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: 04/NSW13

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

WILLIAM JAMES HAMILTON
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.

3 April 2014

Panel:

Maria McCrossin (Panel Chairperson)

Bruce Gleeson

John Keeves

Companies Auditors and Liquidators Disciplinary Board
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DECISION AND REASONS

A. Introduction and summary of Contentions

1. This is an Application under s1292 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 12 June 2013. By the Application, ASIC asks the Board to suspend the registration of the Respondent, William James Hamilton ("Mr Hamilton") (a registered liquidator and official liquidator).

2. The ASIC contentions alleging that Mr Hamilton failed to carry out or perform adequately and properly the duties of a liquidator under s1292(2)(d) group Mr Hamilton's alleged acts and omissions into two areas.

   (a) First, the "Deed of Settlement and Release Issue" (Contentions 1, 2, 3 & 4):

      (i) Contention 1 alleges that Mr Hamilton entered into a Deed of Settlement and Release with Beauty World International Pty Ltd ACN 114816303 ("BWI"), Ms Manel Issa ("Ms Issa") and Mr Ali Hammoud ("Mr Hammoud") on 14 January 2009 ("Deed of Settlement and Release") without properly assessing which remedies were in the best interests of creditors; and/or ascertaining the true indebtedness of BWI and/or the directors of ERB International Pty Limited ACN 088005538 ("ERB"); and/or investigating and assessing the financial capacity of BWI or the Directors;

      (ii) Contentions 2 and 3 allege that Mr Hamilton failed to seek the approval of the Court or of a resolution of creditors as required by the Act before entering the Deed of Settlement and Release which compromised certain debts owing to ERB and imposed certain obligations which may not have been discharged within 3 months of entering into the agreement;

      (iii) Contention 4 alleges that Mr Hamilton failed to seek legal advice in relation to the entering into and settlement of the terms of the Deed of Settlement and Release.

   (b) The second group of Contentions (5, 6, 7, 8, 9 and 11) are referred to in the SOFAC as the "General Conduct Issues". These allege that:

      (i) the 23 September 2008 Notice and Report to Creditors ("23 September 2008 Notice and Report") was not clear, concise and succinct, contained excessive and irrelevant information, lacked sufficient concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of the liquidator's remuneration, and did not set out an adequate description of the major tasks performed or likely to be performed or

the costs of the major tasks in circumstances where the Liquidators were seeking creditor approval for both retrospective and prospective remuneration (Contentions 5&6);

(ii) the 30 April 2009 Report to Creditors ("30 April 2009 Report") regarding the conduct of the winding up of ERB, failed to adequately account to creditors regarding the conduct of the winding up, was not clear, concise or succinct, contained excessive and irrelevant information, lacked sufficient concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of the liquidator's remuneration, and did not set out an adequate description of the major tasks performed or likely to be performed or the costs of the major tasks in circumstances where the Liquidators were seeking creditor approval for both retrospective and prospective remuneration (Contentions 7, 8, 9);

(iii) the Liquidators failed to lodge a Section 533 report with ASIC in circumstances where possible breaches of the Act by the Directors had been identified and they had formed the view that ERB would be unable to pay its unsecured creditors more than 50c in the dollar (Contention 11).

3. In essence, Mr Hamilton responds to these allegations in the following way:

(a) the contentions relate to conduct of the liquidation of ERB in respect of which he was joint liquidator. The other joint liquidator was his then business partner Mr Pino Fiorentino ("Mr Fiorentino") who had the day-to-day conduct and control of the liquidation of ERB;

(b) it was the usual practice in their partnership to accept all insolvency appointments jointly and one of either Mr Hamilton or Mr Fiorentino would have the day-to-day conduct of the insolvency administration;

(c) that where Mr Fiorentino as liquidator had day-to-day conduct and control of the liquidation of ERB, Hamilton should not be held liable for any failures to carry out or perform adequately and properly the duties of a liquidator as required by s1292 of the Act, in the liquidation of ERB.

4. The matter was heard over three days commencing 5 November 2013.

5. Mr. Russell of counsel appeared for ASIC and Mr Hamilton represented himself at the hearing although on the third day of the hearing Mr Hamilton sought leave to file further final written submissions on the legal issues which he retained solicitors Colin Biggers and Paisley to prepare. The Board received and considered these submissions as well as a further submission in response from ASIC, before making this decision.

B. Outline of facts

6. The relevant background facts of this matter may be summarised as follows:

(a) Mr Hamilton has been an Official Liquidator since approximately October 1962 and a Registered Liquidator since 20 December 1982. Mr Hamilton continues to be registered as a Liquidator under the Corporations Act and is a member of the Institute of Chartered Accountants in Australia ("ICAA") and the Insolvency Practitioners Association of Australia ("IPA") (now known as the Australian Restructuring Insolvency & Turnaround Association ("ARITA")).

(b) Between June 1994 to 26 November 2010 Mr Hamilton was a joint partner in the insolvency firm "Hamiltons Chartered Accountants, Business Advisors" ("Hamiltons"). The other partner was Mr Fiorentino.

(c) ERB owned and operated a chain of beauty salons known as "Ella Rouge Beauty." Its directors were Mr Hammoud and his wife, Ms Issa, who were also equal and joint shareholders.

(d) On 28 March 2008, ERB (under its then name of Ella Rouge Beauty Pty Ltd), as vendor, and BWI as Trustee of the Shanel Family Trust, as purchaser, executed a Business Sale Agreement ("Sale Agreement"), pursuant to which ERB sold and transferred its business to BWI for no cash consideration. It was not in contention between the parties that the Sale Agreement appeared to have been "back dated" to 28 February 2008 in the sense that there are other executed copies of the Sale Agreement dated 28 February 2008. In their reports the Liquidators took the effective date of the Sale Agreement to be 28 February 2008.

(e) On 2 April 2008, ERB was placed into a creditors' voluntary liquidation. Mr Hamilton and Mr Fiorentino ("Liquidators") were appointed joint liquidators by its shareholders, Mr Hammoud and Ms Issa ("the Directors").

(f) As at 2 April 2008, the directors and equal shareholders of BWI were Mr Hammoud and Ms Issa. On 15 December 2008, BWI resigned as Trustee of the Shanel Family Trust.

(g) The Shanel Family Trust was established by a deed dated 29 November 2006. The specified beneficiary of the Shanel Family Trust was Ms Issa and the Trustee was BWI.

(h) On 15 December 2008 Ella Rouge Beauty Pty Limited ACN 130 458 365 ("Ella Rouge Beauty") was appointed the new Trustee of the Shanel Family Trust. The directors and equal shareholders of Ella Rouge Beauty were Mr. Hammoud and Ms. Issa.

7. In broad terms the Sale Agreement provided that ERB transferred all of its assets and liabilities to BWI, and gave to BWI an effective assignment of any lease (subject to the Lessor's consent), for a purchase price representing the aggregate of the total values of the component parts of the business. The values of the component parts of the business in Schedule 8 listed total assets of $4,057,098.75 and total liabilities of $4,057,100.75. That is, there was no cash consideration.

8. On 2 April 2008, the Liquidators sent a Notice to Creditors advising of a meeting of creditors to be held on 16 April 2008 ("2 April 2008 Notice").

9. A Form 509 Summary of Affairs of a Company as at 2 April 2008 ("RATA") accompanied the 2 April 2008 Notice and listed the following as creditors of ERB:

   (a) Directors $2,152,199.64;

   (b) Office of State Revenue ("OSR") $464,246.45;

   (c) Australian Taxation Office ("ATO") $56,294.85.

10. On 16 April 2008, the first meeting of creditors of ERB was held during which the creditors resolved, *inter alia*, that the Liquidators appointed by the members remain as Liquidators.

11. On 24 April 2008 Mr Fiorentino received draft legal advice on the Sale Agreement ("24 April 2008 Draft Legal Advice") from lawyer, Mr James Hamilton, Mr Hamilton's son, of RBHM Commercial Lawyers ("James Hamilton") which advised, *inter alia*, that:

   (a) by the Sale Agreement, BWI, a related party, purported to take over the obligations to all creditors of ERB, with the value of the assets matching the value of the creditor obligations meaning no cash price was paid;

   (b) the Sale Agreement was most likely an uncommercial transaction as defined by s588FB of the Act ("Uncommercial Transaction");

   (c) in the event of an Uncommercial Transaction, the remedies available to the Liquidators included:

      (i) enforcing the agreement and claiming a right of indemnity

      (ii) setting aside the Sale Agreement and claiming:

         (I) the payment of money; or

         (II) avoiding the Sale Agreement; or

         (III) varying the terms of the Sale Agreement;

(d) all the old pre-sale creditors of ERB would be entitled to prove in the liquidation; and

(e) there was a possible claim for an indemnity under the Sale Agreement.

12. On 10 September 2008, James Hamilton provided Mr Fiorentino with comments on the draft report to creditors prepared by Mr Fiorentino. James Hamilton's comments included, *inter alia*:

(a) his view that a cost benefit analysis of the funding costs and potential returns in respect of the claims would be useful;

(b) considering the work that had been done he found it quite surprising that the value of the business had not been ascertained by now; and

(c) the business sale investigations appeared a little scant given the time that had elapsed and the remuneration incurred.

13. Further, in the same draft report, the Liquidators had identified, *inter alia*:

(a) the Directors were debtors of ERB in the sum of $71,010;

(b) BWI was a debtor of ERB in the sum of $146,693.14;

(c) they had realised $50,000 from BWI as indemnity payments under the Sale Agreement;

(d) the company's bank account was an ANZ account number 012 395 3539 09367 ("ERB ANZ Pre-liquidation bank account"); and

(e) Mr Hammoud had deposited the sum of $300,000 into ERB's ANZ Pre-liquidation bank account on 25 February 2008 as a director's loan.

14. On 11 September 2008, James Hamilton advised Mr Fiorentino that in relation to the Sale Agreement discussions Mr Fiorentino was holding that morning with BWI, any deal reached with BWI to settle the indemnity claim would require:

(a) creditor or court approval; and

(b) had to be documented in a Deed.

15. On 23 September 2008, Mr Fiorentino sent a Notice to Creditors advising of a meeting of creditors to be held on 8 October 2008 ("23 September 2008 Notice") for the purpose of considering the attached Report of the Liquidators) and:

(a) to consider whether creditors wished to indemnify the Liquidators and/or provide a fund to enable the Liquidators to carry out public examinations under s596A and s596B of the Act and, if necessary (depending on the outcome) to take legal action;

(i) concerning monies owed to ERB by BWI under the Sale Agreement;

(ii) to recover the amount paid to GuildSuper of $125,000 and interest or earnings thereon since the payment of that money by ERB in October 2003 (Resolution 1);

(b) if thought fit resolve to fix the remuneration of the Liquidators of ERB in the sum of $198,561.91 excluding GST for the period 2 April 2008 to 21 September 2008 (Resolution 2); and

(c) if thought fit resolve that the remuneration of the Liquidators of ERB be fixed on a time basis based upon Hamiltons Scale of Fees to be paid as and when incurred at the discretion of the Liquidators in the first instance not to exceed the sum of $100,000 without further approval by a meeting of creditors (Resolution 3).

16. A Report to Creditors accompanied the 23 September 2008 Notice ("23 September 2008 Report") in which the Liquidators advised, *inter alia*:

(a) Mr Hammoud and Ms Issa were debtors of ERB in the amount of $97,306.53;

(b) BWI was a debtor of ERB in the amount of $146,693.14;

(c) pursuant to the Sale Agreement, ERB had a right of indemnity against BWI for $964,246.45 ("Right of Indemnity");

(d) they had realised $50,000 from BWI as indemnity payments under the Sale Agreement;

(e) Mr Hammoud had deposited the sum of $300,000 into ERB's ANZ Pre-liquidation bank account on 25 February 2008 as a director's loan;

(f) the Sale Agreement could be set aside if it was uncommercial which would depend, in part, on whether a fair value had been paid for the assets;

(g) they did not have sufficient funds to undertake a business valuation;

(h) even if the Sale Agreement could be set aside, it remained an issue, as to whether commercially, the Liquidators might better serve creditors by seeking to enforce the indemnity by leaving the agreement on foot;

(i) they had been in discussions with the purchaser about what it intended to do to meet its obligations to indemnify ERB under the Sale Agreement; and

(j) provided the Sale Agreement remained on foot, they estimated a return to creditors of 75 cents in the dollar.

17. As noted in paragraph 16(e), in the 23 September 2008 Report the Liquidators advised creditors that Mr Hammoud had deposited $300,000 of his own monies to ERB's ANZ Pre-Liquidation account on 25 February 2008. The Liquidators were not at the time aware of the ERB Westpac 1 account which Mr Hammoud had in fact transferred funds from into ERB's ANZ pre liquidation account. Because Mr Hammoud had not loaned the $300,000 to ERB, but merely transferred those funds from one ERB account to another, ASIC asserted that the Directors were debtors of ERB in the sum of $397,206.53, rather than the $97,306.53 originally assessed by the Liquidators. Mr Hamilton contested this assertion. The evidence supports the fact that Mr Hammoud did not lend $300,000 to the company on 25 February 2008 but that it was a transfer of funds from one ERB bank account to another.

18. On 26 September 2008 James Hamilton on Mr Fiorentino's instructions sent a Notice of Demand to Mr Steven Pateman ("Mr Pateman"), the solicitor for Mr Hammoud and Ms Issa, demanding payment of $97,206.53.

19. On 4 October 2008, Mr Bastas, the accountant for BWI, advised Mr Fiorentino, *inter alia,* that:

(a) he did not agree with the Liquidators' assessment of money owed by BWI; and

(b) the business was under revenue pressure and there were no funds to pay unexpected costs.

20. On or before 8 October 2008, Mr Hammoud and Ms Issa submitted proofs of debt dated 7 October 2008 to the Liquidators of ERB claiming amounts of $1,443,151.32 and $1,431,612.85 respectively, comprising employee entitlements and loans.

21. On 8 October 2008, a meeting of creditors of ERB was held, at which:

(a) the motion for Resolution 1 (for funding) did not carry;

(b) the motions for Resolution 2 and 3 (for remuneration) did carry.

22. In October 2008, Mr Fiorentino and Mr Hamilton discussed Mr Fiorentino's intention and proposed course of action to use anticipated recoveries to fund the public examinations and Court proceedings.

23. On 10 October 2008, Mr Pateman advised James Hamilton that the Directors (Ms Issa and Mr Hammoud) rejected any claims by the Liquidators that they were debtors of ERB.

24. On 2 December 2008, Mr Fiorentino advised Mr Pateman that unless he received cash flows and financial accounts of BWI by 10 December 2008, he would proceed with a court application to hold mandatory examinations. Also on this day, Mr Fiorentino informed James Hamilton that he expected to receive monies in the next week or so to fund public examinations and that there were "plenty of dates" in January.

25. On 16 December 2008, and by email of that date from James Hamilton to Mr Fiorentino, James Hamilton:

    (a) referred to a meeting between Mr Fiorentino and Mr Hammoud in September 2008 at which the indemnity issue was discussed;

    (b) stated that ERB's accountant had sent cash flows which he noted Mr Fiorentino did not necessarily accept;

    (c) advised that the various Westfield leases did not appear to ever have been assigned to BWI, and queried whether Mr Fiorentino needed to consider disclaiming them; and

    (d) sought instructions on what Mr Fiorentino wanted him to do on the indemnity issue given that the next step would be to sue BWI.

26. On 17 December 2008, Mr Pateman advised Mr Fiorentino by email;

    (a) that Mr Bastas was getting all the supporting documentation for the BWI projected balance sheet and projected P&L so that Mr Fiorentino could see how Mr Bastas came to the figures previously estimated; and

    (b) subject to that information, Mr Pateman would be instructed to negotiate a settlement of the purchase and release of parties in order to finalise all matters so far as Mr Hammoud was concerned.

27. On 17 December 2008, following the email referred to in paragraph 27, James Hamilton advised Mr Fiorentino to prepare a schedule of creditors and arrange a meeting.

28. On 19 December 2008, Mr Fiorentino advised Mr Pateman by email that:

    (a) the Right of Indemnity against BWI was $4,719,862.77;

    (b) he required the actual financial accounts and MYOB file of BWI to the current time to consider the present financial position of the indemnifier; and

(c) unless he received the information forthwith, he would proceed with a public examination of the Directors and the external and internal accountants.

29. On or shortly before 14 January 2009, the Liquidators had in their possession the following documents:

(a) BWI bank statement as at 31 December 2008 which was faxed to Hamiltons on 14 January 2009;

(b) letter from the OSR to BWI dated 10 December 2008;

(c) BWI Creditors Schedule for January 2009;

(d) BWI Aged Payables Summary as at 14 January 2009 with a print date of 14 January 2009;

(e) BWI Payroll Activity Summary Report for December 2008 quarter with a print date of 14 January 2009;

(f) Projected Balance Sheet of BWI recording negative net assets of $3,156,389 as at 30 June 2009; and

(g) Projected Profit and Loss Statement of BWI projecting a net loss of $3,156,399 for the year ended 30 June 2009.

30. No evidence was led that the Liquidators received the actual cashflows and financial accounts of BWI requested by Mr Fiorentino on 2 December 2008 and in his email to Mr Pateman of 19 December and there was no evidence that Mr Fiorentino had ever requested or enquired about the Directors' financial position.

31. On 14 January 2009, and with some apparent urgency that day the Liquidators entered into the Deed of Settlement and Release with BWI, and the Directors pursuant to which:

(a) BWI, Mr Hammoud and Ms Issa were released from all claims by ERB and the Liquidators;

(b) ERB received $60,000; and

(c) BWI and the Directors agreed to offer and provide all reasonable assistance as requested by the Liquidators or ERB to complete the administration, including Mr Hammoud agreeing to be informally examined by the Liquidators on specific matters and signing an accurate copy of the transcript of the examination.

32. The Deed of Settlement and Release recited, *inter alia*:

(a) the Liquidators' had formed the view that BWI did not pay sufficient consideration to ERB for the transfer of ERB's business pursuant to the Sale Agreement;

(b) the Liquidators had demanded that Mr Hammoud, Ms Issa and BWI produce financial records demonstrating the state of the business at all relevant times since the execution of the Sale Agreement; and

(c) that in response to that request, Mr Hammoud, Ms Issa and BWI had produced books and records of BWI and certain projected financial statements.

33. In summary the effect of the Deed of Settlement and Release was that ERB gave up its potential right of indemnity against BWI (quantified at $4,719,862.77 by Mr Fiorentino as well as its potential claims against the Directors for repayment of loans, in exchange for a payment of $60,000 and a commitment by the Directors and BWI to provide reasonable assistance as requested by the Liquidators.

C. The Witnesses

34. A statement from Mr Bastas was tendered by ASIC and statements from Mr Hamilton, Mr Pateman and Ms Marie Therese Doran were tendered by Mr Hamilton. Mr Hammoud was summonsed to give evidence in the proceedings and was cross examined by Mr Hamilton and Mr Hamilton and Mr Pateman were cross examined by ASIC's counsel Mr Russell.

D. Mr Hamilton as joint liquidator without day-to-day involvement in the liquidation – overview of issues and submissions

35. Mr Hamilton's appointment as liquidator was a joint appointment with his partner Mr Fiorentino. Mr Hamilton described the firm's practice with regard to joint appointments in his Section 19 examination and it was not in contention between the parties that Mr Fiorentino had the day to day conduct of the ERB liquidation.

36. ASIC's general submission, based on the Board's decision in *ASIC v Timothy Paul Heesh* (1 May 2000) (*"Heesh")* (affirmed on appeal in *Re Heesh and Companies Auditors and Liquidators Disciplinary Board* (2001) 37 ACSR at 8(e) (*"Re Heesh"*) was that, for the purposes of the execution of the function of the office of liquidator, a joint liquidator who does not have the main carriage of the matter still has to have an adequate and proper involvement in the liquidation.

37. We agree with this submission. The question for determination is what "adequate and proper" involvement entails, and while this will depend upon the precise facts and circumstances of each matter, *Re Heesh* provides useful guidelines for assessing the standard required.

38. ASIC drew a distinction between Mr Hamilton's duties as liquidator in relation to the Deed of Settlement and Release Issue the subject of Contentions 1-4 ("Deed of

Settlement and Release Issue") and the General Conduct Issues referred to in Contentions 5-9 and 11 ("General Conduct Issues"). In the "legal" submissions filed on behalf of Mr Hamilton by his lawyer following conclusion of the hearing, a similar distinction was drawn. It was submitted also for Mr Hamilton that whether to execute the Deed of Settlement and Release was a matter for the business judgement of the Liquidators and Mr Hamilton did what was required of him as the joint liquidator who did not have the day-to-day carriage of the ERB liquidation.

39. It is convenient to maintain the distinction in this decision as to the level of Mr Hamilton's involvement between the two groups of contentions.

40. In relation to the Deed of Settlement and Release Issue (Contentions 1-4), Mr Russell submitted that Mr Hamilton took an active role in the drafting and settlement of the Deed of Settlement and Release and so must principally be responsible for any failures that led to execution of that document. Mr Russell's alternative submission was that the relevant question in relation to Contentions 1-4 is whether Mr Hamilton met the standard of the second joint liquidator signing, that is to say, the joint liquidator who had not had principal responsibility for conducting the liquidation.

41. It was submitted on behalf of Mr Hamilton that the Board should regard what Mr Fiorentino and Mr Pateman said to Hamilton as if they were contained in a written memorandum from Mr Fiorentino to Mr Hamilton accompanying the draft Deed of Settlement and Release and that it is incorrect to assert that the adequate and proper performance of the duties of a liquidator requires the joint liquidator to go beyond this (i.e. beyond what was told to him by his joint liquidator Mr Fiorentino and Mr Pateman (who acted for BWI) and, in effect undertake the primary tasks himself.

42. Finally, in relation to Contentions 1-4 Mr Hamilton submitted that the facts in *Re Heesh* can be distinguished because Mr Hamilton did not agree to, and nor did he, do nothing.

43. By contrast, the General Conduct Issues set out in Contentions 5-9 and 11 each rely wholly upon the conduct or lack thereof, of Mr Fiorentino in his duties as the joint liquidator in respect of the matters the subject of those contentions, for the alleged failure of Mr Hamilton to adequately and properly discharge his duties as liquidator.

44. Mr Hamilton put forward two alternative responses to the General Conduct Issues. First, that in relation to the General Conduct Issues he was entitled to and did rely upon and act on the basis that Mr Fiorentino as liquidator:

    (a) was a registered liquidator for greater than twelve years and an official liquidator for almost twelve years;

    (b) had the day to day conduct and control of the liquidation of ERB;

    (c) prepared and issued the relevant reports; and

    (d) was obtaining advice and assistance from James Hamilton.

45. Second and in the alternative, Mr Hamilton asserted that, in relation to the General Conduct Issues:

(a) the information included in the 23 September 2008 Notice and Report are matters for real world judgements made by Mr Fiorentino at the time having regard to what was then known and commercial, time and other pressures under which Mr Fiorentino then operated; it is not to be judged with hindsight;

(b) viewed as a whole the 23 September 2008 Notice and Report prepared by Mr Fiorentino was done on a reasonable and rational basis;

(c) there has been no complaint by any stakeholder or any other creditor as to the 23 September 2008 Notice and Report or that they were unable to understand it; and

(d) the 23 September 2008 Notice and Report did not constitute conduct by Mr Fiorentino that breached the IPA Code of Professional Practice for Insolvency Practitioners issued by the IPA (effective from 21 May 2008) ("IPA Code"), the Code of Ethics for Professional Accountants issued by the Accounting Professional Ethical Standards Board ("APES"); or the Act.

46. In relation to the General Conduct Issues ASIC submitted that the decision in *Re Heesh* was directly on point because there is no distinction in substance between the facts in *Re Heesh* and the facts in this matter. The fact that in *Re Heesh* there was an arrangement or an agreement that the registered liquidator (acting as an administrator) do nothing was, in ASIC's submission, no different to the position in this matter where Mr Hamilton did nothing. Whether there was an agreement or arrangement to that effect is neither here nor there.

47. The issue before the AAT in *Re Heesh* was whether Mr Heesh was responsible, for the acts and omissions of his partner and co administrator, Mr McDonald when Mr Heesh had himself played no part in the administration, in circumstances where he was appointed jointly and severally on the express basis that Mr McDonald would carry out the administration. The Board found that he was so responsible. The AAT upheld the Board's decision.

48. In *Re Heesh* ASIC summarised its contentions as follows:

> *27. "Each of the positions of director, receiver and liquidator are offices. Each has responsibilities and functions. To discharge their obligations the office holders need to act."*
>
> *28. "The Respondent suggests that in a joint administration, one administrator can act without the need for consent or approval of the other, and that liability can thus be avoided. It is submitted that this must be wrong; both are responsible for the discharge of the duties of office."*
>
> *29. "In any event if this argument of the Respondent was to be made good, the "innocent" administrator needs to show that he has acted properly. This would not be shown if he had done nothing at all."*

49. The Deputy President, after discussing the case of *Kendle v Melsom* (1998)193 CLR 46, ("*Kendle v Melsom")* stated;

> *"The majority decision in Kendle v Melsom appears to me to be authority for the proposition that an appointment of co-liquidators is the conferral of an office, of necessity joint….The majority recognised also that duties could as between co-administrators, be allocated between them, and so that it was not necessary that each act be carried out by all of the co administrators. The majority decision cannot in my view be read in such a manner that where in relation to any one administrator, a specific act or duty is allocated to one of them or separately, the other or others of them have no responsibility whatsoever."*

50. At 9(d) the Deputy President went on to find:

> *"If, as the applicant argues, he was appointed purely as a reserve or 'backstop', in case of need, then the desired effect could be achieved through the issue of an appropriate power of attorney. The applicant was not obliged to accept appointment; however when he did, he automatically accepted the responsibility to act as a reasonable person in a like position would act in the circumstances, and that responsibility remained of force and effect throughout the administration."*

E. Approach to determining the duties of Mr Hamilton as the joint liquidator of ERB in respect of the Deed of Settlement and Release Issue (1-4) and the General Conduct Issues (5-9 and 11).

51. The Board agrees with the parties that the question regarding what was required of Mr Hamilton to adequately and properly discharge his duties as joint liquidator differs in the context of his active involvement in the Deed of Settlement and Release Issue as compared to the General Conduct Issues in which he was not directly involved. Having assumed the responsibility as joint liquidator of ERB, the question to be considered in light of the authority provided by the *Re Heesh* decision and the principles discussed in that case, is whether Mr Hamilton as joint liquidator, acted as a reasonably competent liquidator in a like position would have or whether his acts or omissions constituted a failure to carry out adequately and properly the duties of a liquidator.

52. Our starting point is that *Re Heesh* is authority for the proposition that when Mr Hamilton accepted appointment as joint liquidator of ERB, on the basis that Mr Fiorentino would have the day to day carriage of the matter, there is no doubt that, along with the conferral of powers and the right to perform functions as liquidator, Mr Hamilton also accepted responsibilities and duties.

53. What is clear from *Re Heesh* is that it is not an answer to the discharge of those responsibilities, as Mr Hamilton submitted (in the alternative) in relation to the General Conduct Issues (and to an extent in relation to the Deed of Settlement and Release Issue), for one joint liquidator to merely say that he relied on the other. In circumstances where he does rely on the other and does nothing himself, then to the extent duties were performed or improperly performed it is a performance by both Liquidators and the joint liquidator without primary conduct of the liquidation will

nevertheless be responsible for any inadequacy of the performance. If he performs some acts, such as checking that processes and procedures are being followed and/or checking whether an act has been performed or performed adequately, the question becomes one of reasonableness.

54. Consistent with this approach, we have dealt with Contentions 5-9 and 11 on the basis that to the extent there was improper performance of duties by Mr Fiorentino in relation to the matters particularised in Contentions 5-9 and 11, Mr Hamilton is prima facie responsible for the acts of his joint liquidator unless he can show he took steps himself which made his reliance reasonable in the circumstances. We will further discuss our reasons in the context of the General Conduct Issues below.

55. The nature of Mr Hamilton's responsibility as joint liquidator in the context of Contentions 1-4 is less straightforward, and not fully answered in our view by simply accepting that because Mr Hamilton played an active role in the events on 14 January 2009 which led to the execution of the Deed of Settlement and Release then he was a principal actor and his responsibilities must meet the standard of the liquidator with day to day conduct of the matter.

56. It is also clear however that to the extent Mr Hamilton was involved and did ask questions of Mr Fiorentino and Mr Pateman he was not wholly relying on Mr Fiorentino to discharge responsibilities on his behalf.

57. We have formed the view that Mr Hamilton's conduct in relation to the Deed of Settlement and Release Issue, should be assessed having regard to his role as joint liquidator without primary carriage of the matter ("Second Liquidator"). The relevant question is whether what action he took met the standard of a reasonably competent liquidator in similar circumstances having regard to the inherent duties of the office and whether the conduct was sufficiently adequate and proper so as not to enliven the Boards power under s1292(2)(d). This approach is consistent with the comments by the Deputy President in *Re Heesh* at 8(e) that where a specific act or duty is allocated to one or other joint administrator, it is not the case that the other has no responsibility (see paragraph 49 above) while at the same recognising that the reasonableness of Mr Hamilton's conduct should not be assessed only with regard to the events on 14 January 2009 even though he was directly involved on that day, but within the overall context of the liquidation where his partner had primary carriage to that point.

58. We have therefore approached an assessment of the reasonableness of Mr Hamilton's performance of his duty as joint liquidator in relation to Contentions 1-4 on the basis that Mr Hamilton's role was as Second Liquidator and in assessing the adequacy and propriety of his conduct it is appropriate to take into account that fact that Mr Fiorentino was the primary joint liquidator with responsibility for day to day conduct of the liquidation. We set out further below, within the context of each of the contentions, the reasons for our findings that he failed to adequately and properly discharge his duties in relation to the Deed of Settlement and Release Issue.

F. The parties' submissions on the construction of s1292(2)(d)(i) and the role of the Board.

59. In relation to each of its contentions, ASIC alleges that Mr Hamilton, within the meaning of s1292(2)(d)(i), in the conduct of his liquidation of ERB (as joint liquidator of ERB) has failed to carry out or perform adequately and properly the duties of a liquidator.

60. The submissions made by Mr Russell in relation to the Board's task under s1292(2)(d)(i) to determine whether a person has failed to carry out or perform adequately and properly the duties of a liquidator included the following:

(a) It is not necessary in every case under s1292, for ASIC to identify a specific "duty" required to be performed (*ASIC v Avitus Thomas Fernandez* Decision of the Board, Matter No 02/VIC13 dated 29 October 2013) (*"Fernandez"*) at 48(a)).

(b) While ASIC has framed its contentions as being constituted by a contravention or failure to comply with a particular statutory provision (e.g.: s180 of the Act) or professional standard (e.g.: 130.1b APES), the Board's exercise of power under s1292 does not depend upon it being satisfied, to a legal standard, of a contravention of a statutory provision or a failure to comply with the standard, or indeed to determine such a matter; rather, the question for the Board is the adequacy and propriety of the carrying out or performance of the relevant duty having regard to the duties imposed on a liquidator by relevant statutory provisions and standards, and that is to be judged by the Board by making an evaluative and subjective determination (*ASIC v Allan Gregory Walker* (Decision of the Board, Matter No 06/VIC07) dated 22 December 2008) (*"Walker"*) at 7.3(b)).

(c) The level and standard of performance of the duty or function needs to be tested against a relevant benchmark which is "professional standards" (*Fernandez* at 48(b)) which calls for an acquaintance with professional standards and the task of determining the relevant accepted professional standards is a task within the expertise of the Board (*Fernandez* at 48(c)).

(d) The level of performance called for is that of "adequacy"; the standard is that the duty or function must be performed "properly" and in making the assessment the Board is entitled to have regard to published codes or standards of professional bodies. The accepted professional standards may be found by the Board to be set by or reflected in the published standards or codes (*Fernandez* at 48(e)) and will involve having an intelligent understanding of the purposes which the provisions of the Act were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved.

(e) In determining whether Mr Hamilton had adequately and properly performed his duties as a liquidator, the Board should have regard to:

(i) what the Act requires;

(ii) the general law;

(iii) professional standards endorsed by relevant professional bodies (being the IPA, the ICAA and CPA Australia); and

(iv) generally accepted standards of professional conduct, including what the Board believes a reasonably competent practitioner would have done in similar circumstances in the proper and adequate performance of relevant professional duties.

61. Mr Hamilton made the following submissions on the construction of s1292(2)(d) in response to ASIC's submissions on this point:

(a) The Board is not exercising judicial power of the Commonwealth and is not to determine whether Mr Hamilton has committed an offence under the Act or otherwise *Albarran v Members of the Companies Auditors and Liquidators Board* (2007) 231 CLR 350; [2007] HCA 23 at [21]) (*"Albarran"*).

(b) In order for The Board to make the order sought by ASIC under s1292(2)(d)(i) it must be satisfied that Mr Hamilton has failed to carry out or perform "adequately and properly" the "duties of a liquidator" as a joint liquidator of ERB, where Mr Fiorentino, the other joint liquidator, had the day to day conduct and control of the ERB liquidation.

(c) "Adequately and properly" in s1292(2)(d) is a composite expression.

(d) The Board could be satisfied that a person has failed to perform or carry out adequately and properly the duties as a liquidator "even if it is not possible to point to some particular statutory provision which has been breached."

(e) In order to be relevantly satisfied, the Board does not have to be: "satisfied as to a legal standard…the question of adequacy and propriety of the carrying out or performance is to be judged by the Board by making an evaluative or subjective determination" *(Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board and Another* [2006] 151 FCR 478 at [45]) (*"Albarran FC"*)

(f) Section 1292(2)(d)(i) requires the Board to be satisfied in the requisite sense of a negative matter, namely failure to carry out or perform adequately and properly the duties of the liquidator, as it is the reaching of this level of satisfaction that enlivens the Board's discretionary power to deal with a liquidator's licence.

(g) The Board's statutory function does not extend to a general inquiry into the conduct of a liquidator. Rather, it is required to undertake its task within the confines of the contentions made and if ASIC does not make good one or

more of its contentions, strictly construing the language of those contentions, the Board's task is not to reformulate the contention(s) or to consider the matter as if the contention(s) was/were differently worded.

(h) Even if the Board finds one or more of the ASIC contentions are established, that does not have the legal consequence that it must find that the liquidator has failed to carry out or perform adequately and properly "*the duties of a liquidator*". Section 1292(2)(d)(i) uses the word "duties", not duty and further does not use the word "functions" which the Board may make findings about if there is a complaint under s1292(2)(d)(ii).

(i) Even a finding by the Board that a liquidator has not performed a duty does not compel or require it to be thereby satisfied that the liquidator has failed to carry out or perform adequately and properly *"the duties of a liquidator*" That is a different question which, depending upon all of the facts and circumstances, including the content of the relevant duty, and the significance of the non compliance therewith, may or may not result in the Board being satisfied of the relevant statutory matter under s1292(2)(d)(i) of the Act.

G. Our approach to determining whether Mr Hamilton has failed to carry out or perform adequately and properly the duties of a liquidator under s1292(2)(d)(i).

62. We are in general agreement with each of the parties' submissions on the role of the Board, as summarised above, except the final part of the Respondent's submission set out in paragraph 61 (h), as to which see our comments in paragraph 65 regarding Block J's comments in *Re Heesh*.

63. Even though ASIC's contentions in this matter were framed as being constituted by a contravention or failure to comply with a particular statutory provision and/or professional standard, the relevant authorities cited by the parties make it quite clear that the Board's role under s1292 is not to exercise judicial power and does not depend upon it being satisfied, to a legal standard, of those contraventions or failures to comply, or to determine such a matter; rather, the question for the Board is the adequacy and propriety of the carrying out or performance of the relevant duty and that is to be judged by the Board by making an evaluative and subjective determination (*Walker* at 7.3(b)).

64. There is no doubt that Mr Hamilton had duties imposed upon him as a consequence of his appointment to the office of liquidator, albeit joint. For example, as a liquidator, he becomes an officer of the relevant corporation (s 9 of the Act) and under s180(1) of the Act, he is required and thereby assumes a duty to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were an officer of the corporation in the corporation's circumstances and occupied the office held by, and had the responsibilities within the corporation as, an officer.

65. We agree with the parties that it is certainly not the role of the Board to make a finding as to whether Mr Hamilton breached s180. Rather, s180 provides the

source for one of the duties of a liquidator, i.e. to act in terms of s180, by reference to which the Board may evaluate the adequacy and propriety of the liquidator's conduct in discharging his duties i.e. in this case was there a degree of care and diligence exhibited in the performance of duties that one would reasonably expect from the officer of a corporation. The references in the SOFAC to specific duties by reference to the Act (e.g. s180) reflects this position rather than asserting any breach of that section and we do not therefore see that there is any requirement to reformulate the contentions to ensure that s1292(2)(d) will be complied with, as suggested in Mr Hamilton's legal submissions.

66. In its decision in *Fernandez*, the Board reviewed the relevant authorities and captured a series of propositions relevant to the nature of the question to be determined under 1292(2)(d)(ii) and the role of the Board in considering that question. Although in *Fernandez*, the Board was concerned with s1292(2)(d)(ii), and we are here concerned with s1292(2)(d)(i), the observations are nevertheless relevant as subsection (d)(i) applies to the conduct of a liquidator acting as a liquidator whereas subsection (d)(ii) ensures that if a liquidator behaves inadequately or improperly in doing something that only a liquidator can do but not in the role of a liquidator, then the provisions of s1292 still have effect. [See Block J in *Re Heesh* paragraph 9(a) where he expressly agreed with ASIC's submissions on this point set out in the decision at Clause 1A, paragraph 3(b)].

67. The Board's observations in *Fernandez* were 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 s1292(2), for ASIC to identify a specific "duty" required to be performed by a registered liquidator. See also *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq) (2003) 177 FLR 289; (2003) 47 ACSR 155* at [100];

(b) second, 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) third, 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;

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

(e) fifth, 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; and

(f) sixth, the assessment will also involve having an intelligent understanding of the purposes that 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.

68. The statutory question we must decide under s1292(2)(d)(i) therefore is whether we are satisfied, on the basis of the contentions before us and the facts that have been established, that Mr Hamilton, as joint liquidator, has failed to carry out or perform adequately and properly the duties of a liquidator having regard to the synopsis of the principles applicable to the Board in making a decision under s1292(2)(d) usefully summarised in *Fernandez*.

H. The Deed of Settlement and Release Issue (1-4)

69. The Deed of Settlement and Release Issue comprising the first 4 contentions in the SOFAC, each relate to various aspects of Mr Hamilton's conduct on 14 January 2009 in the lead up to execution of the Deed of Settlement and Release between the Liquidators and BWI and the Directors Ms Issa and Mr Hammoud.

70. In general terms ASIC's Contentions 1-4 are that the Liquidators ought not to have entered into the Deed of Settlement and Release when they did, based on the information they had. Pursuant to the Deed of Settlement and Release, the Directors Mr Hammoud and Ms Issa and BWI were being released from potential claims but ASIC's allegations were that those potential claims had not been properly assessed and no proper or adequate investigation had been done as to their financial capacity to pay moneys or what their true indebtedness to ERB was.

71. The first matter we have considered in relation to the Deed of Settlement and Release Issue generally is the evidence in relation to Mr Hamilton's role in relation to the negotiation and drafting of the Deed of Settlement and Release that took place on 14 January 2009. It is clear from Mr Hamilton's affidavit and further evidence in cross examination, and not in contention between the parties that Mr Hamilton was actively involved with Mr Fiorentino in the events of 14 January 2009 that culminated in the execution of the Deed of Settlement and Release by the Liquidators.

72. Mr Hamilton says it was his practice not to sign an agreement where he was joint liquidator with Mr Fiorentino unless he was satisfied it was appropriate to do so.

73. Mr Hamilton said that he would ask questions of Mr Fiorentino, look at documents, enquire whether Mr Fiorentino had obtained legal advice and read and be satisfied of the terms of the instrument he was being asked to sign.

74. Mr Hamilton set out in further detail the steps he took on 14 January 2009, including drafting and settling amendments to the Deed of Settlement and Release, which led to his decision to execute the Deed of Settlement and Release.

75. The final legal submissions received from Mr Hamilton's lawyer stated that the decision to execute the Deed of Settlement and Release was a commercial judgement for Hamilton to make and it was not appropriate for the Board to involve itself in the commercial decision making process Hamilton undertook as a court would not. We agree that it is not the Board's role to second guess commercial decisions with the benefit of hindsight but that is a different issue to forming a view about whether the standard of diligence applied by Mr Hamilton was adequate which is what is required of the Board.

76. We have already set out our view (paragraph 57 above) on how Mr Hamilton's conduct should be assessed namely within the context of his role as joint liquidator without primary carriage of the matter – the Second Liquidator. The relevant question is whether what action he took was sufficiently careful and diligent as to meet the standard of a reasonably competent liquidator in similar circumstances having regard to the inherent duties of the office.

77. Mr Hamilton contended that it was Mr Fiorentino's job to be satisfied as to certain of the matters upon which the Liquidators based their judgement that day. We do not agree that this answers the case against him as joint liquidator of ERB. If Mr Hamilton was in the position of a Second Liquidator who "did nothing at all" as in *Re Heesh*, the mere fact of his reliance would have placed him in a position of prima facie responsibility for any improper and inadequate acts of his joint appointee. It does not follow therefore that where Mr Hamilton did take some action he was simply entitled to rely on it being Mr Fiorentino's responsibility to be satisfied as to certain of the matters upon which he based his judgement that day in discharge of his own responsibilities. This approach is consistent with the view expressed in *Re Heesh* that the majority decision in *Kendle v Melsom* does not stand for the proposition that where in relation to any one administrator, a specific act or duty is allocated to one of them separately, the other of them has no responsibility whatsoever. Such an interpretation would be entirely at odds with the legal concept of a joint appointment to an office such as a liquidator.

78. In our view it is reasonable that a competent liquidator in a like position as Second Liquidator, acting carefully and diligently, would be entitled to assume a more detailed and extensive knowledge on the part of their co-liquidator who had primary involvement in the conduct of the liquidation. For this reason we do not agree with Mr Russell's oral submission that if we are satisfied on the matters referred to in his final written submissions then we must find that Mr Hamilton engaged in the act of entering the Deed of Settlement and Release and did not properly and adequately carry out his duties. While we are satisfied of the matters referred to in those paragraphs (as set out below) and that Mr Hamilton did engage in the acts which took place on 14 January 2009, the relevant matters by reference to which the adequacy and propriety of Mr Hamilton's conduct is to be assessed differs from that of Mr Fiorentino because of Mr Hamilton's role as Second Liquidator.

79. Mr Heesh argued that the ASC (as it then was) was obliged to specify how Mr Heesh should have acted but this was rejected by Block J who said that "*where a person is obliged in accordance with a statutory provision to act in a reasonable manner having regard to the circumstances, the circumstances may of course vary from case to case*". Mr Hamilton had a similar statutory duty under s180 of the Act

to act carefully and diligently having regard to the circumstances, and his own conduct on that day should be assessed with reference to the level and standard of the performance of his duties tested against the relevant benchmark of professional standards (*Fernandez*).

80. Based on the authorities discussed above, Mr Hamilton as the joint liquidator prima facie shared responsibility for Mr Fiorentino's acts as well as his own. The question is whether what he did to discharge the duties of the office in those circumstances, was what a reasonable person in a like position would have done.

81. We agree with Mr Hamilton that this should not involve jointly performing all aspects of the liquidation with Mr Fiorentino. In our view it is a question of assessing how that responsibility could have been properly and adequately discharged by the Second Liquidator i.e. what would a careful and diligent liquidator in a like position do?

82. In order to answer this question it is relevant to consider what steps Mr Hamilton took to test both the information he relied upon from Mr Fiorentino and his own assumptions, the nature and substance of any additional information Mr Hamilton sought and from whom, and in general, the overall soundness and scope of the information on which he was prepared to base his commercial decision to enter into the Deed of Settlement and Release that day.

83. It follows that, in assessing the adequacy and propriety of Mr Hamilton's conduct, the Board does not need to (and nor would it be appropriate for it to) *"involve itself in the commercial decision making process of Hamilton"*. Rather our focus in respect of each of the contentions involving a commercial decision will be on the process followed by Mr Hamilton before making the decision. Considerations relevant to this assessment include for example:

    (a) what steps he took to place himself in a proper position to make a decision eg: whether he turned his mind to what information was relevant; whether he sought that information; what documents he read; whether he considered whether legal advice was required; whether he tested the veracity and/or sufficiency of the information available or provided to him; and

    (b) whether the rationale for his decision was documented i.e. was there a demonstrable process followed and recorded, eg: a contemporaneous file note which set out the reasoning behind his decision and attaching, for example, the information relied upon and details of any legal advice sought.

Evidence (or the lack of it) that such processes were followed is instructive regarding the level of care and diligence applied in the discharge of his duties and whether in the circumstances, that discharge was sufficiently adequate and proper.

I. Contention One

84. ASIC's first contention is that, within the meaning of s1292(2)(d) of the Act, in the conduct of his liquidation of ERB (as joint liquidator of ERB) Mr Hamilton failed to carry out or perform adequately and properly the duties of a liquidator when, as

joint liquidator, he entered into a Deed of Settlement and Release with BWI, Ms Issa and Mr Hammoud on 14 January 2009 without:

(a) properly assessing which remedies were in the best interest of the creditors; and/or

(b) ascertaining the true indebtedness of BWI and/or the Directors of ERB; and/or

(c) investigating and assessing the financial capacity of BWI or the Directors.

85. ASIC framed its contention in terms of a failure by Mr Hamilton to act diligently which is the standard required by Section 130.1b) of APES 110 and/or a breach of s180 of the Act which imposed a duty on Mr Hamilton, as an officer of the corporation within the s9 definition of that term, to discharge his duties diligently.

86. Dealing with s180 of the Act, and as already discussed, (paragraph 65 above) it is not for this Board to determine whether Mr Hamilton breached that Section. That is not our role. Rather, s180(1) identifies a duty of the office of liquidator (reasonable care and diligence) and the question for determination is whether Mr Hamilton discharged that duty adequately and properly. The level of performance called for is that of "adequacy" and the standard is that the duty must be performed properly having regard to what proper professional practice required to enable those purposes to be achieved (*Fernandez* at 47(e)).

87. The statutory duty of care and diligence embodied in s180 (1) of the Act provides as follows:

> *180 (1) A Director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:*
>
> *(a) were a Director or officer of a corporation in the corporation's circumstances; and*
>
> *(b) occupied the office held by, and had the same responsibilities within the corporation, as the director or officer.*

88. The second source of duty identified by ASIC in relation to this contention was the duty to act diligently embodied in Section 130.1b) of APES 110 (page17). APES 330 section 1.5 provides that members shall comply with the fundamental principles outlined in the APES 110.

89. 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."

90. The principle of "Professional competence and due care " is discussed in Section 130 and Section 130.1 b). APES (February 2008) provides:

> *130.1 The principle of professional competence and due care imposes the following obligations on Members:*
>
> *b) To act diligently in accordance with applicable technical and professional standards when providing their services.*

91. The relevant threshold question in respect of Contention 1 is whether a liquidator acting carefully and diligently would be required to undertake an assessment of the matters set out in Contentions 1(a), 1(b) and 1(c) before compromising potential claims on behalf of creditors and if so, whether the steps Mr Hamilton took as the Second Liquidator were sufficiently adequate and proper to discharge those duties. In relation to the first question we think there is little doubt that when taking such an important step on behalf of creditors a liquidator has a duty to ensure that to the extent possible he has fully informed himself regarding the facts relevant to enable him to make judgements on behalf of stakeholders, that he has turned his mind to whether legal advice is necessary or desirable in the specific circumstances, and that he is satisfied there is sufficient verifiable information regarding the financial position of the parties potentially to be released from claims. Only by taking those steps could he satisfy himself that agreeing to release potential claims would be in the interests of the creditors.

92. Mr Hamilton accepted in his evidence that this was a significant settlement of a claim in the liquidation. He referred to it as a phoenix operation. The fact that Mr Hamilton was aware that this was potentially a phoenix transaction (and therefore potentially voidable under s588FE of the Act) was a significant consideration for the Board when assessing whether Mr Hamilton discharged his duties adequately and properly in the process of deciding to reach a compromise with the potential phoenix company and its Directors. Mr Hamilton was clearly on notice that the sale agreement giving rise to the potential claims and causes of action being compromised might have been an uncommercial transaction pursuant to s588FB of the Act. He would also have been aware, by virtue of the nature of the transaction, that its object was to deprive unsecured creditors of equal access to the selling company's assets.

93. In circumstances where a liquidator compromises claims and causes of action on behalf of creditors with a phoenix company for a small fraction of their apparent value it is difficult to envisage what steps he could take to demonstrate he had acted adequately and properly. While the specific circumstances will always be relevant to the assessment, a liquidator would, in our view, and at a minimum have to be able to demonstrate that, based on relevant information including, in this case, sufficiently detailed and verified relevant financial information, he had considered the rationale for the compromise proposed, with specific reference to the interests of stakeholders, including the creditors, and had clearly recorded the basis for any conclusion to proceed.

94. As to Mr Hamilton's position as Second Liquidator the relevant considerations are not substantially different to those set out above, except that to the extent he relied on information from Mr Fiorentino there is the additional consideration of the steps he took to assess the adequacy of the information and test its veracity.

Contention 1(a)

95. Contention 1(a) alleged that Mr Hamilton did not properly assess which remedies were in the best interests of creditors prior to signing the Deed of Settlement and Release.

96. The evidence on this issue was that the only legal advice received on potential legal actions by Liquidators on behalf of ERB creditors was the 24 April 2008 Draft Legal Advice. In his oral evidence Mr Hamilton said that the 24 April 2008 Draft Legal Advice also stated that a public examination of directors would be needed before anything could be done. The 24 April 2008 Draft Legal Advice does not in fact refer to the need for public examinations prior to assessing appropriate remedies, although it did recommend that the directors should be asked about the sale and some other matters by serving a notice under ss475(2) and (3) of the Corporations Act. There was no evidence that the Liquidators followed that recommendation.

97. Mr Hamilton’s further evidence was that there was no legal advice given about possible claims against the directors, or about the possible defences of BWI to any of the Liquidators or ERB’s potential claims, because in everyone’s mind the usual first step is a public examination under s596A/596B of the Act.

98. On 14 January 2009 when the Deed of Settlement and Release was signed there were potential creditor claims, yet to be resolved, by Westfield and by the former employees, and the Liquidators had received but not ruled or determined upon the proof of debts lodged by the directors Mr Hamilton deposed to his awareness of these claims prior to 14 January 2009.

99. Mr Hamilton did not consider or take into account any of the potential claims referred to in paragraphs 97 - 98 above before deciding to sign the Deed of Settlement and Release, even though he said he was aware of them, because in his mind whether to sign the Deed of Settlement and Release was a commercial consideration.

100. The evidence in relation to Contention 1(a) is that Mr Hamilton, even though actively involved in the events of 14 January as set out in his affidavit, by his own admission, did not, on 14 January 2009, seek to satisfy himself about any of the matters referred to above prior to signing the Deed of Settlement and Release and nor did he turn his mind to the potential implications of those matters for ERB or the creditors.

101. Mr Hamilton's evidence in cross examination and his submissions placed emphasis on the public examination process under s596A/596B of the Act as being a necessary precursor to the assessment of potential remedies. He asserted that, as there was a lack of funding to undertake those examinations, it was not reasonable to require that an adequate and proper exercise of his duties would entail an assessment of what remedies were in the best interest of creditors. We do not accept Mr Hamilton's evidence that public examinations were a necessary and singular precursor to enabling an assessment of remedies available to creditors in this case, nor his evidence that there were no funds available because creditors had not passed a resolution to provide a fund for this purpose at the 23 September 2008 meeting.

102. There were a number of steps which were potentially available to the Liquidators, such as the s475(2) and (3) notices recommended in the 24 April 2008 Draft Legal Advice**.** Early steps to assess the potential remedies identified in the 24 April 2008 Draft Legal Advice would have been consistent with discharging their fiduciary duties to act in the interests of creditors. There is no evidence that any steps to assess the potential claims identified in the 24 April Draft Legal Advice were taken by Mr Fiorentino between receipt of the 24 April 2008 Draft Legal Advice and 14 January 2009 when the Deed of Settlement and Release was signed.

103. Our view on Mr Hamilton's assertion that there was an absence of funds available to conduct public examinations is that it is without foundation. Mr Hamilton's own evidence was that Mr Fiorentino would get $152,000 from the potential ATO recovery and that the cost of a public examination would be $64,000. It was not in dispute that at the end of the winding up, the Liquidators had realised in total $536,929.15 of which all was paid out in remuneration and disbursements and nothing went to unsecured creditors. We do not accept that it would not have been open to the Liquidators to decide to prioritise the application of approximately $64,000, a relatively small proportion of those funds to the conduct of public examinations of the directors. A timely undertaking of this process may well have assisted the Liquidators in assessing potential claims and remedies available to creditors and in our view the liquidators had a duty both to ERB and the creditors to take reasonable steps to assess those potential claims and remedies.

104. Even if the public examination process was a not critical step to understanding what potential claims might be available to claw back funds for creditors, the correspondence between James Hamilton and Mr Fiorentino dated 2 December 2008 demonstrates that as at that date, Mr Fiorentino was contemplating using future recoveries to fund public examinations and court proceedings. As late as 19 December 2008 this still appeared to be the case on the basis of the correspondence.

105. There is no evidence however that that state of affairs materially altered between 19 December 2008 and 14 January 2009, when the Deed of Settlement and Release was rapidly negotiated and signed.

106. Even though actively involved in the events of 14 January 2009 as already set out Mr Hamilton did not, on 14 January 2009, before making a commercial decision in relation to executing the Deed of Settlement and Release, address his mind to, or seek to obtain any information in relation to, what may or may not have been done by his joint liquidator regarding assessment of what claims or remedies were in the interests of the creditors. That is to say Mr Hamilton did not independently consider those issues and therefore weigh them in the commercial decision he made to sign the Deed of Settlement and Release the Directors and BWI at that time. This information was critical to assessing whether such a settlement would be in the best interests of the creditors.

107. A description of the role and obligations of a liquidator is contained in *ASIC v Edge* (2007) 211 FLR 137; [2007] VSC 170, where Dodds-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 judgement" 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)

108. Thus, the role of a liquidator (and administrator) is one that 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 often urgent, and conflicting claims upon its property. A liquidator or administrator must have the judgement, insight, expertise and ability to be able to analyse, understand and deal appropriately with the issues thrown up in this volatile environment. In *Korda Re: Stockford Ltd* [2004] FCA 1682 Finkelstein J at p50 stated:

> "An insolvency practitioner stands in a fiduciary relationship with the creditors."

109. Given the role performed by a liquidator - a fiduciary and paid professional who controls a corporation's affairs and property in the interests of others, the duties to act with honesty, probity, care and diligence inevitably must require a liquidator, even a joint liquidator without day to day involvement but who has nevertheless agreed to the responsibilities inherent in that office, to turn his mind to and seek sufficient information on key issues which are likely to affect the creditors and the company to whom he owes those duties.

110. One of those key issues which directly impacted the creditors was what potential actions and remedies may have been available to them against BWI and the Directors especially as the 24 April 2008 Draft Legal advice had alerted the Liquidators to the existence of potential claims.

111. Mr Hamilton did not turn his mind to the issue of what remedies were potentially available to creditors before deciding to execute the Deed of Settlement and Release. In our view this amounted to a failure to act carefully and diligently in fulfilling his duties to the creditors as Second Liquidator as he did not take the steps which would have been necessary to put himself in a position where he had adequate information to satisfy himself about matters critical to making a professional business judgment about whether ERB's and the creditors interests were best served by executing the Deed of Settlement and Release. Nor did he have adequate information to test his view that the settlement was *"the best price"*.

112. Mr Hamilton as Second Liquidator should have at least taken steps on that day to inquire, either of himself or the primary liquidator, or by reference to the documents and available information, about the current status of the potential claims and recoveries. He should also have ensured that a sufficiently detailed note of the commercial rationale for his decision was retained on the file and his omission in this regard was also, in our view, a failure to act carefully and diligently.

113. Mr Hamilton's submission that in any event, an analysis of the information thus revealed, demonstrates that had any funding been provided by stakeholders, it would have produced nothing in return for those creditors in recovery of costs or as an improvement in their position as unsecured creditors of ERB, is in our view misconceived. Regardless of what the position may have been, Mr Hamilton had not taken any steps to test the knowledge he had, nor did he turn his mind to what further relevant information he may need to appropriately inform himself, before he took an important step on behalf of the creditors of ERB, when he owed them a duty to act in their interest. His actions must be considered in that context and not on the basis of what the information may or may not have revealed. In other words, a failure to exercise reasonable care and diligence is still a breach of the liquidator's duty even if by chance, no adverse consequences flow.

114. We refer to and repeat our comments in paragraph 92 and 93.

115. For the reasons set out above we are not satisfied that Mr Hamilton met the standard of a reasonably competent liquidator in the position of Second Liquidator and he did not therefore perform his duties adequately and properly as required by s1292(2)(d)(i) of the Act.

116. In all the circumstances we find that Contention 1(a) is established.

Contentions 1(b) and 1(c)

117. Contention 1(b) and 1(c) concern the adequacy of Mr Hamilton's actions, as joint liquidator, in ascertaining the true indebtedness of BWI and/or the Directors of ERB, and investigating and assessing the financial capacity of BWI or the Directors.

118. Mr Hamilton said that he read the draft Deed of Settlement and Release on 14 January 2009 and made some amendments to it, but was not too concerned about checking the Recitals, because he had knowledge of the work Mr Fiorentino, James Hamilton and Julian Svehla had put into it. Mr Hamilton's evidence was that at the time he executed the Deed of Settlement and Release he had not read any of the Creditor's Reports.

119. Recital G of the Deed of Settlement and Release recorded that the Liquidators had demanded that Mr Hammoud, Ms Issa and BWI produce financial records statements and accounts of BWI to demonstrate the state of the business. Mr Hamilton's evidence was that he had never seen any of those demands, that it had all been done by Mr Fiorentino and that he cannot recall whether he read it on the day.

120. Recital H of the Deed of Settlement and Release records what had been produced evidencing the trading position of BWI. Mr Hamilton confirmed that he accepted that the Liquidators did not have in their possession actual figures for the trading of BWI since it had been taken over and he agreed that they were significant matters in assessing the financial position of BWI. When asked by Mr Russell whether, absent those actual figures i.e. trading figures, profit and loss statement and balance sheet, the Liquidators were ever in a position to properly form an opinion as to the financial position of BWI, Mr Hamilton's response was "*The answer is obvious isn't it? They weren't because – you say 'the financial position of BWI'. Those figures only point to what they say they are: cash flow projections for the year 2009, the profit and loss projections for 2009…"*

121. Mr Hamilton's evidence was that he was aware that Mr Fiorentino was relying upon the documents set out in the Recital H of the Deed of Settlement and Release and that he was aware Mr Fiorentino had not obtained any actual figures. He recalled that Mr Fiorentino had spoken to him in December about possibly obtaining some information from Mr Pateman, but he could not recall whether Mr Fiorentino actually did that and Mr Hamilton did not question Mr Fiorentino on 14 January 2009 as to whether Mr Fiorentino had obtained the information he was seeking. On 14 January, he recalls Mr Fiorentino was walking around with the documents, but Mr Hamilton did not look at them.

122. As to the financial position of the Directors, Mr Hammoud and Ms Issa, the evidence was that, despite obtaining the benefit of a release under the Deed of Settlement and Release, details of their financial position were not sought by Mr Fiorentino, nor referred to in the Deed of Settlement and Release. At no time either

prior to or on 14 January 2009 did Mr Hamilton make enquiries of Mr Fiorentino regarding the Directors' financial position. Although not referred to in his affidavit, Mr Hamilton's evidence in cross examination was that he did recall that Mr Pateman made it clear that BWI was in financial difficulty and Mr Hammoud also was having difficulty paying his debts. Mr Hamilton's evidence was that he did not respond when Mr Pateman told him this because it is what he expected. Mr Hamilton's evidence was that he did not expect BWI would be making profits and for Mr Hammoud to do that (i.e. the phoenix transaction) is a desperate act Hamilton's evidence was *"why would I expect he's a man of anything else but straw? What evidence is there?"*.

123. In response to Mr Russell's statement that these were matters which should have been exercising his mind at the time, Mr Hamilton's response was, "*They should have been exercising the mind of Pino at the time, yes"*. Mr Hamilton had sought amendments to the Deed of Settlement and Release and executed it and agreed that he was not a passive bystander but he said *" ...I don't think the deed is worth anything. I think that at that stage it was a lost cause. Absolute lost cause. Nobody was interested. Creditors weren't interested. Nobody would put up money for a PEX (public examination)….the liquidator had nothing. No funds. I can show you the cash receipts and payments to show there were never any surplus funds available."*

124. Mr Hamilton agreed that the Liquidators had no basis to form any opinion or view as to the director's financial position. When asked about the opinions and conclusions he drew and on what basis Mr Hamilton's response was *"Well, my mind didn't exercise any basis at the time of signing that Deed. I was already conditioned to the fact, from talking to Pino, that it was a lost cause. No creditors were interested. The stakeholders were not prepared to put up money. They wouldn't come to meetings. The Liquidators had no funds you know. And not only that, in hindsight it can be shown that it would have, if ASIC's recommendations had been followed, the stakeholders would have lost money."*

125. Despite the Deed of Settlement and Release recording that the Liquidators had formed the view that BWI had not paid sufficient consideration for the transfer of ERB's business pursuant to the sale agreement, and Mr Hamilton's evidence that he knew this from the sale agreement, Mr Hamilton had not been told this at the time by Mr Fiorentino and nor had a valuation been done.

126. As to conducting a valuation Mr Hamilton's evidence was that there was not the financial means to undertake one but he had nevertheless formed the view that insufficient consideration had been paid by BWI.

127. Further, the Liquidators did not turn their minds to the possibility of obtaining a statutory declaration from the Directors as to any information that had been provided and nor did they consider inserting a warranty or term into the Deed of Settlement and Release to protect their position.

128. In relation to Contention 1(b) and 1(c) Mr Hamilton made three submissions; the first was that whether or not Mr Hammoud was a debtor for $397,306 is problematic. Mr Hamilton asserts that the transfer of $300,000 which ASIC alleges was from one ERB account to another, was not known to the Liquidators and the

records of that account were not produced with the books and records demanded by Mr Fiorentino from Mr Hammoud and not recorded in the MYOB ledger; Second, the BWI debt of $146,693.14 was a debt created by the sale agreement and not a debt in the normal sense; third, the debts to Mr Hammoud and Ms Issa of $1,443,151.32 and $1,431,612.85 were not admitted by Mr Fiorentino. Mr Hamilton submitted on this basis that he satisfied his duties as an ordinary competent liquidator. In relation to Contention 1(c) Mr Hamilton submitted that, in the context of having no funds available to investigate and assess the financial capacity of BWI and/or the Directors of ERB, he had satisfied his duties as a competent liquidator.

129. The reasons for our findings regarding Contentions 1(b) and 1(c) are similar to those expressed in relation to Contention 1(a). Mr Hamilton did not, on 14 January 2009 seek to satisfy himself about any of the matters referred to in Contention 1(b) and 1(c) prior to signing the Deed of Settlement and Release, as he failed to independently consider any of the issues set out above and nor did he make sufficient enquiries.

130. Regardless of what the actual position may have been, Mr Hamilton had not sought to test the knowledge he did have, nor turn his mind to what further relevant information he may need before he took an important step on behalf of the creditors of ERB to whom he owed fiduciary duties. Clearly, his actions must be considered in that context and not on the basis of what the information may or may not have revealed as suggested in his submissions.

131. Mr Hamilton's argument, that based on the actual position gleaned from information he subsequently reviewed, his commercial judgement must have been correct, is flawed, Mr Hamilton had taken no steps to test his view about the actual position by verifying what he was told or by seeking to read the information himself or question the joint liquidator about the content of the information he had and the basis for the views he had formed.

132. Mr Hamilton should have on 14 January 2009, taken steps to enquire into the nature of the information Mr Fiorentino had to hand and make an independent assessment of what that information disclosed before making a decision on behalf of ERB and creditors to release BWI and the Directors from further claims for the sum of $60,000.

133. By not taking those steps Mr Hamilton failed as Second Liquidator to put himself in a position where he had adequate information to test his view that the settlement was *"the best price"* or which would have allowed him to make an informed judgement about matters that, in our view, were fundamental to the commercial rationale for entering into a Deed of Settlement and Release.

134. For the reasons set out above we are not satisfied that Mr Hamilton met the standard of a reasonably competent liquidator in the position of Second Liquidator and did not therefore perform his duties adequately and properly as required by s1292 (2)(d)(i) of the Act.

135. Finally in relation to Contention 1 we refer to Mr Hamilton's affidavit evidence as to the "Communication Practice", which described the practice of the firm

Hamiltons by which Mr Hamilton and his partner Mr Fiorentino kept each other informed of the progress of their matters. We note that this practice was entirely informal, and ad hoc as accepted by Mr Hamilton in cross examination and did not involve either any system of review or utilise a software system to keep track of critical dates or the like. Our view is that the absence of any formal processes to enshrine appropriate risk management procedures within the firm does not meet the appropriate professional standard properly expected of a liquidator. Those processes should always include the practice of keeping of an adequate and proper contemporaneous file note of the rationale for important commercial decisions reached, including details of information and advice taken into account and why the decision is in the interests of the relevant stakeholders. Hamiltons did not engage in this practice and the absence of a formalised process within the firm regarding the retention of such records has weighed in our decision that Mr Hamilton did not carry out his professional duties in a sufficiently adequate and proper manner.

136. In all the circumstances we find that Contentions 1(b) and 1(c) are established.

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

J. Contentions 2 and 3

138. The second and third of ASIC's contentions are that by failing to seek the approval of the Court or of a resolution of creditors before entering into the Deed of Settlement and Release to compromise the following debts owing to ERB:

(a) $397,306.53 by the Directors; and

(b) $146,693.14 by BWI; and

by failing to seek the approval of the Court or of a resolution of creditors before entering into the Deed of Settlement and Release pursuant to which the following obligations were imposed:

(a) BWI and the Directors agreed to offer and provide all reasonable assistance as requested by the Liquidators or ERB to complete the administration;

(b) Mr Hammoud agreed to be examined by the Liquidators on specific matters;

(c) Mr Hammoud agreed to sign an accurate copy of the transcript of the examination,

and which may not have been discharged within 3 months of entering into the agreement;

Mr Hamilton:

(a) acted in breach of ss477(2A) and 477(2B) of the Act, as applied by s506(1A); and/or

(b) acted in breach of 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

139. ASIC submitted that the Liquidators were required to seek court or creditor approval for entry into the Deed of Settlement and Release under ss477(2A) and 2(B) of the Act because the Deed of Settlement and Release released:

(a) the Directors from a debt owed to ERB of at least $371,010;

(b) BWI of a debt owed to ERB of $146,693.14; and

(c) the obligations of BWI, Mr Hammoud and Ms Issa under Clauses 4.1 and 4.2 of the Deed of Settlement and Release may have been discharged by performance more than three months after the Deed of Settlement and Release was entered into.

140. Mr Hamilton submitted that there was no necessity for him to seek approval from the Court or Creditors before entering into the Deed of Settlement and Release. Further:

(a) the amount of $397,306.53 was a disputed debt;

(b) the sum of $146,693.14 owed by BWI to ERB is not a debt but a claim by ERB upon the Right of Indemnity under the Sale agreement;

(c) there is doubt as to whether ss 477(2A) and (2B) apply;

(d) s477(2B) does not apply to monetary obligations.

141. There is much evidence on the question of the first two points the subject of Mr Hamilton's submission. However we do not think it is necessary to make findings in relation to that evidence in order to form a view about the adequacy and propriety of Mr Hamilton's conduct as Second Liquidator in the context of these contentions. That is because his evidence was that on 14 January 2009 he did not even turn his mind to the question of the application of ss 477(2A) and (2B) of the Act and whether court or creditor approval was necessary. Mr Hamilton conceded in cross examination that it would have been prudent to get creditors approval because it involved the directors. In his submissions Mr Hamilton noted that in making that statement he was not conceding that it was necessary to obtain approval under s477(2A) and 2(B), only that it would have been prudent.

142. We refer to and repeat our comments in paragraphs 92 and 93 above.

143. In Mr Hamilton's closing oral submissions, he submitted reliance can't be placed on his not knowing the substance of James Hamilton's advice to obtain the approval of creditors because after 24 April 2008 *"there was none and I've checked it out with him. The last advice received was 24 April. From then on, he was working with Fiorentino but there was no advice on what to do, whether there was*

(sic) any prospects of success, and the likelihood of recovering and how much. Nothing of that nature." This submission is inconsistent with the evidence and somewhat misconceived. Quite clearly James Hamilton was acting as a paid legal advisor to Mr Fiorentino in respect of this liquidation, whether his advice was oral or written, formal or informal. For example the letter from James Hamilton which stated:

> "*At the meeting today, say it is without prejudice on the sale agreement discussions and you should speak to them about how they intend to meet the creditor obligations they promised to meet under the agreement, which must now be paid in cash to the Liquidators, as the unpaid creditors as at your appointment now crystallise in the liquidation. Ask them what they propose to do? Say that any deal reached with them would require creditor or court approval and to be documented in a Deed."*

was clearly legal advice regarding, inter alia, the manner in which to conduct the meeting (without prejudice) and a step that would be required to validate any agreement reached (creditor or court approval). Mr Hamilton was not aware of the existence of this advice but had he turned his mind to the possibility of what may be required to validate the Deed of Settlement and Release or questioned Mr Fiorentino, or indeed retained a lawyer to advise he would have been seen to have taken steps to assure himself that the relevant bases had been covered, however he did none of these things.

144. In the circumstances, Mr Hamilton's conduct on 14 January 2009 as Second Liquidator was not sufficiently adequate and proper, as he should reasonably have been expected to turn his mind to and assure himself that relevant statutory requirements would be met. Mr Hamilton had a duty to act with reasonable care and diligence, but before signing the Deed of Settlement and Release, he did not even turn his mind to the issue of what needed to be done in order to ensure that the settlement being effected would be in compliance with the provisions of the Act, even though they were proceeding on the day without the benefit of legal advice.

145. The fact that at the relevant time the procedures in place at the firm Hamilton's did not require a record to be kept of the steps taken by the Liquidators nor prompt action by the Liquidators to address matters such as whether the provisions of s477(2A) and 2(B) required consideration has also weighed significantly in our decision that Mr Hamilton did not discharge his duty as Second Liquidator to ensure that requirements of the Act, if relevant, would be met. In *Re Heesh* it was stated "*that the joint administrator had a duty to ensure that the duties and responsibilities of the administrators were properly carried out, not only by having the correct systems and procedures in place, but by some personal action to check that those systems were working, as well as an obligation to have some regular contact with his co-administrator to ascertain progress of the administration*" (p8). In this case the systems and procedures were clearly not adequate to ensure that the responsibilities and duties of the Liquidators insofar as compliance with these provisions of the Act was required, would be properly carried out.

146. For the reasons set out above we are not satisfied that Mr Hamilton exercised sufficient care and diligence to meet the standard of a reasonably competent

liquidator in the position of Second Liquidator and did not therefore perform his duties adequately and properly as required by s1292(2)(d)(i) of the Act.

147. In all the circumstances we find that Contentions 2 and 3 are established.

K. Contention 4

148. By failing to seek legal advice in relation to the entering into, and settling of the terms of the Deed of Settlement and Release, Mr Hamilton:

(a) failed to act diligently as required by section 130.1b) of APES 110; and/or

(b) acted in breach of s180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

149. The evidence was that legal advice was not obtained on behalf of the Liquidators in relation to entering into the Deed of Settlement and Release. On 14 January 2009, Mr Fiorentino did in fact seek the advice of James Hamilton to review the Deed of Settlement and Release. However James Hamilton was on holidays and not due back at work until 18 January 2009. Mr Hamilton, in conversations with Mr Fiorentino and Mr Pateman on 14 January 2009, sought assurances that James Hamilton would, if he were there, agree to the Deed of Settlement and Release. In paragraph 490 of his affidavit Mr Hamilton deposed to asking Mr Fiorentino whether the settlement, in principle, was along the lines discussed with James Hamilton however he did not go on to ask him what advice James Hamilton had given.

150. Mr Hamilton also sought assurances from the solicitor for the directors and BWI that the Deed of Settlement and Release represented what had been negotiated through James Hamilton but conceded in cross examination that it was not appropriate for him to rely on statements made by the solicitor for BWI and the directors.

151. It is clear from the evidence that there were a number of outstanding issues that may have been impacted by entry into the Deed of Settlement and Release at that time. For example, the effect of entering the Deed of Settlement and Release on the potential Westfield creditors and negotiations to assign leases and the unresolved employee claims.

152. In Mr Hamilton's affidavit he deposed to the fact that the proposed settlement was along the lines that Mr Fiorentino had discussed with James Hamilton and that James Hamilton would approve it based upon negotiations which had taken place prior to him going on holidays.

153. While we do not think that a legal adviser is necessarily required in every case where a liquidator is negotiating the potential resolution of claims, we have formed the view that in the circumstances of this case a reasonable person in a like position to Mr Hamilton on 14 January 2009, that is to say, a reasonably competent "second" joint liquidator would have sought or required that legal advice be sought

in relation to entering into the Deed of Settlement and Release. Relevant factors which have weighed in our consideration include:

(a) the fact that James Hamilton's assistance was actually sought on the day but in his absence on holidays the Liquidators proceeded anyway;

(b) the ramifications the Deed of Settlement and Release would have on the rights of creditors in the liquidation of ERB particularly in circumstances where what remedies were in the best interests of creditors, had not been assessed by Mr Hamilton;

(c) the fact that the creditors without consultation were giving up substantial potential claims for a sum which would be fully applied to Liquidators' remuneration;

(d) the fact that the other parties to the Deed of Settlement and Release were legally represented; and

(e) the apparent haste with which the Deed of Settlement and Release was being negotiated which was never queried by Mr Hamilton although he conceded in cross examination that he probably should have.

154. For the reasons set out above we are not satisfied that Mr Hamilton exercised sufficient care and diligence to meet the standard of a reasonably competent liquidator in the position of Second Liquidator and did not therefore perform his duties adequately or properly as required by s1292(2)9d)(i) of the Act.

155. In all the circumstances we find that Contention 4 is established.

L. Contentions 5-9 and 11 "General Conduct Issues" – Outline of Submissions

156. In addition to referring to the duties applicable to liquidators contained in s180(1) of the Act and APES 110 Section 130 (see paragraph 86 above), Contentions 5-11 (excluding 10 which is not pressed) refer to relevant clauses in the IPA Code. For convenience we set out the relevant clauses of the IPA code as follows:

The Code (IPA)

Clause 8.1 (Need for Effective Communications)

Effective communication in insolvency is essential because of the:

- *legal and commercial complexity of the insolvency processes;*
- *legal and commercial implications of letters and reports;*
- *high emotions surrounding financial loss and loss of livelihood; and*
- *lack of knowledge and expertise in the insolvency process, and its language and terminology, by most stakeholders.*

*Accordingly, communications from members **should** be:*

- *clear and concise and written where possible in lay terms (except when communicating with sophisticated creditors and advisers);*
- *objective;*

- *responsive;*
- *timely; and*
- *given in a professionally courteous tone and manner.*

*Practitioners **should** carefully exercise their professional judgement when balancing the needs of individuals for information or responses to inquiries with the overall efficiency and costs of the administration.*

*Practitioners **should** display sensitivity in dealing with individual creditors who will have suffered a financial loss that may be small in the broader context, but may be significant to them. Clarity in explaining the various rights, obligations, processes and timeframes can diffuse feelings of animosity wrongly directed to the Practitioner.*

The timely reply by the Practitioner to inquiries from creditors and debtors will assist in diffusing animosity and concern that they are not being heard.

Communicating with debtors, directors and others involved in the insolvency may require firm and forthright communication, particularly in situations where there is a refusal to co-operate, and belligerence, or where examinations or litigation are involved.

Clause 8.2 (Plain English)
*The use of jargon **should** be avoided. Simple language **should** be used wherever possible. Practitioners **should** be aware that terms with which they are familiar on a daily basis may mean little to a creditor with no experience in insolvency.*

Clause 13.2.2 (Prospective Fee Approval)
*A Practitioner may seek approval from creditors for time-based remuneration to be determined in advance of the work to be performed. The approved amount **must** be capped to a nominated limit.*

The claim for remuneration will subsequently be calculated on a time basis for necessary work properly performed and can be drawn without further approval of creditors up to the capped amount.

The hourly rate to be applied may be escalated by an agreed formula where the escalation factors are objectively and independently determinable.

The escalation does not apply to the capped total, only to the hourly charge rate.

If the Practitioner wishes to change the capped amount, or the rate scale other than as agreed, he will need to seek creditor approval.

Clause 13.4 (General guidance on reporting)
The provision to creditors of voluminous detailed information is not a substitute for a clear and concise report. It is the relevance, quality and focus of the information rather than the quantity and detail that is important. Creditors and even committees are not necessarily conversant with insolvency issues and processes, nor do they have the capacity or time to understand WIP records. Creditors have the right to ask questions and have them answered and to inspect supporting documentation if requested.

*A Practitioner **should**:*

- *provide information that is specific to the administration, rather than generic;*
- *try and ensure that the level of information is proportionate to the size and complexity of the administration;*
- *try to assist committee members or creditors by highlighting the key components of the remuneration claim and any areas that committee members or creditors are likely to view as contentious; and*
- *provide a summary of relevant information.*

*Questions from creditors **should** be anticipated and not discouraged.*

Additional information should be provided if requested.

Clause 20.2 (Structure of the Recommended Report)
The recommended report is divided into five parts with the first two being remuneration specific.

Part 1: Description of Work
Part 2: Calculation of Remuneration
Part 3: Report on Progress of the Administration
Part 4: General Supporting Information
Part 5: Initial Advice to Creditors

*In practice the report **should** form a coherent narrative where an overview and status report is followed by the substantive claims and then general explanatory information.*

Part 1: Description of Work
The tasks which Practitioners undertake can be broadly divided into seven categories. These are:

a) Assets

b) Creditors

c) Employees

d) Trade On

e) Investigation

f) Dividend

g) Administration

Information on the seven categories is to be set out in tabular form making it easy for creditors to understand the type and purpose of work being undertaken. A typical list of tasks is included as guidance. The narrative provided must be sufficient, meaningful, open and clear and provide specifics of the work done for this particular appointment.

- *The table included in the report for the particular administration **should** properly reflect the work done on that appointment. Inclusion of the full list for all appointments is not appropriate and*

*is not a proper reflection of the work undertaken on the appointment. Proper time recording systems **should** be able to readily generate re**ports t**hus reducing the time taken to prepare this information.*

- *The General Description column is indicative only and **should** be amended to suit the particular appointment. Use specific details (i.e., detailing specific asset or c**lass of** asset realisations).*
- *Where the method of remuneration is time based, dollar value of remuneration attributed to that category of work and hours taken **should** be included under the task heading for each task category.*
- *Further details and particulars may be required for large administrations (i.e. more or different sub-categories) or where the remuneration claimed relates to a lengthy period of time (i.e., may need to be divided into time periods).*

Part 2: Calculation of Remuneration (Time Basis)
The suggested format provides all the information necessary to allow a creditor to understand the calculations for the claim for remuneration. Who did what for how long and at what rate?

Part 3: Report on Progress of the Administration
It is common practice to include a progress report with the remuneration report. While not forming part of the remuneration claim, it provides context for creditors to understand the stage of the administration – work completed, work under way, work still to be undertaken. This part of the report may be incorporated as part of a more general report to creditors.

Part 4: General Supporting Information
This is information that needs to be provided in support of the remuneration claim, such as the actual resolutions to be put to creditors and presentation of details of receipts and payments. These items may be incorporated into the general report to creditors if one is being provided.

Part 5: Initial Advice to Creditors
*This information is standard and **should** be provided to creditors at the commencement of the administration. Creditors **must** have received this information before being asked to approve remuneration*.

157. We note that with the exception of the requirement to cap the amount of future remuneration to be approved by creditors, which is a mandatory requirement, all other guidance in the excerpts quoted above are "*recommended behaviours*" as referred to in Clause 1.3 of the IPA Code.

158. The General Conduct Issues set out in Contentions 5-9 and 11 each have the common feature that they rely wholly upon the contents of reports and actions taken by the joint liquidator Mr Fiorentino for the alleged failure of Mr Hamilton to adequately and properly discharge his duties as liquidator.

159. ASIC's position in relation to the General Conduct Issues Contentions (5-9 and 11) was that there is no distinction of substance between the facts in *Re Heesh* and the situation in this matter because, with respect to the matters the subject of these

contentions, Mr Hamilton did nothing and the fact that there was no agreement or arrangement to that effect was neither here nor there.

160. Mr Hamilton, although denying the General Conduct Issues, did not argue that he did anything in relation to the reports and acts which comprise these contentions. In his affidavit and response Mr Hamilton asserted that in relation to the General Conduct Issues either he was entitled to and did rely upon and act on the basis that Mr Fiorentino as liquidator:

(a) was a registered liquidator for greater than twelve years and an official liquidator for almost twelve years;

(b) had the day to day conduct and control of the liquidation of ERB;

(c) prepared and issued the relevant reports;

(d) was obtaining advice and assistance from James Hamilton;

(e) had adequately, properly and reasonably performed his duties in preparing the relevant reports.

Or alternatively he submitted:

(a) that there was no complaint by any creditor of ERB about the General Conduct Issues;

(b) that the reports should not be criticised from hindsight and without regard to real world constraints and the pressures under which Mr Fiorentino was operating;

(c) that the reports should be viewed as a whole;

(d) that the General Conduct Issues did not breach any of the standards or obligations set out by ASIC in the SOFAC.

M. Finding on Mr Hamilton's alternative response to the General conduct Issues that he relied on Mr Fiorentino

161. The answer to Mr Hamilton's first response to the General Conduct Issues that he relied on Mr Fiorentino and is not responsible for any acts or omissions is found in the authority of *Re Heesh*. That is *"the joint administrator had a duty to ensure that the duties and responsibilities of the administrators were properly carried out, not only by having the correct systems and procedures in place, but by some personal action to check that those systems were working, as well as an obligation to have some regular contact with his co-administrator to ascertain progress of the administration.*"(p8) In circumstances where he did not, the position is that to the extent duties were performed or improperly performed by the joint administrator (or liquidator) it is a performance by both Liquidators and the joint liquidator without primary conduct of the liquidation will nevertheless be responsible for any inadequacy of the performance. This was the approach adopted by the Board in *Heesh* and affirmed as generally correct by Block J in *Re Heesh*.

162. In the decision on appeal Block J stated;

> *"The applicant contends also that the matter can be tested by assuming, again by way of hypothesis, that Mr McDonald had acted in all respects correctly; he went on to contend that in these circumstances he (the applicant) would not be obliged to do anything at all. That contention would then suggest that since he is obliged to do nothing where his co administrator acts correctly, similarly he is obliged to do nothing when his co administrator acts incorrectly. That this argument is also untenable is obvious. It could be likened to the analogy of a night watchman who falls asleep at his post or deserts his post. The fact that the place which he has been engaged to guard is then not in fact robbed, cannot have the effect that the nightwatchman is not in breach of his duties."* (paragraph 9(e))

163. Block J's reasoning makes it clear that even if one joint administrator (or liquidator) has not apparently failed in discharging any of his duties, inaction on the part of the other joint liquidator to take some action would not be an adequate and proper performance of duties and may enliven the Board's power under s1292(2). It follows from this that it may not have been necessary for us to make findings about the sufficiency of the reports and other acts performed by Mr Fiorentino and referred to in Contentions 5-9 and 11, in order to make a finding regarding Mr Hamilton's conduct and whether it was sufficiently adequate and proper because, even if the content of the reports met the appropriate standard in all respects, Mr Hamilton could still have failed in his duties if the evidence was that he had done nothing. Such inaction would not be an adequate and proper performance of duties. However, we have not stopped there with our assessment, as the General Conduct Issues contentions, as pleaded by ASIC refer to the deficiencies in the reports as the conduct for which Mr Hamilton shared responsibility by virtue of his role as joint liquidator.

164. The first relevant question to consider is whether there were any systems in place which may assist Mr Hamilton's argument that it was reasonable on his part as joint liquidator to rely on Mr Fiorentino. If there were not then Mr Hamilton's argument that he was entitled to rely on Mr Fiorentino must fail.

165. Turning therefore to the evidence of what systems were in place, Mr Hamilton's evidence was that there was no system or practice in place within Hamiltons whereby the joint liquidator without day to day conduct of the matter would necessarily review, even in the most cursory way, reports and notices issued by the other joint liquidator.

166. Mr Hamilton did not take notes of issues he discussed with Mr Fiorentino.

167. Mr Hamilton took no steps as joint liquidator to assist Mr Fiorentino with necessary tasks such as the Report to Creditors even though he believed that Mr Fiorentino was under pressure.

168. In his Response, Mr Hamilton referred to the communication practice as the means by which he remained abreast of developments in matters where he was joint liquidator with Mr Fiorentino but did not have the day to day conduct of the matter. In his evidence on cross examination it was disclosed that there were no formal systems of review within the practice at the time between Mr Hamilton and Mr

Fiorentino in relation to joint liquidations and the communication practice was entirely informal and ad hoc. Further the firm did not have practice management software for the management of liquidations/administrations in relation to key dates and matters to be actioned. However at the front of a file there was a program which Mr Hamilton described as "not formal" and in respect of which there was no system ensuring that either he or Mr Fiorentino would complete that checklist to ensure all relevant matters were attended to.

169. On the basis of the evidence before us it is clear that the systems and procedures in place were not effective in ensuring that if there were issues with the manner in which the joint liquidator was conducting the liquidation, they would have been brought to the attention of the other liquidator. The only system in place, according to the evidence, appeared to be a checksheet attached to the front of each file which, in any event, was the responsibility of the administrative staff to update rather than either of the Liquidators.

170. There was no evidence that Mr Hamilton took any step personally to check the rather rudimentary system that was in place.

171. While Mr Hamilton did have regular but ad hoc contact with Mr Fiorentino, it appears from the evidence that that communication was not directed to relevant issues which would have ensured adequate and proper satisfaction of Mr Hamilton's duties. Mr Hamilton clearly proceeded on the assumption that Mr Fiorentino was appropriately experienced to do the job properly, that he did not need to look over any documents produced by Mr Fiorentino and that he did not have a role in relation to material produced by Mr Fiorentino even though he had accepted an appointment as joint liquidator. To the extent there was communication it was not directed to ensuring that duties were being carried out adequately and properly, as Mr Hamilton took the view he was entitled to rely on Mr Fiorentino in this regard.

172. In light of the matters referred to above, in respect of each of the General Conduct Issues, our view is that Mr Hamilton, had not taken any adequate or proper steps to ensure that there were correct systems and procedures in place or any steps to check they were effective. In those circumstances there is no reasonable basis for him to argue that it was reasonable for him, in discharging his duties as joint administrator (or liquidator), to have relied on Mr Fiorentino. It is therefore only necessary to consider whether the acts of the other joint liquidator met the appropriate standard because in these circumstances, duties performed by the joint liquidator is performance by both administrators or liquidators (see *Re Heesh* comments paragraph 161).

173. For the reasons set out above it is our view therefore, that Mr Hamilton's reliance on Mr Fiorentino does not provide an answer to the General Conduct Issues. It is a matter for determining in relation to each of the General Conduct Issues whether the joint liquidator met an appropriate standard so as to make a finding on whether Mr Hamilton carried out his duties adequately and properly.

174. In light of this finding we will refer to the liquidators jointly in the discussion following. While consideration of Mr Hamilton's conduct as a joint liquidator in respect of the General Conduct Issues necessarily involves us forming a view based

on the evidence before us of acts performed by Mr Fiorentino as the other joint liquidator, our findings in this matter apply as between the parties in this matter, and not quite obviously, with respect to Mr Fiorentino.

N. Contention 5

175. Contention 5 relates to the 23 September 2008 Notice and Report which ASIC alleges was not clear, concise and succinct, and contained excessive and irrelevant information. The particulars set out in the SOFAC in relation to Contention 5 are as follows:

(a) the following information was unclear and confusing:

(i) an estimate of funds available for distribution of $1,924,848.45 without clearly explaining the contingencies on which the estimate was based;

(ii) an estimated dividend to creditors of 75 cents in the dollar without clearly explaining the variables on which the estimate was based;

(iii) a statement that there were no offences which required reporting to ASIC; and

(iv) a document with the heading "*The Australian Laser Clinic Pty Limited (in liquidation)"* which appeared to relate to another matter;

(b) duplication of information as follows:

(i) accounting information that was deemed unreliable by Mr Fiorentino was reported excessively within the body of the Report; and

(ii) the RATA was summarised in an attachment to the 23 September 2008 Notice to Creditors, set out in full twice in the body of the 23 September 2008 Report to Creditors and was also attached as an annexure; and

(c) irrelevant information included as annexures as follows:

(i) a 10 page detailed listing of books and records;

(ii) copies of company tax returns; and

(iii) detailed accounting records.

176. Contention 5 referred to the duties of a liquidator found in s180 of the Act (care and diligence), APES 110, s130.1b) (diligence), and Clause 8.1 (need for effective communication), 8.2 (plain English) and 13.4 (General guidance on reporting) of the IPA Code.

177. Mr Hamilton responded to this contention on two bases. The first basis, already discussed was reliance on Mr Fiorentino and we refer to and repeat our finding and reasons in paragraphs 161-173.

178. The alternative basis to which he responded to this contention was as follows:

(a) the information included in the 23 September 2008 Notice and Report are matters for real world judgements made by Mr Fiorentino at the time having regard to what was then known and commercial, time and other pressures under which Mr Fiorentino then operated; it is not to be judged with hindsight;

(b) viewed as a whole the 23 September 2008 Notice and Report prepared by Mr Fiorentino was done on a reasonable and rational basis;

(c) there has been no complaint by any stakeholder or any other creditor as to the 23 September 2008 Notice and Report or that they were unable to understand it;

(d) the 23 September 2008 Notice and Report did not constitute conduct by Mr Fiorentino that breached the IPA Code the Compiled APES or the Act.

179. As to the matters raised by Mr Hamilton and set out in sub-paragraphs a-d, we acknowledge and agree that, for example, the duty of care and diligence sourced from s180 of the Act requires a subjective evaluation to be made, (by reference to a reasonable person in a like position), in order to form a view on the degree of care and diligence required to satisfy the duty. However, we do not agree that the matters raised by Mr Hamilton's response are relevant to such an evaluation. We have already referred to the role and function performed by the liquidator, a fiduciary and paid professional who controls a corporation's affairs and property in the interests of others. It cannot be said that an absence of complaint by creditors or individual pressures of a particular liquidator are in any way relevant to the question of whether that liquidator has met the standard required of him in performing his duties.

180. Accordingly the question for the Board in relation to Contention 5 is whether the matters identified in the 23 September 2008 Notice and Report amount to a failure by the Liquidators to perform adequately and properly their duties under s1292(2)(d)(i) by reference to the duties identified by ASIC in its SOFAC and set out in paragraph 176 above.

181. In Mr Hamilton's cross-examination regarding the report he expressed his view that the report was "not the best", and that in hindsight "it was not very good." At another point he said "why this report is so difficult to understand, I don't know.". Those were the views of the joint liquidator once he had read the 23 September 2008 Notice and Report which he did not read or review before it was despatched to creditors in 2008.

182. None of the particulars alleged as constituting the so called deficiencies in the 23 September 2008 Notice and Report were specifically dealt with by Mr Hamilton, although his defence was that they were not sufficient to justify a finding that the Liquidators had not met the standard of adequate and proper which would enliven the Board's power under s1292(2). As noted he also submitted that external factors, such as the lack of creditor complaint and the pressures on Mr Fiorentino were relevant factors to be taken into account in that assessment. We disagree that such factors are relevant for the reasons set out in paragraph 179.

183. We refer to our discussions in general at G herein on the approach to determining whether Mr Hamilton has failed to carry out or perform adequately or properly the duties of a liquidator under s1292(2)(d)(i). Whether the Liquidators failed to perform their duties adequately and properly in relation to the 23 September 2008 Notice and Report to creditors can be determined by this Board by an examination of the matters raised by ASIC with regard to the contents of the 23 September 2008 Notice and Report and the Board's own assessment, as an expert tribunal, of whether the report as a whole, met a sufficient standard having regard to the matters set out in the IPA Code or otherwise whether it demonstrated an appropriate standard of care and diligence (APES 110 and s180 of the Act).

184. The relevant provisions of the IPA Code have already been set out (paragraph 156). What will sufficiently constitute clarity and conciseness (8.1), plain English (8.2) and satisfy as well the recommendations outlined in the general guidance to reporting in 13.4 of the IPA Code may vary from case to case depending upon matters such as the size of the liquidation, whether there are differing classes of creditors and the existence or otherwise of complex issues in the liquidation. There will often be a balancing act involved between being concise and perhaps sacrificing some of the information that could provide greater clarity in more complex liquidations.

185. The particulars in support of Contention 5 that the 23 September 2008 Notice and Report demonstrate that the Report did contain unclear and confusing information as well as duplicated and irrelevant information. In relation to the specific matters raised by ASIC in relation to the 23 September 2008 Report we agree that the matters set out in paragraphs 175(a)-(c) did make the document unclear and confusing in those respects. Because the information being conveyed was not given relevant context, such as setting out contingencies and variables, it did not provide a realistic picture of the actual current status of those elements of the liquidation.

186. In relation to the statement on page 14 of the report under the heading - *Report under S533 – duty to report offences* the response was *"unaware of any such offences"* yet on the following page the statement *"accordingly there is an offence under s286(2)"* is made. This is clearly inconsistent and confusing.

187. There are also various typographical errors in the documents such as the page headed *"The Australian Laser Clinic Pty Ltd in liquidation"* and an incorrect paragraph reference.

188. As the report included many years of financial statements which were annexed in full rather than, for example, condensing the major relevant sections of those

financial reports that the Liquidators wished to highlight, the annexures, are voluminous and in our view this contributed to making the report confusing. Rather than simply annexing large volumes of information to the 23 September 2008 Report to Creditors, providing relevant, focussed and quality information as recommended by the IPA Code would in our view, entail providing relevant summaries in the report rather than simply providing the totality of information in an annexure for the recipient to sift through and make a judgement about what is relevant.

189. Having regard to the matters set out in paragraphs 186-189, the 23 September 2008 Report, in some significant and substantive respects, did not satisfy the guidelines set out in clause 8 and 13.2 of the IPA Code. While we accept that these guidelines were not mandatory, in our view, proper professional practice requires a liquidator to ensure such reports do substantially reflect relevant professional guidelines as issued from time to time by the relevant bodies. In instances where such guidelines and codes are not followed or met it is also evidence, prima facie, that a sufficient level of care and diligence was not exercised by the liquidator in the discharge of his duty.

190. In our view in the respects identified the report was deficient and did not reflect the level of care and diligence reasonably expected of a professional liquidator.

191. We find that Contention 5 has been established.

O. Contention 6

192. Contention 6 alleges that the Liquidators failed in the 23 September 2008 Notice and Report to set out:

(a) sufficient, concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of his remuneration;

(b) an adequate description for the major tasks he had performed, or he was likely to perform; and

(c) the costs associated with each of those major tasks,

in circumstances where they were seeking creditor approval for both retrospective and prospective remuneration.

193. This contention refers to duties set out in Clause 20.2 of the IPA Code, and/or section 130.1b) APES 110; and/or s499(7)(a) of the Act; and/or s180 of the Act.

194. Section 499(7)(a) of the Corporations Act provides;

Before remuneration is fixed under subsection (3) by resolution of the creditors, the liquidator must:

(a) prepare a report setting out;

(i) such matters as will enable the creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and

(ii) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and

(iii) the costs associated with each of those major tasks;

195. Mr Hamilton responded to this contention on two bases. The first basis, already discussed was reliance on Mr Fiorentino and we refer to and repeat our finding and reasons set out in paragraph 161-173 herein.

196. Insofar as Mr Hamilton alternatively responded to this contention by raising the matters set out in paragraph 178(a)–(d) we repeat our comments in paragraph 179 herein.

197. The second limb of Mr Hamilton's alternative response to Contention 6 is that the 23 September 2008 Notice and Report was not contrary to the relevant clauses of the IPA Code, and/or APES110, and/or s499(7)(a) of the Act and /or s180 of the Act.

198. Clause 20.2 of the IPA Code recommends seven main task areas, with general description of tasks for each task area and suggestions for more detailed wording of the task for each and states:

> *Information on the seven categories is to be set out in tabular form making it easy for creditors to understand the type and purpose of work being undertaken. A typical list of tasks is included as guidance. The narrative provided must be sufficient, meaningful, open and clear and provide specifics of the work done for this particular appointment. (Extract from IPA code 20.3)*;

199. The 23 September 2008 Report, however listed up to 35 tasks and ASIC contended the task descriptions were inadequate and failed to provide sufficient concise meaningful information to creditors to make an informed assessment of the reasonableness of the remuneration in accordance with s499(7)(a) of the Act.

200. It was further submitted by ASIC that most task descriptions were generic in nature, did not clearly and meaningfully describe the work undertaken and were not divided into task areas or general descriptions as recommended by clause 20.2 of the IPA Code. Examples given were:

(a) The existence of three categories of tasks relating to Books and Records and four categories of task relating to Investigation;

(b) Six separate tasks relating to "Drawing Docs" were so general that it was not possible to identify what the Liquidators did and why it was necessary;

(c) there is a category of task "Engrossing Docs" for 18.4 hours which explains what was done but not why it was necessary;

(d) there are three tasks for Letters: 19 Letters; 21 Letters – Lengthy and 21 Letters – Short which only explains how they were done but not what was done; and

(e) there is a task "Overhead" – which implies a cost of business and not a task required to be completed in insolvency.

201. We agree that the descriptions provided in many instances did not make it easy for creditors to understand the type and purpose of work being undertaken and it appears clear that the Liquidators did not follow the recommended template from the document or the task areas set out in Clause 20.2 of the IPA Code.

202. ASIC in its submissions made the point that prospective remuneration and costs are very relevant in circumstances where the asset realisation strategy is being reported on and creditors are being asked to fund further action. Creditors need to be able to make an assessment of the likely recovery of costs so that they can assess the prospects of a return. The major tasks projected are necessary to assess whether the costs include, or otherwise, the costs of public examinations they are being asked to fund or if they are to be funded from recoveries.

203. Section 499(7)(a)(ii) and (iii) of the Act provides that a liquidator must prepare a report setting out a summary description of the major tasks performed, or likely to be performed, by the liquidator and the costs associated with each of those major tasks. The 23 September 2008 Report lists descriptions of the tasks likely to be performed after the date of the Report, but does not include an estimate of the costs associated with those major task areas and does not therefore comply with the requirements of s499(7)(a) (iii) of the Act.

204. Having regard to the evidence of the matters set out in paragraph 188 above, the 23 September 2008 report, in some substantive and significant respects, did not satisfy the guidelines set out in clause 20.2 of the IPA Code and did not in all respects satisfy the requirements of s499(7)(a) of the Act. In our view appropriate care and diligence requires a liquidator to ensure that reports do substantively reflect relevant guidelines as issued from time to time by the relevant bodies, and that they comply with applicable provisions of the Act. We are therefore satisfied that the Liquidators failed to perform their duties adequately and properly in relation to the provision of appropriate information on remuneration in the 23 September 2008 Report.

205. We find that Contention 6 has been established.

P. Contention 7

206. ASIC's seventh contention is that the Liquidators failed to adequately account to creditors in the 30 April 2009 Report regarding their acts and dealings and the conduct of the winding up of ERB.

207. This contention refers to duties set out in Section130.1b) of APES 110; and/or s180 of the Act and/or s508(2) of the Act.

208. Section 508(2) of the Corporations Act provides as follows:

The liquidator must lay before a meeting convened under paragraph (1)(a) or subparagraph (1)(b)(i) an account of:

(a) the liquidator's acts and dealings; and

(b) the conduct of the winding up;

during that first year or that succeeding year, as the case may be.

209. ASIC submitted the Liquidators failed to adequately account to creditors regarding their acts and dealings and the conduct of the winding up of ERB, in the 30 April 2009 Report for reasons including the following:

(a) Notice – Summary of Receipts and Payments – no explanation of why the estimated return to creditors had reduced from 74.94 cents in the dollar as at 21 September 2008, to 14.2 cents in the dollar; there was no reference at all in the body of the report to the estimated distribution;

(b) The 30 April 2009 Report did not include details of what investigations the Liquidators had undertaken since 23 September 2008 causing them to form the view that "*BWI did not pay sufficient consideration to ERB for the transfer of ERB's business pursuant to the Sale Agreement*";

(c) in relation to the Deed of Settlement and Release, there was no explanation about why the Liquidators had not:

(i) informed creditors of their intention to enter into it;

(ii) sought creditor or court approval prior to entering into it; and

(iii) provided creditors with any details regarding the basis upon which they had formed the view that "*the financial position of the Directors of the Company was not of substance*"; and

(d) further, in relation to the Deed of Settlement and Release, there was no explanation about how it impacted ERB's potential claims against:

(i) the Directors of $97,306.53;

(ii) BWI of $146,693.14; and

(iii) BWI of $4,719,862.77 (Right of Indemnity).

210. Mr Hamilton responded to this contention on two bases. The first basis, already discussed, was reliance on Mr Fiorentino and we refer to and repeat our finding and reasons set out in paragraphs 161-173 herein.

211. Insofar as Mr Hamilton alternatively responded to this contention by raising matters set out in paragraph 178(a)-(d) we repeat our comments in paragraph 179 herein.

212. The second limb of Mr Hamilton's alternative response to Contention 7 (in summary) was that the 30 April 2009 Report did meet the requirements of the Act and the relevant codes.

213. We agree that the omissions from the report identified by ASIC and set out in paragraph 198 are significant. Section 508(2) is clear in its requirement that the liquidator must provide an account of his acts and dealings and the conduct of the winding up. The matters set out by ASIC relate to key issues for the creditors of ERB and their omission from the report meant that the creditors were not provided with an account which included all relevant dealings of the Liquidators and the conduct of the winding up as required by s508(2) of the Act.

214. In our view appropriate care and diligence in the discharge of the liquidator's duties when preparing reports requires strict compliance with applicable provisions of the Act such as s508(2). In light of the omissions in the report, we are therefore satisfied that the Liquidators failed to perform adequately and properly their duty to adequately account to creditors in the 30 April 2009 Report.

215. We find that Contention 7 has been established.

Q. Contention 8

216. Contention 8 makes the same allegation as Contention 5 except in relation to the 30 April 2009 Report, that is that the 30 April 2009 Report was not clear concise and succinct and contained excessive and irrelevant information.

217. Mr Hamilton responded to this contention on two bases. The first basis, already discussed, was reliance on Mr Fiorentino and we refer to and repeat our finding and reasons set out in paragraphs 161-173 herein.

218. Insofar as Mr Hamilton alternatively responded to this contention by raising matters set out in paragraph 178(a)-(d) we repeat our comments in paragraph 179 herein.

219. The second limb of Mr Hamilton's alternative response to Contention 8 (in summary) was that the 30 April 2009 Report did meet the requirements of the Act and the relevant codes.

220. The particulars relied upon by ASIC in support of its contention are that the 30 April 2009 Report was not clear, concise and succinct and contained excessive and irrelevant information including:

(a) page 2 - 4 extensive references to case law and statutes regarding the law of insolvency without providing any clarification of their significance in the liquidation of ERB; and

(b) page 5 paragraph 1.4.2 to Page 11 paragraph 1.16.1 references to 15 Tables and 9 Graphs which:

(i) were not included in the 30 April 2009 Report;

(ii) were described as "*presently being finalised*" or "*presently being prepared*";

(iii) added no meaning or clarification; and

(iv) if completed, were never provided to the creditors.

221. When Mr Hamilton was asked whether he had a similar view on the 30 April 2009 report as on the 23 September 2008 report he answered:

> "*That's almost as bad. But all the information is there. The issues are there. It's just that when you look at it in hindsight it's hard to grasp."*

222. Neither of the particulars alleged in Contention 8 as constituting the deficiencies of the 30 April 2009 Report were directly addressed by Mr Hamilton in his response, although his response was that they were not sufficient to justify a finding that the Liquidators had not met the standard of adequate and proper that would enliven the Board's power under s1292(2)(d)(i).

223. The particulars for Contention 8 were not supplemented by any submissions by ASIC and besides the comment by Mr Hamilton set out above there was no other questioning by ASIC's counsel with respect to this particular contention. In the absence of further evidence or submissions specifying how the matters identified were relevantly not clear, concise and succinct and contained excessive and irrelevant information we do not believe we can come to a proper conclusion on this contention, even though Mr Hamilton himself clearly regarded the report as having some deficiencies. While the absence of graphs may be substantively significant, their relevance to the overall report has not been identified and so it is difficult to form a view on the import of the references to them in the report and the fact they were never provided to the creditors.

224. We find that Contention 8 has not been established.

R. Contention 9

225. Contention 9 makes the same allegation as Contention 6 except in relation to the 30 April 2009 Report, that is that the Liquidators failed to set out sufficient information to enable creditors to assess the reasonableness of their remuneration.

226. Mr Hamilton responded to this contention on two bases. The first basis, already discussed, was reliance on Mr Fiorentino and we refer to and repeat our finding and reasons set out in paragraphs 161-173 herein.

227. Insofar as Mr Hamilton alternatively responded to this contention by raising matters set out in paragraph 178(a)-(d) we repeat our comments in paragraph 179 herein.

228. The second limb of Mr Hamilton's alternative response to Contention 6 (in summary) was that the 30 April 2009 Report did meet the requirements of the Act and the relevant codes.

229. We refer to paragraph 156 which sets out the relevant sections of the IPA Code.

230. In the 30 April 2009 Report as with the 28 September 2008 Report, there are listed up to 33 types of tasks.

231. The IPA Code template at 20.3 provides a summary table of tasks and general description:

> *"Information on the seven categories is to be set out in tabular form making it easy for creditors to understand the type and purpose of work being undertaken. A typical list of tasks is included as guidance. The narrative provided must be sufficient, meaningful, open and clear and provide specifics of the work done for this particular appointment. (Extract from IPA Code 20.3)";*

232. The 30 April 2009 Report also contains an extensive list of tasks without any reconciliation to the earlier task list or the respective hours and charge;

233. Finally, the 30 April 2009 Report failed to provide dedicated commentary setting out specific reasons for the variance between the Liquidators' initial prospective remuneration and the subsequent increase in the remuneration, both incurred and prospective.

234. As to prospective remuneration the 30 April 2009 Report lists descriptions of the tasks likely to be performed after the date of the Report, but does not include an estimate of the costs associated with those major task areas and does not therefore comply with the requirements of s499(7)(a)(ii) and (iii) of the Act.

235. We agree that prospective remuneration and costs are very relevant in circumstances where the asset realisation strategy is being reported on and creditors are being asked to fund further action. Creditors need to be able to make an assessment of likely recovery of costs so that they can assess the prospects of a return. The major tasks projected are necessary to assess whether the costs include, or otherwise, the costs of public examinations they are being asked to fund or if they are funded from recoveries.

236. Section 499(7)(a)(ii) and (iii) provide that a liquidator must prepare a report setting out a summary description of the major tasks performed, or likely to be performed, by the liquidator and the costs associated with each of those major tasks;

237. Having regard to the matters set out above, the 30 April 2009 Report, in some significant respects, did not satisfy the guidelines set out in clause 20.2 of the IPA Code and did not satisfy the requirements of s499(7)(a) of the Act. In our view appropriate care and diligence requires a liquidator to ensure that reports prepared

by them substantively reflect relevant guidelines as issued from time to time by relevant bodies, and also that the reports comply with applicable provisions of the Act. We are therefore satisfied that the Liquidators failed to perform their duties adequately and properly in relation to the provision of appropriate information on remuneration in the 23 September 2008 Report.

238. We find that Contention 9 has been established.

S. Contention 10

239. ASIC's tenth contention was withdrawn

T. Contention 11

240. ASIC's eleventh contention is that the Liquidators failed to lodge a report with ASIC pursuant to s533(1)(d) of the Act ("s533 Report") in circumstances where they had identified possible breaches of the Act by the Directors (s533(1)(a)), and had formed the view that ERB would be unable to pay its unsecured creditors more than 50 cents in the dollar (s533(1)(c)).

241. This contention refers to the duties set out s533(1)(d) of the Act, and s180 of the Act. Section 533(1) (Reports by liquidator) of the Act provides;

> *(1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:*
>
> *(a) past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or*
>
> *(b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:*
>
> *(i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or*
>
> *(ii) may have been guilty of any negligence, default, breach of duty or breach of Trust in relation to the company; or*
>
> *(c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;*
>
> *the liquidator must:*
>
> *(d) as soon as practicable, and in any event within 6 months, after it so appears to him or her, lodge a report with respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597;*

242. Mr Hamilton concedes the facts of this contention but states he was relying upon Mr Fiorentino as joint liquidator, to lodge the s533 Report or inform ASIC as to why it was not required to be lodged. Further Mr Hamilton stated that Mr Fiorentino made disclosure of the potential offences to creditors in the 23 September 2008 and the 30 April 2009 reports. Finally he says he was not aware of this until he read ASIC's letter to Mr Fiorentino dated 22 September 2010. We do not regard any of these matters as an answer to Contention 11.

243. As to Mr Hamilton's reliance argument we refer to and repeat our finding and reasons set out in paragraph 161-173.

244. There was a clear and unequivocal statutory obligation on the Liquidators to lodge the relevant report within six months in circumstances where they had identified potential offences and where the payment of unsecured creditors was less than 50c in the dollar. At the very latest the s533 Report should have been lodged by 29 October 2009 and it was not.

245. Whether the potential offences were disclosed to creditors as was submitted by Mr Hamilton is not a relevant consideration for compliance with s533 (and in any event, in the 23 September 2008 Report the information regarding this matter was unclear and inconsistent (see paragraph 186 herein)). As to the fact that Mr Hamilton was not aware of this matter until April 2010, this is also irrelevant to Mr Hamilton's responsibility as joint liquidator to ensure the duties of the office of liquidator were carried out adequately and properly.

246. In our view appropriate care and diligence in the discharge of a liquidator's duties requires strict compliance with applicable provisions of the Act and failure to lodge a report was a failure to carry out a duty of the office of liquidator. The failure of the Liquidators to lodge a s533 Report and therefore ensure compliance with a relevant provision of the Act was not an adequate and proper performance of those professional duties.

247. We find that Contention 11 has been established.

U. Appropriate orders

Sanctions Hearing

248. On 11 March 2014, the Panel held a hearing in relation to what orders, if any, should be made under s1292(2) of the Act in relation to Mr Hamilton, having regard to our determination that Mr Hamilton had failed to carry out or perform adequately and properly the duties of a liquidator ("the Sanctions Hearing"). Mr Hamilton was represented by counsel Mr Andrew Harding and solicitor James Hamilton from Surry Partners. ASIC was represented by counsel, Mr Russell.

ASIC's ability to seek a different sanction to that set out in the SOFAC – Parties' Submissions

249. Following delivery of the determination to the parties and prior to the Sanctions Hearing in this matter, ASIC notified Mr Hamilton by email that its submissions on sanction would seek cancellation of Mr Hamilton's registration as a liquidator.

The email referred to ASIC's *"application in the SOFAC for a six month suspension."* Mr Hamilton objected to this purported change.

250. The panel sought submissions from the parties on this issue prior to the Sanctions Hearing, directing ASIC to provide written submissions addressing the basis for its power to amend the sanction sought in the application and SOFAC which it had lodged with the Board. There were further oral submissions on the point at the hearing and final written submissions were invited to ensure that each party had sufficient opportunity to address the Board on this matter.

251. It is convenient to deal with this issue separately to our findings on the appropriate sanction in this matter.

252. In the first written submissions received from ASIC, Mr Russell viewed the real issue as "*not whether ASIC has power to amend the sanction sought in the SOFAC but rather, whether the Board has power to give a sanction greater than (or lesser than or different from) that originally indicated as being sought by ASIC in the SOFAC."* The Board is certainly aware of its powers under s1292(2) of the Act and the fact that it may impose a sanction different from that sought by ASIC. However, the Board's power under s1292(2) does not answer how ASIC may appropriately amend its application and SOFAC in a matter before the Board, after the conclusion of the proceedings, to seek an order different to that which was set out in the application which accompanied the originating SOFAC and to all intents and purposes, this is what occurred and was the issue to which Mr Hamilton objected.

253. At the Sanctions Hearing Mr Russell submitted that the change of tack by ASIC was justified by the Board's findings and that whether or not ASIC's action may be unfair to Mr Hamilton has to be tested by reference to evidence before the Board, of which there was none. Finally Mr Russell submitted that absent such evidence the Board, as a matter of fairness, is at least required to consider ASIC's submissions on sanction.

254. Mr Hamilton's counsel submitted that the Board does not have power under s1292(2) to impose an order different to the order initially sought by ASIC or alternatively, as a matter of procedural fairness, it should not now be open to ASIC to seek a far more draconian order against Mr Hamilton, in circumstances where Mr Hamilton defended the case against him without threat of such an order being sought.

255. There were final written submissions addressing procedural fairness invited as a result of argument before the Panel at the hearing, as neither party had referred to any relevant authorities on procedural fairness in their first submissions.

256. ASIC's final submissions this time articulated the issue as whether *"in the event the Panel considers or accepts ASIC's submission that Mr Hamilton's registration be cancelled, whether or not Mr Hamilton will be denied procedural fairness; more specifically, whether or not Mr Hamilton will have been denied a fair hearing?"*

257. Mr Russell's final written submissions included;

(a) Reference to the High Court decision in *Barbaro v The Queen* [2014] HCA 2 (12 February 2014). In that case, the High Court found there was no want of procedural fairness or other unfairness in the trial judge's refusal to receive submissions from the prosecutor about the range of available sentences, because neither the prosecution nor an offender's advisers can do anything more than proffer an opinion as to what might reasonably be expected to happen. It is for the sentencing judge alone to decide what sentence will be imposed (majority at 47). Mr Russell likened the roles of ASIC, a respondent and the Board under the statutory scheme of s1292(2) as similar to the roles of the prosecutor, an accused and the sentencing judge described. Accordingly ASIC's statement or submission at any time as to the orders it seeks can be no more than its opinion as to the appropriate sanction the Board should order on its findings, having regard to the contentions established.

(b) Procedural unfairness must amount to practical unfairness within the applicable decision-making framework (*Barbaro* at [65] per Gageler J). In order to establish a breach of procedural fairness it must be demonstrated that the procedure was unfair, not that an expectation engendered by the representation [of a decision-maker] has been disappointed: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1 at [34], [36]-[38] per Gleeson J; at [105] – [106] per McHugh and Gummow JJ.

(c) If a Tribunal is considering ordering a different or harsher penalty to that which has been previously indicated, it is a denial of procedural fairness for the tribunal to deny the respondent an opportunity to call evidence or make submissions on that penalty; *Lloyd v Veterinary Surgeons Investigating Committee* [2005] NSWCA 456 @[1],[85],[87].

(d) The matter of *ASIC v Gould*, 26 August 2004 (unpublished) which concerned the refusal of the Board to allow ASIC to amend its SOFAC, is distinguishable on its facts because unlike this matter it concerned the amendment of allegations in a SOFAC and is a decision reflecting the then practice of the Board and may not necessarily be its practice today.

258. Mr Harding's final submissions posed the issue as *"whether the Panel should proceed to receive or entertain ASIC's submission that cancellation is an appropriate penalty, given the basis on which ASIC conducted the case throughout and having regard to the Panel's overriding obligation to afford the Respondent procedural fairness and ASIC's role as a model litigant to act "fairly"."*

259. Mr Harding's submissions included the following points:

(a) the Board's practice manual for conduct matters includes the requirement that the Respondent be entitled to know the case sought to be made against him and paragraph 4.1(c) requires ASIC to identify in the SOFAC the orders it seeks against the Respondent, being an important means by which the Respondent is informed of the case that is being made against him.

(b) ASIC's role in actively contending for cancellation may be thought to sit uncomfortably with the pronouncement by a majority of the High Court in *Barbaro v The Queen* [at 39] that "*It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which it considers should be reached or a statement of the bounds within which that result should fall"*.

(c) The panel should not entertain ASIC's submission on cancellation as this would amount to Mr Hamilton being allowed to prepare for and appear at the hearing not fully appreciating the case against him, and on a false premise and work an injustice to Mr Hamilton.

(d) If ASIC wished to contend for a more severe sanction, it should have done so at an earlier stage in the proceedings, and by the conventional method of applying to amend its SOFAC, in accordance with the procedures.

The panel's view on whether there has been any practical unfairness

260. In the email from ASIC to the Respondent shortly following the delivery of the determination to the parties in this matter, ASIC, referring to the sanction it had initially sought in the SOFAC, notified the Respondent it would now be seeking cancellation of Mr Hamilton's registration at the Sanctions Hearing. It is not surprising that the Respondent objected to this and regarded it as a change to the SOFAC especially given the manner in which the email was expressed. The process for amendment of documents filed with the Board is set out in the Board's procedures (Conduct Manual 4.9(a)) and leave from the Panel is required. If leave had been sought the Panel would have had an opportunity to consider whether it was appropriate for ASIC to file an amended application/SOFAC to revise the sanction in advance of the Sanctions Hearing. Even had leave been granted, at least the Respondent would have been clear about why (or why not) the change had been made and the basis for it, before he presented his arguments in mitigation of sanction.

261. The Respondent's submission referred to in paragraph 254 suggested that the Board does not have power under s1292(2) to impose an order different to the initial order sought by ASIC. However, no action on ASIC's part can affect the power of the Board to act or not act under s1292(2). We are not therefore concerned that, having heard ASIC's submissions on cancellation at the sanctions hearing, even though leave had not been sought or granted, we are in any way bound by them. In any event, Mr Hamilton's counsel was provided with the opportunity to respond to ASIC's submissions on cancellation. For these reasons we do not consider that the fact that submissions on cancellation of Mr Hamilton's registration were made by ASIC at the sanctions hearing resulted in any practical unfairness to either party.

262. Mr Russell submitted that because there was no evidence before the Board regarding how ASIC's change of sanction may have been unfair to Mr Hamilton it was not open to the Board to consider whether the purported change could have been unfair. In our view it would have been open to us to draw an inference from the objective facts available regarding the possible impact of the purported change. In the circumstances however, this has not been necessary because the Board must exercise its sanction power under s1292(2) independently having regard to

established principles regardless of ASIC's submissions as to appropriate sanction and whether or not the sanction sought had been revised.

263. The dicta in *Barbaro* regarding the status of submissions made by parties to the sentencing authority is instructive precedent for the status of submissions on sanction matters made to this Board i.e. that ASIC's submissions as to appropriate orders are no more than an expression of its opinion as to the appropriate sanction and do not affect the independent exercise by the Board of its sanction power under s1292(2). However, the characterisation of submissions on sanction to the Board was not in our view the threshold issue which gave rise to these arguments before the Panel. Mr Hamilton objected to ASIC changing its stance on sanction because he was concerned that it could have resulted in unfairness to him. The point is that he was not clear about the potential ramifications of ASIC's action. To the extent ASIC indicated its basis for changing the sanction, it had referred Mr Hamilton to the SOFAC. It is understandable that Mr Hamilton regarded the change as one being made to the application/ SOFAC, as the Panel did, and Mr Hamilton was entitled to be heard on his objection to this development. In the event, there was no resultant unfairness to Mr Hamilton because, as already noted, the Panel is always obliged to exercise its sanction power under s1292(2) independently. However, we do make the observation that ASIC is the prosecuting regulator in all proceedings before the Board and so has a high level of familiarity with Board processes. By contrast, respondents are unlikely to have any experience at all of Board proceedings. They should be entitled to expect that all steps taken by ASIC in proceedings will comply with the procedures prescribed by the Board and ideally refer specifically to those procedures in correspondence with the Respondent. This assures clarity, consistency and certainty of the disciplinary process being engaged in and avoids confusion such as arose in this matter.

264. On 24 March 2014 ASIC purported to file further submissions in reply on this point, to which the Respondent objected. ASIC did not seek leave to file these submissions. ASIC asserted it should be permitted to file the reply because it had been directed by the panel to file its written submissions first despite the onus being clearly on the Respondent to prove there would be procedural unfairness. However, and as set out above, ASIC was directed to file written submissions first because it had sought to change the sanction being sought following the determination, and without following the procedures set out, and the Respondent objected. ASIC was therefore asked by the Panel to outline the basis on which it was purporting to apparently amend the SOFAC/Application. In the circumstances, we have decided not to consider ASIC's further submissions in reply.

265. One final matter we wish to address is Mr Russell's submission that it would be unfair for the Panel not to have considered ASIC's submissions on cancellation. As already discussed, the status of such submissions is as an opinion or recommendation to the Panel. As a matter of practice it is customary for the Board to receive such submissions when hearing those from a Respondent and we expect this will continue. The decision in *Barbaro* makes it clear that not hearing those submissions from ASIC, or indeed, any others from ASIC on sanction for any reason, (such as the submissions in reply referred to in paragraph 264) would not result in any unfairness to ASIC. It is the Board's role alone, exercising its power under s1292(2) to decide the appropriate sanction in accordance with the relevant established principles.

Mr Hamilton's evidence and submissions on sanction

266. Mr Hamilton's counsel submitted that in the circumstances an admonishment or reprimand together with an undertaking would be an appropriate sanction because the findings against Mr Hamilton are at the lower end of the scale of seriousness, involving as they do primarily errors of omission and not findings of dishonesty, misleading conduct or sharp practice. There is no finding that Mr Hamilton is not a fit and proper person to act as a liquidator.

267. Other relevant factors submitted on behalf of Mr Hamilton included:

(a) the sound professional reputation he has enjoyed over many years;

(b) the fact that he has never before been the subject of a complaint or disciplinary action;

(c) his full cooperation with ASIC over the course of this investigation;

(d) the fact that the findings do not involve a pattern of conduct;

(e) the fact that he will not again be acting as a joint liquidator.

268. Mr Hamilton was prepared to give a binding undertaking that he will maintain a summary of all key decision making steps that are taken throughout the course of an appointment and the reasons supporting any key decision and will not act again as a joint liquidator.

269. Mr Hamilton tendered four character references.

270. Finally, it was submitted that Mr Hamilton has already paid a heavy price for these proceedings, both in terms of money and time cost and a suspension or cancellation order would give rise to significant financial hardship for Mr Hamilton and would adversely affect third parties.

ASIC's outline of submissions on sanction

271. ASIC helpfully referred to the relevant principles in relation to the Board's exercise of power under s1292 (d)(2), as set out in *ASIC v Dean-Willcocks* (12 April 2006) and paragraphs 12, 13 and 14 of *ASIC v McVeigh* (19 January 2010) CALDB proceedings 10/VIC08 as follows:

(a) The principal purpose of these proceedings is protective rather than punitive and the guiding principle in making any order is protection of the public;

(b) The protection of the public includes;

(i) ensuring that those unfit to practise do not continue to hold themselves out as fit to practise;

(ii) deterring the practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them;

(iii) the maintenance of a system under which the public can be confident that the relevant practitioner and other practitioners will know that breaches of duty will be appropriately dealt with; this system recognises that registration as a liquidator is a privilege, the continued existence of which is dependent on diligent performance of its attendant duties;

(c) It is important to demonstrate that there is a regulatory regime applicable to liquidators which is effective in maintaining high standards of professional conduct; it may be accepted that publication of the Board's orders may impact a respondent financially, professionally and personally and that there is an element of deterrence (and therefore consequential public protection) in these matters; however, the principal element of deterrence is in the order the Board makes since that is the way the protection of the public can be most directly and effectively advanced;

(d) The Board (as a disciplinary tribunal) should avoid being concerned with the personal impact on the practitioner, and such matters are to be given limited consideration, as the prime concern of the Board is protection of the public;

(e) The question of what order the Board should make depends on the merits of each case and a range of factors; such factors can include not only the objective circumstances of the particular case but also less tangible matters such as a respondent's recognition and acceptance of breaches of duty, attitude to compliance with professional standards generally and willingness to improve;

(f) One of the principal factors relevant to the Board's consideration of sanctions is the seriousness of the matters found to be established;

(g) While references to a respondent's competence and integrity are factors to be taken into account in assessing the public interest, in particular in connection with the likelihood of a respondent committing similar errors in the future, nevertheless the Respondent remains subject to the same regulatory regime as all other registered liquidators and the Board's order must be appropriate to the seriousness of the failures which have been found to be established; those practitioners and the business community which they serve need to be aware that to continue to retain their status as registered liquidators, they need to continue to perform their duties adequately and properly;

(h) Genuine contrition or remorse is a necessary prerequisite to any possibility of rehabilitation and genuine acceptance of failure is a necessary prerequisite to contrition or remorse.

272. With reference to the established principles set out above, and we agree that they provide a useful framework for our decision regarding an appropriate sanction in this matter, ASIC submitted that in real terms Mr Hamilton was found to have failed to discharge his duties as liquidator in relation to the Deed of Settlement and Release Issues and the General Conduct Issues. ASIC submitted that there are no

mitigating circumstances for Mr Hamilton's conduct and the stance taken by Mr Hamilton at the hearing in relation to his conduct demonstrates not merely a serious dereliction of duties but also a fundamental lack of understanding of them. For someone of his experience the conduct is inexcuseable and the public is best protected by a cancellation order.

273. In the alternative to its submissions on cancellation, ASIC made further oral submissions on a period of suspension of Mr Hamilton's registration of at least six months, having regard to the issues raised by Mr Hamilton regarding procedural fairness and ASIC's power to change the sanction it sought in the SOFAC. In relation to suspension of Mr Hamilton's registration as a liquidator, Mr Russell pointed to three distinctions between *re Heesh*, in support of his submission that the conduct in this matter should be regarded as more serious. The first point of difference was that in relation to the Deed of Settlement and Release issue, Mr Hamilton was actively involved in the events of 14 January 2009. The second point was that there was no agreement between Mr Hamilton and Mr Fiorentino for Mr Hamilton to do nothing, as there was in *Heesh*, and the third point referenced the Board's findings in the case regarding the lack of effective systems and processes in place at Mr Hamilton's firm to support a proper level of oversight by a jointly appointed liquidator. The combination of these three factors, he submitted, support a suspension of a minimum of six months together with an undertaking that Mr Hamilton would submit to an appropriate peer review at say, six months and twelve months after the end of any period of suspension.

What, if any, sanctions should be imposed by the Board?

274. The function being performed by the Board in exercising powers under s1292(2) 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 s1292(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 s1292(2) in the light of all the considerations before it that are considered relevant."*

275. It is common ground, that the principle which guides the Board in exercising powers is protection of the public. We note that in *Re Young and CALDB (2000) 34 ACSR 425* that the *AAT* said (at paragraph 80), that the jurisdiction created by s1292 is of a protective nature and: "*it seems that the protection of the public*

should be the principal determinant of a proper order but that this may be achieved by an order affecting registration of the person in question. In other words, deterrence is an element of public protection."

276. We agree with the statement in *McVeigh* at 12.7 that in exercising our powers under s1292(2) :

(a) Our prime concern has to be protection of the public;

(b) The protection of the public includes the maintenance of a system under which the public can be confident that the relevant practitioner and all other practitioners will know that breaches of duty will be appropriately dealt with;

(c) The personal circumstances of the practitioner are to be given limited consideration.

In this matter the Board has found that Mr Hamilton failed to perform adequately and properly the duties of a liquidator in respect of nine of the ten contentions pressed in the SOFAC.

277. Mr Hamilton submitted that the seriousness of this matter was at the lower end of the scale involving as it did omissions rather than commissions on his part. We do not agree that this characterisation of Mr Hamilton's conduct is appropriate given the facts and the findings made by the Board.

278. The first four contentions in the SOFAC, involved the Deed of Settlement and Release Issue. The conduct for which Mr Hamilton was responsible in respect of those contentions and which was found not to meet an appropriate standard was not conduct that can be described as in any way unique to or dependent upon his role as the second liquidator. His actions on the day the Deed of Settlement and Release was signed cannot be viewed, or indeed explained away, simply as omissions which occurred because he was under a mistaken impression that Mr Fiorentino was responsible for the conduct of the liquidation. Mr Hamilton played an active role in the events of that day and a number of his actions demonstrated an ignorance of, or lack of proper attention to the due exercise of the duties of the liquidator's office. For example, in relation to Contention 1(a) Mr Hamilton did not turn his mind to the current status of potential claims and recoveries before deciding whether to enter into the Deed of Settlement and Release. It is clear from his evidence and the conduct of his defence to this contention that, even having had cause to reflect upon it, he regarded his conduct as appropriate. If Mr Hamilton had turned his mind to the issue, it may well have been the case that had he questioned Mr Fiorentino adequately and properly on the matter, and recorded that appropriately, then he would have discharged his duty as a second liquidator to a sufficient standard. It will of course always depend upon the particular facts. However, we are not suggesting that an enquiry independent of the first joint liquidator would always be necessary, although turning one's mind to the issue and doing at least something, would be necessary.

279. Thus, the manner and extent of assessment and enquiry necessary to adequately and properly discharge the duty identified would likely have differed depending upon

whether Mr Hamilton was the second or primary joint liquidator or indeed a sole liquidator. Nevertheless there is a reasonably obvious obligation, if the liquidator's duty to creditors is to be adequately and properly discharged, for a liquidator to identify and turn their mind to the issue of what potential claims and recoveries may be available. This is especially so in the circumstances of a potential settlement with a phoenix company and its directors, as a proper assessment of what is being given up for the price of the settlement and whether that is an acceptable outcome for the relevant stakeholders is critical.

280. Likewise, in relation to the general conduct issues the subject of the second set of contentions in the SOFAC, Mr Hamilton argued his defence, not on the basis that he had done anything as second joint liquidator in relation to the acts and reports the subject of these contentions, only that he was entitled to and did rely and act upon the basis that Mr Fiorentino was an experienced liquidator with carriage of the matter, or alternatively (for example) that the reports met the relevant standards. Many of the points raised by Mr Hamilton in defence of his conduct as second joint liquidator of ERB as well as the substance of the undertakings he offered to ASIC, demonstrate that Mr Hamilton did not sufficiently appreciate the full range and extent of his obligations as were relevant in the ERB liquidation and that remained the case throughout his defence of the matter.

281. In his affidavit filed at the sanctions hearing, Mr Hamilton states that he has taken account of the findings in the determination and goes on to state that "*in the circumstances that then existed, I realise that I should have taken a more dominant role and I have now ensured my work practices have been improved.*" In our view more than playing a more dominant role would have been required in order to avoid the failures that occurred. Likewise, in order to address the issues identified by our findings and fulfil our protective role, the sanction we impose must serve to support public confidence that as a registered liquidator, Mr Hamilton is aware of and up to date with the full range of his duties and will be working within an office framework that includes appropriately comprehensive and up to date risk management and compliance procedures.

282. In light of the above matters we regard the conduct established in this matter as more serious than contended for by Mr Hamilton's counsel and the sanction imposed must in our view address this appropriately if the Board is properly to fulfil its protective role.

283. While what order is appropriate depends on the merits and specific circumstances in each case, it is important to maintain a regime that is effective in maintaining high standards of conduct. Many of Mr Hamilton's submissions in support of an admonishment or reprimand related to Mr Hamilton's personal circumstances. For example his long standing as a practitioner and the practical impact an order for suspension would have on him personally. These factors are quite clearly not determinative of our view on the nature of the sanction which is appropriate. That exercise must have objective regard to the seriousness of the conduct established and the suitability of the sanction to address the concerns raised by the conduct and the circumstances giving rise to it. An important element of public protection is the deterrent nature of the sanction both in respect of the practitioner in question as well as practitioners generally.

284. Mr Hamilton tendered four character references in his support. We have given credit to the statements of Ms. Virgara and Messrs. Stern, Ma and Conway. Each of those persons, all with significant credentials were firmly of the view that Mr Hamilton had performed in a proper and competent manner in their dealings with him.

285. However, having regard to the circumstances of this case and the relevant applicable principles, we have formed the view that an order for suspension of Mr Hamilton's registration for a period of six months, with appropriate undertakings provided by Mr Hamilton to undertake a period of continuing professional education, to address any gaps in risk management and compliance practices which may still exist at the firm, and independent peer review of his first 4 liquidations following the suspension period, will achieve the Board's objective of public protection both by their remedial effect in addressing concerns identified and their deterrent effect by discouraging similar conduct recurring in the future.

286. We note that in the case of *Re Heesh* the period of suspension deemed appropriate was two months. We have formed the view that the conduct in this matter was more serious and a longer period is justified. We agree with ASIC that Mr Hamilton's active involvement in the conduct the subject of the first four contentions is a relevant distinction from the facts in *Re Heesh* and one that contributes to our view that the conduct here was more serious.

287. Likewise the apparent lack of effective systems and processes in place at the firm to prevent the failures which occurred is a significant distinguishing factor as regards *Re Heesh* and weighed in our view that the conduct in this matter was more serious.

288. Other factors which weighed in forming our view include the fact that a period of suspension will allow Mr Hamilton time to put into place the necessary arrangements to give effect to the second undertaking to be ordered before taking on any new appointments to any office required under the Act to be filled by a registered liquidator.

289. A final relevant issue in assessing the appropriate sanction in this matter, having regard to the sanction imposed in *Re Heesh*, was the fact that *Re Heesh* was the first matter in which the duties of a jointly appointed registered liquidator (acting as an administrator), not conducting the insolvency administration was considered. If Mr Hamilton had been fully aware of his professional obligations as joint liquidator he would have been aware of that decision and its potential implications for him in accepting appointments as a joint liquidator. However had he been aware of that decision (and certainly he became so in the course of these proceedings), he did not appreciate the implications of its application to his own position in the ERB liquidation and he defended the matter on the basis his conduct was not wanting in any way.

290. We accept the submission by Mr Hamilton's counsel that there is no lack of contrition or remorse on Mr Hamilton's part and that he is genuinely committed to addressing the matters arising from our findings in the matter.

291. The orders that we make must reflect the need for an improvement in, and updating of, Mr Hamilton's knowledge and skills and we believe this can be achieved by

ordering the undertaking to complete 16 hours of additional professional development education before accepting any further appointments to any office required under that Act to be filled by a registered liquidator.

292. Finally we believe community expectations have moved on significantly in the last 14 years and that a period of six months suspension, having regard to the fact that the conduct in this matter was more serious than in the *Re Heesh* matter, more adequately reflects those expectations, in particular to uphold a system under which the public can be confident that there is a regulatory regime in place which is effective in maintaining consistently high standards of professional conduct across the industry.

V. Orders

294. We order as follows:

(a) The registration of William James Hamilton as a liquidator be suspended for a period of six months commencing on a day which is 60 days from the date this order takes effect.

(b) Mr Hamilton is required to give the following undertakings in writing to ASIC within 14 days after this order takes effect:

(i) Within six months after 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 and of ARITA, Mr Hamilton must complete at his expense and in forms to be agreed in advance by ASIC (which could include courses, lectures, seminars, workshops, mentoring programmes) an additional 16 hours of professional development training covering the areas of reporting (to creditors, ASIC and other practitioners), dealings with property, compliance and risk management and liquidator's duties to creditors and stakeholders.

(ii) On completion of any professional development training undertaken by Mr Hamilton in accordance with paragraph (i), Mr Hamilton shall procure and lodge with ASIC a certificate or certificates of satisfactory completion (given by a person or entity agreed in advance by ASIC).

(iii) That, during the period of suspension ordered, or before Mr Hamilton accepts any new appointments as a registered liquidator, Mr Hamilton will, at his expense, retain an appropriately qualified independent consultant agreed in advance with ASIC to:

1. undertake a gap analysis of the current risk management and compliance procedures with respect to the conduct of liquidations and company administrations in place at the firm W J Hamilton and Co;

2. prepare a report outlining any gaps identified and including recommendations regarding specific processes and procedures necessary to address any gaps identified;

3. oversee the implementation of all recommendations made.

(iv) Prior to accepting any new appointments as a registered liquidator Mr Hamilton is to provide a copy of the report in paragraph (iii) 2 above to ASIC and procure and provide to ASIC confirmation from the independent consultant engaged that they have engaged in each of the steps above and in their opinion the compliance and risk management processes of the firm with respect to the conduct of company administrations and liquidations is appropriate and up to date.

(v) That following the period of suspension Mr Hamilton will submit the first four company external administrations conducted by him as a liquidator registered under the Corporations Act to an independent review by a person approved by ASIC (such approval not to be unreasonably withheld). Such person is to confirm in writing to ASIC that they have conducted a review and whether in their opinion the relevant external administration has been conducted in accordance with the Corporations Act, the ARITA Code of Professional Practice and the APES Code of Ethics for Professional Accountants.

(vi) Until Mr Hamilton has complied fully with undertakings (i) – (iv), Mr Hamilton will not accept any new appointment to any office required under the Corporations Act to be filled by a registered liquidator.

W. Notice

295. Within 14 days of the date hereof, formal notice of this Decision will be given to Mr Hamilton under s1296(1)(a) of the Act, a copy of that notice will be lodged with ASIC under s1296(1)(b) and the Board will cause to be published in the Gazette a notice in writing setting out the Decision.

Maria McCrossin 3 April 2014

Panel Chairperson