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: 05/QLD13

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

WAYNE JOHN WESSELS
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.

15 November 2013

Panel:

Howard Insall SC (Panel Chairperson)

Eric Passaris

Professor Ian Ramsay

Companies Auditors and Liquidators Disciplinary Board
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DECISION AND REASONS

A. Introduction

1. This is an Application under s 1292 of the Corporations Act 2001 ("the Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC") on 1 July 2013. By the Application, ASIC asks the Board to suspend the registration of the Respondent, Wayne John Wessels ("Mr Wessels") (a registered auditor).

2. In essence, the application related to alleged failures on the part of Mr Wessels in relation to his conduct of an audit of Kleenmaid Corporate Pty Limited, part of a group of companies which went into administration in 2009, with a significant deficiency of assets over liabilities.

3. The Statement of Facts and Contentions ("SOFAC") dated 1 July 2013 raised a significant number of issues. However, following a mediation conducted at the Board by the Deputy Chairperson, Ms Maria McCrossin, assisted by Board member, Mr David Sauer, the parties came to an agreement as to the facts and the appropriate orders. This was embodied in an "Agreed Statement of Facts and Consent Orders" which was tendered at the hearing on 25 October 2013. At that hearing, Mr Greg McNally SC appeared for ASIC and Mr Mark Steele SC appeared for Mr Wessels.

4. Notwithstanding the parties' agreement, the Board's jurisdiction only arises under s1292 where it is satisfied of certain matters set out in that section. Relevantly, s1292(1) provides:

> "(1) The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this section that, before, at or after the commencement of this section:
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> …
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> (d) the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
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> (i) the duties of an auditor; or
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> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered company auditor;
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> or is otherwise not a fit and proper person to remain registered as an auditor;

by order, cancel, or suspend for a specified period, the registration of the person as an auditor."

5. Accordingly, before exercising our powers under s 1292(1) in this matter, it is necessary for us to be satisfied (relevantly) that Mr Wessels has failed to carry out or perform adequately and properly the duties of an auditor as required by s 1292.

B. Principles relating to consideration of agreed facts and orders

6. Before dealing with the facts, we will address the parties' submissions concerning the principles applicable to approval of consent orders on the basis of agreed facts.

7. The parties were in agreement about the effect of those principles. The parties accepted that the question whether orders should be made was ultimately one for the Board, and that the Board needed to be "satisfied" of relevant matters in s 1292 before doing so. However, it was submitted (amongst other things):

   (a) In most cases it is appropriate to allow and even encourage parties to simplify litigation by making admissions so as to achieve the just, quick and cheap resolution of their dispute: *Dean-Willcocks Pty Ltd v Cmr of Taxation (No 2)* (2004) 49 ACSR 325 at [28] per Austin J;

   (b) The fact that the parties join in proposing a discretionary order to be made by consent is a consideration favouring a discretionary decision to make it. This is a particularly powerful consideration when ASIC, which for relevant purposes is a guardian of the public interest, has consented. However, the decision is for the Court, not for the parties: *Re One Tel; ASIC v Rich* (2003) 44 ACSR 682 at [27].

8. We are unaware of (and were not taken to) any authority dealing expressly with the Board's powers to make orders by consent, on the basis of agreed facts[1]. We note that there is no express legislative provision dealing with the Board's power to make orders by consent (compare, for example, s 564 of the Legal Profession Act 2004 (NSW), which expressly provides for such consent orders in relation to disciplinary proceedings against legal practitioners).

9. Further, we are unaware of any authority which has explicitly examined the power of any disciplinary tribunal to make consent orders on the basis of agreed facts. However, this course has been adopted in a number of disciplinary cases:

[1] Brief reference to the issue was made in the previous decision of the Board in *ASIC v Walker* 22 December 2008 at [7.1(c)], but it is not apparent that the Board was taken to the authorities on the issue other than *ASIC v Starnex Securities Pty Ltd* [2003] FCA 1375, a decision of Finkelstein J, who appears to have adopted a more restrictive approach than that adopted in the other authorities, discussed below.

(a) In *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, the New South Wales Court of Appeal removed the name of a barrister from the roll by consent (at [13]). It also proceeded to consider an application for declarations that the Opponent had been guilty of professional misconduct and was not a fit and proper person to remain on the roll. It made those declarations upon the basis of an agreed statement of facts (see [15]). It has to be said, however, that the agreed facts were clear and stark, and included the fact that the Opponent, a Queen's Counsel at the New South Wales Bar, had failed to lodge tax returns for a period of 38 years. The case contains no explicit discussion of the court's power to make the orders by consent or on the basis of agreed facts;

(b) In *Barrister's Board v Pratt* [2002] QCA 532, the Queensland Court of Appeal made orders removing the respondent from the roll in circumstances where the respondent consented to the orders. However, it is not apparent from the short judgment whether the orders were made as a result of that consent or on the basis of evidence actually adduced on the hearing;

(c) In *Law Society of the Australian Capital Territory v Burns* [2012] ACTSC 91, the Supreme Court of the Australian Capital Territory made an order, by consent, removing the name of a solicitor from the roll on the basis that the solicitor was not a fit and proper person to remain on the roll. The court found this to be established upon the basis of an affidavit sworn by the solicitor dealing with her conduct;

(d) In *Legal Services Board v Williams* [2009] VSC 561, Pagone J made orders to which the respondent had consented although it is not clear whether this was simply on the basis of agreed facts.

10. However, it seems clear in disciplinary cases (certainly where the inherent jurisdiction in relation to legal practitioners is exercised) that merely because an application is made by consent, the court is not compelled to make the orders sought, if not satisfied that they are appropriate (see *The Prothonotary of the Supreme Court of New South Wales v Ritchard* (New South Wales Court of Appeal, 31 July 1987, unreported) and *Legal Services Commissioner v Rushford* [2012] VSC 632).

11. As the parties pointed out, the courts have made orders by consent on the basis of agreed facts in analogous situations, such as applications for disqualification of directors under the Corporations Act.

12. One such case was *Re OneTel Limited (in liq); ASIC v Rich* (2003) 44 ACSR 682. In that case, Bryson J (as he then was) made declarations and orders which were proffered with the consent of the defendant (Mr Keeling), on the basis of agreed facts (see para [1]).

13. The declarations sought in that case included declarations establishing contraventions of s 180(1) of the Corporations Act (including contraventions relating to the failure to monitor management, the failure to take reasonable steps to assess One.Tel's financial position and performance and the failure to take reasonable steps to assess properly material adverse developments (at [11])).

14. Bryson J made declarations as sought, on the basis of the agreed statement of facts (see [1], [11]). He did not expressly discuss the nature of the court's jurisdiction to do so.

15. He then proceeded to consider the consent application for orders that, amongst other things, the defendant be prohibited from managing corporations for 10 years pursuant to s 206C of the Corporations Act. That section provided:

> "On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if: (a) a declaration is made under section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; (b) the Court is satisfied that the disqualification is justified."

16. At paragraph [27], Bryson J continued:

> "The conditions of the power to disqualify Mr Keeling from managing corporations in s 206C(1) … have been fulfilled. If the Court is to make an order of disqualification the terms of each section point out three stages each of which is discretionary:
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> (1) the stage in para (1)(b) — "the Court is satisfied that the disqualification is justified";
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> (2) the decision to make an order of disqualification; and
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> (3) decision on the period that the Court considers appropriate.
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> These closely related discretions must be addressed together. Decision can only be made by the Court, and cannot be delegated to anyone else; it cannot be delegated to the parties, which would in effect happen if the Court adopted an agreed form of consent orders without giving genuine consideration to what the Court should do. The fact that parties join in proposing a discretionary order to be made by consent is a consideration favouring a discretionary decision to make it; this is a particularly powerful consideration when ASIC, which for relevant purposes is a guardian of the public interest, has consented. However decision is for the Court, not for the parties. The approach to the Court made by the parties in the present

case has accorded with what I have said; they have not claimed to control the Court's decision."

17. *ASIC v Rich* (2004) 50 ACSR 500 was a similar case where White J accepted that the Court could proceed on the basis of an agreed statement of facts. At [15], he said:

> "Although a declaration cannot be made under s 1317E unless the court is satisfied that the contravention has occurred, the material which may produce that satisfaction may include a statement of agreed facts and admissions by the parties. That was the course taken in *ASIC v Rich* at [2] and [10]. It is consistent with the course adopted by Austin J in *Dean-Willcocks Pty Ltd v Cmr of Taxation (No 2)* (2004) 49 ACSR 325. As Austin J observed in the latter case (at ACSR 331, [28]):
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> > 'A court is never bound by admissions made inter parties or in the pleadings: *Termijtelen v Van Arkel* [1974] 1 NSWLR 525. It may decline to act on admissions if, for example, they are made so as to attract a jurisdiction that is not naturally present. However, in most cases it is appropriate to allow and even encourage parties to simplify litigation by making admissions so as to achieve the just, quick and cheap resolution of their dispute …'."

18. The jurisdiction exercised by Bryson J in *Re OneTel* and White J in *ASIC v Rich* has clear similarities to the jurisdiction which we are required to exercise in the present case. Those cases provide clear support for the approach proposed by the parties on this Application.

19. These decisions were approved by Barrett J (as he then was) in *ASIC v Elm Financial Services Pty Ltd and Ors* (2005) 55 ACSR 411, where His Honour said:

> "As is made clear by, in particular, the decision of Bryson J in *Re One.Tel Ltd; Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 682 and that of White J in *Australian Securities and Investments Commission v Rich* (2004) 50 ACSR 500, a declaration of contravention under s 1317E of the Corporations Act, being a declaration on a matter relating to public or analogous rights, should not be made by consent of ASIC and the person against whom ASIC has proceeded unless the court has a basis for being satisfied by evidence (including agreed facts) that the statutory conditions for the making of the declarations have been fulfilled."[2]

[2] See also, to similar effect, *ASIC v Lindberg* (2012) 91 ACSR 640 at [6]-[11]; *Minister for the Environment, Heritage and the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10 at [24]-[38].

20. In *ASIC v Edwards* (2004) 51 ACSR 320 at [3], Barrett J held that the approach of Bryson J in *One.Tel* and White J in *ASIC v Rich* did not apply directly to a case where the agreement involved asking the court to accept undertakings by consent, because the court was not, in such a case, exercising the statutory jurisdiction. In our view, this is inapplicable to the Board's jurisdiction. The Corporations Act expressly provides the Board with statutory jurisdiction to require undertakings in lieu of cancellation or suspension (see s 1292(9)). However, Barrett J went on to note that the court would not, in any event, accept undertakings by consent unless it has power to enjoin the acts and activities constituting the substance of the undertaking. In our view, this approach is equally applicable to the Board's jurisdiction. The Board can only accept undertakings of a type contemplated by s 1292(9) and such undertakings must be in a form which makes them readily enforceable.

21. We should note that the authorities on consent orders are not entirely consistent. Finkelstein J has adopted a different approach in a number of cases. In particular, in *Crosbie v Federal Commissioner of Taxation* (2003) 130 FCR 275 at [2], His Honour said:

> "The court can only make an order under that section if it "is satisfied that a transaction of the company is voidable" under s 588FE. Two New South Wales cases, *Cadima Express v Deputy Commissioner of Taxation* (1999) 33 ACSR 527, a decision of Austin J, and *S J P Formwork (Aust) Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2000) 34 ACSR 604, a decision of Santow J, stand as authority for the proposition that this condition will be satisfied by a consent judgment; that is, a judgment which the court enters without an examination of the facts. With regret, I am unable to agree. A court cannot be "satisfied" that a transaction is a voidable transaction unless it has before it the facts which will establish that conclusion. Indeed, on one view the "satisfaction" that is required by s588FE is akin to a "jurisdictional fact" the existence of which must be determined before the court can exercise its power to avoid a transaction: *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 390-392; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 650-651. There are any number of cases which show (expressly or by implication) that for a decision-maker to reach the required level of "satisfaction" about the existence of a state of affairs the decision-maker must undertake an inquiry into its existence."

22. In *Dean-Willcocks Pty Ltd v Cmr of Taxation (No 2)* (2004) 49 ACSR 325, Austin J disagreed with the views expressed by Finkelstein J. With respect, for the reasons identified by Austin J, we consider that Austin J's approach

is to be preferred[3]. His approach is consistent with a significant body of authority already discussed and we consider that it is persuasive.

23. Accordingly, we accept the parties' submissions that the Board may proceed on the basis of consent orders and an agreed statement of facts. Having said that, the Board's ability to do so may depend on the circumstances. The Board may well be "satisfied" where, for example, agreed facts involve an admission of a straightforward act (such as misappropriation) and an agreement that by reason of this act, the respondent is not a fit and proper person. But where the agreed facts concern conduct which is more nuanced or not so clearly improper, or where the "agreed facts" relate to conclusions of mixed fact and law, (such as whether certain matters constituted a failure to carry out adequately and properly the duties of an auditor), it may be more difficult for the parties to proceed by way of "agreed facts" and consent orders (cf *Legal Services Commissioner v Rushford* [2012] VSC 632 and the decision of the Board in *ASIC v Walker* 22 December 2008 para [7.1(c)]).

C. The agreed facts and orders

24. The parties proffered an Agreed Statement of Facts and Orders at the hearing.

25. The SOFAC and Response to ASIC's SOFAC dated 5 September 2013 ("Response") were tendered in the case but in order to facilitate the understanding of the Statement of Agreed Facts, not as evidence of the truth of the matters asserted.

26. Notwithstanding this limitation, the SOFAC and the Response reveal the background to the Application and annex a number of documents, the validity of which cannot be in dispute.

27. In the following paragraphs, we set out what we regard as the salient background, drawing upon the Agreed Statement of Facts, read against the background of the matters set out in the SOFAC and the Response.

28. Mr Wessels has been a registered auditor since 6 June 2006. In 2008 he was a partner of the accounting firm PKF, which was engaged by Kleenmaid Corporate Pty Limited to conduct the audit for that company for the financial year ended 30 June 2008. Mr Wessels was the lead auditor of the 2008 Audit.

29. At that time, the "Kleenmaid Group" consisted of two separate groups of companies known as the "Corporate Group" and the "Orchard Group". This division occurred as a result of a restructure which had taken place in 2007. The restructure was not finalised by the time of the audit, or by the time the companies were placed into voluntary administration in 2009.

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[3] See also *ASIC v Starnex Securities Pty Ltd* [2003] FCA 1375.

30. This application concerns the Corporate Group. Kleenmaid Corporate Pty Limited was the holding company for the Corporate Group. The financial reports of six of the seven subsidiary companies in the Corporate Group were consolidated within the financial statements of Kleenmaid Corporate Pty Limited.

31. There was no evidence that the Orchard Group was audited.

32. Whilst the Orchard Group and the Corporate Group were separate "groups" with separate shareholders and directors, the businesses of the two groups remained significantly interconnected. The Orchard Group was the original proprietor of the Kleenmaid appliances and spare parts businesses. Following the restructure certain aspects of the Orchard Group's trading activities were transferred to the Corporate Group.

33. After the restructure, the Orchard Group retained and continued to operate various aspects of the Kleenmaid business including: operating company owned Kleenmaid stores, licensing "Kleenmaid" trademark and brand to the Corporate Group, operating the rewards program, banking customer deposits for the Appliances and Spares businesses and providing product warranties for Kleenmaid products.

34. The Corporate Group's principal activities became: sale of Kleenmaid goods to retail and commercial customers, marketing of Kleenmaid franchises, sale and management of franchises, management of Kleenmaid stores in New South Wales, supply of spare parts to entities under the Kleenmaid banner and to non-Kleenmaid related entities, repairs to Kleenmaid products both in and out of warranty and leasing and sub-leasing property to franchisees.

35. On 9 April 2009 and 15 April 2009, John Greig, Richard Hughes and David Lombe of Deloitte were appointed joint and several administrators of the companies in the Kleenmaid Group, including the companies in the Corporate Group and those in the Orchard Group. The administrators carried out investigations into the Kleenmaid Group. Whilst there was no agreement between the parties as to the matters found by the administrators, the fact of the matter is that the administrators expressed the view, in their Report to Creditors dated 14 May 2009 ("the Deloitte Report"), that they believed that the Kleenmaid Group may have become insolvent in June 2007, if not earlier. They expressed the view that "the Group":

    (a) had experienced cash flow difficulties from at least June 2007;

    (b) had a significant excess of liabilities over assets from at least June 2007 (including a deficiency of assets over liabilities of $19.8m as at 30 June 2007, a deficiency of $49.38m as at 30 June 2008 and a deficiency of $82.069m as at 31 March 2009); and

(c) had experienced negative cash flow in every month since June 2007.

36. The administrators noted, in the Deloitte Report, that no DOCA proposals had been received, as at the time of the report. They recommended that the creditors vote for all the companies in the Kleenmaid Group to be wound up. They estimated that there would be no dividend to unsecured creditors in any company apart from Kleenmaid Pty Limited (a company within the Orchard Group), who might receive between 1 and 2 cents in the dollar.

37. The Agreed Statement of Facts contained the following:

> "17. ASIC contended that Mr Wessels failed to properly identify the significance of the Restructure and the impact of the structural change on the controls of the Corporate Group and address this in the nature and extent of the audit work performed in obtaining an understanding of the entity and its environment as required under ASA 315 *Understanding the Entity and Its Environment and Assessing Risks of Material Misstatement.* ASIC also contended that Mr Wessels failed to obtain sufficient knowledge of the Restructure and to adequately investigate it and its impact on the audit. Whilst the understanding of the Corporate Group was documented to some extent in the audit file, Mr Wessels accepts, in light of ASIC's criticisms of that process in its SOFAC that there was a lack of sufficient appropriate evidence in the 2008 Audit file to support that he had obtained a sufficient understanding of the interrelationships between the Corporate Group and the Orchard Group for identifying the risks relevant to the audit.
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> 18. ASIC's concern was that there were as at 30 June 2008 a number of transactions between the Corporate Group and the Orchard Group suggesting that the financial performance of the Corporate Group was inextricably linked to the financial performance of the Orchard Group and that Mr Wessels, when conducting the 2008 Audit, did not adequately consider the impact of these transactions and links in relation to the going concern status of Kleenmaid Corporate.
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> 19. The Deloitte Supplementary Report under s533(2) reported that the Corporate Group became insolvent in March 2008 as a result of the Orchard Group being insolvent at that date. ASIC contends that Mr Wessels failed to adequately consider management's use of the going concern assumption in the preparation of the financial statements of the Corporate Group as required under ASA 570 *Going Concern*.
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> 20. ASIC does not however contend that there was to its knowledge any material misstatement in the Financial Statements.
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> 21. Mr Wessels undertook work on the going concern assumption but accepts that in his consideration of the going concern

assumption, in view of the nature and extent of the interrelationships between the Corporate Group and the Orchard Group which have been brought to light by ASIC's investigation, he ought to have brought a higher degree of professional scepticism to that task.

22. Mr Wessels acknowledges ASIC's concerns and the seriousness of those concerns.

23. Mr Wessels accepts that, as at 30 June 2008 there was a substantial degree of interrelationship between the Corporate Group and the Orchard Group.

24. The audited 2008 financial report identified the following as a "related party" balance:

> "Trade and Other Receivables: amounts due by related parties – Kleenmaid Holdings Pty Ltd $ 8,750,138" (the **Receivable**)

25. Mr Wessels audited the Receivable as a material balance. Mr Wessels does not accept that the Orchard Group and the Corporate Group were "related parties" within the definition contained in AASB 124 *Related Party Disclosures* and ASA 550 *Related Parties*. In that regard, ASIC accepts that, in the circumstances, the issue of whether the two groups were "related parties" involved difficult matters of professional judgment, on which different parties might reasonably come to different views and accordingly does not press the contention that Mr Wessels failed to meet the standards of reasonably competent and diligent auditor in not applying ASA 550 *Related Parties* in the 2008 Audit.

26. ASIC has identified in its SOFAC a number of material intergroup transactions between the Corporate Group and the Orchard Group during the financial year ended 30 June 2008, including the Receivable.

27. Mr Wessels audited those intergroup transactions as material transactions but now accepts that, in view of the nature and extent of the interrelationships between the Corporate Group and the Orchard Group which have been brought to light by ASIC's investigation, he ought to have brought a higher degree of professional scepticism to the audit and to the auditing of those intergroup transactions as required under ASA 200 *Objective and General Principles Governing an Audit of a Financial Report*.

28. Mr Wessels also accepts that there were deficiencies in the standard of documentation in the audit file for the 2008 Audit and that, in that regard, he failed to meet the standards required by ASA 230 *Audit Documentation*.

29. ASIC accepts that Mr Wessels cooperated fully with ASIC during the course of its investigation, including ASIC's wider investigation concerning the conduct of management and directors of the various Kleenmaid Corporate Group companies."

38. The parties elaborated their agreement in submissions. They agreed (and Mr Wessels admitted) that the failures under s 1292 which enlivened the Board's jurisdiction, were the acceptance by Mr Wessels in the Agreed Statement of Facts that:

(a) there was a lack of sufficient appropriate evidence in the 2008 Audit file to support that he had obtained a sufficient understanding of the interrelationships between the Corporate Group and the Orchard Group for identifying the risks relevant to the audit as was required under ASA 230 "Audit Documentation" (see [17] of the Statement of Agreed Facts);

(b) in Mr Wessel's consideration of the going concern assumption, in view of the nature and extent of the interrelationships between the Corporate Group and the Orchard Group which have been brought to light by ASIC's investigation, he ought to have brought a higher degree of professional scepticism to that task (see [21] of the Statement of Agreed Facts);

(c) Mr Wessels ought to have brought a higher degree of professional scepticism to the audit and to the auditing of the material transactions between the Corporate Group and the Orchard Group as identified by ASIC in its SOFAC as required under ASA 200 (see [27] of the Statement of Agreed Facts); and

(d) there were deficiencies in the standard of documentation in the audit file for the 2008 Audit and that, in that regard, Mr Wessels failed to meet the standards required by ASA 230 "Audit Documentation" (see [28] of the Statement of Agreed Facts).

39. It was accepted by Mr Wessels that the above matters amounted to a failure on his part to carry out and perform adequately and properly his duties and functions pursuant to s 1292(1)(d) in relation to the 2008 Audit.

40. The task to be performed by the Board in considering an application under s 1292 was discussed by the High Court in *Albarran v Members of the Companies Auditors and Liquidators Board* (2007) 231 CLR 350; [2007] HCA 23, where the plurality said (at [18]):

> "[18] In construing par (d) of s 1292(2), weight must be given to the introductory but controlling words "to carry out or perform adequately and properly". Of the words "proper" and "adequate" as they appear here, Tamberlin J said in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* that they invite:

> … the testing of performance against a relevant standard or benchmark of performance. The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of "adequacy". The standard is that the duty must be performed "properly".

[19] Section 203 of the ASIC Act, in dealing with the composition of the board, requires that it include members appointed by the Minister from panels nominated by professional accountancy bodies. The section also now requires the appointment of "business members" from among persons the Minister is satisfied are suitable as representatives of the business community by reason of qualifications, knowledge or experience in fields including business or commerce, the administration of companies, financial markets, and financial products and financial services.

[20] Against that background, in *Dean-Willcocks*, Tamberlin J went on to observe that par (d)(ii) of s 1292(2):

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

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

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

> [22] This construction of par (d) of s 1292(2) is not qualified or displaced by any considerations flowing from the final words in that paragraph "or is otherwise not a fit and proper person to remain registered as a liquidator".
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> …
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> [24] Counsel for the Attorney-General in the present appeals correctly submitted that the words "adequately and properly" import notions of judgment by reference to professional standards rather than pure questions of law and that the concluding expression containing the words "otherwise not a fit and proper person" expands or adds to what precedes it but does not draw in a discrete subject-matter." (citations omitted)

41. The decisions of Campbell J in *Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289; (2003) 47 ACSR 155, Branson J in *Goodman v Australian Securities and Investments Commission*(2004) 50 ACSR 1 and Tamberlin J in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 also provide guidance on the role performed by the Board. In particular, those decisions stand for the propositions that:

    (a) Section 1292(1)(d)(ii) requires assessment of the level and standard of performance of "duties or functions";

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

    (d) 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;

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

42. We are satisfied, by reason of the Agreed Statement of Facts, read against the background of the documents in the SOFAC and the Response,

    (a) That there was a lack of sufficient appropriate evidence in the 2008 Audit file to support that Mr Wessels had obtained a sufficient understanding of the interrelationships between the Corporate

Group and the Orchard Group for identifying the risks relevant to the Audit;

(b) Mr Wessels ought to have brought a higher degree of professional scepticism to his consideration of the going concern assumption;

(c) Mr Wessels ought to have brought a higher degree of professional scepticism to the Audit and to the auditing of the intergroup transactions; and

(d) there were deficiencies in the standard of documentation in the Audit file.

43. We are satisfied, in these circumstances, that in various respects, Mr Wessels:

(a) did not fulfill the requirements under ASA 230 "Audit Documentation";

(b) did not fulfill the requirements of ASA 200 "Objective and General Principles Governing an Audit of a Financial Report".

44. We are also satisfied that the requirements of ASA 200 and ASA 230 set, or alternatively reflect accepted professional standards and that Mr Wessel's failure to comply with those requirements amounts to a failure to carry out and perform adequately and properly the duties of an auditor or the duties and functions required by an Australian Law to be carried out or performed by a registered company auditor, for the purposes of s 1292(1)(d) of the Corporations Act.

45. In the circumstances, we are satisfied that our jurisdiction under s 1292(1) has been enlivened.

46. The parties proffered Consent Orders, which they asked the Board to make, as follows:

"CONSENT ORDERS

(a) That the registration of Wayne John Wessels as an auditor under the Corporations Act be suspended for a period of 3 years commencing 14 days after the date this order takes effect.

(b) The Board notes the undertakings of Wayne John Wessels:

(i) that he will submit his first three audits conducted by him as an auditor registered under the Corporations Act after his suspension for review by an independent reviewer approved by ASIC (such approval not to be unreasonably withheld) to review the audits to confirm

that the audits have been conducted in accordance with the Australian Auditing Standards;

(ii) that he will undertake an additional 10 hours of auditing CPE over the period of 12 months following the date this order takes effect (beyond what is required by the rules of any professional association of which is he a member) and will produce evidence to ASIC of compliance with this undertaking;

(iii) to undertake the audit module of the Chartered Accountants Programme as soon as is reasonably practicable following the date this order takes effect and will produce evidence to ASIC of compliance with this undertaking.

(c) That there be no order as to costs of the proceedings."

47. The parties subsequently clarified that the undertakings proposed were undertakings to ASIC, so that no issue of enforceability by the Board (as discussed in paragraph 20 above) will arise.

48. In proposing these orders, the parties submitted:

(a) The fact that ASIC joins in the proposed orders is "a large factor supporting any decision to accept the agreed period of suspension". ASIC is relevantly a guardian of the public interest, and is in a good position to appraise the practicalities of the litigation and what part they should have among considerations in favour of accepting the agreed outcome: *Re One Tel* at [31];

(b) The fixing of a period of disqualification is not an exact science. Where the parties have agreed on a precise figure, the court need not and should not ask whether it would have fixed the same period of disqualification in the absence of agreement. If the agreed period of disqualification is within a permissible range, it should not be rejected merely because the court would have been disposed to select some other figure: *ASIC v Rich* (2004) 50 ACSR 500 at [80(2)] per White J;

(c) The view of a regulator, as a specialist body, is relevant but not determinative on the question of the period of disqualification, particularly as to the deterrent effect of the order and the likely effect on other like individuals: *ASIC v Rich* at [80(5)].

49. It is appropriate to set out in full White J's summary of the principles which apply to proposed consent sanctions in *ASIC v Rich* (albeit that they were made in a slightly different context). His Honour said, at [80]:

"With appropriate modifications to the case in hand, the approach to be drawn from the authorities cited is as follows:

(1) The responsibility for determining whether a disqualification is justified, and if so for what period, rests with the court, not with the parties.

(2) The fixing of a period of disqualification is not an exact science. Where the parties have agreed on a precise figure, the court need not and should not ask whether it would have fixed the same period of disqualification in the absence of agreement. If the agreed period of disqualification is within a permissible range, it should not be rejected merely because the court would have been disposed to select some other figure.

(3) The court examines all of the circumstances of the case and may act on agreed statements of fact if it is appropriate to do so. The court is not bound to do so. It may request the parties to provide additional evidence and if they do not do so, the court may well not be satisfied that the proposed period of disqualification is within the permissible range.

(4) There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy, and that may be taken into account in determining whether it is appropriate to act on an agreed statement of facts.

(5) The view of the regulator, as a specialist body, is relevant but not determinative on the question of the period of disqualification, particularly as to the deterrent effect of the order and its likely impact on the behaviour of those managing corporations."

50. In our view, it is appropriate to make the orders sought by the parties, in the light of these principles, which we consider apposite to the Board's jurisdiction.

51. The failures by Mr Wessels are not insignificant. Mr McNally SC, on behalf of ASIC, emphasised the importance of the requirements for proper documentation and evidence and professional scepticism in the context of this audit. We accept this, but take into account that Mr Wessels' failures were not of the highest level of seriousness. As Mr Steele SC submitted on his behalf, there was certainly no suggestion of dishonesty or deliberate impropriety on Mr Wessels' part. Mr Steele pointed out that ASIC did not contend that, to its knowledge, there was any material misstatement in the financial statements. Mr Steele submitted that in view of Mr Wessels' age (47 years), a suspension of three years at this point of his career was a very significant matter. The publicity which will attend the matter would obviously affect his professional reputation.

52. It was acknowledged by ASIC that Mr Wessels cooperated fully with ASIC during the course of its investigation, including ASIC's wider investigation concerning the conduct of management and directors of the various Kleenmaid Corporate Group companies. There was no evidence of any previous complaints about Mr Wessel's conduct as an auditor.

53. In our view, the sanctions proposed by the parties are certainly within "the permissible range" of sanctions and there is no proper reason for the Board to attempt any alternative formulation.

Decision

54. For the reasons set out above, we have decided to exercise our powers under s 1292 of the Act by making the order set out in paragraph 59 below.

55. The parties agreed that there would be no order as to costs of the proceedings, and, accordingly, we make no order as to costs.

56. It is usual for the Board publicise its decisions on its website and by means of a media release. Mr McNally submitted that the usual course should be adopted and Mr Steele did not raise any matter which would cause us to adopt a different approach. Accordingly, the Board will publish a copy of these reasons on its website and issue a media release relating to the matter.

Date of effect of order

57. Normally, an order would come into effect at the end of the day on which a notice of the decision is given to a respondent under s 1296(1)(a), see s 1297(1)(a). However, in view of the form of the orders proposed by the parties, we will postpone the date upon which the orders come into effect for 14 days.

Notice

58. Within fourteen days of the date hereof, formal notice of this Decision will be given to Mr Wessels under s 1296(1)(a) of the Act, a copy of that notice will be lodged with ASIC under s 1296(1)(b) and the Board will cause to be published in the Gazette a notice in writing setting out the Decision.

Orders

59. We order:

    (a) That the registration of Wayne John Wessels as an auditor under the Corporations Act be suspended for a period of 3 years;

    (b) This order will come into effect fourteen days from the date hereof.

60. We note the undertakings of Mr Wayne John Wessels given to ASIC:

(a) that he will submit his first three audits conducted by him as an auditor registered under the Corporations Act after his suspension for review by an independent reviewer approved by ASIC (such approval not to be unreasonably withheld) to review the audits to confirm that the audits have been conducted in accordance with the Australian Auditing Standards;

(b) that he will undertake an additional 10 hours of auditing CPE over the period of 12 months following the date this order takes effect (beyond what is required by the rules of any professional association of which is he a member) and will produce evidence to ASIC of compliance with this undertaking;

(c) to undertake the audit module of the Chartered Accountants Programme as soon as is reasonably practicable following the date this order takes effect and will produce evidence to ASIC of compliance with this undertaking.

Howard Insall SC
Panel Chairperson

15 November 2013