either indemnity or sufficient assets I could readily convert to meet the costs of the administration. I was told and I saw the evidence of - or some evidence on 6 September, no earlier, that the carved out property was there. It was reported in the annual statements, in the financial statements and the annual reporting of the company. I saw it in certain bank documents, admissions to the bank. I was also part of a sale program of the Bombala land to reduce the bank's debt. So it was clear to me but I still needed a lot more information, to verify that this $200,000 being part proceeds - and I was aware there were other proceeds of Bombala land. A figure was mentioned in the vicinity of about 600 plus. All right, well, my job on the day like any administrator or liquidator is to move in and grab assets. That's what we do.

Just try and direct your answer to the question that's being asked?---Sorry.

Can you just confirm you did not regard that payment on 6 September as an up front payment of fees; is that correct?---No, I did not. With hindsight I would give you a different answer. On 6 September I did not regard - - -

> What do you mean "with hindsight"? Do you mean you now accept it was a payment of up front fees?---Now I accept that it would make reference to it---
>
> Can you just answer the question that I asked. Do you now accept that it was an up front payment of fees?---Well , if it remained the same character of funds, property, proceeds of Bombala land, it is not a payment of - I still say it is not a payment for fees, it's property of the company.
>
> It doesn't matter where the funds come from, really, does it, in terms of the purpose for which it's being paid; whether it came from the Bombala land or from the other assets of the company. The question I am asking you is what did you understand as to the purpose for which you were receiving the payment?---It was an asset over which I had a lien in respect of my costs and expenses as administrator."

331. This is just one example of the way in which Mr Fernandez's answers demonstrated a lack of understanding and expertise. Another example was Mr Fernandez's continuing insistence in his evidence that he had an entitlement to a lien over the funds, when a rational basis for that assertion was never articulated. Mr Fernandez expressly disavowed any reliance upon legal advice[23]. We agree with Mr Liondas' submission in relation to this matter:

> "A rational basis for a belief that he might be entitled to a lien over that property that belonged to the receivers has not been explained. Again, the fact that he held the view, and more so the fact that he is prepared to continue to attempt to defend it before the Board, far from providing context that assists his position, demonstrates troubling disregard for basic precepts of insolvency law that would or should be known to an experienced practitioner."

332. If Mr Fernandez's conduct did not involve "disregard" for those basic precepts, in our view it involved, at least, a troubling ignorance thereof.

333. Ms Folie submitted that Mr Fernandez had a genuine belief as to the existence of the lien and that he was entitled to have that tested before paying the moneys to the Receivers[24]. She expressly refrained from making any submission as to the reasonableness of the belief.

334. But in our view, that submission misses the point on several levels. *First*, this is not a case concerned about discretions or business decisions[25] where due regard will be paid to the liquidator's *bona fide* judgment, even if it is unreasonable. This is a case concerned with whether Mr Fernandez is a fit

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[23] T270.

[24] T265.

[25] See eg, *Yeomans v Walker* (1986) 5 NSWLR 378 at 383.

and proper person to be registered as a liquidator. *Bona fides* is not the touchstone. *Secondly*, and in any event, in our view, Mr Fernandez's asserted belief was not merely unreasonable but irrational in the light of the known circumstances. No submissions were made as to an arguable legal basis for the claim to a lien. *Thirdly,* and to make matters worse, it was an asserted belief about a matter which is the bread and butter of a liquidator's work, namely the operation of securities over property. In our view, any reasonably competent liquidator would have known that there was no proper basis to claim to a lien in the known circumstances. *Fourthly*, we reject the assertion that a liquidator is entitled to have beliefs "tested" in court before any criticism can be levelled at the conduct. A liquidator should not persist in litigation where it is not rationally based.

335. In our view, Mr Fernandez is not a fit and proper person to remain registered as a liquidator. Our reasons are apparent from the preceding paragraphs, but to summarise, Mr Fernandez has failed in a number of respects to perform properly and adequately the duties and functions of an administrator. Those failures, taken together, establish that Mr Fernandez is not a fit and proper person to remain registered, having regard to:

    (a) The fact that those failures occurred in relation to a number of different areas;

    (b) They continued over a period of many months;

    (c) In the absence of any allegation of dishonesty, those failures are only consistent with a serious lack of judgment, insight, expertise and ability - an inability on the part of Mr Fernandez to understand the issues;

    (d) In our view, his asserted belief that he had a lien and his failure to repay the funds when demanded by the Receivers was insupportable and demonstrated a troubling disregard or ignorance of basic precepts of insolvency law;

    (e) His evidence in the witness box simply confirmed that there is a serious problem underlying his behaviour and that he does not have the necessary judgment, insight, expertise and ability essential to the role of registered liquidator.

336. We have given very serious consideration to this issue because a finding that a person is not a fit and proper person to remain registered as a liquidator is not lightly made. Having considered the issue with care, we are firmly of the view that Mr Fernandez is simply not a fit and proper person to remain registered as a liquidator.

337. We find that Contention 10 is established.

G. Appropriate orders

(a) Sanctions Hearing

338. On 9 October 2013, the Panel held a hearing in relation to what orders, if any, should be made under s 1292 of the Act in relation to Mr Fernandez, having regard to our determination, including our finding that he was not a fit and proper person to remain registered as a liquidator ("the Sanctions Hearing").

(b) ASIC's evidence

339. At the Sanctions Hearing, ASIC tendered an affidavit of Gregory McLeod which annexed evidence relating to a previous application against Mr Fernandez brought to the Board in 2005 ("the 2005 Hearing").

340. The complaint at the 2005 Hearing related to the fact that Mr Fernandez had failed to lodge numerous forms and notifications required by the Corporations Act over a period of approximately ten years. The items not lodged included notifications of appointment of an external administrator, Form 524 accounts of receipts and payments and minutes of creditors meetings. Mr Fernandez failed to lodge in excess of 100 documents in relation to 31 different companies. Some of these had been outstanding for more than ten years. The failures occurred in respect of the vast majority of Mr Fernandez's insolvency administrations.

341. At the 2005 Hearing, Mr Fernandez sought to explain the failures on an absence of staff in about 2002 and personal difficulties, but ultimately, accepted that the reason was for the failures was: "he just can't run a sole practice [as a liquidator] any more". His counsel indicated to the Board that he regarded the application to the Board as a watershed experience in his life and that he had decided to change his practice to meet the concerns which had arisen, by giving up his sole practice as a liquidator and working as a consultant at another firm on the basis that all future appointments, assuming he was allowed to continue to act as a liquidator, would be joint appointments with a partner at that firm.

342. At the conclusion of the 2005 Hearing, the Board found that Mr Fernandez had failed to carry out or perform adequately and properly the duties of a liquidator and duties and functions required by an Australian law to be carried out by a registered company liquidator. In giving reasons in relation to sanctions, the Board stated that the breaches were not accidental or inadvertent, but that there was "a pattern of continuous failure to perform straightforward statutory obligations".

343. The Board said:

> "Ultimately, when we pressed for an explanation of the course of conduct over the years, we were told that the running of a sole

practice was extremely difficult for Mr Fernandez and in fact beyond his capacity. We accept that as an explanation".

344. The Board also said that Mr Fernandez:

> "has moved to rectify the position by entering into an arrangement with … a well-established accounting firm with a successful insolvency practice. The arrangement … is that Mr Fernandez will become a consultant and will transfer all his appointments to [that firm] and will only accept appointments in new administrations on a joint basis with [that firm]".

345. The Board continued:

> "ASIC … submits that the failures justify cancellation. We do not believe that to be the case. There is genuine contrition being shown here and a constructive effort to establish an acceptable way of Mr Fernandez conducting a successful insolvency practice. We do not believe that in those circumstances it is appropriate for us to terminate his registration, but we are going to contemplate other remedies instead of that."

346. The Board then outlined to the parties the orders it proposed to make, namely, suspension for three months together with an undertaking by Mr Fernandez that he would not undertake any administration except on a joint basis. The Board proposed that that arrangement could only terminate with ASIC's approval. Counsel for ASIC then indicated that its preferred position was to avoid a policing role in relation to Mr Fernandez and suggested that there be a formal sunset clause applying to the requirement that Mr Fernandez undertake liquidations only on a joint basis. Ultimately the Board made orders including:

(a) An order that Mr Fernandez's registration as a liquidator be suspended for three months and

(b) A requirement that Mr Fernandez give an undertaking that following his suspension, he would not, for a period of 12 months accept new appointments otherwise than as joint appointments with another registered liquidator.

347. There was no evidence before us concerning when or why Mr Fernandez had an apparent change of mind concerning his ability to undertake sole appointments.

348. We do note, however, that Mr Fernandez' statement of intention to cease accepting sole appointments was expressed in unconditional terms at the 2005 Hearing and that the Board had originally envisaged that the joint appointment regime would continue indefinitely unless ASIC agreed

otherwise. This suggestion was modified to a twelve month period due to ASIC's reluctance to undertake a policing role.

(c) Mr Fernandez' evidence

349. At the Sanctions Hearing, Mr Fernandez tendered statements in the nature of references from a number of persons. None of these witnesses were cross-examined by ASIC and we accept the evidence in these statements as truthful. The statements were from the following persons:

(a) Mr Richard Leggo, a commercial and real estate property lawyer and private investor, who has had dealings with Mr Fernandez since at least 2010. In 2010, he arranged for Mr Fernandez to be appointed as a receiver and manager over a company involved in property development. Mr Leggo said that Mr Fernandez had to deal with a competing receiver and manager in relation to disputes with unitholders involved in the development. Mr Leggo said that Mr Fernandez was tested in many ways as a result of the competing claims. Mr Leggo said that he found Mr Fernandez to be a person who provided clear and precise recommendations and who conducted his role in an open and even handed basis. He found Mr Fernandez to be even handed, open, honest and candid. He believed, from his dealings with Mr Fernandez, that he was a fit and proper person to be involved in the activities involving a liquidator and he would be very surprised if the matters the subject of the Board's decision were fully reflective of the way in which Mr Fernandez performed work for him in 2010 and 2011;

(b) Mr Chris Lambis, a chartered accountant, who also held registration as a certified practising accountant, registered company auditor and certified financial planner. Mr Lambis has known Mr Fernandez personally and professionally for 16 years. He gave a number of examples of Mr Fernandez having given advice to companies in financial difficulty, or having acted as administrator or liquidator. He said that he found Mr Fernandez to be highly straightforward, highly knowledgeable, and able to speak to clients at their level. He expressed the view that Mr Fernandez was perfectly capable of performing the role of an administrator or liquidator;

(c) Mr Steve Christodoulou, who was, from 2005 to 2013, the Managing Director of a company which is one of the world's largest electrical component manufacturers and suppliers. He has known Mr Fernandez for at least seven years. Mr Christodoulou said that he arranged for Mr Fernandez to be appointed administrator of a subsidiary company, Atco Controls Pty Limited, ("Atco") on 13 April 2006 and on 14 July 2006, when Atco was placed into liquidation, Mr Fernandez was appointed liquidator. Mr Christodoulou's evidence relates only to Mr Fernandez performance in connection with the Atco matter. (We note that whilst Mr Christodoulou refers only to

Mr Fernandez, Mr Fernandez was not appointed as the sole administrator or liquidator of Atco). Mr Christodoulou stated that Mr Fernandez performed his role at all times in a highly professional and competent manner. He had no reservation about Mr Fernandez's independence, impartiality and appreciation for the tasks at hand and that he would happily recommend him to any future engagement as a liquidator;

(d) Mr Michael Carew, employed as a full time adviser to Australia's largest privately owned electrical wholesaler. He has known Mr Fernandez for 18 months. He has dealt with Mr Fernandez in his capacity as receiver and manager of a debtor company and noted that Mr Fernandez was, at all times, impartial and unbiased in his approach. In his opinion, Mr Fernandez was the epitome of an independent unbiased receiver and manager.

(d) The parties' submissions

350. ASIC's submissions concerning sanctions were to the following effect:

(a) The Board's discretion to impose sanctions was enlivened in the present case and it appeared that there was no dispute that some order ought to be made;

(b) Protection of the public was the guiding principle and this had two aspects: protecting the public from the possibility of future failures by the individual concerned and ensuring that the public is secure in the knowledge that those entrusted with the task of conducting insolvency appointments can properly be entrusted with that task;

(c) The only appropriate sanctions in the light of the Board's findings were cancellation or suspension for a significant period;

(d) A finding that a person was not fit and proper would normally justify an order for cancellation unless special circumstances existed or the Board could be satisfied that the person would become fit within a discrete period of time;

(e) The Board should order cancellation because, in the present case, the Board could not conclude that Mr Fernandez would be fit within any such period. Indeed, Mr Fernandez's conduct and his explanations therefore were not conducive to drawing such a conclusion;

(f) In upholding the majority of ASIC's contentions, the Board had made findings of serious and not technical failures which related to different circumstances, namely failure to make disclosure to creditors, failure to make disclosure to the receivers, failure to make disclosure to the replacement administrators, failing to take care that

statements were not false or misleading or did not omit information and failure to deliver up property to the receivers in a timely fashion;

(g) ASIC drew attention to the matters supporting our finding that Mr Fernandez was not a fit and proper person, particularly the matters in paragraph 324*ff* above, including the fact that Mr Fernandez's failure to disclose continued over a period of four months when there were a number of occasions where he was obliged to disclose the payment to a variety of persons with different concerns and that Mr Fernandez's retention and failure to disclose occurred where he either had no belief that he was entitled to act this way, or any belief which he had was irrational. ASIC also pointed to the evidence given by Mr Fernandez in cross-examination, upon which we relied;

(h) Further, there were additional reasons why cancellation rather than suspension was the appropriate order in the present case:

(i) The seriousness of Mr Fernandez's failure and the fact that third parties were misled;

(ii) The length of Mr Fernandez's experience (as a Certified Practising Accountant since 1980 and a registered liquidator since 1991) meant that he could not rely upon inexperience as an explanation for his conduct. Indeed, the findings of lack of judgment, insight, expertise and ability were all the more concerning given his lengthy experience;

(iii) Mr Fernandez was a very unsatisfactory witness. Mr Fernandez's lack of candour before the Board should be taken into account;

(iv) This was Mr Fernandez's second appearance before the Board and his "antecedents" ought to be taken into account.

351. Mr Fernandez's submissions were to the following effect:

(a) The Board retained a full discretion as to which sanctions to impose under s 1292;

(b) The appropriate principles which should guide the Board were set out in the Board's decision in *McVeigh*, in particular, the discretion should be guided by the need to protect the public;

(c) Here, it was inappropriate to order cancellation because special circumstances existed, namely the absence of any conscious personal dishonesty;

(d) There were two aspects to protection of the public: the public interest in ensuring that the individual concerned follows the appropriate course of action in future and the public interest in ensuring that the

can be sure or as reasonably sure as possible that those trusted with the task of performing the role of liquidators can be properly trusted with that task. The Board must consider how a particular sanction addresses both aspects of the public interest;

(e) Further, on the material before the Board, the Board could be reasonably satisfied that it is likely that at the end of any period of suspension, and subject to compliance with undertakings being offered, Mr Fernandez would not be such a danger to the public that he should not be allowed to resume practice;

(f) The conduct did not involve the highest level of seriousness:

(i) There were essentially only two aspects to the conduct: the failure to disclose (which could be described as one ongoing course of conduct) and the failure to deliver up the property;

(ii) The period over which the conduct extended was four months;

(iii) Only one external administration was involved;

(iv) Mr Fernandez did not seek to profit from his conduct;

(v) There is no evidence that anyone was misled by his conduct.

(g) The sanctions should be appropriate to the conduct involved and sanctions should not be ordered which are more than necessary to effect the objects of the Corporations Act, to ensure the protection of the public and deterrence of other liquidators;

(h) Mr Fernandez was prepared to offer undertakings to address the key aspects of the Board's findings (see Schedule B);

(i) It was not appropriate for Mr Fernandez's registration to be cancelled having regard to the absence of dishonesty and the fact that the Board could reasonably be satisfied that he is or will after a period of suspension be fit and proper to resume practice, having regard to the statements filed on his behalf and the nature of those statements (which are overwhelmingly positive and show that Mr Fernandez is competent and well regarded) and the undertakings offered;

(j) If the Board considered that a period of suspension was warranted, Mr Fernandez submitted that a period of 90 days was appropriate;

(k) The findings concerning Mr Fernandez's lack of candour were not sufficiently significant to justify cancellation;

(l) Any costs ordered to be paid by Mr Fernandez could be taken into account in determining the appropriate sanctions;

(m) The Board ought to adopt a consistent approach in relation to sanctions.

(e) What, if any, sanctions should be imposed.

352. The function being performed by the Board in exercising powers under s 1292 was described by the Full Court of the Federal Court in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 233 ALR 37 at page 47 as follows:

> "The purpose or object of the inquiry undertaken by the board, in exercising the power conferred by s 1292(2), is not the ascertainment or enforcement of any legal right, but the determination whether, in the view of the board, taking into account past failures of duties, a defeasible right should continue into the future. No punishment is imposed by reason of any conclusion that duties or functions have not been carried out or performed adequately and properly. Rather, upon being satisfied of past failures of duty, the board is empowered to deal with the continued existence of a statutory right. …. The question of the adequacy and propriety of the carrying out or performance is to be judged by the board by making an evaluative or subjective determination. Having made that evaluative or subjective determination, the board will consider whether the rights of the registered liquidator as to the future are to be changed by the exercise of the power under s 1292(2) in the light of all the considerations before it that are considered relevant."

353. We accept, as appears to be common ground, that the principle which guides the Board in exercising powers is protection of the public and that this involves two aspects: first, protection of the public from the actions of a person found not to be a fit and proper person and secondly, protection of the public by encouraging other liquidators to adhere to proper standards (see the decision of this Board in *ASIC v McVeigh* at paragraph [12] and cf *Queensland Law Society Incorporated v Carberry* [2000] QCA 450 at [37]*ff*).

354. We agree with ASIC's submission that, in the circumstances of the present case, the only sanctions which could be contemplated are cancellation or suspension for a significant period.

355. We do not find it necessary to consider whether there is a rule of the type suggested in *Carberry*, by Moynihan SJA and Atkinson J namely:

> "Once it has been determined that a solicitor is unfit for practice, a suspension, even coupled with an order to satisfactorily complete a practice management course, could only apply in exceptional circumstances".

356. We are not sure that a rule can be stated in such unambiguous terms, (see the High Court decisions which were cited in support of the proposition). We accept, of course, that once a person is found not to be a fit and proper person to remain registered as a liquidator, cancellation may be seen as a logical consequence. However, it is clear that the discretion under s 1292 is not constrained, in terms, and we believe it is better to avoid superimposing any requirement for exceptional circumstances as suggested in *Carberry*.

357. However, we accept that where a finding is made that a person is not a fit and proper person, there needs to be some reason why suspension, rather than cancellation, would be the appropriate order. As Reynolds JA said in *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 at 76:

> "An order for suspension must be based upon a view that at the termination of the period of suspension the practitioner will no longer be unfit to practice because, subject to any limitation imposed on the issue of a practising certificate, his name will then be on the roll of solicitors and he may resume his practice."

358. We accept that Mr Fernandez's conduct did not involve the highest level of seriousness (such as dishonesty or misappropriation of property). We accept that there was no allegation or finding that Mr Fernandez engaged in conscious dishonesty. However, it does not follow that cancellation is inappropriate. In our view, an order for cancellation is the appropriate order in this case because Mr Fernandez's failures were serious, we could not conclude that Mr Fernandez would be fit after a period of suspension and Mr Fernandez's conduct, his explanations and the prior appearance before the Board were not conducive to drawing such a conclusion

359. The full import of Mr Fernandez's conduct is not conveyed by suggesting that it really only involved two matters over a short period (ie non-disclosure and retention of receipt of money). In our view, Mr Fernandez's conduct involved a number of different and serious failures including the following:

(a) His failure to disclose the payment to creditors in the first DIRRI. This involved a failure to act in accordance with professional standards which required him to be and to be seen to be independent. This failure was exacerbated by the non-disclosure in his third DIRRI, after concerns about independence had been specifically drawn to his attention by ASIC and when he should have had a heightened awareness of his obligations;

(b) His failure to disclose to the Receivers that he held the property when he knew or suspected that the property was charged to the secured creditors and that control thereof was a matter for the Receivers. This involved a failure of a different kind, namely, a failure to perform obligations stemming from the very nature and role of the office performed by an administrator or in accordance

with commonsense, professional norms and fair dealing, which required him to disclose the existence of property to its true owners or controllers (or those whom he knew and suspected to be the true owners or controllers);

(c) His failure to disclose that he held the property, in his letter dated 24 November to the Replacement Administrators. This involved a failure similar to that in (b) above, but it was an entirely separate act involving its own particular circumstances, ie, failing to refer to the property when responding to a specific request about whether he held any company property. It was unacceptable conduct in its own right and, as indicated above, we consider that this was a serious failure;

(d) His failure to deliver the property to the Receivers as from 9 September, when he really knew all that he needed to know to conclude that he was obliged to account for the funds to the Receivers forthwith – or, at the very least, that there was an issue crying out for verification. Again, this involved a similar failure to (b) but it also involved a separate and serious breach: retaining property which he knew or ought to have known belonged to someone else.

360. Assuming, as we do, that Mr Fernandez acted honestly, this conduct gives rise to a very significant concern about Mr Fernandez's judgment and ability.

361. We must also consider Mr Fernandez's conduct as a whole. Notwithstanding the knowledge he had as from 9 September, he held onto the property until it was discovered by a third party and proceedings were taken against him to recover the property. Prior to discovery, he did not disclose the fact that he held the property when required to disclose that fact on number of separate occasions, and in particular, when the Replacement Administrators expressly asked him whether he held any property.

362. We have found that Mr Fernandez failed to perform adequately and properly the functions of a liquidator, that Mr Fernandez lacks necessary judgment, insight, expertise and ability and that he has a troubling disregard or ignorance of some basic precepts of insolvency law. These findings have been made in relation to a practitioner with over 30 years experience as an accountant and over 20 years experience as a liquidator.

363. The nature of Mr Fernandez's responses to the complaints against him are relevant. He has not fully accepted or understood his failings. He did not repay the funds until ordered to do so and has not adduced any legal advice supporting this attitude. His asserted belief that he had a lien was unsupported by any legal advice. The nature of his evidence in the witness box demonstrated that he did not fully accept or understand his failings.

364. It is appropriate to take into account Mr Fernandez's previous appearance before the Board. We think that there are two particularly significant matters which emerged from the 2005 Hearing:

(a) The Board found that Mr Fernandez's failures were not accidental, inadvertent or by way of oversight, but a pattern of continuous failure to perform straightforward statutory obligations;

(b) Mr Fernandez accepted that the running of a sole practice was "beyond his capacity". The Board gave credit to Mr Fernandez for coming to this realisation and appeared to base its orders on Mr Fernandez's plans to cease taking sole appointments (albeit without imposing that as an indefinite requirement).

365. As to the first matter, the Board's 2005 findings suggested a problem which is not dissimilar to that revealed in the present application, namely a lack of insight and judgment – and having an ignorance or disregard for basic precepts of insolvency law.

366. At the 2005 Hearing, Mr Fernandez's counsel submitted: "whatever leniency you feel this case might warrant would certainly not be misplaced. Mr Fernandez will not risk his reputation again. The public will suffer not harm again…" Yet after a period of suspension and being subjected to undertakings, Mr Fernandez is back before the Board again. Whilst the circumstances are different, this background militates against any view that Mr Fernandez will be fit to practice after a further period of suspension.

367. As to the second matter, Mr Fernandez acceptance in 2005 that running a sole practice was beyond his capacity gives us no comfort for thinking that he will be a fit and proper person to be registered as a liquidator after some further period of suspension and education.

368. Ms Folie submitted that we could be reasonably satisfied that at the end of a period of suspension, Mr Fernandez would likely be fit to resume practice. She submitted that the test as to the level of satisfaction was slightly lower than that required in some of the solicitors' cases (namely, a requirement that the tribunal "be confident" that the respondent would be fit and proper).

369. We are not sure that the cases contemplate such fine distinctions and, in any event, we consider that the satisfaction should be clear. A person who is not fit and proper should not be practising as a registered liquidator. If the Board concludes that a person is not fit and proper, that person should not resume practice unless there is some real basis for thinking that the person would be fit and proper. In making a difficult judgment about such a future prognosis, the tribunal should adopt a clear test which minimises the potential for further risk to the public. In our view, the Board should not contemplate a respondent continuing to practice unless it could be confident that he would be fit and proper at the time.

370. Ms Folie relied on two key matters in submitting that the Board could be reasonably satisfied that Mr Fernandez would likely be fit to resume practice, after a period of suspension (which was proposed to be three months):

(a) The evidence given by Messrs Christodoulou, Leggo, Lambis and Carew, which was said to be overwhelmingly positive;

(b) The undertakings proffered (see Schedule B).

371. We are not reasonably satisfied, or confident, by reason of these matters, (or anything else) that Mr Fernandez would likely be fit and proper after the contemplated period of suspension.

372. We have given credit to the evidence of Messrs Christodoulou, Leggo, Lambis and Carew. Each of those persons were firmly of the view that Mr Fernandez had performed in a proper and competent manner in their dealings with him.

373. However, in our view, the evidence was limited. Each of Messrs Leggo, Christodoulou and Carew have only dealt with Mr Fernandez as a client, and only in relation to one matter, although, in the case of Mr Christodoulou, the dealings have extended over seven years. Mr Lambis has had a longer and more varied association with Mr Fernandez but the association was still from the perspective of a client, although Mr Lambis appears to have acted as an intermediary in contacting Mr Fernandez on behalf of his own clients. Without in any way casting any aspersions on the evidence so far as it goes, the perspective of a client is likely to be limited. None of the witnesses asserted that he was expert in the functions and duties of a liquidator. Moreover, a client will not have direct personal knowledge of much of the work carried out by a liquidator and a client may be satisfied with the performance of a liquidator in terms of the results achieved, without being aware of any issue concerning the performance by the liquidator of his duties and functions.

374. It may be assumed that Mr Fernandez has had extensive dealings with other liquidators over recent years and that he would have had repeated dealings with some liquidators. It may be assumed that he has had dealings with some highly experienced and well respected members of the profession over the years.

375. No evidence was led from any such liquidator.

376. Further, no statement was adduced from any partner of the firm which Mr Fernandez was to join in 2005 nor was a statement adduced from the partner with whom Mr Fernandez took joint appointments in accordance with his 2005 undertakings. There was evidence before us that Mr Fernandez was appointed as administrator and liquidator of Atco jointly with another liquidator but there was no statement from that person.

377. We have not referred to these matters to suggest that we should draw any negative inference from the absence of additional evidence, but simply to explain why we consider that the evidence which was adduced was limited.

378. Ultimately, we do not consider that the evidence adduced was sufficiently persuasive in relation to the purpose for which it was tendered, namely to give the Board confidence that Mr Fernandez would be a fit and proper person after a period of suspension. The evidence was not sufficient to persuade us that Mr Fernandez's conduct in this matter was an aberration or momentary lapse or that the issues are so limited and specific that Mr Fernandez will possess fitness after a period of suspension, education and peer review.

379. The undertakings proffered by Mr Fernandez contemplated that he would undertake a course of education within a three month period (or such further period as ASIC may agree) dealing with issues of independence, reporting and dealings with property and a peer review process for Mr Fernandez's first five administrations after his suspension.

380. In our view, such undertakings would not be sufficient to deal with the issues as we perceive them. We are concerned about Mr Fernandez's lack of insight, judgment and ability notwithstanding his extensive experience in the industry. Our concerns increased when the evidence concerning the 2005 Hearing was adduced. We are concerned that the conduct the subject of that hearing involved serious failings. We are concerned by the fact that Mr Fernandez accepted that he did not have the capacity to operate as a sole liquidator. And we are concerned that notwithstanding his avowed intention not to "risk his reputation again", he engaged in the conduct the subject of these proceedings. We are not satisfied that a course of education of the type proposed would remedy Mr Fernandez's failings.

381. We are not confident (or reasonably satisfied) in these circumstances that Mr Fernandez will be fit and proper after a period of suspension notwithstanding the positive but limited evidence provided in the witness statements adduced and the proposed undertakings proffered.

382. As to Ms Folie's submission that the Board should adopt a consistent approach in relation to sanctions, we accept, as a broad proposition, that it is desirable that the Board adopts a consistent approach to sanctions. Nevertheless, circumstances vary significantly from cases to case and in our view, there is nothing to suggest that cancellation in the present case would be inconsistent with sanctions imposed by the Board in other cases. Whilst the present case may not have involved conduct of the most serious kind, (where cancellation is often a foregone conclusion) there are a number of circumstances in the present case which, nevertheless, justify cancellation:

    (a) We have found that Mr Fernandez is not a fit and proper person to remain registered. This is a significant finding and is usually a more

serious finding than a finding of failure to adequately or properly perform duties;

(b) Whilst Mr Fernandez's conduct did not involve dishonesty, it was unacceptable and inexplicable in a number of respects, specifically, his failure to inform the Replacement Administrators that he held the property when he was expressly asked whether he held such property, his failure to inform the Receivers of the property as from 9 September notwithstanding his knowledge at that date, and his failure without rational explanation to transfer the property when its existence was discovered by the Receivers and its return was demanded;

(c) We have found that Mr Fernandez has not fully accepted or understood his failures;

(d) We have found that Mr Fernandez evidence in cross-examination confirmed that there is a serious problem underlying his behaviour;

(e) Mr Fernandez has been brought to the Board on a previous occasion and serious findings were made against him on that occasion;

(f) Mr Fernandez accepted on that occasion that he did not have the capacity to act as a sole liquidator;

(g) We are not satisfied Mr Fernandez will be fit and proper after a period of suspension.

383. Accordingly, we do not consider that there is any reason based upon consistency of approach which would make cancellation inappropriate.

384. In all the circumstances, we believe that the appropriate order in the present case is cancellation of Mr Fernandez's registration. We note that ASIC's policy concerning registration may make it difficult for Mr Fernandez to reapply for registration in the short term if we cancel his registration (see for example Regulatory Guide 186.24). But that cannot be a reason why we should refuse to cancel, in circumstances where we cannot be confident that Mr Fernandez's failings will be resolved after period of suspension and a course of education.

385. We note the approach endorsed by Dixon CJ in an analogous area in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 286 where his Honour said: "I may add, too, that I think that it is open to the Supreme Court to suspend a barrister from practice … But, even so, it is probably a better course in most cases where room exists for the belief that time may give the barrister a title to resume his place at the Bar to allow him to re-apply at a subsequent time and offer positive evidence of the grounds upon which he then claims to be re-admitted."

386. We note that, in responding to Mr Fernandez's proffered undertakings, ASIC proposed a different set of undertakings which, it submitted, would be necessary if the Board were minded to suspend rather than cancel registration (see Appendix C). These were very much more extensive than Mr Fernandez's proposed undertakings. Whilst it may well be said that the more extensive the requirements imposed upon Mr Fernandez, the more likely he would be satisfy a fit and proper test, we agree with ASIC's submissions that the extensive nature of the proposed undertakings tended to confirm that cancellation was the appropriate order.

Decision

387. For the reasons set out above, we have decided to exercise our power under s 1292 of the Act to cancel the registration of Avitus Thomas Fernandez as a liquidator.

Date of effect of order

388. Normally, an order would come into effect at the end of the day on which a notice of the decision is given to a respondent under s 1296(1)(a), see s 1297(1)(a). However, it is usual, in the case of liquidators, to delay the effect of orders to permit liquidators to make arrangements for the hand over of matters.

389. ASIC submitted that 30 days was an appropriate period to permit this to be done. Mr Fernandez submitted that 90 days was appropriate particularly as he has been the liquidator of Atco for eight years and where that matter was ongoing.

390. In our view, it is not appropriate to allow more than 30 days. In our view, this will provide quite sufficient time for the hand over of matters. Nothing in our orders will prevent Mr Fernandez from continuing to provide assistance to the new liquidator of Atco after the cancellation of his registration comes into effect.

Notice

391. Within fourteen days of the date hereof, formal notice of this Decision will be given to Mr Fernandez under s 1296(1)(a) of the Act, a copy of that notice will be lodged with ASIC under s 1296(1)(b) and the Board will cause to be published in the Gazette a notice in writing setting out the Decision.

Orders

392. We order:

(a) That the registration of Avitus Thomas Fernandez as a liquidator be cancelled;

(b) That this order will come into effect 30 days after the date hereof.

Howard Insall SC
Panel Chairperson

29 October 2013

SCHEDULE A

List of Wilmott Forest subsidiaries

(a) Willmott Forest Products Pty Ltd (ACN 103 019 094) (Ex 1 Tab 10; page 401);

(b) Willmott Forests Investment Management Pty Ltd (ACN 098 718 837) (Ex 1 Tab 10, page 415);

(c) Willmott Forests Nominees Pty Ltd (ACN 085 588 772) (Ex 1 Tab 10, page 427);

(d) Bioenergy Australia Pty Ltd (ACN 096 335 901) (Ex 1 Tab 10, page 439);

(e) Bioforest Limited (ACN 096 335 876) (Ex 1 Tab 10, page 465);

(f) Willmott Energy Pty Ltd (ACN 130 251 759 (Ex 1 Tab 10, page 481);

(g) Willmott Notes Pty Ltd (ACN 134 963 036) (Ex 1 Tab 10, page 491);

(h) Willmott Subscriber Pty Ltd (ACN 134 963 027) (Ex 1 Tab 10, page 499); and

(i) Willmott Finance Pty Ltd (ACN 081 274 811) (Ex 1 Tab 10, page 507).

SCHEDULE B

Undertakings

38. The respondent offers to give the following undertakings:

(a) That within 90 days after the date this order takes effect, or such further period as ASIC shall agree in writing, Mr Fernandez must, in addition to the normal requirements for continuing professional development, undertake and complete education (in forms to be agreed in advance by ASIC – which could include courses, lectures, seminars, workshops, mentoring programs) covering the areas of independence, reporting and dealings with property, on the completion of which Mr Fernandez must procure and lodge with ASIC a certificate (given by a person or entity agreed in advance by ASIC) or certificates of satisfactory completion.

(b) That, until Mr Fernandez has complied fully with his undertaking given under (a) above, Mr Fernandez will not accept any new appointment to any office required under the Corporations Act to be filled by a registered liquidator, until he has so complied.

(c) With effect from the later of the expiry of any period of suspension and the date on which Mr Fernandez has fully complied with his undertaking given under (a) above, for each of his first five voluntary administrations to which he is appointed, he will (at his expense) furnish to ASIC within two months after the second meeting of creditors (under s 439A of the Corporations Act) a written report prepared by a registered liquidator (approved in advance for the purpose by ASIC) reporting on the adequacy of compliance during that voluntary administration with all relevant requirements and professional standards relating to independence, reporting and dealings with property.

SCHEDULE C

Proposed Orders Regarding Suspension

1. The registration of Avitus Thomas Fernandez as a liquidator be suspended for a period of two 2 years commencing on the day which is 30 days from the date this order takes effect.

2. Avitus Thomas Fernandez give the following undertakings in writing to the CALDB within seven (7) days after this order takes effect:

   (a) Within 2 years after the date this order takes effect, or such further period as ASIC may agree in writing, in addition to the usual yearly requirements for continuing professional development of the ICAA, Mr Fernandez must complete, at his expense and in forms to be agreed in advance by ASIC (which could include courses, lectures, seminars, workshops, mentoring programs) an additional 30 hours of professional development training covering the areas of independence, reporting (to creditors, ASIC and other practitioners), dealings with property and professional ethics.

   (b) On completion of any professional development training undertaken by Mr Fernandez in accordance with paragraph 2(a), Mr Fernandez shall procure and lodge with ASIC a certificate or certificates of satisfactory completion (given by a person or entity agreed in advance by ASIC).

   (c) Until Mr Fernandez has complied fully with his undertakings given under (a) and (b) above, Mr Fernandez will not accept any new appointment to any office required under the *Corporations Act* to be filled by a registered liquidator.

   (d) With effect from the later of the expiry of the period of suspension set out at paragraph 1 above and the date on which Mr Fernandez has fully complied with his undertakings given under paragraphs 2(a) and (b) above:

      (i) Mr Fernandez will procure, at his expense, an independent registered liquidator, to be approved by ASIC in advance (at ASIC's absolute discretion), to provide written reports to ASIC on the adequacy of Mr Fernandez's compliance, during the relevant appointment, with all relevant professional standards and duties (particularly, although not exclusively, as they relate to; reporting to creditors, ASIC and other practitioners; dealing with property; and professional ethics).

      (ii) The undertaking set out at paragraph 2(d)(i) above will apply to Mr Fernandez's first ten appointments which require registration as a liquidator, where:

A. at least 5 of the 10 appointments are appointments in respect of which the independent registered liquidator (or liquidators) appointed in accordance with this paragraph consider that the fees or remuneration to be derived by Mr Fernandez, or any firm or partner associated with him, are expected to be more than $50,000;

B. at least 3 of the 10 appointments are voluntary administrations which do not result in a deed of company arrangement being entered into by creditors;

C. at least 2 of the 10 appointments are voluntary administrations which do result in a deed of company arrangement being entered into by creditors; and

D. at least 2 of 10 appointments are creditors' voluntary liquidations.

(iii) With respect to each appointment, the relevant independent registered liquidator will provide the written reports to ASIC referred to at paragraph 2(d)(i) above:

A. two months after the second meeting of creditors (under s 439A of the Corporations Act) (for the appointment as a voluntary administrator under Part 5.3A);

B. two months after the earlier of the date of his first report to creditors and the date six months after his appointment (for an appointment as a liquidator); and

C. within 6 months of his appointment for any other appointments,

and thereafter quarterly for the life of the appointment, with a final report at the end of each appointment;

(iv) Any independent registered liquidator procured by Mr Fernandez pursuant to paragraph 2(d)(i) must be independent with respect to both the relevant administration(s), and with respect to Mr Fernandez.

(e) Within seven (7) days of the date this order takes effect, Mr Fernandez will provide to ASIC all of the books and records of Mr Fernandez's existing appointment, in order to assist ASIC in procuring replacement liquidators to act with respect to those two appointments.

(f) Mr Fernandez will do all things requested of him by ASIC or the replacement liquidators, at his own cost, to facilitate the appointment of the replacement liquidators and the conduct of those liquidations.