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

MATTER NO: 02/NSW12

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

MARK DARREN LEVI
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.

2 July 2013

Panel:

Howard Insall SC (Panel Chairperson)

Geoff Brayshaw

Robert Ferguson

Bruce Gleeson

John Keeves

Companies Auditors and Liquidators Disciplinary Board
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[Note: This is a redacted version of the Reasons omitting certain extracts from transcript and citations to evidence]

DECISION AND REASONS

A. Introduction

1. This is an Application under s 1292 of the Corporations Act lodged with the Board by ASIC on 12 October 2012. By the Application, ASIC asks the Board to cancel the registration of the Respondent, Mark Darren Levi ("Mr Levi") (a registered liquidator and official liquidator).

2. In essence, the Application relates to actions allegedly carried out by Mr Levi between 2008 and 2010, whilst he was a senior member of the staff of Jamieson Louttit & Associates. Jamieson Louttit & Associates (which is the trading name of a company known as A.C.N. 120 764 365 Pty Limited) ("JLA") was a firm owned and controlled by Mr Jamieson Louttit, another registered liquidator and official liquidator. At the time, Mr Louttit was the receiver of a company known as Biseja Pty Ltd (Receiver and Manager appointed) ("Biseja").

3. ASIC alleges that in April 2009 and again in October 2009, Mr Levi used Biseja's funds to pay his personal tax. ASIC alleges that Mr Levi falsified the records of Biseja to disguise these payments. ASIC alleges that Mr Levi admitted the defalcations in October 2010, after he had left JLA. ASIC alleges that Mr Levi has, since that admission, falsely asserted that the payments were made with Mr Louttit's knowledge and consent.

4. The allegations are in the main, explicit allegations of dishonesty. Whilst it may be said that nearly every application before the Board involves serious allegations, here the allegations are clearly of a very serious kind.

5. Mr Levi rejects the allegations that he dishonestly misappropriated moneys or that he falsified any records. In essence, he asserts that the payments were authorised by Mr Louttit and the evidence before the Board was incapable of sustaining the very serious allegations made against him.

6. The matter involved substantial interlocutory disputation, (discussed in more detail in paragraphs 13*ff* below) including an application by Mr Levi to the Chairperson for a stay in December 2012, and similar applications to the Supreme Court of New South Wales and the New South Wales Court of Appeal in January 2013 and April 2013 respectively. The matter was ultimately heard by the Board over four days from 6 to 9 May 2013. Mr Jonathon Priestley of counsel appeared for ASIC. Mr Robert Sutherland SC and Mr Steven Golledge of counsel appeared for Mr Levi.

7. We handed down our determination on 14 June 2013. A further hearing in relation to appropriate orders was held on 26 June 2013. On that occasion, Mr Greg McNally SC appeared for ASIC and Mr Robert Sutherland SC appeared for Mr Levi.

B. The pleaded issues

8. In the Amended Statement of Facts and Contentions ("SOFAC") filed on 22 April 2013, ASIC contends that Mr Levi is not a fit and proper person to remain registered as a liquidator within the meaning of section 1292(2)(d) of the Act on the grounds set out in six Contentions particularised in the SOFAC.

9. Each of the Contentions relates to an allegation that Mr Levi used funds belonging to Biseja for his own benefit, namely to make payments to the Australian Taxation Office ("ATO") for his benefit. The SOFAC asserts that this was done in two separate transactions:

   (a) On or about 3 April 2009, $22,737.87 was paid by cheque from the Biseja ANZ Business Cash Account (4805-17307) ("the Biseja Receivership Account") into Mr Levi's account with the ATO in respect of Mr Levi's personal tax liability which had been assessed ("the First Transaction"); and

   (b) On or about 26 October 2009, $69,022.00 was paid by cheque from the Biseja Receivership Account into Mr Levi's account with the ATO on account of Mr Levi's personal tax liability which had not yet been the subject of a formally issued notice of assessment ("the Second Transaction").

10. The six Contentions are as follows:

   First contention. Mr Levi dishonestly used the funds of the First Transaction for his own benefit knowing he had no right or entitlement to do so;

   Second Contention. Mr Levi dishonestly used the funds of the Second Transaction for his own benefit knowing he had no right or entitlement to do so;

   Third Contention. Mr Levi falsified the Biseja cashbook as follows:

   (a) In the period between 31 March 2009 and 8 April 2009 by purporting to apply GST to deposits taken on property sales so as to create in the Biseja accounts an apparent increase in the amount payable to the ATO by Biseja but which amount when paid to the ATO was applied for the use and benefit of Mr Levi; and further and in the alternative;

   (b) In the period between 6 July 2010 and 31 August 2010 by decreasing the actual amount paid to the ATO by Biseja and increasing the amounts recorded as paid to The Entrance 1st National and Gadens solicitors in the Biseja accounts; and further and in the alternative;

   (c) In the period between 6 July 2010 and 31 August 2010 by decreasing the actual amount paid to the ATO by Biseja and increasing the

amounts recorded as paid to The Entrance 1st National, the Receiver and Gadens solicitors in the Biseja accounts.

Fourth Contention. Mr Levi dishonestly and without proper authority used the Biseja Funds of the First Transaction and the Second Transaction for his own benefit, regardless of whether or not the Receiver of Biseja (Mr Louttit) either knew and/or authorised either or both of the First Transaction and the Second Transaction.

Fifth Contention. Mr Levi's conduct in answering ASIC's allegation of the First Transaction and Second Transaction show him not to be a fit and proper person to be a registered liquidator for two reasons:

(a) Mr Levi ought to have realised the First Transaction and the Second Transaction were a dishonest use of Biseja funds regardless of whether Mr Louttit knew and/or authorised the First Transaction or Second Transaction or both of them.

(b) Mr Levi's denial of using The Biseja Funds of the First Transaction and the Second Transaction without Mr Louttit's consent is false.

Sixth Contention. Mr Levi failed to ensure that proper records were kept of the First Transaction and/or the Second Transaction and each of them.

11. We should note that we read Contention 5 as involving two alternative allegations. We refer to the allegation involving sub-para (a) as "Contention 5(a)" and that involving sub-para (b) as "Contention 5(b)".

12. Although the Chairperson made directions, in accordance with the normal procedures of the Board, for the filing of a Response to the SOFAC by Mr Levi, no Response was ever filed.

13. However, the matter had an unusual procedural history. In December 2012, Mr Levi asked the Chairperson to stay the Board proceedings on the basis that criminal proceedings against him arising from the same incidents were "on the cards" (to coin a phrase used in the cases) and that Mr Levi would suffer prejudice if the Board proceedings were heard, particularly by reason of an asserted potential for interference with his privilege against self incrimination.

14. On 21 January 2013, the Chairperson rejected the stay application. One of the bases for the Chairperson's decision was that any prejudice to Mr Levi from having to defend the Board proceedings prior to any criminal proceedings was ameliorated by the fact that there was no compulsion on Mr Levi to do anything in relation to the Board proceedings. The Chairperson noted that whilst compliance with pre hearing directions (particularly the service of a Response and exchange of witness statements) was highly desirable in assisting the efficient conduct of the Hearing, out of an abundance of caution, directions would confirm that Mr Levi could

attend the Hearing and hear the case against him before electing to provide a Response and go into evidence. The Chairperson noted that whilst this may create some difficulties for ASIC in dealing with any Response and any evidence adduced by Mr Levi, any problems arising could be dealt with at the Hearing[1].

15. Mr Levi decided not to file any Response, apparently on the basis of the Chairperson's observations. In the circumstances, that decision was understandable and no negative inferences have been drawn from Mr Levi's approach to the Hearing.

16. At the Hearing itself, towards the end of the second day of the Hearing, after the completion of Mr Louttit's cross-examination, Mr Sutherland indicated that Mr Levi proposed to proceed with the Hearing, relying upon Mr Levi's section 19 examination, subject to comments that would be made about it, but without giving evidence himself[2]. Ultimately Mr Levi called no witnesses.

17. The essence of Mr Levi's response to the SOFAC (as revealed in his response to ASIC's opening and in final submissions) was that Mr Levi rejected the allegations that he had dishonestly misappropriated moneys from the Biseja Receivership Account or that he falsified any records of the Biseja Receivership or of the accounting practice conducted by Mr Louttit. His case, in essence, was that the two payments of his tax from Biseja funds were made with the agreement of Mr Louttit as payments owed by Mr Louttit under a profit share agreement. Mr Levi said that he believed that JLA had outstanding fees owed by Biseja at the time of the payments, thus explaining why they were made from Biseja funds, rather than JLA's funds. His counsel submitted that the evidence adduced before the Board was incapable of sustaining the very serious allegations made against him in respect of Contentions 1 to 5. As for the Sixth Contention he submitted that the evidence did not establish, as a matter of fact or law, that he was responsible, in the sense alleged by ASIC, for maintaining the business records kept by Mr Louttit, including those in respect of what is described in the SOFAC as the First Transaction and the Second Transaction. He rejected the allegation that he is not a fit and proper person by reason of any deficiency in those records[3].

18. At the Hearing, ASIC joined issue with Mr Levi on the key elements of his response. ASIC submitted that there had been no profit share agreement as alleged, that Mr Levi admitted misappropriation either expressly or by his actions in 2010 and that the case of misappropriation was made clearly on

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[1] Mr Levi also applied to the Supreme Court of New South Wales for a stay. Rothman J dismissed that application on 3 April 2013. Mr Levi sought leave to appeal from that decision and a further interlocutory stay pending determination of that appeal on 1 May 2013. Basten JA refused that application on 2 May 2013. In view of Mr Sutherland's submissions concerning these applications (T3*ff*), we should expressly note that these matters have not affected our decision in this matter, and, in particular, no negative inferences have been drawn concerning Mr Levi or his case.

[2] [redacted]

[3] [redacted]

the evidence. ASIC submitted that, in any event, even if the payments were made with Mr Louttit's consent, this did not avail Mr Levi.

19. Thus, the principle issues for determination are:

(a) Was a case of dishonesty by misappropriation of the funds without Mr Louttit's authority or consent established on the evidence, and, more specifically:

(i) Was there a profit share agreement between Mr Louttit and Mr Levi pursuant to which Mr Levi was entitled, as at March 2009, to approximately $22,000.00 and, as at October 2009, to approximately $69,022.00;

(ii) Did Mr Levi admit that he had misappropriated the funds without Mr Louttit's authority or consent in October 2010, either expressly or by his actions;

(iii) Do the circumstances of the two payments show that Mr Louttit was aware of and authorised the payments?

(iv) Was the Biseja cashbook falsified and if so, by whom?

(v) Did the evidence as a whole establish that Mr Levi dishonestly used the funds of the First and Second Transactions without Mr Louttit's authority or consent;

(b) Even if the payments were made with Mr Louttit's authority and consent, was Mr Levi's use of the funds for his own purposes nonetheless dishonest and without proper authority;

(c) Did Mr Levi's denial of misappropriation show that he is not a fit and proper person because

(i) he ought to have realised that the First and Second Transactions were a dishonest use of Biseja funds regardless of whether Mr Louttit knew and/or authorised them;

(ii) Mr Levi's denial of using the Biseja Funds without Mr Louttit's consent was false;

(d) Did Mr Levi fail to ensure that proper records were kept of the First Transaction and/or the Second Transaction.

C. Issues relating to dishonesty

(i) The nature of the allegations and dishonesty.

20. The first four Contentions are explicit allegations of dishonesty[4]. The sixth is clearly not. Contention 5 is not so clear[5].

21. Whilst Mr Levi took no point in relation to Contention 5, (and proceeded on the basis that it was an allegation of dishonesty[6]) it is important that we deal with the meaning of the allegation at the outset.

22. A case of dishonesty cannot be maintained unless it is clearly alleged. In *Fortescue Metals Group Ltd v Australian Securities and Investments Commission* (2012) 291 CLR 399; [2012] HCA 39, French CJ, Gummow, Hayne and Kiefel JJ said, at [26]:

> "It is fundamental, and long established, that if a case of fraud is to be mounted, it should be pleaded specifically and with particularity *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 704 and 709; *Banque Commerciale SA, en Liquidation v Akhill Holdings Ltd* (1990) 169 CLR 279 at 285. A pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity. If an alternative case of misleading or deceptive conduct is to be advanced, it is necessary to identify that claim as separate from the allegation of fraud. "

23. That rule is applicable in proceedings before the Board because the rule is a general rule of procedure and not confined to courts of strict pleading: *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 per Mason CJ and Gaudron J at 285; *Minister for Crown Lands v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201; *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASCA 255.

24. In pleading a case of fraud or dishonesty, it is not necessary to use those specific words, provided it is clear that fraud or dishonesty is being alleged: *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, at 268.

25. In our view, Contention 5(b)[7] is an allegation of dishonesty. The allegation is that Mr Levi has falsely denied lack of consent. The particulars of the

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[4] SOFAC para 8, 15, 16, 18 and T 49.

[5] [redacted]

[6] [redacted]

[7] SOFAC para 22.2.

Contention include the assertion that the version of events given by Levi is false[8].

26. The allegation in Contention 5(a) that Mr Levi ought to have realised the Transactions were a dishonest use of Biseja funds regardless Mr Louttit's knowledge or authorisation is not so clear.

27. In *MacLeod v R*, (2003) 214 CLR 230, Gleeson CJ, Gummow and Hayne JJ referred to the decision of *Peters v R* (1998) 192 CLR 493 and said:

> "[37] In a passage that has significance for the present appeal, Toohey and Gaudron JJ stated:
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> > 'In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest ... If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.'
>
> Their Honours rejected any further requirement, derived from *R v Ghosh*, that the accused must have realised that the act was dishonest by those standards.
>
> ...
>
> **[46]** Adopting the reasoning in *Peters*, as we do, and applying it to the offences now under consideration, there is no requirement that the appellant must have realised that the acts in question were dishonest by current standards of ordinary, decent people. To require reference to a "subjective" criterion of that nature when dealing with a claim of right would have deleterious consequences. It would distract jurors from applying the *Peters* direction about dishonesty, and it would limit the flexibility inherent in that direction. A direction about the "subjective" element of a claim of right was neither necessary nor appropriate in this case.
>
> **[47]** It was open to the jury, looking at the matter by reference to the standards of ordinary, decent people, to conclude that at the time of the various takings or applications of sums by the appellant he knew of his lack of entitlement to take or apply the funds of Trainex for his own use or benefit and that, on that account, his acts were dishonest."

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[8] SOFAC par 37.6.

28. Against that background, we consider that Contention 5(a) is an allegation of dishonesty, ie an allegation that Mr Levi was dishonest in using the funds, even if Mr Levi failed to recognise that fact. It is not particularly meaningful, consistently with *Macleod v R*, to read Contention 5(a) as an assertion that even if Mr Levi was not dishonest in receiving the payments, he ought to have recognised that his actions were dishonest.

29. Another issue which arose in relation to the allegations in the SOFAC was whether a finding on a non-dishonest basis was open on the basis of the matters said to constitute dishonesty. Mr Priestley submitted that if ASIC made good the contentions of the factual matters that occurred, then whether the Board concluded that that was dishonest or not, it still amounted to conduct showing that Mr Levi was not a fit and proper person[9]. No submission was made on behalf of Mr Levi that it was not open to ASIC to proceed this way (cf *Middleton v O'Neill* (1943) 43 SR(NSW) 178 at 184) although we take the view that any such allegation should be clearly particularised as an alternative case (cf *Fortescue Metals Group Ltd v Australian Securities and Investments Commission* (supra) and *King v Health Care Complaints Commission* [2001] NSWCA 411 at [106]; *Smith v NSW Bar Association* (1992) 176 CLR 256 at 269, 270 and 272).

(ii) Briginshaw v Briginshaw

30. In view of the nature of the allegations being made in this Application, (particularly the explicit allegations of dishonesty) the assessment required by *Briginshaw v Briginshaw*[10] has to be kept in mind[11].

31. In *Briginshaw v Briginshaw*, Dixon J said at 361-362:

> "... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a

[9] [redacted]

[10] (1938) 60 CLR 336.

[11] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [170]

particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences"

32. Dixon J continued, particularly with regard to circumstantial evidence (at 368-9)

> "Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find."

33. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 the Court stated at 170-171:

> "The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct." [citations removed]

34. We approach the matter in the light of the above statements of principle.

D. The witnesses

35. Mr Louttit was the primary witness called by ASIC. He gave extensive evidence dealing with his knowledge of the events in question. He denied the profit share agreement as alleged by Mr Levi, he denied any knowledge or authorisation of the payments and (at least implicitly) he denied any knowledge of or involvement in the falsification of records. He gave evidence that Mr Levi admitted to him, in October 2010, that he had

misappropriated the Biseja funds. He also gave evidence of the usual practices of JLA, particularly in relation to the system for calculating and paying GST for Biseja.

36. Mr Sutherland challenged Mr Louttit's credibility. In essence, Mr Sutherland submitted that Mr Louttit was not "the paragon of virtue" which he presented himself as. Mr Sutherland relied upon the fact that when Rothman J handed down judgment in Mr Levi's application for a stay, Mr Levi applied for and was granted an order prohibiting publication of Mr Levi's name or things that would identify him, yet Mr Louttit thereafter published Mr Levi's name on his (Mr Louttit's) website. He also submitted that there were serious questions about Mr Louttit's animus indicating that he would do anything to destroy Mr Levi. He also relied upon an answer which Mr Louttit gave in cross-examination that "we wouldn't be sitting here" if he and Mr Louttit had agreed on partnership terms. He also suggested that the fact that Mr Louttit leant on his staff, including an 18 year old girl, to become contractors rather than PAYG employees[12] called into question his credit and credibility.

37. As to Mr Sutherland's first point, it is not correct that Mr Louttit presented himself as a "paragon of virtue" in the sense of some kind of exemplar of the highest professional or moral standards (or that ASIC did so). True, it is, that Mr Louttit emphatically denied that he was, contrary to Mr Levi's assertions, involved in the misappropriation. He gave certain evidence as to his usual practices and about what he would or would not have done as a matter of usual practice. We do think that he overstated the extent to which he was likely to have complied with usual practice. But we do not think that this was a basis for a general attack on Mr Louttit's character or credibility.

38. As to the publication of Mr Levi's name in breach of Rothman J's order, Mr Sutherland expressly did not seek a determination from us that this was a contempt of court. He submitted that this action showed that Mr Louttit was a man who was prepared to ignore an order of court and take his own course for his own purpose. Even this submission was not without difficulty because the circumstances (particularly Mr Louttit's understanding) were not fully explored before us. It was not clear that Mr Louttit had actually read the line of the Report (in the formal parts on the second page) which contained the Publication Restriction. Further that line was not expressed as an order of the court to the world at large. However, we do think that Mr Louttit's actions in publishing Mr Levi's name, when Rothman J had clearly sought to avoid disclosure of his name, shows at least a certain recklessness in relation to the authority of a superior court.

39. As to Mr Louttit's general "animus" towards Mr Levi, and his alleged willingness to destroy Mr Levi, the objective evidence shows that Mr Louttit's animosity is recent, compared with a positive attitude towards Mr

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[12] [redacted]

Levi prior to 2011. If anything, we think that this tends to support Mr Louttit's evidence, in other words, he is now extremely upset with Mr Levi because (on Mr Louttit's version of events) Mr Levi perpetrated the fraud but, on being reported to ASIC, falsely accused him (Mr Louttit) of being the wrongdoer.

40. As to the question whether Mr Louttit "leant on his staff" to be employed as contractors, both Mr Louttit and Ms Koka denied this[13]. There simply was insufficient exploration of the issue (and the question whether persons were properly retained) for us to come to any conclusions about this issue.

41. We note, in any event, that Mr Levi sent a letter to ASIC on 21 May 2009[14] in support of his application to become registered as a liquidator, enclosing extracts from JLA's human resources manual noting:

> "the firm has engaged external HR consultants to provide strategic and operational advice on the firm's human resourcing capabilities, gaps and requirements. This has resulted in an enhancement of the firm's policies and procedures with respect to the hiring and retaining of professional and administrative staff."

42. We do not consider that this matter provided any basis for us to question the credibility of Mr Louttit's evidence in relation to the matters in issue in these proceedings.

43. Mr Sutherland also referred to an answer given by Mr Louttit when he was being cross-examined about whether Mr Levi disagreed about the partnership terms being offered by Mr Louttit and said they were not fair. Mr Louttit said "yes, otherwise we wouldn't be sitting here"[15]. He clarified this by saying "If I had agreed the terms with him in respect of the partnership, I would have been in partnership with him".

44. In our view, all Mr Louttit meant by this answer was that if Mr Levi had agreed with the terms proposed by Mr Louttit and considered them fair, they would have gone into partnership. Mr Louttit may have expressed himself awkwardly by saying "we would not be sitting here" but it cannot fairly be suggested, having regard to the topic being explored, that Mr Louttit meant anything other than "we would be in partnership".

45. As a general matter, and notwithstanding the matters referred to above, particularly in paragraphs 37 to 39, we believe that Mr Louttit was generally a credible witness. He gave evidence without prevarication and without being dogmatic. We do not accept every aspect of his evidence (particularly in relation to the extent to which he believed he complied with usual practice), but, as a general matter, he appeared to be a generally

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13 [redacted]

14 [redacted]

15 [redacted]

truthful witness seeking to give direct answers to questions, to the best of his recollection. We do not think that the matters raised in paragraphs 37 to 39 above are a basis for concluding that he was not a generally truthful witness. Indeed, in relation to the publication issue, without in any way condoning Mr Louttit's action, we think that this action is not inconsistent with Mr Louttit telling the truth and being extremely upset with Mr Levi, for the reasons discussed above.

46. Ms Koka appeared genuinely daunted by the experience of being cross-examined. She did not appear overly sophisticated. Whilst we have some reservations about her evidence, to the extent that she says she would have observed usual practices, we have no reason to doubt her veracity as a general matter.

47. Mr Cavanagh was cross-examined very briefly. He appeared to be a truthful witness.

E. The basic factual background

48. In our view, subject to certain reservations identified later in these reasons[16], the following matters were established on the evidence and we so find.

49. Mr Levi is 39 years old. He holds a Bachelor of Business from the University of Technology, Sydney and a Masters of Business Administration from the Australian Graduate School of Management. He is a Certified Practising Accountant. He commenced employment in accounting/insolvency firms in about 1992.

50. As from February 2006, Mr Levi was employed in the role of Director by JLA.

51. JLA is a boutique insolvency and advisory firm, specialising in Receiverships, Voluntary Administrations, Liquidations, Crisis Management, Insolvency and Forced Sales. Mr Jamieson Louttit is the sole Director and Secretary of JLA and has been since its incorporation in December 2001.

52. Mr Louttit is a Chartered Accountant and since 19 December 1997 has been a member of the Institute of Chartered Accountants in Australia ("ICCA"). He holds a Masters of Taxation Law and a Bachelor of Business (Accounting) from the University of Technology Sydney. He is a Registered Liquidator and has been registered since 25 January 1999. He is an Official Liquidator and has been registered as such since 22 January 2003.

53. Mr Levi was employed by JLA as a contractor and was paid on an agreed hourly rate. Mr Levi issued monthly tax invoices to JLA for professional services, expenses and disbursements. It should be noted that JLA paid

[16] See evidence as to compliance with usual practice, discussed in Section F(iii).

these invoices promptly after being submitted. In most instances, the invoices were paid on the day, or on the day after they were submitted.

54. On 4 September 2008, Mr Louttit was appointed a receiver and manager of the property of Biseja.

55. Mr Louttit was chosen by Mr Michael Linton, an officer of the appointor (Seiza Management Pty Limited) based upon Mr Linton's knowledge of Mr Louttit alone. Mr Linton decided to appoint Mr Louttit because of the work which Mr Louttit had performed on two previous receiverships. Mr Linton had no recollection of working with Mr Levi prior to the appointment of Mr Louttit on the Biseja receivership.

56. Mr Louttit asked Mr Levi to be responsible for the day-to-day management of the receivership under his supervision and direction. We accept Mr Louttit's evidence that Mr Levi was, in fact, responsible for the day-to-day management of Biseja. According to the information in his Application to be registered as a Liquidator, (which Mr Levi confirmed to be true and correct as at 24 April 2009), Mr Levi's role in the Biseja receivership was that he had overall supervision of the matter including staff resourcing and supervision, reporting directly to the Receiver. He set out extensive particulars of his role, including the following: "Trade-on with a view to realising as a going concern ... Structure and implement realisation strategy ... taking possession of, protecting and arranging valuation of the assets ... report to and ongoing liaison with secured creditor ... leading divestment team to effect a sale ... assessment of taxation issues, instructing third party experts".

57. In this role, Mr Levi supervised two other members of JLA staff, Amelia Koka, an Intermediate Accountant, and Jessica Ratcliffe, a receptionist. Ms Koka's responsibility was to update the Biseja cashbook, write cheques, draft correspondence and prepare the quarterly Business Activity Statements ("BAS").

58. Mr Louttit set up a bank account for Biseja (as required by s 421 of the Corporations Act). Mr Louttit was the only signatory to the account which had the number 012241 – 4805 – 17307.

59. The primary financial record maintained by JLA in relation to external administrations was the cashbook. The cashbook was maintained electronically in the form of an "Excel" spread sheet. The function of the cashbook was to record all payments and receipts in the course of an administration. JLA's usual practice was for every payment made from the Biseja bank account to be recorded in the Biseja cashbook. Ms Koka, under Mr Levi's supervision, had primary responsibility for ensuring the cashbook in relation to the Biseja receivership was updated and accurate. Although Ms Koka had primary responsibility for maintaining the Biseja cashbook, it could be accessed by anyone at JLA.

60. The Biseja cashbook is overwritten each time it is updated. There was no audit function on the cashbook and so that, if changes were made, it is not possible to identify who made changes to the Biseja cashbook nor is it possible to identify when they were made, or what changes were made (except by comparing snapshots of the cashbook, printed at particular times). The usual practice was that when a payment was made from the receivership account, a copy of the Biseja cashbook at the relevant time was printed and attached to the payment voucher and filed in hard copy. Consequently there are snapshots of the Biseja cashbook at particular dates.

61. JLA's usual practice was for hard copy documents relating to Biseja to be filed in lever arch folders. Relevantly, there were two categories of hard copy documents:

    (a) BAS and documents involving taxation issues (which were filed in lever arch folders marked "5 taxation") and

    (b) receipt vouchers, payment vouchers, bank statements, bank reconciliations, cheque books and deposit books (which were filed in lever arch folders marked "3 cashbook").

62. Biseja was a property development company. The administration of the receivership required a number of properties at The Entrance, NSW to be prepared for sale, marketed and sold. GST was payable on the sales. JLA retained Mr Shannon Cavanagh at a firm known as Bacchus and Associates Pty Ltd ("Bacchus") to provide advice as to the amount of GST payable on the sales of properties.

63. Mr Louttit and Ms Koka gave evidence of JLA's usual practice in relation to the calculation and payment of GST in relation to Biseja[17]. This is one aspect of the evidence which we will consider later in these reasons.

64. We note, at this stage, that Mr Louttit's evidence as to JLA's usual practice in relation to Biseja was as follows:

    (a) Ms Koka would send an email to Mr Cavanagh advising that a sale had been completed;

    (b) Mr Cavanagh would calculate the GST payable on the sale using the GST Margin Scheme;

    (c) Following receipt of Bacchus' GST advice, Ms Koka, under Mr Levi's supervision, would prepare and collate the payment voucher with supporting documentation including a BAS checklist, the BAS Return, a bank reconciliation, a copy of the cashbook and bank statement and a cheque payable to the ATO;

[17] [redacted]

(d) Mr Levi would check the BAS calculation;

(e) The payment cheque and payment voucher with supporting documentation would be placed into Mr Louttit's in-tray for signing, as he was the only signatory to the Biseja bank account;

(f) Mr Louttit would sign a number of cheques on a daily basis. He would check the payment voucher and the supporting documents being the BAS Checklist, the bank reconciliation, BAS and cashbook;

(g) Mr Louttit would review the Biseja bank statement to check that there were sufficient monies in the Biseja bank account to make the payment;

(h) Mr Louttit would review the bank reconciliation prepared by Ms Koka and Mr Levi;

(i) Mr Louttit would initial the BAS checklist so that there was a record of him reviewing the document;

(j) Once Mr Louttit had signed the payment cheque he would put the signed cheque and BAS Statement into his secretary's out-tray;

(k) His secretary would photocopy the BAS Return and payment cheque and place the copies for filing together with the payment voucher in the relevant staff person's in-tray to be marked for filing. In the case of Biseja, this was Ms Koka. The filing would then be placed in the filing tray and the filing clerk would complete the filing;

(l) The ATO payment cheque and the original BAS would be sent to the ATO by mail. If the BAS was late, the payment would be taken to the ATO in person;

(m) Mr Louttit said that he had no recollection of authorising payments to be made to the GPO and that this was not usual practice.

65. Ms Koka's evidence of practice in relation to preparation of documents in relation to GST payments was as follows:

(a) She would send "Settlement Statements" provided by Gadens Lawyers to Mr Cavanagh of Bacchus so that he could advise in relation the amount of GST payable;

(b) She would receive advice from Bacchus as to the amount of GST incurred in respect of real estate sales for each quarter;

(c) She would calculate the net amount of GST payable by Biseja each quarter by adding the total amount of GST payable in respect of real estate sales, as advised by Mr Cavanagh, to GST payable in respect of other transactions, (which she calculated herself), and then deducting

the amount of GST refunds Biseja was entitled to in respect of purchases made during the quarter;

(d) She would enter in the cashbook the individual GST amounts payable and refundable in respect of each relevant transaction;

(e) To effect payments of GST, she would prepare a payment voucher and supporting documents (which comprised documents referred to on a BAS Checklist, including a printout of the cashbook for the relevant quarter showing the individual amounts she had used to calculate the GST Payment and a copy of the relevant GST advice from Mr Cavanagh) and draw a cheque for the appropriate amount in favour of the ATO for Mr Louttit to sign;

(f) She would start preparing the BAS Return after receipt of the BAS Advice from Mr Cavanagh. She would update the cashbook and prepare GST workings either on the printout of the cashbook or on a separate filenote. She would also prepare the BAS either in pen or pencil and a BAS checklist. Her usual practice was to update the cashbook and prepare all these documents in one sitting;

(g) She would then provide all of these documents to Mr Levi to check;

(h) Once Mr Levi had checked the above documents, she would be asked by Mr Levi to draw the payment cheque to the ATO. If changes were required in the course of this process Mr Levi would hand write his correction on either the summary of her workings or the cashbook extract that was part of the supporting documentation. If changes were required to the BAS return, she would white out the figure on the BAS return and write in the correct figure. She would not complete a new form;

(i) She would then prepare the payment voucher, the bank reconciliation, write out the payment cheque and a letter to the ATO to be signed by Mr Louttit;

(j) All of these documents would be provided to Mr Levi not Mr Louttit. She gave Mr Levi the cheque, the payment voucher and supporting documentation and, as she understood the matter, Mr Levi checked them, signed or initialled the checklist and payment voucher and gave them to Mr Louttit for him to sign the payment cheque;

(k) Ms Ratcliffe would take the cheque to the GPO for payment and provide the receipt to Ms Koka for filing. Ms Koka was unaware of any occasion on which Mr Louttit or Mr Levi took a cheque to the GPO;

(l) After the cheque had been signed, the corresponding payment voucher and supporting documentation, including a copy of the

cheque, cashbook extract, bank statement and bank reconciliation, would normally be left in Mr Louttit's filing tray. The filing clerk would normally collect them, record the number of pages (for billing purposes) and file them in accordance with a number written on the top document (indicating the correct file) by either Mr Louttit or Ms Koka;

(m) The number "3" indicated that the documents were to be filed in the Biseja Bank File while the number "5" indicated that the documents were to be filed on the Biseja Tax File. Both files were maintained in the general office area and were readily accessible by Mr Louttit, Mr Levi and all JLA staff;

(n) For Biseja's GST Transactions the documents filed in the Bank File normally included:

(i) The signed or initialled payment voucher;

(ii) A copy of the signed cheque;

(iii) The bank reconciliation and corresponding bank statement and cashbook;

(o) The documents filed in the Tax File normally included:

(i) The receipt obtained from the GPO (if payment was made at the GPO);

(ii) A copy of the lodged BAS Return;

(iii) A copy of the covering letter to the ATO attaching the BAS Return;

(iv) Copy of Mr Cavanagh's BAS advice;

(v) The BAS checklist;

(vi) A filenote/extract of the cashbook with my handwritten workings of the GST calculation.

66. Mr Louttit's usual practice in relation to seeking remuneration for the work carried out by JLA on the Biseja administration, was to submit invoices on a monthly basis. Only Mr Louttit had access to MYOB (where the books and records of JLA were maintained) and the work in progress. It was his usual practice to prepare the invoice, send it by post or email and arrange for a hard copy to be filed on the Biseja files. His usual practice was to seek written or verbal approval for the payment from Michael Linton. On receipt of the approval, he would verbally instruct Ms Koka or Mr Levi to raise a cheque for payment. The cheque would be prepared by Ms Koka, checked

by Levi and then signed by Mr Louttit. The cheque would then be banked into the JLA business account.

67. All of the invoices which JLA issued in the Biseja receivership were in evidence.

68. Of some significance is the fact that the first invoice, issued 10 October 2008 in the sum of $90,454.10, was paid by Australian Executor Trustees Limited ("AET"), the Trustee of the Trust which was the chargee which had appointed JLA as receiver. This invoice was paid by AET because, at that time, there had not been any recoveries in the Biseja receivership from which JLA' fees could be paid. This payment was not recorded in the Biseja cashbook.

69. The First Invoice was paid on 12 November 2008.

70. Mr Levi was intimately involved in the Biseja receivership from the outset, formally reporting to the appointor/secured creditor on, at times a weekly basis. Mr Levi billed significant hours on the matter on a monthly basis (see JLA's First Invoice for $90,454.10 charging 188 hours for the Manager and Mr Levi's invoice for the same period charging 221 hours).

71. (We note, at this point, that Mr Levi asserts that he was aware that Mr Louttit was drawing remuneration for Biseja at about this point in time, and that he accordingly asked Mr Louttit in December 2008 for his share under the profit-share agreement).

72. Over the following months, JLA continued to bill Biseja on a monthly basis. Mr Levi continued to have the day-to-day management of Biseja and continued to invoice JLA for services on a monthly basis. Mr Levi was paid by JLA very promptly upon rendering his invoice.

73. By about March 2009, Mr Levi had a tax bill of $22,737.87 which was overdue and he had requested the ATO to allow him to pay by instalments. Mr Levi received a letter, dated 24 March 2009, from the ATO referring to a recent request by Mr Levi regarding his outstanding tax account and agreeing to accept an arrangement for payment by instalments.

74. Biseja's GST for the March 2009 quarter was due by 28 April 2009.

75. We will come to the details later, but some time between 31 March 2009 and 8 April 2009, someone falsified entries in the Biseja cashbook to inflate Biseja's GST for the March 2009 quarter by $22,737.87 (ie, the same amount as Mr Levi's tax obligation). The Biseja cashbook as at 31 March 2009 recorded the correct GST liability of $80,743.34 whereas the cashbook as at 8 April 2009 recorded, falsely, that the GST payable for the March 2009 BAS Quarter was $103,481.21.

76. The First Transaction took place on 2 April 2009. The precise details are a matter of dispute but what can be said is that on 2 April 2009, Ms Koka prepared a Biseja cheque payable to the ATO in the sum of $103,481.00. The cheque was signed by Mr Louttit. On 3 April 2009, Mr Levi took that cheque to Australia Post at the GPO in Martin Place, Sydney and instructed the cashier to apportion the cheque in accordance with two remittance slips: the Biseja remittance slip for Biseja's GST of $80,743.34 and a remittance slip for Mr Levi's personal tax obligation of $22,737.87. The ATO apportioned the cheque in accordance with Mr Levi's instructions. A BAS was lodged with the ATO. On the form as lodged, the correct amount of GST is recorded.

77. On 24 April 2009, Mr Levi applied to be registered as a Liquidator. Mr Louttit was one of his two referees and strongly supported Mr Levi's application.

78. Over the ensuing months, JLA continued to invoice Biseja on a monthly basis and Mr Levi continued to invoice JLA on a monthly basis. Mr Levi's invoices continued to be paid by JLA very promptly.

79. On 24 July 2009, Mr Levi was registered as a Liquidator.

80. By about October 2009, Mr Levi had another tax obligation of about $69,000.00.

81. Biseja was obliged to lodge its BAS for the September 2009 quarter by 28 October 2009.

82. On or about 26 October 2009, the Second Transaction took place.

83. Ms Koka had prepared a draft BAS on or about 1 October 2009 containing the correct amount of GST payable, namely $18,723.00.

84. Some three weeks later, on about 21 October 2009, Ms Koka prepared a Biseja cheque in the sum of $87,745.00 payable to the ATO. Mr Louttit identified the signature on the cheque as his.

85. On 26 October 2009, Mr Levi took the cheque for $87,745.00 to the GPO and caused it to be split as to $69,022.00 for the payment of his personal tax, and as to the amount of $18,723.00 in payment of Biseja's GST.

86. A BAS was lodged with the ATO. It appears to be a modified version of the draft prepared by Ms Koka, containing some of her handwriting. But some of her handwriting (particularly her handwriting of the ultimate amount of GST payable) no longer appears. The ultimate amount of GST ($18,723.00) has been written in by someone else.

87. Someone made an entry in the Biseja cashbook (see printout of cashbook as at 4 March 2010) stating that a payment of $87,745.00 was made to the ATO on behalf of Biseja as at 21 October 2009.

88. In about September 2009, Mr Louttit had instructed TressCox to prepare a Confidentiality Agreement. Mr Louttit gave evidence that this was for the purposes of commencing partnership discussions with Mr Levi. Mr Levi signed the agreement. It is clear that partnership discussions took place between Mr Louttit and Mr Levi, although we will deal with the details subsequently in these reasons.

89. On 17 November 2009, Mr Levi was registered as an Official Liquidator.

90. In December 2009, Mr Levi received his first appointment. He was appointed as Receiver and Manager over Tresedar Pty Ltd (ACN 003 377 642) ("Tresedar"). It seems clear that an agreement was made relation to profit sharing regarding Tresedar. Mr Levi was seeking appointments at this time on the basis that he would be using JLA's premises, staff and equipment. An agreement was made between Mr Louttit and Mr Levi concerning profit share on Mr Levi's appointments. Profit share payments were made in relation to Tresedar in February 2010 and following (discussed in more detail below).

91. In about March 2010 Mr Louttit was notified by the ATO that Biseja had been selected for an audit of its BAS for the period commencing 1 July 2006. Mr Levi was the primary point of contact with the ATO during the audit. The audit took place over the period up to about August 2010.

92. Mr Levi left JLA on 13 August 2010.

93. Mr Louttit had asked Mr Cavanagh to take over the role of dealing with the ATO after Mr Levi left.

94. At some time between 6 July 2010 and 31 August 2010, someone reversed the earlier false entries in respect of Biseja's GST for the March 2009 quarter and for the September 2009 quarter. The effect of these changes was to remove the false entries suggesting that Biseja had a higher GST obligation than the amount actually paid to the ATO. As a result of the changes, the Biseja cashbook recorded the correct lower GST obligation but included additional false entries to deal with the gap between the amounts of GST liability and the amounts of the cheques drawn.

95. Over the period between Mr Levi's departure and the end of October 2010, Mr Louttit sent a series of emails to Mr Levi asking him for his time sheets and other information so that the profit share payments in relation to matters over which Mr Levi had been appointed could be calculated and paid. Mr Levi did not respond to any of these emails. Mr Louttit's requests became increasingly strident.

96. In late September 2010, Mr Louttit asked Mr Cavanagh to undertake a final review of the GST paid on the settlement of Biseja properties. Mr Louttit gave evidence that the purpose of this review was to ensure that the correct amount of GST had been remitted to the ATO. On 5 and 6 October 2010, Mr

Cavanagh discovered the falsifications made to the Biseja cashbook in relation to the First and Second Transactions.

97. In the meantime, Mr Louttit's email demands to Mr Levi continued and ultimately, he made a final demand, threatening to pursue his rights "more formally". Mr Levi did not respond. On 27 October 2010, Mr Louttit placed caveats over properties in respect of which Mr Levi was receiver. Mr Levi then called Mr Louttit and they arranged to meet the following day. The terms of the discussion at the meeting which took place on 28 October 2010 are in dispute. Mr Louttit asserts that Mr Levi admitted misappropriating Biseja funds. Mr Levi asserts that there was discussion during which Mr Louttit was threatening or "extorting" him.

98. On 29 October 2010, Mr Levi sent an email to Mr Louttit saying "JL – please note that I can come to your office to go through things with you in detail, if this assists".

99. On the same day, Mr Louttit contacted Mr George Boland of ASIC and told him that he thought Mr Levi had misappropriated moneys from the Biseja account. Mr Louttit sent a letter to ASIC to this effect on 1 November 2010.

100. Mr Levi sent a number of emails in the following days. He offered to pay Mr Louttit an amount of approximately $99,119.45 in relation to the fees and to pay Biseja for the amounts paid by Biseja for his personal tax. The latter amounts are referred to as the "other moneys" in the email traffic but there is no doubt that this term is a reference to the Biseja payments on the First and Second Transactions.

101. One of the emails from Mr Levi stated:

> "Jamieson
>
> I think it more important to pay back the other monies and would be grateful if you could send through the relevant bank account details to enable this to occur asap, as initially discussed.
>
> Please know that I am again truly and sincerely sorry for any issues that this may cause however fully appreciate your obligations."

102. On 9 November 2010, Mr Louttit met Mr Levi and Mr Levi handed him two cheques payable to Biseja totalling $92,000.00 and a further two cheques payable to JLA totalling $109,031.40.

103. On 14 December 2010, Mr Louttit provided a report to ASIC on the misappropriation.

104. Mr Levi was interviewed by ASIC in relation to the matter and asserted that the payments were made with Mr Louttit's authority.

F. Was a case of misappropriation without Mr Louttit's authority or consent established on the evidence?

(i) Was there a profit share agreement between Mr Louttit and Mr Levi as alleged by Mr Levi pursuant to which Mr Levi was entitled, as at March 2009, to approximately $22,000.00 and, as at October 2009, to approximately $69,022.00?

105. Critical to Mr Levi's response in this matter is his assertion that he and Mr Louttit had entered into a profit-split agreement prior to the time of the First Transaction and that the payments of his tax bills by Biseja represented payments to which he was entitled pursuant to that agreement.

106. Mr Sutherland submitted, at this Hearing, that unless we accepted Mr Louttit's claim that he was tricked into signing the Biseja cheques, we could not be comfortably satisfied that Mr Levi's account of the profit share agreement is untruthful. This is not the correct approach to the question. The question whether the payments were made without Mr Louttit's authority and consent must, ultimately, be considered on the whole of the evidence. The key factual issues need first to be considered independently. We must consider the profit share agreement issue without making any assumption that we cannot be satisfied that Mr Louttit was tricked.

107. We should briefly outline Mr Levi's contentions about the agreement, and how it related to the tax payments, before proceeding to consider the evidence in detail. We should note that Mr Louttit emphatically denies Mr Levi's assertions.

108. Mr Levi asserts that in early 2008, he was not happy with the hourly rate he was being paid by JLA. He raised this with Mr Louttit and this led to an agreement, in July 2008, that he was to be paid a profit share by JLA, going forward, on matters which he was integral in bringing in. He was to be entitled to a half share of profits, to be calculated as half of 20-30% of the fees paid in the matter. Mr Levi asserts that when the Biseja appointment was made, it was agreed that the profit split arrangement would apply, because he was integral in securing the matter for JLA. By December 2008, the first remuneration had been drawn in Biseja and Mr Levi asked for his share. Mr Louttit delayed and Mr Levi asked again in the following months.

109. As at March 2009, Mr Levi owed $22,000.00 in tax. Mr Levi said that he told Mr Louttit that he needed to pay his tax. Mr Levi contends that Mr Louttit asked Mr Levi to calculate what was owing under the profit share agreement. Mr Levi did so, in accordance with the arrangement to pay a half share of 20-30% of fees, and, using GST inclusive remuneration payments totalling $198,289.10 (being the figure recorded in the cashbooks of Biseja and in the Form 524 summary of remuneration paid for the six month period 4 September 2008 to 4 March 2009), this produced approximate figures of between $19,800 and $29,750. Mr Levi asserts that Mr Louttit suggested that he would pay Mr Levi's tax. Mr Levi agreed as it

was in between the two figures. Mr Louttit proposed paying the amount with a Biseja cheque. Mr Levi believed that the first remuneration payment of $90,000.00 payable to JLA was outstanding[18] and so he assumed that Mr Louttit could legitimately pay him from Biseja funds. Therefore, a Biseja cheque was prepared, including both an amount of about $22,000.00 for Mr Levi's tax and an amount of about $80,000.00 for Biseja's GST and Mr Levi took this cheque to the GPO and paid both his own and Biseja's tax.

110. In October 2009, Mr Levi had another tax bill, this time for approximately $69,000.00. He asked Mr Louttit for his profit split again. Mr Levi prepared another calculation of profit split which came to $69,021.94 owing, after taking into account the March payment of $22,737.87. Again, the profit split was calculated using GST inclusive remuneration payments. Mr Levi asserts that Mr Louttit told him to arrange for payment in the same way as the first payment, namely by adding that sum to the amount owed by Biseja for GST and paying both by means of a Biseja cheque.

111. We now turn to the detail.

Mr Levi's case

112. Mr Levi stated, in his s19 transcript that after a period at JLA, he was not happy with the amount he was being paid and had negotiations with Mr Louttit as to a higher rate. Mr Louttit said he could not justify paying a higher rate "so there were negotiations, and then an agreement to share profits on certain matters".

113. [redacted]

[18] [redacted]

114. Mr Levi was asked how he secured the Biseja job for Mr Louttit and he suggested that it was the relationship he had with Mr Linton and the work he had done on previous appointments by Mr Linton (Gospa and Holden Street) including the marketing work of going out and winning jobs.

115. Mr Levi said he had discussions with Mr Louttit for about six months prior to July 2008. He said that "The profit share agreement was entered into or agreed in July 2008". [redacted]

[redacted]

116. The file note to which Mr Levi was referring was produced by Mr Levi at the s19 examination and also tendered before the Board. It is an undated JLA standard form file note containing handwritten notes. (Mr Louttit gave evidence that this was a note prepared in about December 2009 as a rough calculation which he prepared for Mr Levi to illustrate the effect on the profitability of JLA if Mr Levi was appointed on administrations that generated fees between $30,000 to $100,000). The notes on the document are largely figures and there is nothing in the notes which establish the date on which it was prepared.

117. The document which, on Mr Levi's version of events, set out the agreed profit split (Ex 2 Tab 18) is hard to reproduce accurately in type form, but, essentially provided as follows:

Sales		
Fees Cash Collected	30,000	100,000
Expenses		
Less Advertising		
Expenses (Disbursement) 2 to 5%	2,000	5,000 (to 20g)
Courier/Photocopy/Postage	28,000	95,000
Wages on job Hours Actual 40% to 50%	(11,200 to 14,000)	(38,000 to 47,500)
ML * ——(1)		
AK *		
JL * (1)		
	(8,400)	(28,500)
O/H 30%		
Profit 20% to 30% 5,600 to	8,400 (30%)	19,000 to 28,500 (30%)
½	½	
2,800 to 4,200	2,800 to 4,200	9,500 to 14,500

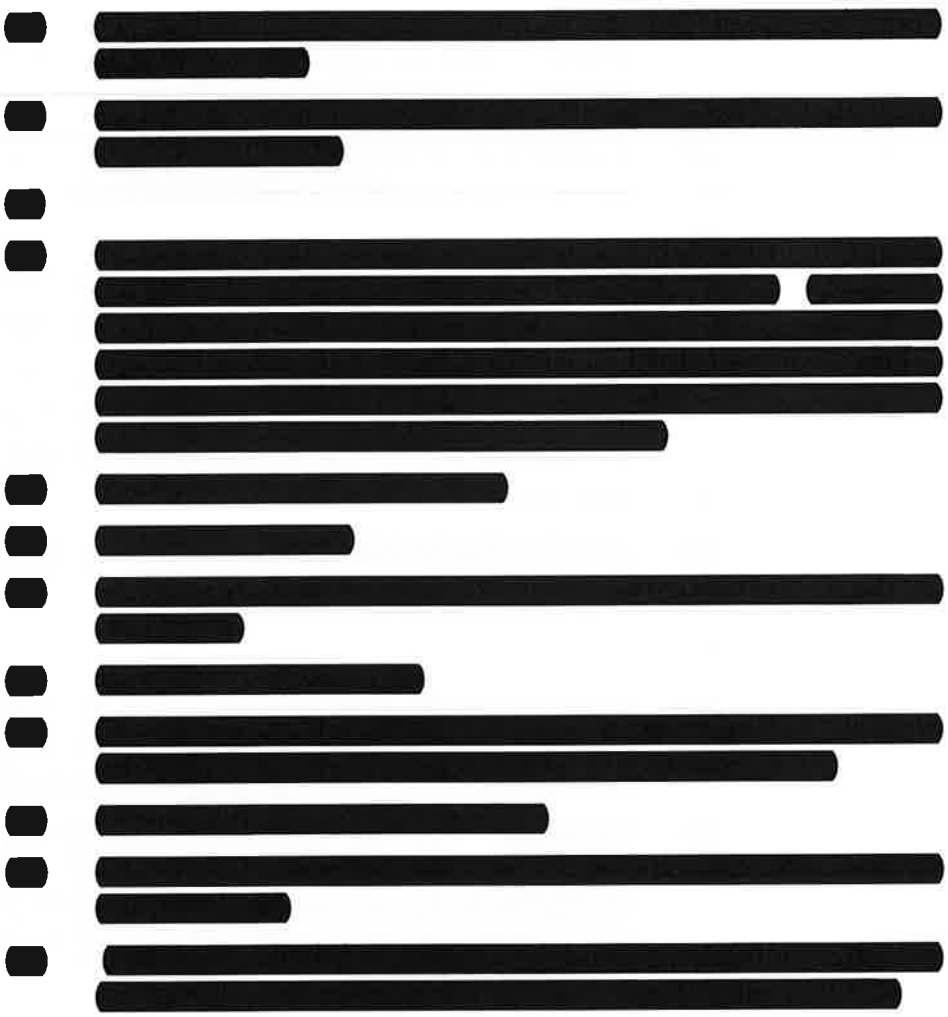
9,500 to 14,500

118. [redacted]

[redacted]

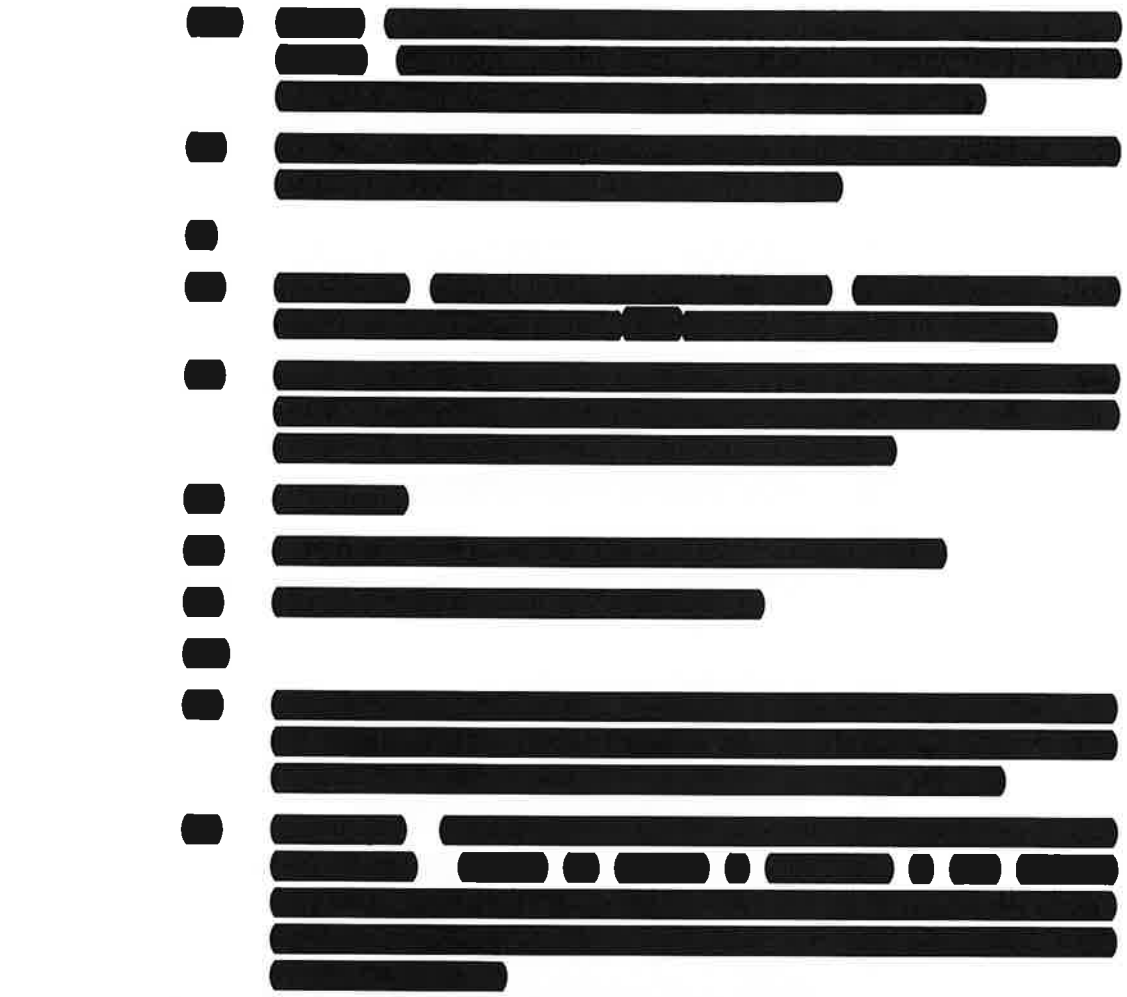
119. [redacted]

[redacted]



120.

121.



122.

[19] Handwritten correction to transcript.

[redacted]

123. At this point, we note the following about Mr Levi's version of events:

(a) Mr Levi asserted that there was an *agreement*;

(b) The agreement was entered into in July 2008;

(c) The agreement was that he was to be paid half of 20-30% of fees on a matter;

(d) The parties confirmed that the agreement applied to Biseja in August 2008;

(e) The agreement asserted by Mr Levi was one made in relation to matters where Mr Levi was integral in securing the work for Mr Louttit.

124. We do not agree with Mr Priestley's submission that Mr Levi stopped short of asserting an enforceable agreement [redacted] Those passages refer to Mr Louttit dealing with Mr Levi's claim under the agreement and Mr Levi's repeated requests for payment. In our view, Mr Levi's evidence was clear: he believed that there was a binding agreement and that it was to apply to Biseja, [redacted] (Of course, if there was no agreement, then Mr Levi's assertions fall apart. There would be no legitimate justification for him to ask for and accept payment, a profit share in the absence of any agreement).

125. We note, in this regard, that Mr Levi's written submissions referred to "an understanding" between Mr Levi and Mr Louttit "albeit one that, as is commonly the case in discussions between senior employees and business owners on the sensitive issue of progression to partnership or some level of profit sharing, was taking some time to crystallise into a formal or concluded agreement". The submissions went on to assert that, pursuant to that account, Mr Levi had "a legitimate expectation to be entitled to receive a proportion of the monies paid to Mr Louttit as remuneration on the Biseja assignment".

126. The import of this submission is not entirely clear. It may be that this submission was designed to deal with the suggestion that, as a matter of law, there was no "agreement" as asserted by Mr Levi (because, for example, there was no certainty). If so, we do not believe that the technical enforceability or otherwise of the agreement is to the point. Mr Levi's asserted that he and Mr Louttit agreed to a profit split in accordance with a particular formula and that they agreed that this would apply to Biseja. He did not give evidence that, although he knew there was no concluded

agreement, he still believed he was entitled to the profit split. To the extent that Mr Levi's written submissions seek to suggest this, we do not accept them.

127. We make the following observations, at this point, about Mr Levi's case:

(a) If, as alleged by Mr Levi, Mr Louttit agreed to the profit share agreement and agreed that it would apply to the Biseja, it is not apparent why Mr Louttit would then resist making payment in December 2008, when asked. According to Mr Levi's version, the amount of profit share owing in December would have been somewhere between $6,300 and $9,600, approximately, and no more[20]. At that time, Mr Levi said that he knew there were enough funds within the matter for Jamieson to be able to draw remuneration. If Mr Louttit had made the agreement, (because "he didn't want to lose" Mr Levi), the assertion that he resisted payment of a small amount in December, when asked, is simply not convincing;

(b) This position becomes even more unusual, as time went on. Mr Levi said that he asked for payment again in January, again in February and again in March. In circumstances where it has been clearly established on the evidence that Mr Louttit paid all Mr Levi's other invoices very promptly, the notion that Mr Louttit would not pay relatively small amounts of money, when asked over a period of four months, lacks cogency;

(c) Mr Levi asserts that the agreement was to apply to matters in which he was integral in securing the work;

(d) However the unchallenged evidence of Mr Linton was as follows:

"8. I was formally introduced to Jamieson by Tim Sherrad of Gadens Lawyers while I was employed at Sieza. Tim Sherard organised the introduction and recommended Jamieson as insolvency practitioner that Seiza would be interested in engaging as Jamieson is not part of a large practice.

9. The first matter that I recall working on with Jamieson was the receivership of Holden Street Pty Ltd ("Holden"). JL was appointed the Receiver and Manager of Holden on 15 November 2007.

10. Jamieson and I also worked on the administration of Gospa Pty Ltd ("Gospa"). Jamieson was appointed the Receiver and Manager of Gospa on 8 August 2007.

...

[20] Applying Mr Levi's asserted agreed formula to the amount of $63,720.80, the first item on Mr Levi's March Biseja Claim, see Exhibit 10, Ex 2 Tab 13.

15. I made the decision to recommend the appointment of Jamieson as Receiver and Manager of Biseja because of the work he had done on Holden and Gospa. My decision to recommend Jamieson was based on my knowledge of him alone. I do not recall working with Mark Levi (Mark) prior to recommending the appointment of Jamieson as Receiver and Manager of Biseja."

(e) Mr Louttit gave similar evidence as to the reason for his appointment to Biseja;

(f) There is no reason for us not to accept this evidence. In those circumstances, even if Mr Louttit had made an agreement in principle as alleged by Mr Levi, there is no real basis for accepting Mr Levi's assertion that the agreement would apply to Biseja.

128. At his s19 examination, Mr Levi produced what he said was the document he had provided to Mr Louttit containing his calculations (Exhibit 10) ("the March Biseja Claim"). Apart from his assertion, there is no evidence of its existence prior to being produced at the s19 examination. Mr Louttit denied ever having seen this document.

129. The March Biseja Claim reads as follows:

		Biseja Split Mar-09	
Fees ($)		**Net Profit %**	**Net Profit %**
63,720.80		**20%**	**30%**
35,355.10			
38,841.00			
21,212.40			
39,168.80			
198,298.10		**39,659.62**	**59,489.43**
	ML owing 50%	**19,829.81**	**29,744.72**

130. Mr Levi said that he gave this document to Mr Louttit. [redacted]

[redacted]

[redacted]

131. (The figure ultimately paid ($22,737.87) falls within the range of profit shares calculated at half of either 20% ($19,829.81) or 30% ($29,744.72) of remuneration paid, including GST, for the period ($198,298.10)).

132. Mr Levi went on to deal with the fact that a Biseja cheque was subsequently drawn to pay both his and Biseja's tax obligations and that he took the cheque to the GPO and paid his (and Biseja's) tax with the cheque.

133. We should add, at this point, that Mr Sutherland stated, in opening the matter for Mr Levi[21]:

> "That by the time March came around, the end of March in 2009, he was led to understand that Mr Jamieson Louttit at that point in time, if we freeze frame the end of March, beginning of April in '09, had fees which were outstanding that had been rendered in relation to the receivership on Biseja in the vicinity of about $90,000. One sees invoice number 1, which is referred to in ASIC's chronology, as having been rendered at some point in time.
>
> It is objectively clear now that the appointor of the receivership paid that invoice direct to Jamieson Louttit. So Louttit & Associates were paid the $90,000-odd but they were paid direct from AET, the trustee behind the appointor, and that it wasn't paid out of the funds in the Biseja account.
>
> ...
>
> That is fundamental to the case that Mr Levi asserts, that is, that he understood that money was still outstanding and that Louttit was owed it and that Louttit had in effect an entitlement to funds that had not been paid."

134. There is a substantial problem with the March Biseja Claim. It does not set out the correct total of fees received on the Biseja job. It lists the amounts of *the second* to sixth payments of fees to JLA on the Biseja matter, but omits the amount of the first payment. The first invoice was for an amount of $90,454.10. Mr Levi was intimately involved in the Biseja receivership from the outset and billed significant hours on the matter on a monthly basis (compare, in particular JLA's First Invoice for $90,454.10 (for September) ("the First Invoice") charging 188 hours for the Manager and Mr Levi's invoice for the same period charging 221 hours).

---

[21] [redacted]

135. If the March Biseja Claim was a contemporaneous record prepared by Mr Levi, applying a profit split to all of the fees on the Biseja matter, the question arises why the invoice did not include the first payment of remuneration, particularly as it was a very substantial payment.

136. Mr Priestley submitted that the omission was only explicable on the basis that the March Biseja Claim was a concoction.

137. It seems to us that there are only three rational alternatives.

138. The first is that the March Biseja Claim is a fabrication and Mr Levi decided to omit reference to the first payment of $90,000 in order to make the figures work. If Mr Levi had included the first payment, the March Biseja Claim would show that Mr Levi was entitled to between $28,875.22 and $43,312.83 (i.e. based upon 20% to 30% of remuneration paid, including GST). But if this were the case, his assertion as to the basis for the payment of his tax would unravel, as it hinges upon a profit share entitlement of only about $22,000 as at March 2009.

139. The second possibility is that the March Biseja Claim is a fabrication and that when Mr Levi made up his story at some time prior to his s19 examination, he calculated the March Biseja Claim on the basis of a copy of Biseja's cashbook and/or Forms 524, forgetting that the payment of the First Invoice was not included in the cashbook or Forms 524, because it had been paid by the appointor to Mr Louttit direct.

140. We note that the Form 524 report filed by JLA for the period up to March 2009 records (incorrectly) that remuneration of the precise figure used by Mr Levi in the March Biseja Claim (ie $198,298.10) was paid and that the attached cashbook of Biseja sets out the same individual instalments of remuneration as are contained in the March Biseja Claim (ie the second to sixth payments, but excluding the first payment).

141. The third possibility is that the March Biseja Claim is not a fabrication and Mr Levi did not think that the First Invoice had been paid as at March 2009, when he made his claim, and so deliberately left the figure off the March Biseja Claim when he prepared it in March 2009.

142. We do not accept the third possibility as credible:

    (a) In the first place, as far as we are aware, it is only in submissions to this Board that Mr Levi has asserted that he believed that the First Invoice was outstanding at the time of the March Biseja Claim. He did not assert this in his s 19 examination. At p 70 of his examination transcript, he said "I presumed that he had had $22,000 adjusted *against future fees*, so fees that he drew going forward" (emphasis added). His solicitor's letter to ASIC dated 31 January 2011, said:

"The first debt sought to be resolved with the Australian Tax Office involved $22,737.87 and was remedied on the instructions of Mr Louttit by funds from Biseja. Mr Levi was under the impression that Mr Louttit *would simply forego fees or would in some other way remedy the account* with Biseja. The second debt to be repaid, again with the Australian Tax Office, was remedied on 21 October 2009. This again was paid from Biseja funds and again, Mr Levi was under the impression that the funds would be remedied by Mr Louttit". (emphasis added)

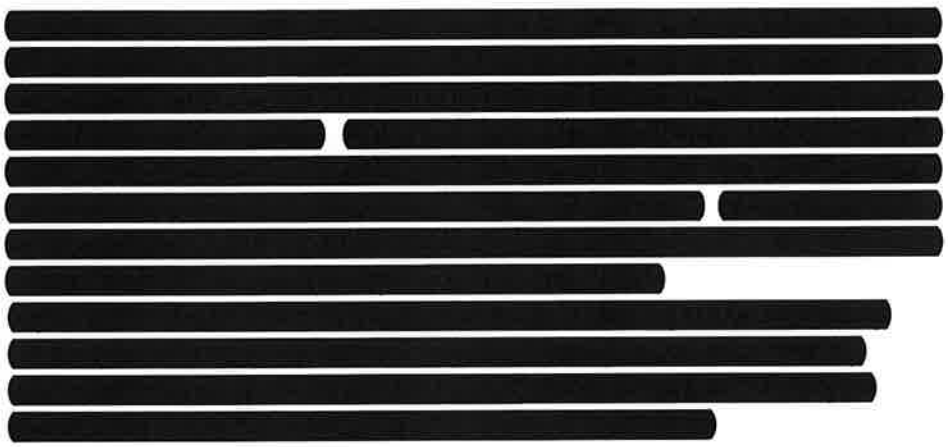
(b) Secondly, we consider that Mr Levi must have known, in late 2008, that the First Invoice had been paid. Mr Levi was intimately involved in the Biseja receivership from the outset, formally reporting to the appointor/secured creditor on, at times a weekly basis. Mr Levi billed significant hours on the matter on a monthly basis (compare, in particular the First Invoice for $90,454.10 charging 188 hours for the Manager and Mr Levi's invoice for the same period charging 221 hours). The Biseja matter was a matter on which JLA was continuing to incur a large amount of fees and expenses. It is not in dispute that Mr Levi was aware of the first invoice having been submitted. It was to be expected that invoices would be paid in the order in which they were submitted. If Mr Levi's story is true, and Biseja was the first matter on which he was entitled to a profit split, it seems highly likely that he would have taken a keen interest in the amounts of fees being paid. It seems highly likely that he would have asked Mr Louttit about the matter by December 2008 and Mr Louttit would have told him that the invoice had been paid direct;

(c) Thirdly, even if Mr Levi assumed, initially, that the First Invoice had not been paid, we find it virtually inconceivable that he would not have raised whether it had been paid with Mr Louttit as the 2009 year progressed. One would have expected, at the very least, that he would have raised the matter in March, when he prepared the March Biseja Claim. Moreover, Mr Levi does not assert that he raised the matter at any time with Mr Louttit, even when it came to the second transaction in October 2009;

(d) Fourthly, prior to the second transaction, Mr Louttit provided Mr Levi with the JLA Sales/Customer Summary (Ex 2 Tab 13). This shows that the first invoice had been paid ("closed"). Yet Mr Levi did not include this amount in his second profit share calculation.

143. We do not accept that Mr Levi believed that the First Invoice remained outstanding as at late March 2009. In our view, Mr Levi's failure to make a claim in respect of the First Invoice, at any time, notwithstanding his knowledge that it had been rendered, severely damages the credibility of his story.

144. As to the period after March 2009, Mr Levi said that partnership discussions commenced and continued in August, September and October 2009. He said he received the confidentiality agreement in late September or early October. He said that he was having a meeting with Mr Louttit about partnership and the profit split came up. [redacted]



145. We note that the amount of tax which Mr Levi needed to pay in October was $69,022.00. We note, however, that if the calculation of the profit split was to be done on the same basis as the first payment, (ie at half of between 20% of remuneration paid to 30% of remuneration paid), the amount payable by Mr Louttit to Mr Levi, after taking into account the March 2009 payment of $22,737.87, would have been within the range of approximately $12,100.00 to $29,600.00 (rather than $69,022.00).

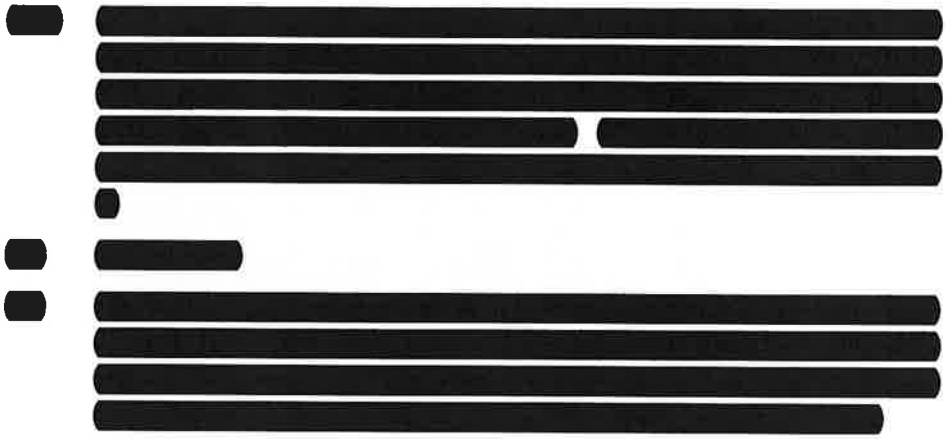
146. However, Mr Levi said that in October he provided Mr Louttit with a document containing a profit split calculation ("the October Biseja Claim") which read as follows:

Fees ($)
63,720.80
35,355.10
38,841.00
21,212.40
39,168.80
40,190.70
25,292.30
26,326.30
16,376.80
15,623.30
11,787.60
14,910.50
348,805.60

Biseja Split
Oct-09

Fees	348,805.60
wages @ 33%	116,268.53
o/heads	49,017.45
Net Profit	183,519.62
ML 50% split	91,759.81
previously paid	22,737.87
Payable	69,021.94

147. [redacted]



148. We consider that there are significant problems with the October Biseja Claim:

(a) First, as with the March Biseja Claim, apart from Mr Levi's own assertion, there is no evidence of this document's existence prior to its production by Mr Levi in his s19 examination;

(b) Secondly, it does not follow the method of calculation which Mr Levi said was agreed in July 2008. Mr Levi's evidence was that Ex 2 Tab 18 set out how the profit split was to be calculated under the agreement;

(c) Thirdly, if the agreed profit share calculation had been performed, the amount payable would only have fallen within the approximate range of $12,100.00 to $29,600.00, substantially less than the amount of tax payable by Mr Levi of $69,022. There is no explanation why Mr Louttit would pay so much more than the amount initially agreed. This does not sit comfortably with Mr Levi's assertion that Mr Louttit was resisting payment;

(d) Fourthly, it must be assumed, that for Mr Louttit to make a payment to Mr Levi, he would be committing a fraud. There is no evidence that any moneys were payable to JLA at the time and, if Mr Louttit agreed to the payment, he was stealing Biseja's money. It is difficult to think that, instead of paying Mr Levi an amount of between $12,100.00 to $29,600.00, he would agree to pay a sum significantly larger, (without any apparent imperative to pay a larger amount in accordance with the original agreement), and obtain the money by defrauding Biseja. Even if it be assumed that the intention was to make good the payment somehow, the transaction was, at least, seriously irregular, and the same logic applies to suggest that there was no need for Mr Louttit to undertake such a risk;

(e) Fifthly, as with the March Biseja Claim, the October Biseja Claim left off the first invoice of $90,454.10. We refer to our discussion of this

issue at paragraph 142 above. That reasoning process applies with more force to the position at October 2009. We consider that Mr Levi did not believe, as at October 2009, that the first invoice had not yet been paid. Accordingly, we consider that the October Biseja Claim was created by Mr Levi, well after the event, for the purposes of supporting his assertions. He left off the first payment either because he needed to do so to make the figures work and/or because he used the Biseja records or the Form 524 (which did not show the payment of the First Invoice, as it was made by the appointor direct to JLA) and he had forgotten that the payment of the First Invoice had been made.

149. We do not consider Mr Levi's assertions about the October Biseja Claim to be credible. The amount of the second payment should have been between $12,100.00 to $29,600.00 if calculated on the July 2008 formula. However, without any rational explanation for the change, a different method of calculation was used for the second payment, producing a figure of $69,022.00, which happened to be the amount of tax which he owed as at October 2009.

150. It is even harder to accept Mr Levi's case when one considers this coincidence in the light of the earlier coincidence, (that the first payment, calculated in accordance with the original agreement, just happened to equate approximately with Mr Levi's tax liability as at March 2009).

151. Mr Levi said that a cheque was prepared and given to him in an amount to pay both his tax ($69,022.00) and Biseja's GST. He took the cheque but did not pay the tax for several days because he was awaiting confirmation of the precise amount of tax which he needed to pay. He then took the cheque to the GPO and paid both his tax and Biseja's tax.

152. We note that notwithstanding the fact that JLA was being paid fees on a monthly basis between March 2009 and October 2009 Mr Levi did not provide Mr Louttit with any other claim for a profit share payment during this period.

Mr Louttit's evidence

153. Mr Louttit denied that there was any profit share agreement as alleged by Mr Levi. He stated that profit share discussions only took place after Mr Levi became a registered liquidator, in the second half of 2009.

154. Mr Louttit's evidence was that a couple of months before Mr Levi's registration, in July 2009, he commenced discussions with Mr Levi regarding the possibility of him becoming a partner of JLA. Mr Levi was registered as a liquidator in July 2009 and as an Official Liquidator in November 2009.

155. Mr Louttit stated that in about September 2009, he instructed TressCox to prepare a Confidentiality Agreement for the purposes of commencing partnership discussions with Mr Levi. A copy of the agreement was provided to Mr Levi who signed the agreement, initialled each page, and initialled a number of handwritten amendments to the agreement. Significantly, the agreement included, amongst other things, the following:

> "A. Jamieson Louttit is a registered Liquidator and Official Liquidator. Whilst the engagements and appointments are in the personal name of Jamieson Louttit, all of the revenue and expenses are banked into and paid from a Service Company.
>
> B. Jamieson Louttit (the "Owner") is the Director and Shareholder of the Service Company and operates the business Jamieson Louttit & Associates (the "Business").
>
> C. The Recipient [defined in the agreement as Mark Levi] *is currently employed and/or contracted by the Owner and/or Service Company, on an hourly rate.* [emphasis added]
>
> D. The Recipient wishes to inspect and obtain copies of an information Memorandum and other information of the Owner and/or Service Company to consider joining the Owner as a Director, Shareholder and/or Partner of the Owner and/or Service Company or some other new company/entity for that purpose."

156. Mr Louttit gave evidence that on 24 September 2009, he prepared and emailed to Mr Levi, as part of their partnership discussions, a 1 page document titled "Jamieson Louttit & Associates, Profit & Loss [Cash], July 2008 through to June 2009". The document is, as its description suggests, a profit and loss statement for JLA for the period July 2008 to June 2009. Thus, the document sets out JLA's total income, deducts costs of sales to reach "Gross Profit" and deducts expenses to reach the "Net Profit". Part of the costs of sales is the fees paid to Mr Levi. The amount recorded as paid to Mr Levi (described as 'Contractors (ML)') as $242,023.70 for the period July 2008 to June 2009. This matches the amount invoiced by Mr Levi to JLA as recorded in Exhibit 3. It is notable that this document makes no reference to any additional payment to Mr Levi of $22,737.00 either as a cost of sales or as part of a profit split.

157. Mr Louttit gave evidence that he instructed TressCox to prepare a shareholders agreement for the purposes of partnership discussions with Mr Levi. The draft agreement was annexed to Mr Louttit's statement. There is no evidence as to the actual date upon which it was prepared but it is apparent that it was prepared at some time into the 2009/2010 financial year. Clause 5.2 makes provision for distribution of profits in certain amounts for the "period ending 30 June 2010" and for following years, that phrase has been changed to the "*financial year* ending 30 June 2011" and so on.

158. In December 2009, Mr Levi received his first appointment. He was appointed as Receiver and Manager over Tresedar. Mr Louttit gave evidence that they had still not reached an agreement regarding the terms of any partnership arrangement at that time.

159. Mr Louttit said that it was at this point that he created the document which is at paragraph 117 above. In his statement, he said that he prepared this during a meeting with Mr Levi in about December 2009, although he could not recall if it was prepared before or after Mr Levi was appointed over Tresedar. In cross-examination he said he believed it was shortly before Mr Levi was appointed over Tresedar. He stated that it was a rough calculation which he prepared for Mr Levi to illustrate the effect on the profitability of JLA if Mr Levi was appointed on administrations that generated fees between $30,000 to $100,000. He stated that the purpose of the document was to illustrate that the profit element was between 20 to 30% of the fees generated.

160. Mr Louttit said that he and Mr Levi also discussed how they would share profits earned from external administrations to which Mr Levi was appointed. He said that they had a conversation to the following effect:

> "Mr Louttit: "you cannot just come into the partnership and expect to share in all the profits. You have to add value and increase the profits. Otherwise I might as well do nothing."
>
> Mr Levi: "Your overheads are too high"
>
> Mr Louttit: "They are reflective of the costs of running an insolvency practice."
>
> Mr Levi: "I do not have any control over the overheads, you control the cheque book. In any event if I bring in a job, there are no additional overheads incurred by you anyway".
>
> Mr Louttit: "How about we calculate the split of profits without the overheads and just include gross fees less wage costs and then divide the profits equally between us on the matters you bring in. I can't be fairer than that"
>
> Mr Levi: "Okay". "

161. Mr Louttit gave evidence that as an interim measure while the terms of the partnership were negotiated, he agreed to a profit sharing arrangement to deal with the fees earned in respect of Tresedar and any other administrations where Mr Levi was appointed as the liquidator, receiver or administrator. He said that it was agreed that Mr Levi could use JLA's premises, staff and equipment to work on any administrations over which he was appointed and that they would share any profits equally. This profit sharing arrangement was:

(a) Mr Levi and other JLA staff would record any time they spent on the administrations;

(b) JLA would invoice Mr Levi in his capacity as receiver/ liquidator/ administrator of the administration for the time incurred at the JLA charge out rates;

(c) JLA staff would be paid by JLA;

(d) Mr Levi would be paid by JLA at Mr Levi's agreed contracting rate; and

(e) JLA and Mr Levi would share equally any profit made on the administrations after the deduction of salaries including Mr Levi's salary.

162. During the period December 2009 to August 2010, Mr Levi was appointed over the following administrations:

(a) Anneliese Pty Limited (ACN 089 666 606);

(b) C.F. Cornely Pty Ltd (ACN 072 787 181);

(c) Masterfab Steel Engineering Pty Ltd (ACN 138 910 004);

(d) Tresedar Pty Ltd (ACN 003 377 642);

(e) Asset Life Pty Ltd (Veston Pty Ltd) (ACN 114 426 694); and

(f) Construction Pacific Management Pty Limited (ACN 003 732 876).

163. Tresedar was the only administration that had realisable assets that enabled remuneration to be paid. Mr Louttit gave evidence that JLA made three payments to Mr Levi as part of the profit share arrangement:

(a) payment on 16 February 2010 in the sum of $36,923.30. This represents payment for the invoices for January and February 2010;

(b) payment on 17 March 2010 in the sum of $16,114.40. This represents payment of the invoice for March 2010; and

(c) payment on 16 April 2010 in the sum of $19,499.93. This represents payment of the invoice for April 2010.

164. We accept Mr Louttit's evidence on this issue. In other words, that the only agreement reached between Mr Louttit and Mr Levi dealing with profit share arose after the Biseja appointment and related not to Biseja but to matters over which Mr Levi was appointed.

165. We reject Mr Levi's assertion as to the profit share agreement, and we find that the profit share calculations (the March Biseja Claim and the October

Biseja Claim) were created by Mr Levi well after the event for the purpose of seeking to support his case. We say this for the following reasons:

(a) There is no objective contemporaneous corroboration of Mr Levi's assertions. There is no accounting record of the payments which Mr Levi asserts, yet there are such accounting records of the profit share payments made on Mr Louttit's version of events;

(b) Moreover, Mr Levi's version is contradicted by objectively contemporaneous written records:

(i) the Confidentiality Agreement, signed by Mr Levi in September 2009, confirmed that his status was that he was "employed and/or contracted by the Owner and/or Service Company, on an hourly rate";

(ii) the "Jamieson Louttit & Associates, Profit & Loss [Cash], July 2008 through to June 2009" provided by Mr Louttit to Mr Levi made no reference to the $22,000.00 payment;

(c) We find Mr Louttit's version, (that he only agreed to profit sharing after Mr Levi became a registered liquidator) inherently more likely than Mr Levi's (that he agreed to profit sharing at a time when Mr Levi was a contractor and before he became a registered liquidator);

(d) Mr Levi's case is that the profit share agreement applied to Biseja because he was integral in bringing in the appointment, but that assertion was contrary to all the other evidence. It was contradicted by Mr Linton himself. It was contradicted by Mr Louttit. It was inconsistent with the objective circumstances, including the fact that Mr Levi was only a contractor at the time and not a registered liquidator;

(e) We do not consider that Exhibit 2 Tab 18 was, as Mr Levi asserted, a record of an agreement as to how a profit split was to be calculated. It is far more likely to be a record of calculations, as Mr Louttit described. We believe it would be odd for Mr Louttit (or for Mr Levi for that matter) to commit to an "agreement" which required payment of half of 20 *to* 30% of fees. We consider that Mr Levi asserted that this document recorded an "agreement", so as to derive support for his version of events from a document in Mr Louttit's handwriting;

(f) We consider that Mr Levi's profit share calculations (the March Biseja Claim and the October Biseja Claim) were created well after the event by Mr Levi, for the reasons identified in paragraphs 142-3 and 148-150 above;

(g) We find it very hard to understand why, if Mr Louttit had agreed to the profit share agreement (when he was under no compulsion to do so) he would then resist payment. We find it even harder to understand why, if Mr Louttit had agreed to the profit share agreement, he would not have simply provided a cheque payable to Mr Levi;

(h) Mr Levi's version involves the proposition that Mr Louttit delayed significantly in paying what was owed (in each case, coincidentally, up to the time when Mr Levi's tax was due). Yet this is inconsistent with the objective evidence that on all occasions other than the two in question, Mr Louttit paid Mr Levi very promptly;

(i) On 1 April 2009, Mr Levi rendered JLA a bill for $31,435.00. That bill was paid by 2 cheques of JLA, the first the next day, and the second the day after that. This does not sit comfortably with Mr Levi's assertion that, at the same time, Mr Louttit was still resisting paying a $22,000.00 profit share;

(j) We find it difficult to believe, having regard to Mr Louttit's record in paying invoices, and having regard to what is a normal and appropriate way of doing business, that Mr Louttit would not have simply written out a JLA cheque for the alleged profit share payment;

(k) Mr Levi's version requires us to accept that Mr Louttit chose to engage in fraud himself (taking funds out of the Biseja account without any entitlement), rather than simply paying Mr Levi what he had agreed to pay, bearing in mind that JLA would have had the ability to claim the payments as a tax deduction;

(l) We find it difficult to accept that Mr Levi, acting in the honest belief that he was entitled to payment, would accept a Biseja cheque when there was no discussion with Mr Louttit about whether remuneration remained payable. Moreover, we find it even more difficult to believe that Mr Levi, acting in the honest belief that he was entitled to payment, would accept payment by way of a *single* Biseja cheque drawn primarily to pay for Biseja's GST. These considerations apply with greater force to the Second Transaction. It is not credible to think that Mr Levi could still have thought that JLA was entitled to any payment from Biseja or that Mr Louttit was justified in paying Mr Levi from Biseja funds;

(m) Mr Levi did not issue a tax invoice in relation to either transaction. If this was a legitimate transaction, there is no reason why an invoice would not have been issued;

(n) In addition, we accept Mr Louttit's evidence on this topic.

166. Accordingly, we find that there was no profit share agreement between Mr Louttit and Mr Levi relating to Biseja, as Mr Levi has asserted in these proceedings, pursuant to which he was entitled, as at March 2009, to approximately $22,000.00 and, as at October 2009, to approximately $69,022.00. We find that Mr Levi knew this to be the case and knew that he had no entitlement to receive the payments under the First and Second Transactions.

(ii) Did Mr Levi admit that he had misappropriated the funds without Mr Louttit's authority or consent in October 2010, either expressly or by his actions?

167. Mr Levi left JLA on 13 August 2010. The evidence shows (and it does not appear to be in contest) that in the period from December 2009, when Mr Levi received his first appointment to mid August 2010, when Mr Levi left JLA to set up his own business, he was appointed over the following administrations: Tresedar Pty Limited, Anneliese Pty Ltd, CF Cornely Pty Ltd, Masterfab Steel Engineering Pty Ltd, Asset Life Pty Limited and Construction Pacific Management Pty Limited. During that period, Mr Levi continued to work at JLA and used JLA's premises, staff and other resources in his administrations.

168. As already stated, we accept that there was a profit share arrangement in accordance with the evidence given by Mr Louttit at paragraph 161 above (namely a profit share agreement relating not to Biseja but to administrations over which Mr Levi was appointed).

169. After Mr Levi's departure, Mr Louttit sent Mr Levi a number of emails seeking information to enable him to finalise amounts owing under that profit share agreement, without response.

170. On 27 August 2010, Mr Louttit emailed Mr Levi as follows:

> "Mark
>
> I do not have your timesheets for July 2010 or August 2010
>
> Can you send them across asap
>
> Jamison Louttit".

171. Mr Levi did not reply.

172. On 27 August 2010, Mr Louttit emailed Mr Levi as follows:

> "Can you send me the profit share calculation in March and before this.
>
> Jamison Louttit".

173. Mr Levi did not reply.

174. On 8 September 2010, Mr Louttit repeated his request for the profit share calculation.

175. On 20 September, Mr Louttit sent Mr Levi a schedule listing the administrations to which Mr Levi had been appointed which Mr Louttit said was the subject of the profit share arrangement, namely Tresedar, Anneliese Pty Ltd, CF Cornely Pty Ltd, Masterfab Steel Engineering Pty Ltd, Asset Life Pty Limited and Construction Pacific Management Pty Limited. The email is headed "Split Draft". Mr Louttit gave evidence that he needed Mr Levi to provide details of the time he had spent on these matters so that he could calculate the share of profits due to Mr Louttit on the administrations conducted by Mr Levi from Mr Louttit's office.

176. (Notably, although Mr Louttit was still receiving money from the Biseja receivership, Biseja was not included on this Schedule. Mr Louttit gave evidence that this was because Biseja was not subject to the profit share arrangement).

177. The 20 September schedule is headed "ML Monies owed". The Schedule listed a number of matters including Tresedar. The schedule set out, for each month in 2010 up to August, the hours worked by Mr Levi and by JLA staff on each matter. Thus for June 2010, the Schedule provides the following detail as to hours on Tresedar:

Tresedar June 2010	**Hours**
Mark Levi	79.3
Jamieson Louttit	0.2
Sveta Shao	0.2
Lisa O'Donnell	33.6
Amelia Koka	45.1
Sev Koyunku	11.2
Bronwyn Denning	9.6
Jessica Ratcliffe	2.6

178. Yet for the months of July and August 2010, although the hours for all JLA personnel other than Mr Levi are included, Mr Levi's hours are not. The entry for each matter against Mr Levi's name contains "TBA".

179. In our view, this Schedule was contemporaneous objective evidence supporting Mr Louttit's evidence as to the arrangement relating to Mr Levi's matters, supporting Mr Louttit's evidence that Mr Levi had not provided details of his hours to enable the profit split to be calculated in accordance with that arrangement and supporting Mr Louttit's evidence that moneys (albeit subject to final quantification) were payable by Mr Levi to Mr Louttit pursuant to that arrangement, and we so find. If nothing else, the 20 September email and spreadsheet is objective contemporaneous evidence that Mr Louttit had asserted to Mr Levi, as at that date, that he, Mr Levi, owed Mr Louttit moneys in respect of a profit split for Mr Levi's matters. The email followed a number of emails in which Mr Louttit had requested time sheets and calculations without response from Mr Levi. The absence of any response from Mr Levi to Mr Louttit's emails is consistent with an absence of a basis for disputing Mr Louttit's claim.

180. In a further email on 20 September 2010, Mr Louttit repeated his request for the July and August timesheets.

181. Mr Louttit gave evidence that he met Mr Levi on 30 September 2010 and explained his calculations. Mr Louttit gave evidence that he did not receive any further communication from Mr Levi.

182. On 13 October 2010, Mr Louttit emailed Mr Levi as follows:

> "Mark
>
> I note that we met on 30 September 2010 and that you were going to get back to me within 7 days and at the latest on Thursday 7 October 2010.
>
> It is now 13 October 2010 and I feel that you are just avoiding the issue.
>
> To make this clear, can you please advise by close of business on Wednesday 20 October 2010 whether you are prepared (or not) to draw cheques as set out in the schedule. If you are not, then please not (sic) that I will be reserving my rights to pursue this matter more formally without further notice.
>
> Jamison Louttit".

183. This was clearly a communication which demanded a response from Mr Levi if he claimed he was not obliged to pay any moneys. Yet Mr Levi did not respond.

184. On 20 October 2010, at 5.46 pm, Mr Louttit emailed Mr Levi stating "Mark, It would be nice to think that I was going to get a response".

185. We note that none of the documents sent by Mr Louttit to Mr Levi during this period of three months made any reference to Biseja or made any

demand for moneys apart from moneys payable in respect of Mr Levi's appointments. Unlike subsequent correspondence, to which we refer later, nowhere in the correspondence up to 20 October did Mr Louttit make both a claim to the amount owed in respect of Mr Levi's appointments *and* the amounts paid from Biseja for Mr Levi's tax (or "other moneys").

186. On 27 October 2010, Mr Louttit lodged a caveat over property owned by Tresedar, claiming an equitable lien for remuneration, costs, charges and expenses of the receivership incurred by him on behalf of the receiver. We accept that Mr Levi owed Mr Louttit a substantial sum under the profit share agreement at this date.

187. Mr Louttit also wrote a letter to Mr Levi confirming that he was no longer covered by JLA's Professional Indemnity Policy.

188. On 27 October 2010, Mr Levi called Mr Louttit and asked to meet him.

189. On 28 October 2010 at or around 9:10am, Mr Louttit met Mr Levi at a coffee shop near Mr Levi's office. A discussion took place. Mr Louttit gave evidence of what took place at the meeting. Mr Levi's s19 transcript contains his different version of what took place at the meeting. Included in the evidence are notes by each of Mr Louttit and Mr Levi, said to be a note of the matters discussed. The extent of the disparity in the respective versions of what took place means that they cannot stand together. One or other of the versions must be false.

190. Mr Louttit gave evidence that he wrote his file note as a record of the discussion on 28 October 2010[22]. He stated that he wrote it at or around midday on 28 October 2010 and reviewed the note later in the evening on 28 October 2010 and that the additional notes appearing on the note were made when he reviewed the note. Due to its significance, it is necessary to set out the note in full:

> 'I caught the train from Oatley at around 8.27 which arrives at Town Hall at 8.59 although I recall it being a few minutes late around 9.04am. I remember looking at my watch when entering QVB Building.
>
> On 28 October 2010 at about 9.10am I attended the offices of Mark Levi of Titan Advisory at Level 32, 1 Market St, Sydney NSW. After waiting at reception for a short while we proceeded to chit chat and proceeded to a cafe in St Martin's Tower, 31 Market St, Sydney NSW. We arrived at the cafe around 9.20am.
>
> The purpose of the meeting was to discuss monies owed by Mark Levi for costs and expenses paid by JL on jobs he had been appointed Liquidator/Receiver and manager while he was employed by JL.

[22] It was included in Mr Louttit's Report to ASIC on 14 December 2010: [redacted]

By way of note ML left the firm of Jamieson Louttit & Associates at the close of business on 13 August 2010.

The conversation at the meeting was as follows:

He said "Have you been busy".

I said "We have had a couple of jobs. What do you propose"

(He Said) discussed about Fred being sick with leukaemia.

I said "I was told about 1-2 weeks ago."

He said "Before we get into that, I need to tell you something"

I said "what's that"

He said "I don't know whether you want to hear it"

I said "What do you mean"

He said "I have done something on one of the jobs"

I said "I would rather know than not know and then at least we can fix it"

He said "I have done something with a 3rd party"

I said "What signed a contract and not told me about it"

He said "No"

I said "which job"

He said "up the coast"

I said "what a deposit on Jandt ".

He nodded indicating No

I said "Biseja"

He said "Yes I have done something with a 3rd party"

I said: "Taken a deposit or a commission or something?"

He said "Paid a tax cheque. I am sorry"

I said "How much"

He said "$50,000"

I said "why"

He said "my dad and sister have been in financial trouble for a while. A few years"

I said "I can't believe it. How long ago"

He said "Last year. End of last year"

I said "Fuck! " Mumbled under my breath

He said "I always meant to pay it back and fix it before I left but just did not have the money"

I said "if you had told me I would have given/loaned you the $50,000. I have known you for 20 years I just cannot believe it.

He said "I have never had someone offer to do that for me before.

I said "that's just me",

He said "As you say all the time, desperate people do desperate things"

I said "How did they get it"

He said "I banked the cheque with the ATO. My father was in trouble and need it"

I said "How did he get it"

He said "it went into his account"

I said "have you told Nick"

He said "No"

I said "Does anyone else know"

He said "No. Don't tell anyone. Don't tell Shannon (Cavanagh) or Amelia (Koka)

I said "You need to speak to Fred (Swaab)

He said "I can't"

I said "the first thing you need to do is pay restitution"

He said "That's another problem I can't at the moment"

I said "Why. There's money in Tresedar (in fees outstanding).

He said "I have already paid them"

I said "what to you"

He said "yes"

I said "So you have paid the fees owed whilst with me to yourself"

He said "Yes"

I said "Um"

He said "There is about $80,000 owed in fees on Tresedar at the moment and you can have that. That's all I have got. I can pay that and do a repayment arrangement with you for the rest"

I said "you need to make restitution first. What about doing a redraw on your house"

He said "I am looking into that"

I said "You need to speak to Nicki about it"

He said "I can't"

I said "she is your wife .You have to tell her. You have just bought a new house and how are you going to pay the mortgage"

He said "if you report it, I cannot pay the $80,000 as I will not be able to make a living" (or like)

I said "you cannot use the reporting issue and the payment of money in the same sentence. It is a Crimes Act issue, extortion"

He said " You cannot report it otherwise it is over for me"

I said "I will have to think about it for a couple of days what do you propose"

He said "We could just put it in and forget about it"

I said "What bank it and adjust the cashbook I suppose that I could put an entry in with GST refunds. I will have to think about this".

He said "You could"

I said "I will have to think about it"

I said "You need to find someone you can talk about things to in insolvency. We all have our problems from time to time but you

need to find someone to talk to. Whether that is Shannon (Cavangh), Derek (Hilliard) Fred (Swaab).

He said "I know I wanted to fix it before I left but I couldn't. I did not know how to tell you."

I said "For whatever reason it just not worked out between us"

He said "You did not give me any new jobs for a while and the work was drying up. That's why I left."

I said "I did not give you anything so that you would pull your finger out and get some work"

He said "Yeah I did not realise that"

I said "You still need to pull your finger out and get some work. It is not easy working for yourself'.

He said "I know".

I said "You need to make restitution for starters. I will need to think about what I need to do"

He said "I do too".

I said "I will come back to you in a few days after the weekend as I am going away tomorrow".

He said "That sounds good"

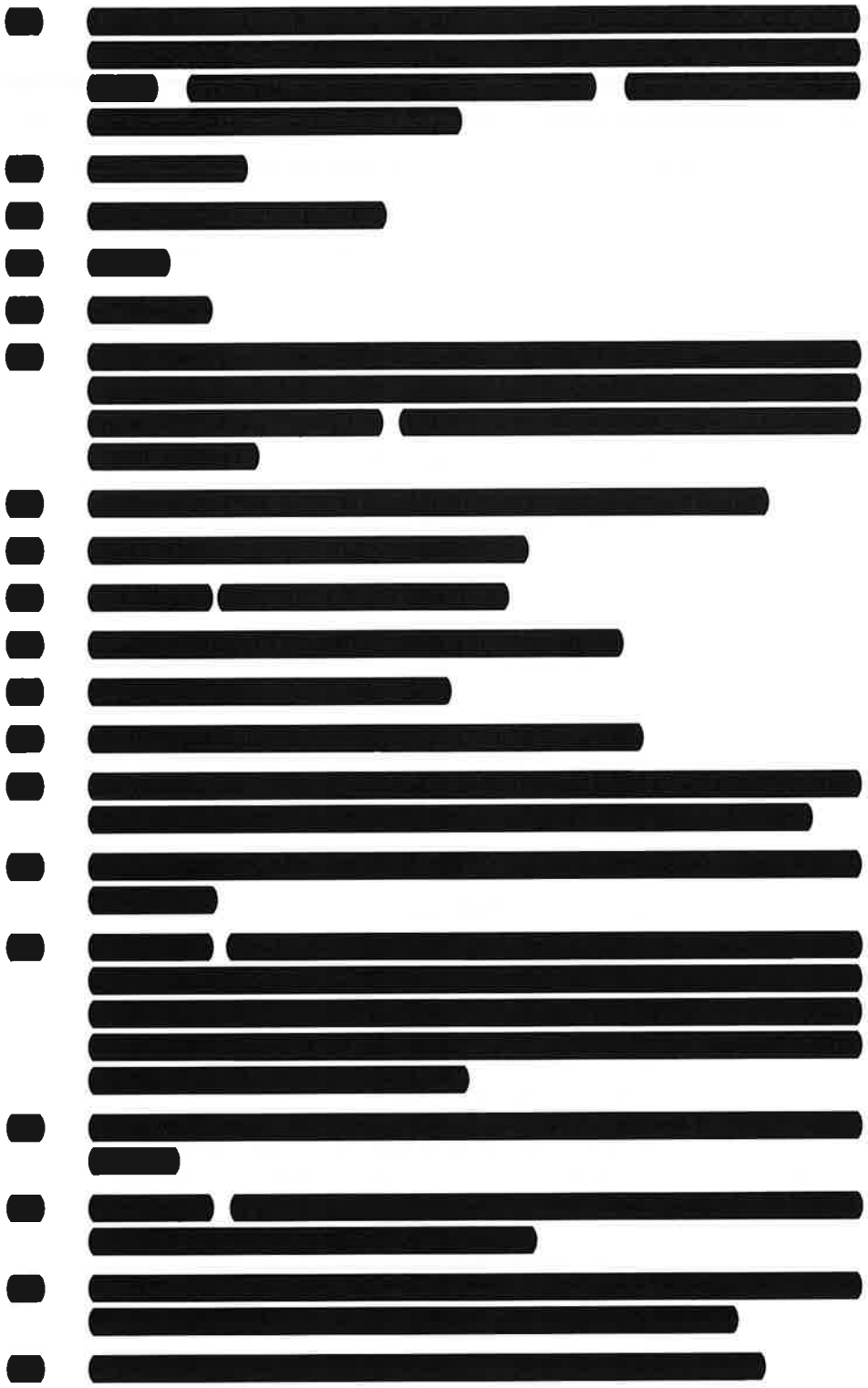
I said "I will have to think about it"

The conversation ended and I went and paid for the coffees and we left and went different ways on the street."

191. Mr Levi's version of the meeting, as disclosed in his s19 examination on 14 June 2011, was radically different, although, as we explain below, it was far from coherent[23]. Mr Levi denied that he had admitted misappropriation. [redacted]

[redacted]

[23] [redacted]



192. At the s19 examination, Mr Levi produced a document which he said was a note which he had written of the meeting, directly after the meeting occurred. A transcript of the note was tendered:

"Transcript of Handwritten Note of Mark Levi

Transcribed by ASIC

1. 28/10/10

2. JL/ML Mtg at St Martins Café

3. JL Concerned re Biseja profit payments.

4. JL asked if ML had spoken to anyone (JLA Office/Girls?)

5. Jandt Concerns? -> ML unsure JL issues raised.

6. ML – "can we move on?!" how??

7. JL wants $ -> not quantified

--> ML offers to go through workings to show no $ owed.

8. JL accuses ML of extorting! ?

--> ML confirms no (and how!?)

9. JL "you don't want Biseja to become a problem"

--> ML "how is it a prob?

--> "what is it going to take to "move on"?

10. JL – Tresedar $150K fees + other jobs <u>>$50K</u> <u>>$20K</u>!! fees paid to him

11. ML offers $90K – as per last mtg but notes "refunds Biseja $'s paid by JL/You"

12. JL wants Tresedar fees paid to him -> to <u>move on</u>

13. Ml can't -> already drawn

(page 2 of handwritten file note)

14. Contd.....

15. JL "do you have money for me or not!"

--> Wants lump sum pymt.

16. JL wants lump sum payment first – will deal with Biseja offer later

- "how much can you afford lump sum / now?"

17. ML - $90K willing to accept? /(undecipherable writing) /(undecipherable writing) as per JL last meeting

18. $90K Biseja profit payment was $90K

--> Same amount, so $90K is it!

19. JL suggests to borrow money

20. "See what you can come up with"

21. "lump sum payment"

22. "or TAB could become a criminal problem for you"

23. JL leaves (mtg starting earlier than thought)".

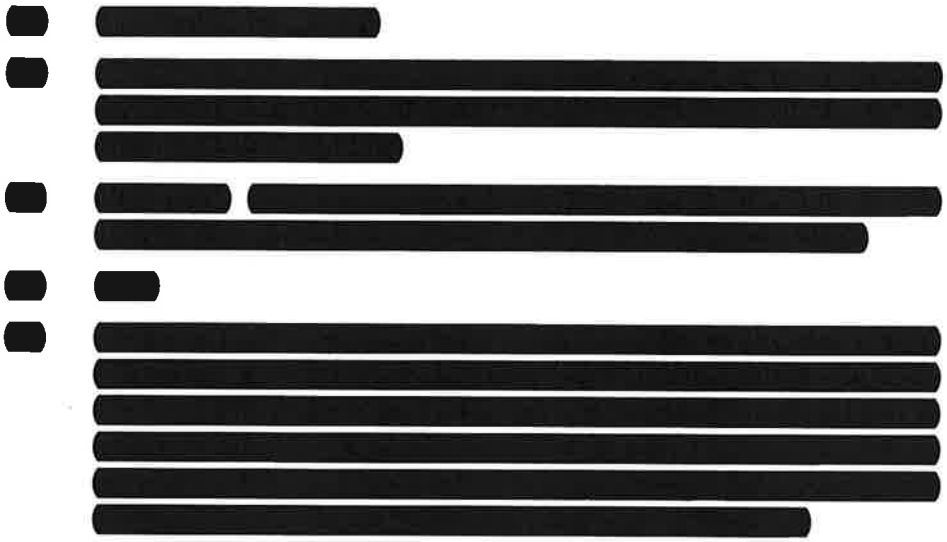
193. The note is cryptic. One might expect this if the note was one recorded during a meeting, when attention is divided between participating in the meeting and making a note. But Mr Levi said that this note was prepared *after* the meeting. If Mr Levi had intended to make a note as a meaningful record of what was said, it is strange that the note was not more comprehensive and, perhaps more importantly, more intelligible.

194. Mr Levi was asked to explain the meaning of his note and to elaborate the discussions to which it referred in his s19 examination. We agree with Mr Priestley's submission that his attempts to explain the file note of that meeting can accurately be described as "tortuous". The attempts went over many pages as the investigator sought to clarify what the file note referred to and what Mr Levi meant by what he said was discussed[24].

195. We include a few examples below.

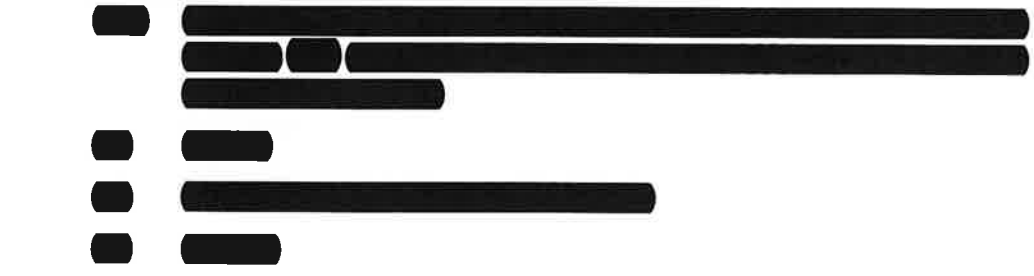
196. [redacted]

[24] [redacted]



197.

198.



199. We will deal with the question more fully later, but we note, at this point, that Mr Levi's version of the meeting borders on unintelligible and is unconvincing:

(a) According to Mr Levi, the purpose of the meeting was to finalise issues that Mr Louttit was raising;

(b) He identified the issues as the caveats lodged by Mr Louttit over properties which Mr Levi had been appointed, the fact that Mr Louttit had contacted Mr Levi's clients and the fact that Mr Louttit had sent him correspondence in relation to PI;

(c) Notwithstanding this, Mr Levi then said that he thought Mr Louttit had placed caveats in order to put pressure on Mr Levi to determine whether Mr Levi had spoken to people about the Biseja payments. This is incoherent. In any event, there is no evidence that Mr Louttit had ever raised any question in relation to Biseja up to this point, whereas the trail of correspondence prior to the meeting shows that

he had become increasingly strident about his demands that Mr Levi pay what he said was owed in relation to profit share;

(d) According to Mr Levi, Mr Louttit was concerned whether Mr Levi had told people about the Biseja payments. If true, this would tend to suggest that Mr Louttit did not want other people to know about the Biseja payments;

(e) Mr Levi confirmed that he had not told anyone else about the Biseja payments;

(f) Despite this, Mr Levi's note seems to suggest that, simultaneously, Mr Louttit was threatening Mr Levi by saying that Biseja could become a problem for Levi. The note also suggests that Mr Levi had no idea how it could become a problem ("How could it become a problem?").

200. We also note, that on Mr Levi's version of events:

(a) The Biseja payments were completely above board. Mr Louttit had agreed to make the payments to the ATO as a payment of a profit share to which Mr Levi was entitled and told Mr Levi to add his tax debt to the Biseja GST and have a cheque drawn up for the total amount;

(b) Mr Levi's case was that he believed, as at the time of the Transactions, that JLA was owed the fees rendered in the First Invoice, so believed that JLA was entitled to pay him by means of a Biseja cheque;

(c) The Transactions had been performed openly. On the First Transaction, Mr Levi asked Ms Koka (who had prepared the BAS for $80,743.13) to draw up the cheque for the amount of $103,481;

(d) The First Transaction was clearly recorded in the paperwork which was in JLA's files (including a cheque requisition written out by Mr Levi himself referring to the GST "and a profit split as agreed by JL"). (The files were available to be inspected by anyone in the office);

(e) Mr Levi did not regard the payment of both his tax and Biseja's tax by means of a single cheque as an unusual or inappropriate way of proceeding[25];

(f) As at October 2010, Mr Levi (i) did not owe Mr Louttit any moneys in relation to Mr Levi's appointments (ii) did not owe Mr Louttit any money in relation to the Biseja matter and (iii) did not understand

[25] [redacted]

why Mr Louttit would be concerned about Mr Levi telling people about the Biseja payments as they were above board and proper payments;

(g) In any event, Mr Levi had not told people about the Biseja payments and told Mr Louttit that he had not.

201. Thus, on Mr Levi's version of events, at the time of the meeting, he would have been entitled to be completely bemused about what (on his version), Mr Louttit was raising in relation to Biseja. The payments were above board, made with cooperation of Mr Louttit and Ms Koka and recorded in the Biseja records.

202. Mr Levi did not say, at any point in his s19 examination, that Mr Louttit explained what he regarded as untoward in the Biseja payments. According to Mr Levi's notes of the meeting, the following exchange took place:

> "JL 'you don't want Biseja to become a problem'
>
> ML 'how is it a prob?'."

203. There is no evidence that Mr Louttit ever answered this question. Mr Levi was pressed about this at his s19 examination and, in our view, he prevaricated in giving his answers and gave no intelligible explanation of this issue. There was no explanation of how Mr Levi could have understood Biseja to be a meaningful threat for him. Mr Levi did not assert that Mr Louttit had said that the Biseja payments were wrongful or that he had wrongly accounted for the payments. In any event, if he had, (or even if Mr Levi assumed he had) that would be a problem for Mr Louttit, not Mr Levi. In those circumstances, there was simply no rational basis for Mr Levi to have been concerned about threats relating to Biseja.

204. Indeed, one thing which was clear, according to Mr Levi, was that Mr Louttit was not threatening to report the matter. According to Mr Levi's version, Mr Louttit wanted to ensure that *Mr Levi* had not told anyone about Biseja.

205. In short, on Mr Levi's version of events:

(a) It made no sense that Mr Levi would be concerned about the Biseja payments. It certainly made no sense that Mr Levi would have any reason to repay the Biseja payments;

(b) It made no sense that Mr Louttit would want anything about the Biseja payments to become public.

206. Yet the objective facts are, that, within a matter of days, Mr Levi had repaid both Biseja payments and Mr Louttit had reported the matter to ASIC.

207. Mr Levi's explanation as to why he took any notice of Mr Louttit's demands was that he did not want to be dragged into some kind of investigation and he just wanted to move on. We do not accept this. On his version of events, there was no reason to think that there was anything to investigate.

208. Mr Louttit was shown the note produced by Mr Levi, purporting to record the 28 October conversation. He denied that the note correctly recorded the conversation. The two versions of the conversation (and the notes) were utterly inconsistent. One version must be false and one of the notes must be a fabrication. It was not put to Mr Louttit that his note was false. It was not put to Mr Louttit that the conversation took place as Mr Levi had asserted in his s19 examination. Whilst this situation was not ideal, (because the material in Mr Levi's s19 examination went into far more detail than the matters disclosed in Mr Levi's note), it seems to us that, in large measure, Mr Louttit was aware of the case being put by Mr Levi and responded to that case in his statement.

209. Before expressing a final opinion on the competing versions, we will examine the events which took place after the 28 October meeting.

210. In our view, what occurred after the 28 October meeting was inconsistent with Mr Levi's version of events, yet entirely consistent with Mr Louttit's version.

211. Mr Louttit gave evidence that immediately after the meeting with Mr Levi on 28 October 2010, he decided to audit the files to discover if Mr Levi's admission of misappropriation was an isolated incident and whether or not any other staff apart from Mr Levi had been involved. It is clear that he did undertake such an investigation, which included a significant amount of work over the ensuing days and weeks, involving JLA staff and Mr Cavanagh. If Mr Levi's version of events is to be accepted, it would seem to follow that this investigation was an elaborate charade on the part of Mr Louttit.

212. In the meantime, as from 28 October, Mr Levi's attitude changed significantly from his prior attitude of non-communication. Levi appeared very eager to correspond with Mr Louttit and sort out the amounts which he now apparently accepted he needed to repay. This is consistent with Mr Louttit's evidence that he had admitted misappropriation on 28 October. Mr Levi sent quite a number of emails to Mr Louttit over the ensuing days.

213. On Friday 29 October 2010 at 9.24 am, Mr Levi sent an email to Mr Louttit:

> "Subject: (none)
>
> ...
>
> JL – please note that I can come to your office to go through things with you in detail, if this assists.

Will wait to hear from you.

Speak soon,

Mark".

214. This does not sit comfortably with Mr Levi's version of events. If Mr Levi had simply offered to pay Mr Louttit money out of a sense of wanting to move on there appears to have been little point in going to Mr Louttit's office to "go through things ... in detail". If, on the other hand, Mr Levi had admitted misappropriation to Mr Louttit the previous day, the email makes sense: Mr Levi was offering to explain the details of the misappropriation.

215. At 10.00 am on the same day, Mr Louttit met Mr George Boland of ASIC and explained that he thought Mr Levi had misappropriated moneys from the Biseja account.

216. Again, this does not sit at all comfortably with Mr Levi's version of events, yet it is entirely consistent with Mr Louttit's version. If, as Mr Levi asserts, Mr Louttit had said on 28 October that he was concerned that Mr Levi had spoken with people about the Biseja payments, it would be odd, at the very least, for Mr Louttit disclose that matter the very next day, and to ASIC, no less. Moreover, if, as Mr Levi appears to suggest, Mr Louttit was seeking to obtain money from Mr Levi on the basis that Mr Levi would not want Biseja to become a problem for Mr Levi, it would be even more odd that Mr Louttit would report the matter the very next day and without having received any money, or even a promise to pay.

217. On the other hand, Mr Louttit's action in promptly reporting the matter is consistent with him having been told of the matter for the first time the previous day and taking the appropriate action in response.

218. Mr Louttit did not respond to Mr Levi's email of 29 October.

219. On 1 November 2010, Mr Levi forwarded his earlier email to Mr Louttit saying:

> "Jamieson
>
> Will you be in a position to meet again either this Wednesday or Thursday morning to finalise things."

220. Again, Mr Louttit did not respond to this email. However, on the same day, he wrote a letter to Mr George Boland of ASIC headed "Preliminary Notification" and stating, amongst other things:

> "It has come to my attention on Thursday 29 October 2010 that an ex-employee Mark Levi (Registered Liquidator 337 042 and 342 613) may have misappropriated/misapplied monies in the amount of

$69,022 from the bank account to which I was appointed Receiver and Manager".

221. Mr Louttit noted that Mr Levi had admitted the misappropriation/misapplication and that he (Mr Louttit) had made a detailed file note of the conversation.

222. On Thursday 4 November 2010, Mr Levi sent a further email to Mr Louttit in which he was seeking clarification of "the amount of monies that you believe are payable in order to satisfy matters between us". Mr Levi referred to the spreadsheet provided by Mr Louttit and that the appropriate figure payable was $99,119.45 in satisfaction of all claims. Later that day, Mr Levi sent a further email noting that his offer was subject to conditions that there be a deed of release, the caveats would be withdrawn and that the offer expired on 5 November.

223. On the same day, Mr Louttit responded to Mr Levi's most recent email as follows:

> "Mark
>
> As a point of clarification:
>
> 1. I assume that this amount is PLUS GST and that you are expecting me to issue you a new invoice and just bill you for services rendered where you will then be in a position to receive the fees as you see fit now and in the future.
> 2. In this is respect (sic) to the other monies I assume you will be providing an additional payment for this as well."

224. On 5 November, Mr Levi responded to Mr Louttit's email as follows:

> "...
>
> Agree with your method of invoicing. Looking at the spreadsheet seems as though you have already included GST in the expense items, however given the need to resolve our issues quickly, add the GST to that total amount (despite it being more than I wanted to pay already!). Please confirm amount and I will draw a bank cheque which I can provide to you today.
>
> Agree other monies still remain payable and hereby confirm that payment for this will be in addition to the above. Please confirm that cob Monday is ok with you for this".

225. In our view, this email is starkly inconsistent with Mr Levi's assertions in his s19 examination that he was entitled to the Biseja payments and that he owed no moneys to Mr Louttit in relation to his appointments. Indeed, the email is an admission by Mr Levi that "the other monies" (which is clearly a reference to the Biseja monies as will be shown) remained payable and

remained payable by him, and, further, that at least $99,119.45 was owed to Mr Louttit in respect of Mr Levi's appointments.

226. Later on Friday 5 November, Mr Louttit responded to Mr Levi's email as follows:

> "Mark
>
> Fees and Expenses
>
> I note that you have offered and prepared (sic) to pay the amount of $109,031.40 (being $99,119.45 plus GST) by way of a Bank Cheque in full and final settlement of the fees and expenses.
>
> Deed of Release
>
> In regards to the simple deed of release for the fees and expenses, there will need to be a specific clause excluding the "other monies" that have been incorrectly paid to you (or that of related 3rd parties) from client accounts. This may be problematic for you and I leave this for you to have a think about. It might be better to just shake hands and move on. I will leave this up to you.
>
> Other monies
>
> On this note you will need to quantify this and set out when this will be paid back to the client accounts.
>
> ..."

227. In response, Mr Levi emailed Mr Louttit at 2.15 pm the same day:

> "Jamieson
>
> I think it more important to pay back the other monies and would be grateful if you could send through the relevant bank account details to enable this to occur asap, as initially discussed.
>
> Please know that I am again truly and sincerely sorry for any issues that this may cause however fully appreciate your obligations."

228. These emails are significant:

(a) First, Mr Levi's assurance that he was "truly and sincerely sorry" is to be understood as an apology (and a considered and genuine apology) for misappropriating Biseja funds. On no sensible basis could this statement be construed in any other way, both on its face and in the context of the preceding and succeeding emails. Nor could it rationally be understood as consistent with Mr Levi's version of events, and, in particular, with the notion that the Biseja payments

were legitimate transactions, that they were payments of money to which he was absolutely entitled and that they were transactions which Mr Louttit not only authorised but actually conceived ("It was his idea");

(b) Mr Levi's explanation of the second email (only in his s19 examination and not referred to in submissions before us) was patently contrived. He suggested that when he said "Please know that I am *again* truly and sincerely sorry for any issues that this may cause however fully appreciate your obligations" (emphasis added) he was actually apologising for a change of mind about paying anything more than the Biseja funds, which was somehow to be conveyed (for the first time) in the email. Of the many problems with this assertion, there never was any change of mind or any suggestion that he would pay only the Biseja amounts. His statement that it was *more important* to repay the Biseja amounts was not suggesting that he was only repaying those amounts, but was a response to Mr Louttit's email stating that the Biseja amounts were not to be the subject of a deed of release, (and that Mr Louttit would leave him to think about this);

(c) Secondly, the fact that Mr Louttit indicated that he was prepared to sign a deed of release in relation to the fees and expenses, but not in relation to the "other monies", ie the Biseja moneys, is consistent with him reserving all his rights against Mr Levi, in relation to the Biseja payments, notwithstanding restitution. If Mr Louttit's plan was (as Mr Levi suggests) to use the Biseja payments as a means of improperly extracting moneys from Mr Levi, it would have made no sense to resist a release in relation to the "other monies". It is even more bizarre to think that Mr Levi would agree to this (if his version of events is correct);

(d) Both emails are consistent with Mr Louttit's version of events, namely that he had only just learned of the fraud and, whilst accepting restitution, was not obliged to provide, nor had any intention of providing a release in relation to the Biseja moneys;

(e) A final matter arising from these emails is the fact that Mr Louttit, in his email, referred to possible payments to "related 3rd parties" from client accounts. This lends credence to Mr Louttit's evidence that he was told for the first time about the payments on 28 October. Mr Louttit's evidence was that Mr Levi told him: "I banked the cheque with the ATO. My father was in trouble and need it" whereupon Mr Louttit said "How did he get it" and Mr Levi said "it went into his account". In other words, on Mr Louttit's evidence, when he was first told about the misappropriation, he was told by Mr Levi that the payment was made to a related third party. On Mr Levi's version of events, he had never suggested to Mr Louttit that the moneys had

been used to pay the obligations of related 3rd parties. On his version, he told Mr Louttit that *he* (Mr Levi) needed the money to pay for his own tax. At the time of this email, Mr Louttit had not received the advice from the ATO that the cheques had been paid into Mr Levi's account. The most rational explanation for Mr Louttit's reference to a payment to "related 3rd parties" is that Mr Louttit's evidence as to the terms of the 28 October conversation was true.

229. Later on 5 November, Mr Louttit responded to Mr Levi's 2.15 pm email in relation to the "other monies" as follows:

> "Can you quantify what you believe is payable and which clients.
>
> Can them (sic) send through bank account details.
>
> Would like to resolve both issues at the same time."

230. On 6 November 2010, Mr Levi replied to Mr Louttit's email as follows:

> "Jamieson
>
> 1. $'s will be available this Monday in full, to satisfy both issues
> 2. 'other monies' since been reconciled and confirm 1 matter only as discussed.
> 3. arranging bank cheques Monday a.m.
> 4. will be in a position to meet Monday 4pm to finalise at same café – please confirm this ok."

231. These emails are, again, consistent with Mr Louttit's version of events and inconsistent with Mr Levi's version. Of particular note is the fact that Mr Louttit asked Mr Levi to quantify the amount of the "other monies" and "which clients", and Mr Levi answered this question, stating that this had "since been reconciled" and he confirmed "1 matter only as discussed". Mr Levi was confirming that *he* had reconciled these issues regarding the "other monies" and that the only matter involved was Biseja, as he had discussed on 28 October, (consistently with Mr Louttit's note of the discussion). Yet if Mr Levi's version of events was true, Mr Louttit had told Mr Levi, in April 2009, that he would pay Mr Levi's tax bill "in lieu of profits that you're owed under our agreement in relation to ... the Biseja administration" and had told Mr Levi to "add your tax to the Biseja GST tax and I will pay it that way and adjust it when I get back". If this was true, there would have been no need for Mr Louttit to ask Mr Levi which client was involved and the natural response to such a request would be for Mr Levi to question why Mr Louttit was asking him, when Mr Louttit was the person responsible for the transaction (and the adjustment) so only he could know the answer for certain.

232. On Monday 8 November 2010, Mr Levi emailed Mr Louttit as follows:

> "Jamieson
>
> Further to my email of 6 Nov 10, I now confirm that I have since obtained the following:
>
> 1. Bank cheques totalling $109,031.40 payable to Jamison Louttit & Associates
>
> 2. bank cheques totalling $92,000.00 payable to Biseja Pty Limited (Receiver and Manager Appointed)
>
> How would you like me to effect payment? i.e. did you want me to proceed with my proposed meeting of 4 pm today? or did you want to send through bank details.
>
> Please contact me today as I am extremely eager to pay the funds owed and am unable to do so until you advise".

233. Mr Louttit replied at 4.50 pm on the same day:

> "Mark
>
> Other monies
>
> Thanks for being honest about the monies owed to Biseja. I think you will find the exact amount is $91,759.87 (refer attached)
>
> Fees and expenses
>
> I will prepare the Tax Invoice for the fees and expenses and withdrawal of Caveats tonight
>
> ..."

234. On 9 November, Mr Louttit met Mr Levi and Mr Levi handed him two cheques payable to Biseja totalling $92,000.00 and a further two cheques payable to JLA totalling $109,031.40.

235. Once again, these emails and the payment of the amounts to Biseja and JLA respectively are consistent with Mr Louttit's version of events, and inconsistent with Mr Levi's version. Mr Levi did not refuse to pay or seek to impose conditions on payment, he indicated that he was *"eager* to pay the *funds owed"* (emphasis added) and he did so. Mr Louttit's reference to Mr Levi being honest in relation to the Biseja moneys (and the absence of any challenge to this by Mr Levi) is consistent with Mr Levi admitting misappropriation. It is completely inconsistent with Mr Levi's story.

236. Mr Sutherland's submissions concerning the admissions were limited. He did not address why we should not accept that the email sequence, the terms of the emails, particularly the apology email or the repayment of the funds do not amount to an admission of misappropriation. He submitted that if Mr Levi was so imbued with the spirit of confession, why on earth did he then go diving around in relation to defending everything that moved[26]. This is hardly compelling logic. The reality of proceedings and the serious potential consequences which might flow from proceedings are often reason enough for people to seek to deny liability, notwithstanding a previous admission.

237. Mr Sutherland also submitted that the tone of Mr Louttit's emails after the 28 October was inconsistent with Mr Levi having confessed. He also suggested that the 5 November email involved "artful construction by a man who is trying to get money out of somebody who he claims owes him money".

238. As to the first matter, we believe that the tone of the emails is consistent with Mr Louttit being shocked by Mr Levi's admission, but also, (at this point) not having any strong animosity towards Mr Levi. We consider that this is demonstrated by the fact that Mr Louttit did not respond to several of Mr Levi's emails after 28 October, namely Mr Levi's email offering to go through things on the 29th, his follow up on 1 November and his subsequent follow up email of 4 November. His subsequent emails are curt but not aggressive.

239. As to the second matter, we do not agree, except to the extent that the 5 November email might have misled Mr Levi about whether or not the matter had been reported. However, that goes nowhere. It does not demonstrate that Mr Louttit's emails are otherwise incorrect nor, more importantly, does it in any way diminish the probative value of Mr Levi's emails. In any event, Mr Louttit gave evidence that the question of reporting the matter was discussed at the 28 October meeting, and that towards the end of the meeting he said "You need to make restitution for starters. I will need to think about what I need to do." The possibility of being reported must have been a matter about which Mr Levi was keenly aware. When he was told that the Biseja moneys would not be included in the Deed of release and that he might need to think about this, he said it was more important to pay back the Biseja moneys. Then he "again" apologised about any issues which this may cause and said "however fully appreciate your obligations". This indicated that Mr Levi was sorry for causing Mr Louttit a problem by reason of the misappropriations and appreciated that Mr Louttit may be obliged to report the matter.

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[26] [redacted]

240. Mr Sutherland also appeared to suggest that the real fulcrum for what took place was the fact that Mr Louttit placed caveats, for which there was no justification, over properties over which Mr Levi had been appointed.

241. In our view, this simply makes Mr Levi's case even harder to accept. His case is that the Biseja payments were completely above board and recorded in the Biseja records, that he owed Mr Louttit absolutely nothing in relation to Tresedar or any other matter and that the caveats had no legal basis. But if this were the case, Mr Louttit did not have a leg to stand on. The only rational response to Mr Louttit's actions would be for Mr Levi to retain solicitors to require the caveats to be removed forthwith and seek damages.

242. It follows from our discussion above, that we accept:

(a) That the apology by Mr Levi in his email of 5 November 2010 is an apology for his actions in misappropriating the Biseja funds without Mr Louttit's knowledge and is an admission that he did so;

(b) That both Mr Levi's emails over the period from 28 October to 9 November 2010 and Mr Levi's delivery to Mr Louttit of cheques payable to Biseja totalling $92,000.00 on 9 November 2010, amounted to admissions that he was obliged to refund the amounts he received under the First and Second Transactions and an admission that he had misappropriated those amounts from Biseja without Mr Louttit's knowledge;

(c) That both Mr Levi's emails over the period from 28 October to 9 November 2010 and Mr Levi's delivery to Mr Louttit of two cheques payable to JLA totalling $109,031.40, amounted to admissions that he was liable to pay Mr Louttit under the profit share agreement referred to in paragraph 161;

(d) That the statement to Mr Louttit in Mr Levi's email of 6 November that he had reconciled the "other moneys" and confirmed that there was "1 matter only as discussed" (in response to Mr Louttit's email asking "can you quantify what you believe is payable and which clients") is strong evidence that Mr Louttit was not aware of misappropriation until the discussion on 28 October 2010;

(e) That the absence of any challenge to Mr Louttit's statement "Thanks for being honest about the monies owed to Biseja" in the email of 8 November 2010 is strong evidence that Mr Levi had confessed the misappropriation and had identified the amounts owing and agreed to repay them; and

(f) that a discussion took place between Mr Levi and Mr Louttit as set out in Mr Louttit's note and, accordingly, we find that Mr Levi admitted that he had misappropriated the Biseja funds (although limited at that time to $50,000.00). That admission, taken together

with Mr Levi's subsequent emails and the delivery to Mr Louttit of cheques payable to Biseja totalling $92,000.00 on 9 November constitute an admission that he had misappropriated the sum of $92,000.00 from Biseja without Mr Louttit's knowledge.

243. We reject Mr Levi's assertion that the reason why he made the payments was the he did not want to be dragged into an investigation and just wanted to move on. On his own version of events, there was no threat by Mr Louttit to report anything and nothing which, on his knowledge, could be the subject of an investigation. The assertion that "he just wanted to move on" is not believable.

244. We should note, finally on this issue, that evidence from Mr Cavanagh was tendered without objection on the first day of the Hearing to the effect that Mr Louttit had told Mr Cavanagh on 29 October 2010 that Mr Levi had admitted that he had used Biseja funds to pay his personal tax debts and that his father was in financial trouble. On the third day of the Hearing, Mr Sutherland sought to object to the evidence. The evidence was clearly hearsay. Counsel for ASIC pressed the evidence on the basis that Mr Louttit (who had been excused) could have been asked about the matter. However, any elaboration by Mr Louttit would have been objectionable on the same basis. The Panel did not reject Mr Cavanagh's evidence having regard to the lateness of the objection and the fact that the Panel is not bound by the rules of evidence. In fact, Mr Louttit had given evidence to similar effect, which was not objected to at all, although suffering from the same problem. However, insofar as Mr Cavanagh's evidence (or Mr Louttit's evidence to similar effect) is relied upon to prove the truth of the matter represented by Mr Louttit, ie, that Mr Levi admitted misappropriation to Mr Louttit, we give it no weight. The evidence that this matter was communicated to Mr Cavanagh has some peripheral relevance as explaining his subsequent actions in seeking documents from the ATO.

(iii) The circumstances of the two Transactions

245. Mr Levi's case concentrated on the circumstances of the two transactions. In essence, Mr Sutherland submitted that the circumstances were such that the Board could not be comfortably satisfied that the payments were made without Mr Louttit's authority. Largely, this depended upon the proposition that Mr Louttit would not have deviated from his usual practice in signing the cheques for the two payments.

246. We have already referred to the evidence of usual practice in relation payment of GST at paragraphs 63 and following above.

247. The third GST period relevant to the Biseja receivership was the period from 1 January 2009 to 31 March 2009.

248. It is clear that, as at the end of March 2009, Mr Levi had an outstanding tax debt of $22,737.87 which was overdue (see letter dated 24 March 2009 from

the ATO to Mr Levi referring to a recent request by Mr Levi regarding his outstanding tax account and agreeing to accept an arrangement for payment by instalments). In his s19 examination, Mr Levi said that his tax was not overdue and he was not having demands. In the light of the terms of the ATO letter, we do not accept that as a truthful statement.

249. On Monday, 23 March 2009, Mr Levi sent an email to Ms Koka stating:

> "AK
>
> As discussed, can you prepare BAS and have a draft to me by **8 April** so that we can lodge and pay BAS by **17 April 09**.
>
> It will be due the following week, however there are public hol's and annual leave interrupting timing then.
>
> Thanks
>
> Mark." (emphasis in original)

250. On Sunday, 29 March 2009, Bacchus emailed Mr Levi, copying Ms Koka and Mr Louttit, advising that the amount of GST payable for the March 2009 quarter (not taking into account deductions for GST on purchases) was $103,545.00.

251. It is clear, (at least for the purposes of this Application), that the amount of GST actually payable was $80,743.00. The cashbook as at 31 March 2009 records that the totals for GST for sales was $103,784.40 and that the totals for GST on purchases was $23,041, resulting in a GST liability of $80,743.34. This was the amount actually paid to the ATO on behalf of Biseja.

252. However, according to the Biseja cashbook as at 8 April 2009 the GST payable for the March 2009 BAS Quarter was $103,481.21. This was an increase of $22,737.87 compared to the Biseja cashbook as at 31 March 2009. The GST liability was calculated in the 8 April 2009 cashbook on the basis that the totals for GST for sales was $126,522.27 and that the totals for GST on purchases was $23,041.06, resulting in a GST liability of $103,481.21.

253. It appears to be common ground (and if not, we find) that the 8 April 2009 Biseja cashbook was falsified by someone so as to show that the Biseja GST liability was higher by $22,737.87 than the actual figure.

254. The 8 April 2009 Biseja cashbook also records 7 entries with the description "deposit held in trust" recording the deposit received for each of the 7 Lots sold in the March 2009 BAS Quarter. Corresponding with each of the deposit entries is an entry for the GST, suggesting that GST has been collected and would need to be accounted for to the ATO.

255. It appears common ground (and if not, we find) that the GST in these deposit entries were also false and included by someone between 31 March

2009 and 8 April 2009. (We also note that they were subsequently reversed, and that the Biseja cashbook was further falsified and we discuss this in detail at paragraphs 330 and following below).

256. Not all the documents which, in accordance with JLA's normal practice, should have been in the Biseja files relating to the Biseja GST for the March 2009 quarter have been found.

257. Mr Louttit did not have a specific recollection of signing a cheque for the BAS payment, signing the BAS or reviewing the supporting documents, although he said he had no reason to believe that he departed from his usual practice. Nor did Ms Koka have any actual recollection of the procedure she adopted for the preparation of the cheque.

258. The documents which were found by Mr Louttit in the cashbook file relating to the March 2009 quarter were the BAS checklist and some accompanying documents. We note:

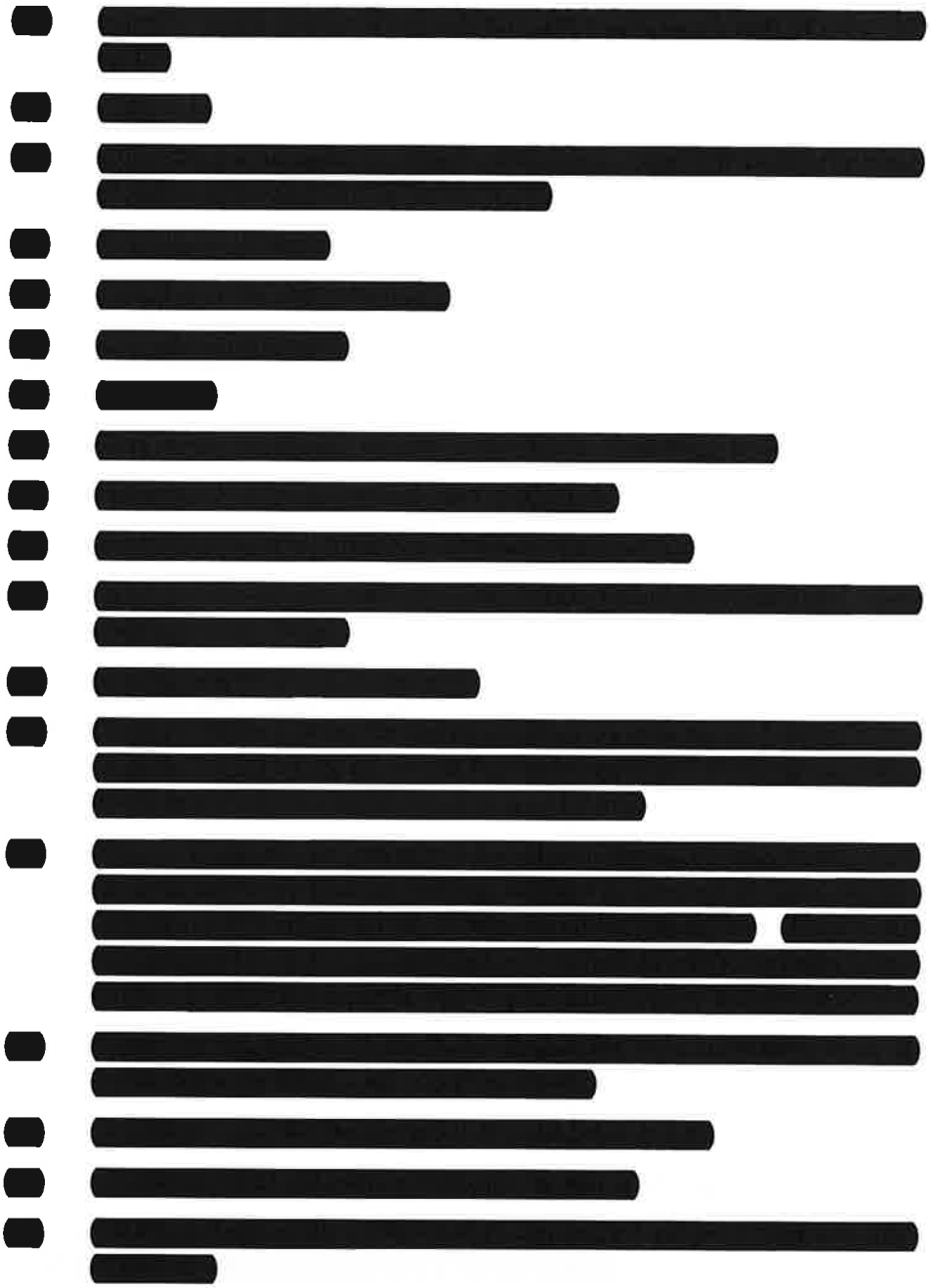
(a) That the BAS checklist was on a standard template with certain entries included as follows: "Prepared by: Amelia Koka; Reviewed by: Mark Levi; Date 2 April 2009". It was not signed by anyone;

(b) The BAS checklist attached a bank reconciliation stating that the ATO was to be paid $103,481.00;

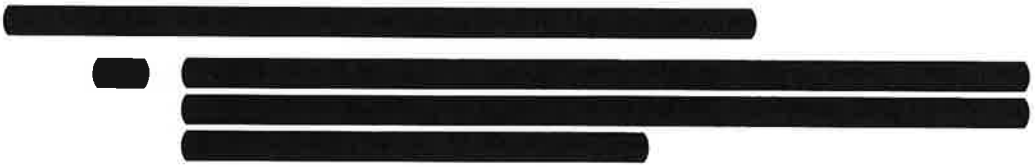
(c) The BAS checklist attached the 8 April 2009 Biseja cashbook (showing the incorrect amount of the GST, ie totalling $103,481.00).

259. Documents which Mr Louttit said he did not find in the files (but which should have existed in accordance with usual practice) were the payment voucher, a copy of the Biseja cashbook at the date of signing the cheque, a copy of the BAS, a copy of the cheque signed by Mr Louttit, the cheque butt and other "usual documentation".

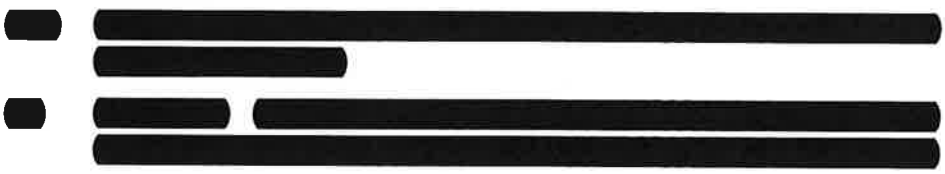
260. [redacted]



261.

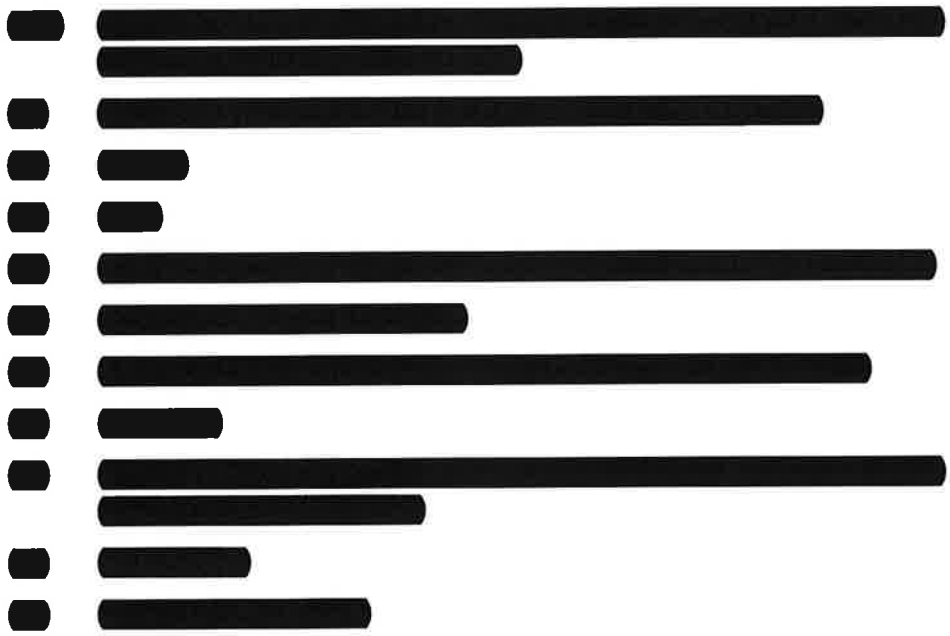


262.



263.

264.



265. What can be said with some certainty, in relation to the first transaction is:

(a) Sometime between 31 March 2009 and 8 April 2009, the Biseja cashbook was falsified so as to suggest that Biseja had a GST liability of $103,481.21;

(b) A cheque dated 2 April 2009 payable to the ATO on the Biseja account in the sum of $103,481.00 was prepared by Ms Koka;

(c) Mr Louttit identified the signature on the cheque as his signature;

(d) On 3 April 2009, Mr Levi took that cheque to Australia Post at the GPO in Martin Place, Sydney and instructed the cashier to apportion the cheque in accordance with two remittance slips: the Biseja remittance slip for Biseja's GST of $80,743.34 and the other being a remittance slip for Mr Levi's personal tax obligation of $22,737.87;

(e) The ATO apportioned the cheque in accordance with Mr Levi's instructions;

(f) The sum of $103,481 was subsequently drawn from Biseja's receivership account;

(g) A BAS statement was lodged with the ATO.

266. Needless to say, the parties had radically different submissions about the effect of the evidence in relation to the First Transaction.

267. It was submitted on behalf of Mr Levi that Mr Louttit had accepted that he would have seen the Bacchus Report either at the time of signing the Biseja cheque or in the days prior to that. This advised that the total amount attributable to GST from the sale proceeds received during the preceding quarter was $103,545.00. It was submitted that the copy of the BAS form retrieved from the ATO disclosed a total GST liability for Biseja of $80,743.00 and that that document was signed by Mr Louttit on 2 April 2009. It was submitted that there was no forensic evidence which would indicate that that document did not include that figure at the time that Mr Louttit signed it and that nothing on the face of the document suggested that at the time Mr Louttit signed the document it contained, in the box in which the Payment of Refund amount was to be inserted, the figure of $103,545.00.

268. Mr Priestley submitted that Mr Levi fraudulently procured the cheque for the higher amount. He submitted that the precise manner in which this was done without Mr Louttit's knowledge was a matter of inference. He submitted that it was notable that the records showed the use of white out on the BAS statements and one compelling explanation was that the BAS statement shown to Mr Louttit when he signed the cheque had the same figure as the cheque ($103,545.00). The supporting documentation such as

it was that was provided to him, supported that number. Having obtained the cheque for the higher sum, Mr Levi then altered the BAS statement.

269. Mr Priestley also submitted that Mr Levi had sought to establish that the procedure of completing BAS statements and effecting payment of the quarterly BAS utilised in the Biseja receivership was open to abuse. The more successful the respondent became in establishing this, it was commensurately demonstrated how a fraud could occur. ASIC adopted one theory put forward by Mr Levi as to what happened: that a "true" BAS statement was created; it was then changed to the higher "false" figure and a cheque procured, and subsequently the BAS was further altered to its original true figure.

270. The original BAS form was not in evidence. The copy in evidence is not particularly clear.

271. The handwriting on the copy of the BAS form in evidence is certainly odd:

(a) In the first place, Ms Koka's handwriting appears on the document, but only in the first two lines on the first page. All of the handwriting on the remainder of the document is in a different hand, and the author was not identified;

(b) Secondly, where changes were required to the BAS form, the normal practice was for Ms Koka to make any required changes. Yet in this case, changes have been made but they have not been made by Ms Koka;

(c) This tends to support the proposition that the document was originally filled out by Ms Koka with certain figures and that those figures were subsequently changed by someone – quite possibly someone who did not want Ms Koka to know about the changes. If the figures have been changed, the question arises as to why they were changed. If, as Mr Levi asserts, the real GST calculations (giving rise to the ultimate figure of $80,743.00) were known all along, Ms Koka would have filled out the whole BAS and there would have been no need for changes and no evidence of any other person's handwriting on the form. Indeed, in Mr Levi's s19 examination, he said that at the time of his conversation with Mr Louttit the BAS had already been prepared with the $80,743.00 figure and he presumed this had been done by Ms Koka;

(d) We also note that all of the handwritten figures on the second page of the BAS form are significantly out of alignment, below the line (as are an "X" which is supposed to be in a box, and the date). This incorrect alignment also suggests that the figures on the BAS were changed. We can think of no reason why a person would enter all the figures on the second page of the BAS significantly below the line on which they should appear, except as part of some attempt to amend

what was already present. It might suggest that white-out was used on the document, and the white out was still wet at the time of the changes, or that some form of photocopying or scanning, possibly involving misplacement of acetate paper, might have been involved.

272. In any event, we believe that the fact that the document is not fully completed in Ms Koka's handwriting and the fact that the document, on its face, appears to have been altered, is consistent with the proposition that the BAS was presented to Mr Louttit containing figures showing a GST obligation of $103,545.00 on 2 April 2009.

273. But even if the figures on the BAS were not changed, it does not follow that Mr Louttit knew about and authorised the payments to Mr Levi.

274. Mr Sutherland's submission in this regard proceeded upon the basis that Mr Louttit would have observed usual practice in reviewing documents and signing the cheques and, in particular, he would not have signed the BAS and the ATO cheque without the correct amounts being included and supported with appropriate documentation. On that basis, it was submitted, the Board cannot be satisfied that Mr Louttit did not know of and authorise the transactions because it cannot be affirmatively proved that the BAS, as signed, was subsequently amended.

275. In our view, this argument ignored the nature of fraudulent conduct and overstated the effect of the evidence as to practice.

276. As to the first of these, it is a matter of common experience that a person intent upon fraud (particularly a trusted colleague of a victim) may procure significant deviations from usual practice or significant breaches of normal controls by means of apparently innocent representations or statements. We note Ms Koka's evidence in the present case, (which we deal with in detail below) where Mr Levi obtained Ms Koka's keys in order to gain access to JLA's premises after he had left JLA at a time when Mr Louttit had told her that he did not want her to have contact with Mr Levi[27].

277. The aim of a person seeking to commit a fraud will often, if not always, be to circumvent usual practice and controls and such person may go to extreme lengths to devise and effect a plan to achieve that aim without detection.

278. There are two alternatives in the present case: either Mr Levi acted with Mr Louttit's authority and consent or he fraudulently misappropriated the funds in question. In considering whether he might have engaged in fraud, it is unrealistic to proceed on the basis that he would not have been able, by means of representations or excuses, to procure a departure from normal practice and controls.

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[27] [redacted]

279. As to the second matter, the evidence of usual practice was just that: usual practice. It was not evidence that the usual practice was always followed.

280. Mr Levi himself stated that Mr Louttit departed from usual practice, and in some significant respects. Indeed, he said that there were times where Mr Louttit would sign cheques without supporting documentation.

281. If this was the case, it may have been the case that Mr Louttit signed the cheque for the March 2009 quarter BAS without any supporting documentation, and at a different time, signed the BAS with the lower figure without recalling the earlier figure. Alternatively, Mr Louttit may have signed the cheque for the March 2009 quarter BAS with only the documentation in the April 2009 BAS checklist (but without the BAS) showing that higher (incorrect) figure of $103,481.00 was payable. Mr Levi might have subsequently asked him to sign the BAS showing the lower figure, which he did without remembering the earlier figure. Mr Levi might have presented the BAS to Mr Louttit and misled him about the amount of the cheque previously signed.

282. [redacted]

283. The objective evidence before us, demonstrated that deviations from usual practice and lack of attention to detail appeared to be reasonably common, and we have real doubts about the extent to which the stated systems were followed. For example, over the course of the relatively brief period with which we are concerned:

(a) Mr Louttit said it was not usual practice to pay BAS at the GPO and he could never recall having authorised this. Yet the very first BAS payment for Biseja was made by payment at the GPO, and Mr Louttit himself referred to this in his letter to the ATO dated 10 March 2009;

(b) The BAS checklist for the March 2009 quarter was not initialled by Mr Louttit in accordance with what he said was his usual practice;

(c) In relation to the June 2009 quarter BAS, Mr Louttit purported to sign a form in relation to Biseja's BAS, but the BAS related to a different company (his signature appearing just above the name Como Hotel Holdings Pty Limited). He was unable to explain why he had signed this[28].

284. Further, the evidence showed that Ms Koka, in particular, was subject to Mr Levi's influence. On Mr Levi's version of the First Transaction, there was no apparent difficulty in getting Ms Koka to prepare a cheque for an amount higher than the amount of the Biseja GST. On his version of events (see paragraph 260 above), he simply came out of Mr Louttit's office, after the discussion about the profit split, and told Ms Koka to prepare a Biseja cheque payable to the ATO in the higher amount. (He must have provided Ms Koka with the figure because she would not have known the amount of Mr Levi's tax to add to the amount of Biseja's tax).

285. Further, the evidence shows that Mr Levi was able to procure a significant breach of normal controls and breach of security on Ms Koka's part without great effort. Ms Koka gave evidence of an incident on or about Friday 27 August 2010, when Mr Levi came to JLA offices late in the afternoon. This was at a time when Mr Levi had left JLA and Mr Louttit had told Ms Koka that he did not want her to have contact with Mr Levi. Prior to coming to the office Mr Levi sent Ms Koka a text to the effect "Is JL there". She said that she took this to mean "is Jamieson Louttit in the office" and she replied "No". Mr Levi then came to the office.

286. When he arrived at the office Mr Levi said words to the effect;

> "I want to look at the files as some of my files are missing"

287. Ms Koka said that she and Bronwyn Denning assisted Mr Levi to go through the files but that they could not find any relating to his administrations. Then she said that she had a conversation with Mr Levi to the following effect:

> "He said : "Let's go downstairs and have a cigarette"
>
> I said: "Ok"
>
> He said: "Can I borrow your keys and security pass to Jamieson's offices so that I can continue searching for my files and photocopy some templates"
>
> I said: "Ok"."

[28] [redacted]

288. Ms Koka said that she gave Mr Levi two keys to open the main door to Mr Louttit's offices and her own security pass which is used to get into the building out of hours. She said that none of the internal offices were locked.

289. Ms Koka said that on Monday 30 August 2010, Mr Levi called her at around 1 pm on her mobile phone and said words to the effect;

> "Can we meet at the water fountain at Martin Place I want to return your keys, security pass and mobile phone".

290. Ms Koka said that she met shortly afterwards and that Mr Levi returned her keys, mobile and security pass and said:

> "I didn't end up using your keys and security pass".

291. Ms Koka said that she did not tell Mr Louttit or anybody else in the office that she had lent Mr Levi the keys to office until Mr Louttit was examined by ASIC around June 2011.

292. This incident showed that Mr Levi was able to influence Ms Koka to act behind Mr Louttit's back and depart from Mr Louttit's instructions in a significant way.

293. As Mr Priestley submitted, "the more successful the respondent became in establishing [departures from normal procedure], it was commensurately demonstrated how a fraud could occur".

294. To the extent that Mr Louttit gave answers in cross-examination suggesting that he did not depart from usual practice in relation to the present Transactions we do not accept that evidence. Mr Louttit had no independent recollection of what took place on either occasion. His answers in cross-examination as to how he believed he would not have deviated, hinged upon his belief rather than his actual recollection. We have no doubt that Mr Louttit had procedures in place along the lines described in paragraph 64 above. We are not satisfied that he was by any means punctilious in following those procedures. We consider that it would not have been exceptional for him to have deviated from normal procedures, particularly if encouraged to do so by Mr Levi.

295. In relation to Ms Koka's evidence, we come to a similar conclusion. We consider that it would not have been exceptional for Ms Koka to depart from normal procedures. We think that she was particularly biddable by Mr Levi. In many respects, she took her instructions from him. She appeared to have a close and casual relationship with him. She appeared ready to accede to significant breaches of procedure if Mr Levi asked her.

296. In our view, notwithstanding Mr Louttit's evidence and Ms Koka's evidence of usual practice and their answers in cross-examination as to how they believed he would not have deviated, (which hinged upon their belief

rather than actual recollection) the evidence of compliance with usual practice was not particularly strong and there was evidence of significant departures from usual practice. We believe that it was likely that Mr Levi procured a departure from usual practice in the present case, particularly in light of the matters we have referred to in paragraphs 276-292 above.

297. The objective circumstances are not consistent with a legitimate transaction. Ignoring, for the moment, our findings in relation to the profit share agreement and the admissions:

(a) We consider that a payment to Mr Levi by means of a Biseja cheque, particularly a Biseja cheque which was primarily intended to cover Biseja's own tax was simply unacceptable practice for a receiver and smacks of fraud. Thus, even if it was Mr Louttit who suggested this means of payment and even if Mr Levi believed he had an entitlement to be paid money, we do not consider that Mr Levi, acting honestly, would have accepted payment by this means;

(b) We do not consider that Mr Levi believed, at the time of the payment, that Biseja still owed fees to JLA in respect of the First Invoice, in view of the fact that that invoice had been rendered five months earlier and Mr Levi was aware that Biseja had been paying all of JLA's subsequent remuneration;

(c) Shortly before the payment, Mr Levi had outstanding tax. He had written to the ATO seeking time to pay and had been given until 1 May 2009 to pay. Thus, there is strong evidence that he was under financial pressure (notwithstanding his assertions to the contrary, late in his s19 examination) and had a clear motive to engage in a fraud;

(d) Eight days after the date of the ATO letter, the first transaction occurred;

(e) On the other hand, Mr Louttit had no motive to engage in a fraud (which he clearly did if Mr Levi is to be accepted - it is not disputed that he knew that the first Biseja invoice had been paid). There was no evidence that Mr Louttit was under financial pressure, or had any other motive which would have caused him to engage in a fraud.

298. We consider, having regard to the objective facts, that Mr Levi procured the March payment for his own benefit without Mr Louttit's authority and consent.

299. We do not consider it was necessary for ASIC to prove the precise method by which the fraud was perpetrated. Of its nature, fraud is often perpetrated covertly and the perpetrators of fraud will often take pains to cover their tracks: *Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA

201 (at 203–4). We consider that it was entirely possible, on the evidence before us, that the fraud was either perpetrated by Mr Levi presenting documentation containing the inflated GST amount, procuring Mr Louttit's signature on the cheque and BAS and then altering the BAS, or by Mr Levi procuring Mr Louttit's signature on the BAS and cheque at different times as a result of misleading inducements and either unsupported or only partially supported by documents.

300. The Second Transaction occurred in late October 2009 and related to the September 2009 quarter BAS. It involved a payment to the ATO by means of a Biseja cheque dated 21 October 2009 in the sum of $87,745.00. It is common ground that the GST payable for that quarter was only $18,723.00. It is also common ground that the cheque was used to pay both Biseja's GST and Mr Levi's personal tax obligation of $69,022.00.

301. Once again, most of the documents which are normally retained were missing from the files. The only documents which were found were an unsigned copy of a BAS Return for the September 2009 quarter and a copy of the corresponding extract of the cashbook in the Tax File.

302. The following documentation was missing:

(a) The payment voucher;

(b) The print out of the Biseja cashbook as at or about the date of signing the cheque;

(c) A copy of the BAS signed by Mr Louttit and filed with the ATO;

(d) A copy of the payment cheque;

(e) The cheque butt;

(f) Other supporting documentation (such as the Bacchus report).

303. As with the First Transaction, neither Mr Louttit nor Ms Koka had any recollection of the Second Transaction.

304. However, the evidence reveals that on 23 September 2009, Ms Koka requested that Mr Cavanagh prepare his Report for the September 2009 quarter. Mr Cavanagh sent his Report to each of Ms Koka, Mr Louttit and Mr Levi on 28 September 2009. The Report calculated that total GST payable was $27,326.00.

305. It appears that Ms Koka prepared a draft BAS on or about 1 October 2009. Certainly, the unsigned BAS (found in the Biseja records) contains only her handwriting (save for the figure "5" in the top right hand corner, supposedly referring to the appropriate file number). That draft was dated 1 October 2009. It contains the figure of $27,326 for GST on sales and

contains the correct amount of GST payable, namely $18,723.00. The cashbook extract as at 29 September 2009, (also found in Biseja's records) also contains only Ms Koka's handwriting. Ms Koka believes from these documents that on or about 29 September 2009, she performed the calculations set out on the cashbook, giving rise to the total amount of GST payable to the ATO for the September 2009 quarter ($18,723.00). She believes that she entered this amount on the second page of the Draft BAS on or about 1 October 2009. She said that these documents would normally have been attached to the BAS checklist and given to Mr Levi to approve.

306. The BAS which was actually lodged with the ATO has been recovered. It contains the same figures as the draft, except that a "2" appears to have been placed in front of the "1" in the date, so that the BAS was apparently dated 21 October at the time it was presented to the GPO. Further, although the figures are the same, not all of the figures in the BAS as lodged are in Ms Koka's handwriting. Only the handwriting alongside the Phone Number and Contact Person on the first page and the date "1 October 2009" was identified as clearly Ms Koka's handwriting.

307. However, the handwriting which Ms Koka identified as her own on both BAS forms appears to be identical in shape and placement. In other words, it appears that the BAS which was lodged was the original of the draft BAS (but with someone else's handwriting in relation to the GST amounts etc). On this basis, it seems reasonably clear that the figures on the original draft BAS have been overwritten.

308. Ms Koka said that she did not know why the draft was not signed by Mr Louttit and lodged with the ATO or why signed copies of the BAS Return, payment cheque and corresponding documents were not filed in the Bank File and the Tax File.

309. The cheque which was actually used to pay the BAS has been recovered. It is dated 21 October 2009 in the sum of $87,745.00 payable to the ATO. Mr Louttit identified the signature on the cheque as his and the handwriting as that of Ms Koka's. Ms Koka's evidence was to the same effect. Ms Koka said that she did not know why she would have written out a cheque for a different amount to the amount on the draft BAS, although she noted that there was a 20 day gap between the date of the draft BAS and the date of the cheque.

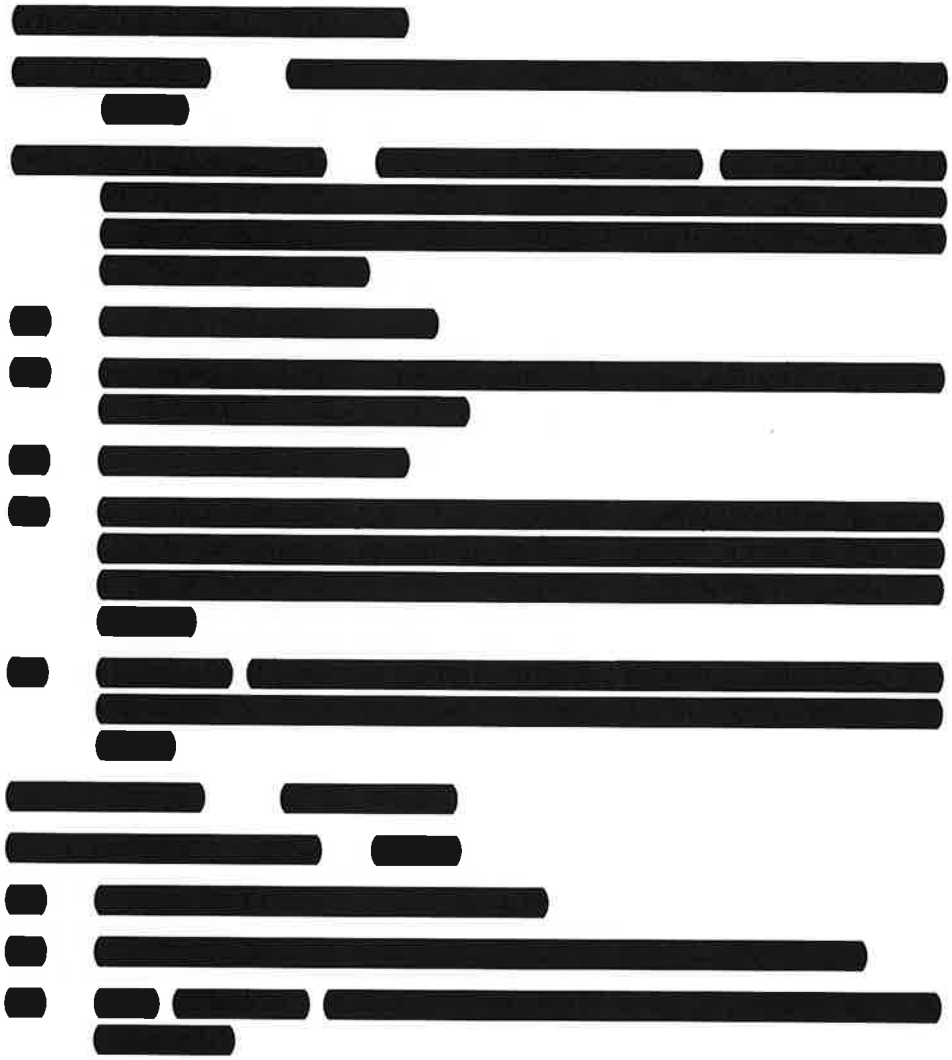
310. There is no doubt, however, that Mr Levi took the cheque for $87,745.00 to the GPO and caused it to be split. The amount of $69,022.00 was deposited to the benefit of Mr Levi, and the amount of $18,723.00 was deposited to the benefit of Biseja.

311. [redacted]

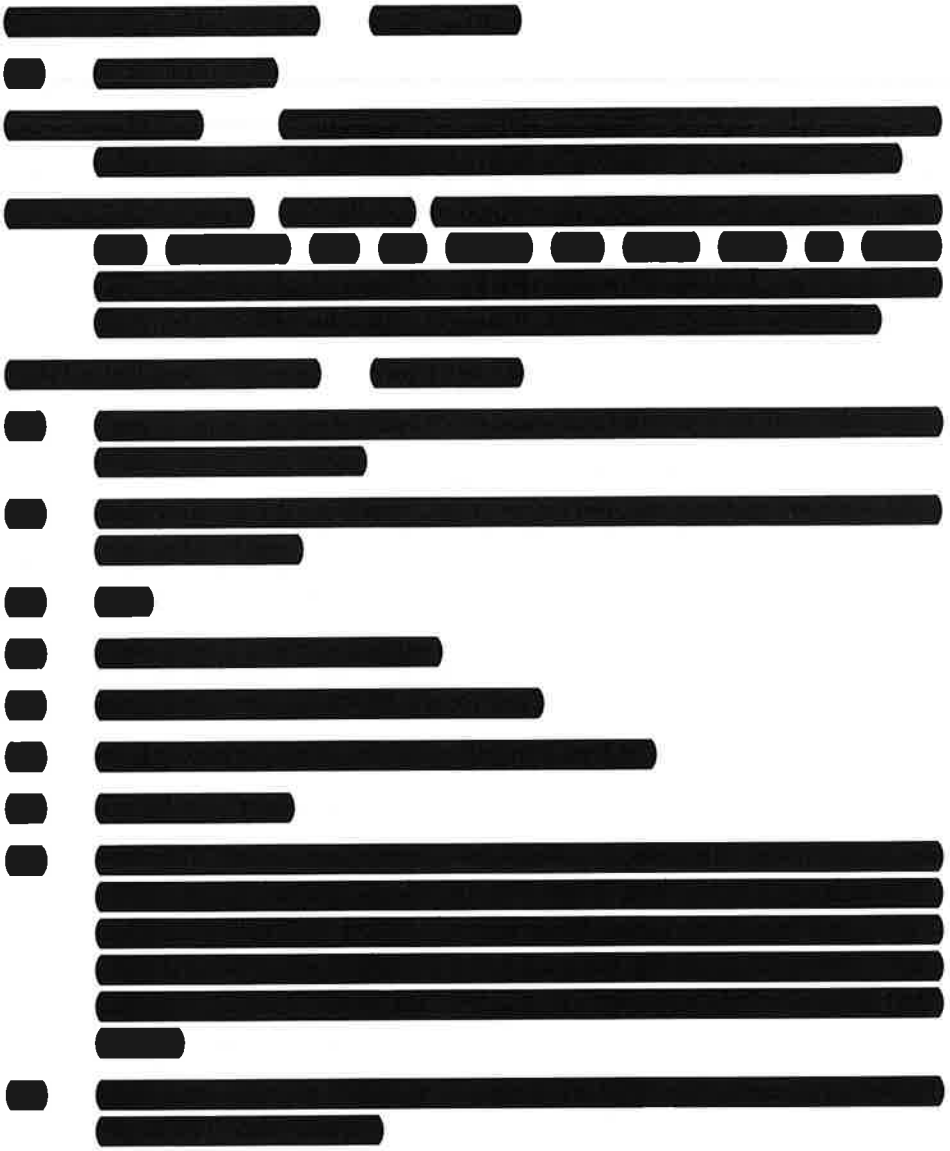
[redacted]

312. [redacted]

313. [redacted]



314. [redacted]



315. Mr Sutherland's submissions in relation to the Second Transaction were along the same lines as his submissions concerning the First Transaction. The thrust of the submissions was that there would not have been any departure from the usual practice in signing BAS forms and BAS cheques and, therefore, it could not be said with clarity, how Mr Levi could have procured the signing of the cheque and the BAS form without Mr Louttit knowing about the difference in amounts.

316. Mr Sutherland submitted that the draft BAS was the same physical document as was signed by Mr Louttit on 21 October 2009. He submitted that although the original of the BAS form was released to ASIC for forensic examination no evidence of the result of that examination has been adduced by ASIC.

317. (In relation to the latter point, we note ASIC tendered a letter from the ATO dated 29 August 2012[29] which referred to the terms of s 355-155 of the Taxation Administration Act making it an offence for ASIC to disclose information (including to a court or tribunal) unless for the original purpose. The original purpose for which ASIC sought the document appeared from the letter to be for the purpose of investigating a serious offence.)

318. Mr Sutherland submitted that the lay evidence was that there has been no apparent alterations made to the original document which was sent to the ATO.

319. The lay evidence referred to was contained in the following passage of Ms Koka's s19 Transcript (T380-1):

> "Q. Just bear with me. I won't waste time on it. I thought it was the second one. If I suggest you were being asked questions about the October BAS and Ms Jeffries said to you, "It's a photocopy of a photocopy of the original," you said: "So we don't know where the original is whether the original got lodged."
>
> Mr Tsakalos:
>
> But if you whited it out, you would have spilled over the boxes, so it looks like this is not whited out at all.
>
> You said: I can't explain it.
>
> A. Correct.
>
> Q. Just accept from me they were asking about the BASes which are in front of you now. Can I just ask you this: we saw earlier on some documents, I think you agreed you couldn't say for sure, but it looked like it might have been whited out and you've written corrected figures. Do you remember me showing you those before?
>
> A. Yes.
>
> Q. And certainly you could see where it looks like an explanation for what's in the image is that whiting out has occurred?
>
> A. Yes.
>
> Q. On what was shown to you by ASIC and what you see here today, on the document behind tab 20, you would agree, wouldn't you, it doesn't look as if it has been whited out?
>
> A. There is no other explanation. But, no, it doesn't look like it has been whited out."

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[29] [redacted]

320. We have some trouble with this submission. In the first place, Ms Koka was simply being asked to express a view, on the basis of inspecting the photocopy of the BAS, as to whether white out had been applied to any part of the original.

321. Secondly, the cross-examination flowed from the premise (put by Mr Tsakalos) that if *Ms Koka* had whited out the boxes, she would have spilled over the boxes. If Ms Koka had used white out, in the ordinary course of business, there would be no need to be concerned about spilling outside the boxes. Her answers about whiting out appear to have been based upon the proposition that there appeared to be no spilling outside the boxes. It is not logical to use that premise to suggest that white out would not have been used at all (for example, very carefully in the course of perpetrating a fraud).

322. In any event, we consider that there must have been some whiting out, or some other system of obliteration on the BAS because it is clear that Ms Koka's original handwriting on the second page has been overwritten somehow. The figures on the document are clearly not the same figures as Ms Koka's figures on the draft (apart from the first two entries and the date). If, as was submitted on behalf of Mr Levi, the draft and the final BAS was the same physical document, then there clearly has been alteration. In the draft, Ms Koka's "3" in the figure "18723" clearly extends below the line of the box. In the final, the figure "3" in the same box does not extend below that line of the box.

323. One has to ask, why has someone taken the trouble to alter the original BAS? There would be absolutely no point in amending the original BAS to include the very same figures again. And it is notable that *all* the figures appear to have been altered. This suggests a need to amend the BAS to represent an entirely new GST calculation. We consider that this suggests that there were two amendments: the first which amended Ms Koka's figures to a series of different figures showing a different calculation of GST and the second, which amended those figures back to the original figures. An obvious reason for doing this would be to use the document, after the first round of amendments, to procure the cheque in a different amount.

324. If one assumes, for the moment, that a fraud was perpetrated, it might have been achieved by Mr Levi taking the draft BAS from Ms Koka on 1 October, and carefully altering the figures to show the higher amounts. On 21 October, quite some time after Ms Koka's calculations had been done, he might have taken the amended BAS (and possibly false documentation as well, such as the false reconciliation in the First Transaction) and instructed Ms Koka to prepare a cheque for the higher amount and then procured Mr Louttit to sign the BAS and cheque for the higher amount, before taking the BAS and cheque away, carefully re-amending the figures on the BAS and lodging the BAS and cheque at the GPO.

325. But, as with the First Transaction, the evidence of departures from normal practice to which we have already referred, shows that a fraud might have been perpetrated in a far simpler manner, ie because normal practices were not complied with, and Mr Levi was able to procure signature of the BAS and cheque on the basis of false representations, assurances or excuses.

326. It was submitted, on behalf of Mr Levi, that there must have been a highly sophisticated fraud involving the making of two sets of alterations to the BAS form in each case in a way which cannot be discerned from an inspection, and was not detected by Mr Louttit in 2009. The scenario we discuss above might require a little care but it would hardly involve a highly sophisticated fraud.

327. As to Mr Louttit not detecting it, the evidence showed that Ms Koka corrected BAS forms with white out rather than preparing a new form, so Mr Louttit would not regard the presence of white out as unusual.

328. Further, as with the First Transaction, we need to consider the issue in the light of the objective circumstances prevailing at the time (ignoring, for the moment, our findings concerning the profit share agreement and the admissions). We refer to the matters discussed above in relation to the First Transaction and note:

(a) Again, payment to Mr Levi by means of a Biseja cheque, particularly a Biseja cheque supposed to cover both Biseja's own tax and Mr Levi's tax was an unacceptable practice. Moreover, unlike the case which Mr Levi put forward in relation to the First Transaction, (where he suggested that he thought fees were still owed to JLA) there was no express suggestion that he thought that fees were still owed at this stage. Such a suggestion would not be credible. So on what basis did Mr Levi think he was entitled to receive payment by means of a Biseja cheque? We do not consider that Mr Levi, acting honestly, would have accepted payment by this means;

(b) Mr Levi had a clear motive to defraud. On his version of events, he was pressing Mr Louttit to pay him because he had a tax debt again "that was due and payable". This time, the amount was, by any standards, large ($69,022.00). With a tax debt of that size due and payable and no apparent means of paying it, Mr Levi was under significant financial pressure;

(c) If Mr Levi did not commit a fraud, it must follow that Mr Louttit committed a fraud in making this payment. (There was no evidence that he was owed any moneys by Biseja). Yet there is no suggestion that he could not afford to make the payment. Why would he not pay in cash, or even pay in instalments? (This also casts doubt on Mr Levi's assertion that Mr Louttit agreed to pay the amount calculated in a different way from the First Transaction, rather than $17,000.00, calculated in the same manner as the First Transaction).

329. In the circumstances, we consider that the second payment was procured by Mr Levi for his own benefit without Mr Louttit's knowledge or consent. As with the First Transaction, we do not think it is necessary to identify the precise method by which the fraud was achieved. We have outlined one way in which it might have been achieved through the use of white out or some other form of obliteration, but even if this was not how the fraud occurred, we consider that it was possible through a failure to observe usual practice and by means of representations or contrivances on the part of Mr Levi.

(iv) Falsification of the records

330. It is clear that the records for Biseja have been altered in relation to the First and Second Transactions. We did not understand Mr Levi to suggest otherwise, although he denies any involvement. Mr Levi's submissions in relation to the falsification were restricted to the following submissions:

(a) that the underlying premise for the allegation was that Mr Levi misappropriated the monies in the first place. If that premise was not made out, then the basis for finding Mr Levi as the person responsible for altering the cashbook, (namely to enable him to first perpetrate and then to conceal his fraud), disappeared;

(b) that, in that event, the evidence showed nothing more than a series of errors and anomalies in the firm's records but no compelling reason to attribute that state of affairs, and any attendant dishonesty or corruption (assuming the state of the records is attributable to such), to Mr Levi as opposed to anyone else who worked in the office or otherwise had access to the records.

331. We have already dealt with the 8 April 2009 alterations, involving the moneys paid away in the First Transaction. To recapitulate:

(a) The Biseja cashbook as at 31 March 2009 recorded that the totals for GST for sales was $103,784.40 and that the totals for GST on purchases was $23,041.06, resulting in a GST liability of $80,743.34 (the correct amount payable and the amount actually paid on Biseja's behalf);

(b) However, according to the Biseja cashbook as at 8 April 2009 the GST payable for the March 2009 BAS Quarter was $103,481.21. This was an increase of $22,737.87 compared to the Biseja cashbook as at 31 March 2009. The GST liability was calculated in the 8 April 2009 cashbook on the basis that the totals for GST for sales was $126,522.27 and that the totals for GST on purchases was $23,041.06, resulting in a GST liability of $103,481.21;

(c) Thus, the 8 April 2009 Biseja cashbook was falsified by someone so as to show that the Biseja GST liability was higher by $22,737.87 than the actual figure;

(d) The 8 April 2009 Biseja cashbook also recorded 7 entries with the description "deposit held in trust" recording the deposit received for each of the 7 Lots sold in the March 2009 BAS Quarter. Corresponding with each of the deposit entries is an entry for GST, suggesting that GST has been collected and would need to be accounted for to the ATO;

(e) these deposit entries were also false and included by someone between 31 March 2009 and 8 April 2009.

332. On 19 October 2009, Mr Louttit lodged a Form 524 (dated 16 October 2009) with ASIC. This form presented the accounts and statements for the period 5 March 2009 and 4 September 2009. The Biseja cashbook as at 4 September 2009, was attached to the Form 524. This contained the same falsifications as the 8 April 2009 cashbook.

333. The Biseja cashbook as at 6 July 2010 also contained the same falsifications.

334. However, the Biseja cashbook as at 31 August 2010 did not contain the same falsifications as the 8 April 2009, 4 September 2009 and 6 July 2010 cashbooks. The cashbook as at 31 August 2010:

(a) recorded a payment to the ATO on 2 April 2009 in the sum of $80,743.13. The payment is described in the cashbook as "payment for Jan-Mar 09". In other words, the false record in relation to the payment to the ATO had been corrected;

(b) The deposit GST entries in the earlier cashbooks were not recorded;

(c) To absorb the additional $22,737.87 paid to the ATO on behalf of Mr Levi in the April 2009 Cheque of $103,451, there are three entries which appear to have been adjusted as follows:

Entry	Date	Description	Form 524	31 August 2010 cashbook	Increase
1	1-04-09	The Entrance First National	$4,818.00	$12,397.29	$7,579.29
2	1-04-09	Gadens Lawyers	$3,323.10	$10,902.39	$7,579.29
3	2-04-09	The Entrance First National	$14,054.60	$21,633.89	$7,579.29
			$22,195.70	**$44,933.57**	**$22,737.87**
					Decrease
4	2-04-09	ATO – Jan-Mar 09	$103,481	$80,743.13	$22,737.87

335. Accordingly, some time between 6 July 2010 and 31 August 2010, someone reversed the earlier false entries in respect of Biseja's GST for the March 2009 quarter and included new falsifications to absorb the resulting $22,737.87.

336. As regards the Second Transaction, the Biseja cashbook as at 4 March 2010 and 6 July 2010 recorded a payment to the ATO on 21 October 2009 in the sum of $87,745 although the actual liability was $18,723.00.

337. However, the Biseja cashbook as at 31 August 2010 recorded a payment of $18,723.00 on 21 October 2009 to the ATO. This is described in the cashbook as "payment BAS Sep 09" and reflects the actual amount due to the ATO for the September 2009 Quarter.

338. To absorb the additional $69,022.00 paid to the ATO on behalf of Mr Levi, in the October 2009 Cheque of $87,745.00, there are three entries which appear to have been adjusted as follows:

Entry	Date	Description	6 July 2010 cashbook	31 August 2010 cashbook	Increase
1	14-10-09	Jamieson Louttit	$14,910.50	$49,421.50	$34,511.00
2	20-10-09	National	$3,278.00	$20,533.50	$17,255.50
3	20-10-09	Gadens Lawyers	$5,520.63	$22,776.13	$17,255.50
			$23,709.13	**$92,731.13**	**$69,022.00**
					Decrease
4	20-10-09	ATO-BAS Sep-09	$87,745.00	$18,723.00	**$69,022.00**

339. It is notable that the difference in the amount recorded as paid to the ATO in the Biseja cashbook as at 26 March 2010 and as at 6 July 2010 (on the one hand), and the Biseja cashbook as at 31 August 2010 (on the other) is $69,022.00 and was applied against Entry 1 as exactly one half of this amount ($34,511) with exactly one quarter ($17,255.50) against Entries 2 and 3 in equal amount. In the Biseja cashbook the $69,022.00 difference was taken off the ATO payment and equates to the value of the Second Transaction (Entry 4).

340. Accordingly, some time between 6 July 2010 and 31 August 2010, someone reversed the earlier false entries in respect of Biseja's GST for the September 2009 quarter GST and included new falsifications to absorb the resulting $69,022.00.

341. At this point it should be noted that a separate issue had arisen in relation to the Biseja BAS forms filed since July 2006.

342. On 4 December 2009 Gadens lawyers (who were engaged by Mr Louttit to provide legal services on the contracts for sale and provide other legal advice), advised Mr Louttit that valuations of Biseja's properties had been obtained indicating a value 65% less than valuations obtained to support the Biseja BAS returns.

343. Mr Louttit engaged Mr Cavanagh to review the question. This led to Mr Cavanagh preparing an application to the Commissioner of Taxation seeking a Private Ruling on the validity of the valuations. In about March 2010 Mr Louttit was notified by the ATO that Biseja had been selected for an audit of its BAS for the period 1 July 2006 to 31 December 2010. As a result, Mr Cavanagh recommended to Mr Louttit that there was no merit in proceeding with the application for a Private Ruling as the issue would be considered as part of the ATO audit.

344. Mr Levi was the primary point of contact with the ATO during the audit. Ms Koka gave evidence that he sometimes asked her to assist in gathering relevant information in relation to the audit.

345. Mr Levi left JLA on 13 August 2010. Mr Louttit asked Mr Cavanagh to take over the role of dealing with the ATO after Mr Levi left. It is not clear on the evidence what Mr Levi knew about the status of the audit as at the time he left, but it is to be assumed that he knew as much as anyone at JLA knew, and probably more. On 9 August 2010, he sent an email to Ms Koka, copied to Mr Cavanagh in relation to the Biseja BAS stating:

> "Amelia – you'll be delighted to know that Shannon has graciously offered to obtain the BAS/info he needs from the ATO site, so you can have more time to spend at the hairdressers. fyi, I'm seeing him Thurs to try to wrap things up.
>
> Shannon – let me know what you need eg send thru tax authority for Jamo to sign, valuer to assign valuation? etc.
>
> Cheers
>
> Mark"

346. It is not clear on the evidence what is meant by obtaining the "BAS/info".

347. On 18 August 2010, Mr Cavanagh sent a letter to the ATO. Amongst other things, that letter included a series of amended BAS calculations.

348. On 24 August 2010, Mr Cavanagh sent a report to JLA in relation to the status of the audit. That letter attached the amended BAS calculations. These calculations recorded correctly the amounts of GST actually paid for the March 2009 quarter and the September 2009 quarter (ie $80,743.00 and

$18,723.00 respectively – see letters dated 18 August 2010). It is not clear, on the evidence, what information Mr Cavanagh used to come up with those figures but if he had regard to the Biseja cashbook, it seems likely that the Biseja cashbook had already been amended by that time, so as to remove the inflated GST figures. This would suggest that the cashbook had already been amended by the time Mr Levi left JLA (thus suggesting that the Biseja cashbook was amended somewhere between 31 July 2009 and 13 August 2009). However, it appears that Mr Cavanagh did not have reference to the Biseja cashbook at this time[30]. If so, and if Mr Cavanagh had used some other secondary source to come up with those figures, it remains possible that the cashbook was amended somewhere between 13 August and 31 August 2009.

349. Attached to the Report was a series of Annexures. Annexure H is headed "Business Activity Statements lodged by the Receiver & Manager". There are no documents behind this annexure. This matter was not elaborated in the evidence, but we can only assume that Mr Cavanagh did not have copies of the relevant BAS forms when he prepared his report. Of course, on the evidence, copies of the signed BAS forms were missing from the files, certainly, as at October 2010.

350. We have already referred to Ms Koka's evidence relating to Mr Levi's visit to the JLA offices on or about Friday 27 August 2010, and his request to use Mr Koka's security pass and keys.

351. Ms Koka said that she did not tell Mr Louttit or anybody else in the office that she had lent Mr Levi the keys to office until Mr Louttit was examined by ASIC around June 2011.

352. Ms Koka was cross-examined at some length in relation to this evidence to the effect that it was not true, and that she made up the evidence to suit her boss[31]. There was some cross-examination as to inconsistencies as to the date of a preparation of a file note referring to the matter and there was some cross-examination as to Ms Koka's recollection of the date. She accepted that the date of the meeting could have been the 20th August rather than 28th although she recalled that the meeting was on a Friday and that her memory was that the date was the 28th.

353. None of the cross-examination of Ms Koka caused us to disbelieve her evidence on this topic. We can understand why Ms Koka would have been reluctant to inform Mr Louttit about this matter. It was clearly a serious breach of security. Whilst Ms Koka may not have suspected any sinister intent on Mr Levi's part at the time, she must have realised it was, at least inappropriate to provide him with her security pass and keys. Ms Koka was told by Mr Louttit that he did not want her to have contact with Mr Levi, prior to any allegation that Mr Levi had been involved in defrauding

30 [redacted]
31 [redacted]

money[32]. Thus, it is likely that she would have had no intention, initially, of informing Mr Louttit about the incident. No doubt her reluctance intensified significantly after the allegations concerning Mr Levi arose. However, we can understand that she may well have decided ultimately to raise the matter at about the time she was examined by ASIC about the events in question.

354. The thrust of the cross-examination was that the event was made up by Ms Koka either because Mr Louttit asked her to do so or she made it up of her own volition in order to help him. These are serious allegations and we do not think there is persuasive reason for accepting them. In relation to the first possibility, it was not put to Mr Louttit that he asked Ms Koka to make up this event. In relation to the second, it was a strange incident for Ms Koka to have made up of her own volition and, in any event, we find it highly improbable that she would have any real reason to do so.

355. In late September 2010, Mr Louttit asked Mr Cavanagh to undertake a final review of the GST paid on the settlement of Biseja properties. Mr Louttit gave evidence that the purpose of this review was to ensure that the correct amount of GST had been remitted to the ATO. This review was conducted partially at the offices of JLA and partially at Mr Cavanagh's offices in Pyrmont. Part of the review was undertaken at JLA's office because the Biseja cashbooks and other documents were at the offices of JLA.

356. Mr Louttit gave evidence that, at about the same time, he was reviewing the records of Biseja so that he could close the administration. Mr Louttit said that during this review, he noticed that there was a discrepancy between his bank records of payments made to the ATO and the ATO's records as shown on the Integrated Account Statement. He gave evidence that, at the time, he thought this was a mistake by the ATO. He said that the ATO allocated a different "CAC" number to each Receiver appointed to Biseja and he thought that the ATO had mistakenly recorded payments made by him to an account in the name of one of the other Receivers. He said that this had happened on other administrations where there have been multiple Receivers on the same administration. Mr Louttit gave evidence that he continued to make inquiries with Ms Koka and Mr Cavanagh in or around early October 2010 to clarify why the ATO Integrated Account did not correspond with the Biseja bank statements.

357. On 5 and 6 October 2010, Mr Cavanagh discovered the falsifications made to the Biseja cashbook in relation to the First and Second Transactions. He asked Ms Koka about them, but she informed him that she did not know why there were discrepancies and said that she had not made the changes. Ms Koka also gave evidence as to discovery of discrepancies and subsequent investigations of such discrepancies in late October 2010.

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[32] [redacted]

358. Mr Cavanagh was going on holiday on 14 October 2010 and shortly before he left, he raised the discrepancies with Mr Louttit. Mr Louttit suggested that it could be related to grossing up the proceeds of the sale of property. While Mr Cavanagh was still on holiday in Byron Bay, on 29 October 2010 he received a telephone call from Mr Louttit in which Mr Louttit informed him that he had discovered why there were discrepancies, in that Mr Levi had admitted to having done the wrong thing and used the Biseja funds to pay his personal tax[33]. Mr Cavanagh thereafter made further investigations of the ATO in relation to the transactions.

359. We reject the submission made on behalf of Mr Levi that the evidence showed "nothing more than a series of errors and anomalies in the firm's records" which could have been attributable to anyone who worked in the office or otherwise had access to the records. In our view, as a matter of common sense and logic, the changes to the Biseja records can only be viewed as deliberate falsifications designed to hide the fact that the Biseja cheques payable to the ATO had been used, in part, to discharge Mr Levi's personal tax obligations. On the cases put forward, and having regard to the objective circumstances, the state of the records is only consistent with Mr Levi or Mr Louttit having deliberately falsified the records in order to disguise the payments to Mr Levi.

360. It is difficult to draw firm conclusions about this issue in isolation (ie simply by reference to the facts concerning falsification). There is no direct evidence identifying the person who actually accessed the cashbook and made false entries therein.

361. Nevertheless when the facts concerning falsification are considered against objective circumstances, it appears likely that Mr Levi was responsible:

(a) First, we accept, (and have no reason to reject) Mr Louttit's evidence that in late September 2010, he asked Mr Cavanagh to undertake a final review of the GST paid on the settlement of Biseja properties in order to ensure that the correct amount of GST had been remitted to the ATO. This evidence was corroborated by Mr Cavanagh's evidence. If Mr Louttit had been responsible for the falsifications, it seems inherently unlikely that, after the completion of the ATO audit, at a time when no discrepancies had apparently been discovered, he would ask Mr Cavanagh to undertake a final review which carried the real risk that discrepancies would be discovered;

(b) Secondly, if Mr Louttit was responsible for the initial falsifications, (without Mr Levi's knowledge) then appointing Mr Levi as the contact point for the ATO audit represented a real danger that the falsifications would be discovered by Mr Levi. The initial falsifications (in April 2009 and in October 2009) may have been sufficient to disguise the overpayment (ie by suggesting that the

[33] We disregard this evidence as evidence of the truth of the matter asserted.

higher (false) amount paid to the ATO for GST was correct), but they were not necessarily sufficient to withstand the scrutiny which may result from an ATO audit, where ATO records of the actual amount of GST paid were likely to surface. The fact that he appointed Mr Levi as contact point supports the proposition that Mr Louttit was not responsible for the falsifications;

(c) Thirdly, the timing of the second falsifications points to Mr Levi being responsible, rather than Mr Louttit. Although the ATO audit represented a real risk that the initial falsifications would be uncovered, Mr Levi was the contact point for the ATO. Whilst he remained at JLA, it was, no doubt, possible for him to control the position. Once he had left, he would no longer control the matter. Accordingly, if he was responsible for the misappropriations and initial falsifications, it would have been important for him to falsify the records a second time at around the time of his departure in August 2010, in order to ensure that the amounts recorded for GST payments in the Biseja records matched the amounts in the ATO records. Thus the timing of the second falsifications was consistent with Mr Levi being responsible;

(d) On the other hand, there is no obvious reason why Mr Louttit would have falsified the records in August 2010. Indeed, if Mr Louttit was responsible for the falsifications, it is likely that he would have carried out the second round of falsifications *before* he appointed Mr Levi as contact point for the ATO audit. In this way, the second falsifications would have occurred before Mr Levi would have any reason to access to the records and the cashbook for the purpose of the audit, and Mr Levi would not be alerted to obvious error in the amounts of GST paid to the ATO;

(e) Fourthly, having accepted Ms Koka's evidence as to the security keys, this evidence is certainly consistent with Mr Levi needing to gain access to JLA's premises without anyone else being present (and without Mr Louttit's knowledge). One possible explanation for such a need would be a desire on his part to effect the falsification of the records.

362. However, at the end of the day, the question of falsification hinges on whether Mr Levi (or someone else) fraudulently misappropriated the moneys. We have found that he did, that he had no profit share arrangement entitling him to receive moneys from JLA (or Biseja) and that he admitted that he had misappropriated the moneys. In those circumstances, the finding that it was Mr Levi who falsified Biseja's records (to cover up his misappropriations) follows as a matter of logic. There is certainly nothing in the evidence to suggest that Mr Levi could not have been responsible. Indeed, for reasons already discussed, the objective circumstances suggest that he was.

363. We will deal with this issue further in the next section.

(v) Did the evidence as a whole establish that Mr Levi dishonestly used the funds of the First and Second Transactions without Mr Louttit's authority or consent and falsified the records?

364. In our view, the evidence as a whole established clearly that Mr Levi dishonestly used the funds of the First and Second Transactions without Mr Louttit's authority or consent.

365. We say this for the following reasons:

(a) In our view, Mr Levi's assertions as to a profit share agreement are false, for reasons set out in Section F(i). We accept Mr Louttit's evidence on this issue and, in any event, on the objective evidence and in the objective circumstances, Mr Levi's assertions are simply not credible;

(b) On that basis alone, Mr Levi's assertions cannot stand. If he had no profit share agreement, there was no basis for him to ask Mr Louttit for any money. His justification for asking for and receiving payment of the amounts in question stands or falls on his assertions in relation to the profit share agreement;

(c) Further, for the reasons set out in Section F(ii) above, we find that Mr Levi's emails over the period from 28 October to 9 November 2010, read as a whole, and particularly in the light of the lack of response to emails in the previous months, contain strong evidence (and/or an admission) that Mr Louttit was not aware of, and had not consented to any payments from Biseja to Mr Levi and that Mr Levi had misappropriated the amounts he received under the First and Second Transactions from Biseja;

(d) Further, we find that Mr Levi's repayment of $92,000.00 to Biseja on 9 November 2010, is strong evidence (and/or an implied admission) that he was obliged to refund the amounts he received under the First and Second Transactions and that he had misappropriated those amounts from Biseja without Mr Louttit's knowledge;

(e) We find that the apology by Mr Levi in his email of 5 November 2010 was an apology for his actions in misappropriating the Biseja funds without Mr Louttit's knowledge and was an admission that he did so;

(f) We accept Mr Louttit's evidence as to the express oral admission made by Mr Levi on 28 October 2010 and we accept his note of the conversation on that date as a generally accurate record of the conversation which took place;

(g) Further, we find that the payments for Mr Levi's benefit were, in fact, made without Mr Louttit's knowledge or consent for the reasons set out in Section F(iii) above.

(h) We are satisfied, having regard to the *Briginshaw* approach, that Mr Levi dishonestly used the funds of the First and Second Transactions for his own benefit knowing he had no right or entitlement to do so.

366. Having regard to the above matters, we consider that the case is more than comfortably made out on the balance of probabilities, approaching the matter with the *Briginshaw* approach in mind, particularly as regards circumstantial evidence. In any event, we note that Mr Levi's admission to Mr Louttit is not circumstantial evidence.

367. Moreover, in Sections F(i) to (iv) above, we have accepted Mr Louttit's evidence in general. In terms of Mr Louttit's evidence as a whole, we confirm that we found him to be a generally credible witness. Of course, "an assessment of the credibility of any particular witness must take into account the extent to which the testimony of that witness is, or is not, conformable to other evidence in the case": *Ballard v Multiplex* [2012] NSWSC 426 at [113]. In our view, Mr Louttit's evidence was conformable with the other evidence in the case.

368. Accordingly, we accept Mr Louttit's evidence, except to the extent that we have specifically noted otherwise. Mr Levi's case cannot stand with the acceptance of Mr Louttit's evidence, particularly in relation to the key question whether Mr Louttit knew of and authorised the use of the Biseja cheques to pay for Mr Levi's tax obligations.

369. We are satisfied that Mr Levi dishonestly used the funds of the First and Second Transactions for his own benefit knowing he had no right or entitlement to do so.

370. As to the falsification of the records, having regard to the evidence as a whole, we again consider that the case against Mr Levi is more than comfortably made out on the balance of probabilities, approaching the matter with the *Briginshaw* approach in mind, particularly as regards circumstantial evidence.

371. Looking at the evidence as a whole, we consider that the case against Mr Levi is clear.

372. Mr Levi had no profit share agreement relating to Biseja and so had no entitlement to receive any money from JLA or Biseja. Mr Levi fraudulently procured the payments without Mr Louttit's knowledge or consent. Clearly then he had a significant motive to seek to cover up the payments. For reasons discussed in Section F(iv) above, the objective circumstances support the conclusion that Mr Levi was responsible for the falsifications.

373. Further, as just discussed, we accept Mr Louttit's evidence generally. This was to the effect that Mr Louttit had no involvement or awareness of the payments to Mr Levi and that the first time he became aware of the discrepancies was in October 2010 when Mr Cavanagh raised them. Having accepted this evidence, as a matter of reality, Mr Levi must have been responsible. On the evidence before us, there is no logic in thinking that the falsifications could have been committed by anyone else.

374. Finally we should note, that although we are comfortably satisfied that Mr Levi falsified the records on the above basis, in addition, Mr Louttit was not cross-examined so as to suggest that he was responsible. It was just as serious to accuse Mr Louttit of falsifying the records, as it was to accuse Mr Levi. This was an aspect of the case where the rule in *Browne v Dunn* applied. There was no Response filed in this matter and it was not obvious that Mr Levi's case was going to be that Mr Louttit was responsible for falsification of the records. Indeed, Mr Levi's submissions included the submission that the evidence showed nothing more than a series of errors and anomalies in the firm's records which could have been attributable to anyone who worked in the office or otherwise had access to the records.

375. During the cross-examination of Mr Louttit, Mr Sutherland indicated that he did not propose to go through the rule in *Browne v Dunn* and put propositions to Mr Louttit in chapter and verse from Mr Levi's s19 examination[34]. However, the Chairperson indicated, in response to this statement, that if Mr Sutherland intended to make any really serious allegations against Mr Louttit, it would be necessary to put these allegations and the basis for the allegations to Mr Louttit[35].

376. We regard an allegation that Mr Louttit was responsible for the falsification of the records as a really serious allegation. Mr Louttit is a registered liquidator. He clearly had the responsibility for maintaining accurate records in relation to Biseja. If we were to find that he had falsified the Biseja records, this would amount to a finding of serious wrongdoing. It was important that if Mr Levi intended to allege that Mr Louttit had falsified the records, this needed to be put to him explicitly so that he could provide any explanation or deal with any material matters showing why he was not responsible. We do not consider that this was a technical matter. We note, for example, Mr Levi asserted that Mr Louttit was going away for April 2009[36]. There was no investigation of whether, in these circumstances, there was any real opportunity for Mr Louttit to falsify the records between the time of allegedly telling Mr Levi to "add [his] tax debt to the Biesja GST" on 2 April 2009 and the time that he went away (bearing in mind that the falsification occurred prior to 8 April 2009). We draw no inferences one way or another about this but simply raise it as the type of issue which

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34 [redacted]

35 [redacted]

36 [redacted]

might have been explored if it had been alleged that Mr Louttit was responsible for the falsifications.

377. Part of the function of the rule in *Browne v Dunn* is to facilitate assessment of the reliability and accuracy of the witnesses: *Rees v Bailey Aluminium Products Pty Ltd* [2008] VSCA 244; (2008) 21 VR 478 at [21]. Part of this may be the demeanour of a witness when faced with a specific allegation.

378. We do not know the reason why allegations of falsification were not put to Mr Louttit[37]. But whatever the reason, we do not believe that it would have been appropriate for us to find that Mr Louttit was responsible for the falsifications without the matter being put. We note that we are, for other reasons, comfortably satisfied that Mr Levi was responsible the falsifications, in any event. But this matter provides us with additional comfort as to the correctness of this finding.

G. The contentions

379. Against the background of the above findings, we return to address the Contentions.

(i) First contention. Mr Levi dishonestly used the funds of the First Transaction for his own benefit knowing he had no right or entitlement to do so.

380. For reasons already set out, we are satisfied that the First Contention is established.

(ii) Second contention. Mr Levi dishonestly used the funds of the Second Transaction for his own benefit knowing he had no right or entitlement to do so.

381. For reasons already set out, we are satisfied that the Second Contention is established.

(iii) Third contention. Mr Levi falsified the Biseja cashbook.

382. The Third Contention is that Mr Levi falsified the Biseja cashbook as follows:

(a) In the period between 31 March 2009 and 8 April 2009 by purporting to apply GST to deposits taken on property sales so as to create in the Biseja accounts an apparent increase in the amount payable to the ATO by Biseja but which amount when paid to the ATO was applied for the use and benefit of Mr Levi; and further and in the alternative;

(b) In the period between 6 July 2010 and 31 August 2010 by decreasing the actual amount paid to the ATO by Biseja and increasing the

[37] [redacted]

amounts recorded as paid to The Entrance 1st National and Gadens solicitors in the Biseja accounts; and further and in the alternative;

(c) In the period between 6 July 2010 and 31 August 2010 by decreasing the actual amount paid to the ATO by Biseja and increasing the amounts recorded as paid to The Entrance 1st National, the Receiver and Gadens solicitors in the Biseja accounts.

383. For reasons already stated, we are satisfied that the Third Contention is established.

(iv) Fourth Contention. Mr Levi dishonestly and without proper authority used the Biseja Funds of the First Transaction and the Second Transaction for his own benefit, regardless of whether or not the Receiver of Biseja (Mr Louttit) either knew and/or authorised either or both of the First Transaction and the Second Transaction.

384. Contention 4 asserts: Whether or not Mr Levi's conduct in using The Biseja Funds of the First and/or Second Transactions in the manner aforesaid was done with the knowledge of the Receiver, such conduct amounted to the unauthorised use of those funds for the reason that Mr Levi knew that at the time of the First and Second Transactions Mr Louttit had no right or entitlement to authorise the First or Second Transaction respectively. Mr Levi's conduct in using The Biseja Funds in the manner aforesaid was carried out by him dishonestly.

385. As we read Contention 4, it only arises for determination if we decide that Mr Louttit authorised the Transactions. As we have found that he did not, Contention 4 does not arise. This is the way the matter was put by Mr Priestley[38]. It is not appropriate to make findings in the alternative: cf *Legal Profession Complaints Committee v Detata* [2012] WASCA 214 at [23].

386. However, having considered the matter in detail, we set out our views on the question.

387. Contention 4 relies upon a series of propositions relating to the nature of receivership bank accounts and the knowledge of Mr Levi.

388. The first matter related the nature of the payments, (from the Biseja Receivership Account) and the provisions of s 421 of the Corporations Act:

(a) Section 421 imposes an obligation on a receiver to open and maintain a bank account;

(b) Mr Louttit opened such a bank account;

(c) The First Transaction and Second Transactions were payments made from the Biseja Receivership Account;

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38 [redacted]

(d) The receiver is under an obligation to pay money of the corporation that comes under his control into the account within 3 business days (section 421(1)(b) of the Act);

(e) The receiver is to ensure that no such account contains money other than the money of the corporation that comes under the control of the receiver (section 421(1)(c) of the Act);

(f) The receiver is required to keep such financial records to correctly record and explain all transactions that the receiver enters into as receiver (section 421(1)(d) of the Act).

389. Secondly, ASIC relied the general duties and obligations applying to receivers, including the fact that the relationship between a receiver and the chargee is a fiduciary one, the primary duty of a receiver is to the mortgagee or chargee under the mortgage or charge in respect of which they are appointed, a receiver is required to get in the assets of the company and to discharge the debts due from the company to the appointer, a receiver is under a duty to account to a mortgagor for surplus funds once the security has been discharged and receiver is also required to account to the mortgagor for his or her conduct of the receivership.

390. Thirdly, ASIC relied upon the terms of the Fixed and Floating Charge between Biseja and the Australian Executor Trustees Limited dated 3 August 2006, which prescribed the order in which money received by the Receiver (or Chargee) pursuant to the charge was to be applied as follows:

(a) Expenses the receiver incurs in exercise of its power in relation to any transaction document;

(b) Outgoings the receiver thinks appropriate to pay;

(c) Receiver remuneration;

(d) Indemnities, payment to the Receiver to give effect to any indemnities contained in the charge document;

(e) Prior Encumbrances;

(f) Secured money, payment to the charge of the secured money;

(g) Subsequent Encumbrances; and

(h) any surplus will belong to the charger or other persons entitled to it.

391. Fourthly, ASIC relied upon the Deed appointing Mr Louttit as Receiver, executed on 4 September 2008, which provided:

(a) that the Receiver will be and will act as the agent for the Chargor and otherwise the Receiver will be the agent of the Chargee (cl 5);

(b) that the Chargee fixed the remuneration of the Receiver and authorised the Receiver to draw remuneration calculated on an hourly basis at the rates which the firm of which the receiver is a partner normally charges for work of a similar nature (as done by his partners, consultants and employees).

392. Fifthly, ASIC asserted that Mr Levi knew or ought to have known, that at the time of the First and Second Transactions:

(a) no fees were due to JLA;

(b) there was no outstanding memorandum of fees issued by JLA to the Chargee; and

(c) there was no right or entitlement of JLA to make use of The Biseja Funds for the purpose of paying the debts of Mr Levi.

393. Sixthly, ASIC referred to the fact that Mr Levi at no time made any inquiry as to the matters set out in the preceding paragraph.

394. Seventhly, ASIC relied upon Mr Levi's application to become registered as a Liquidator of 24 April 2009. Accompanying Mr Levi's application was a "summary of employment history – corporate insolvency experience" . This summary also included a section on "experience at a very senior level in complex matters" referred to as Schedule B. Included in this section was a non-exhaustive description of his role in the receivership of Biseja. These matters were extensive but included:

(a) reporting directly to Receiver, overall supervision of the matter including staff resourcing and supervision;

(b) taking possession of, protecting and arranging the valuation of assets;

(c) reporting to and ongoing liaison with secured creditors; and

(d) providing opinions and recommendations on key financial and legal issues.

395. Eighthly, ASIC asserted that Mr Levi had day-to-day responsibility for giving direction on the Biseja receivership, reporting directly to Mr Louttit.

396. ASIC also relied on certain authorities dealing with the nature of a section 421 account and the obligations of receivers in relation to the property over which they are appointed. It was submitted that even a receiver was not a trustee of funds in a strict sense, s 421 and the terms of the debenture concerning payment obligations at least imposed an obligation on a receiver to account for and apply the proceeds in the account in accordance with the terms of the debenture (cf *Sheahan v Carrier Air Conditioning Pty Ltd & Campbell* (1997) 189 CLR 407).

397. In our view, had it been necessary to determine Contention 4, we would have held that it was established. We agree with each of the matters relied upon by ASIC and note that the first to fourth and seventh matters relied upon cannot really be contentious. We deal with the fifth matter below. We consider that the sixth matter (failure to make an inquiry) and the eight matter (Mr Levi having day-to-day control) were established on the evidence.

398. Mr Levi must have known about the requirements of s 421 and the obligations of receivers generally in dealing with property over which they are appointed, at the time of the two Transactions. In particular, Mr Levi must have known that Mr Louttit was not entitled to use the Biseja bank account to discharge Mr Louttit's personal obligations to Mr Levi.

399. We note, in this regard, that Mr Levi's application to become a registered liquidator is, in itself, evidence that Mr Levi put himself forward as being a person properly qualified to become registered, and thus, as having a proper knowledge and experience of matters of the type under consideration. There is a significant amount of material in that Application and its annexures (including the matters referred to by ASIC) indicating that Mr Levi had significant knowledge about the legal and technical requirements in this area, (Mr Levi having confirmed that all of the information in the application was correct[39]), see for example, Mr Louttit's letter of 24 April 2009 (Ann D) stating that "Mark's accounting, technical and legal knowledge of matters relating to insolvency is of a very high standard". Of course, Mr Levi's Academic Records notes that part of his Bachelor of Business degree included "Company Law" and "Law of Corporate Rec. & Deeds Arrang".

400. We have already found that Mr Levi knew that there were no fees outstanding as at the time of First and Second Transactions, and refer to our reasoning in Section F(i) above.

401. Mr Levi made no inquiry about whether the fees remained outstanding and, on Mr Levi's own version of events, Mr Louttit said nothing about the fees being outstanding (either on the occasion of the First Transaction or the Second Transaction). In those circumstances, a proposal by Mr Louttit that he would pay Mr Levi by means of a Biseja cheque (particularly one which was to deal with both Biseja' tax and Mr Levi's tax) cried out for inquiry. The circumstances of the case were such that a failure to make inquiry could only have been deliberate (or wilful and reckless). Those circumstances are:

    (a) Mr Levi must have known of the obligations in relation to s 421 accounts and the general obligations of receivers;

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[39] [redacted]

(b) Mr Levi's close involvement with the Biseja receivership, his reporting to the secured creditor on an "at times weekly basis";

(c) Mr Levi's knowledge that the Biseja fees were being rendered monthly;

(d) Mr Levi's knowledge that his own fees on the matter were being rendered to JLA monthly and paid very promptly;

(e) Mr Levi's knowledge of the fact that by the time of the First Transaction, the fees would have been four months overdue and by the time of the Second Transaction, ten months overdue.

402. We would infer that, in these circumstances, Mr Levi must have at least strongly suspected that the fees had been paid and that Mr Louttit had no entitlement to pay Mr Levi from the Biseja account. A failure by Mr Levi not to check whether the fees remained outstanding, in the above circumstances, supports a conclusion that he would have believed that the fees had been paid in fact and deliberately or wilfully and recklessly failed to confirm that matter.

403. As Tadgell JA said in *Macquarie Bank Limited v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 145:

> "Though part of the common law, the process of reasoning that authorises a conclusion to be drawn from a condition of so-called wilful blindness really depends on little more than common sense. In some circumstances it may be legitimate to infer that a person's "wilful shutting of the eyes", or wilfully and recklessly failing to enquire, is evidence that the person had no need to look or to enquire in order to know what would be plainly revealed by the merest glance or the most obvious enquiry. Such an inference, as Lord Esher M.R. said in *English and Scottish Mercantile Investment Co. Ltd. v Brunton* [1892] 2 Q.B. 700 at 708:
>
> > "... is an inference of fact drawn because you cannot look into a man's mind, but you can infer from his conduct whether he is speaking truly or not when he says that he did not know of particular facts. There is no question of constructive notice or constructive knowledge involved in that inference; it is actual knowledge which is inferred."

404. In the circumstances, even if Mr Louttit knew about and authorised the payments from the Biseja account, for Mr Levi to have accepted payment in the manner proposed by Mr Louttit, in the circumstances which prevailed and in the light of the knowledge Mr Levi must have had, would have been dishonest. He knew the account was a trust account or akin to a trust account. He knew that Mr Louttit was obliged to ensure that the account did not contain money other than the money of the corporation that came

under the control of the receiver. He knew that Mr Louttit could not take moneys from the account to pay for any obligation which JLA owed Mr Levi. He knew of circumstances strongly suggesting that the fees were no longer outstanding, yet he failed to undertake any simple inquiry to confirm this matter.

405. In any event, even if not dishonest, Mr Levi's conduct in accepting payment in the manner in which he did, and in the circumstances which prevailed, would in our view, still have shown that he was not a fit and proper person to remain registered as a liquidator. We note the following matters:

(a) Mr Levi either knew or ought to have known of the obligations of receivers in relation to s 421 accounts and their general obligations or he did not have knowledge of these extremely important matters;

(b) Mr Levi's close involvement with the Biseja receivership, his reporting to the secured creditor on an "at times weekly basis";

(c) Mr Levi's knowledge that the Biseja fees were being rendered monthly;

(d) Mr Levi's knowledge that his own fees on the matter were being rendered to JLA monthly and paid very promptly;

(e) Mr Levi's knowledge of the fact that by the time of the First Transaction, the fees would have been four months overdue and by the time of the Second Transaction, ten months overdue;

(f) Mr Levi's failure to render a tax invoice or any other meaningful supporting documentation in support of his claim and his acceptance of payment by means of a Biseja cheque rather than a JLA cheque, indeed, his acceptance of a Biseja cheque which was to be used to pay both Biseja's tax *and* Mr Levi's personal tax – a form of Transaction which we believe to be highly inappropriate as a means of effectuating a legitimate payment of fees.

406. In those circumstances, even if we had found that Mr Levi was not actually dishonest, he ought to have known that receiving payment from the Biseja Receivership Account and using those funds for his own purpose was dishonest.

407. However, as already indicated, as Contention 4 proceeds on the basis that Mr Louttit authorised the Transactions, and, as we have found that he did not, it is not necessary to make a determination on Contention 4.

(v) Fifth contention. Mr Levi's conduct in answering ASIC's allegation of the First Transaction and Second Transaction show him not to be a fit and proper person to be a registered liquidator.

408. The Fifth Contention is that Mr Levi's conduct in answering ASIC's allegation of the First Transaction and Second Transaction show him not to be a fit and proper person to be a registered liquidator for two reasons:

(a) Mr Levi ought to have realised the First Transaction and the Second Transaction were a dishonest use of Biseja funds regardless of whether Mr Louttit knew and/or authorised the First Transaction or Second Transaction or both of them.

(b) Mr Levi's denial of using The Biseja Funds of the First Transaction and the Second Transaction without Mr Louttit's consent is false.

409. As already indicated, the Fifth Contention involves two alternatives. Contention 5(a) is based upon the proposition that even if Mr Louttit knew of and authorised the Transactions, Mr Levi ought to have realised that the Transactions were a dishonest use of Biseja's funds. As we have found that Mr Louttit did not know of or authorise the Transactions, this Contention does not arise.

410. Accordingly, we turn to consider Contention 5(b).

411. Mr Priestley submitted that this Contention related to the fact that Mr Levi had shown himself to be not a fit and proper person by the way he had conducted these proceedings, in the sense of "denying and showing a lack of insight and acknowledging his wrongdoing". He submitted that if Mr Levi had any hope at all of remaining on the register, he needed to immediately confess and explain himself and point to some mitigating circumstances to why a defalcation should not result in cancellation. By failing to do that, and batting on bravely, suggesting that "black is white" confirmed that he is not a fit and proper person.

412. We do not accept this as an accurate summary of Contention 5(b). In particular, the Contention does not relate to the way Mr Levi has conducted these proceedings. The Contention, as particularised, relates to Mr Levi's conduct prior to the filing of the SOFAC. The thrust of the allegation is that:

(a) On 28 October 2010, Mr Levi told Mr Louttit that he had used $50,000.00 to pay his tax;

(b) Subsequently, ASIC alleged to Mr Levi that he had acted as alleged in the First and Second Contentions;

(c) Mr Levi denies that he used the funds without the consent of Mr Louttit;

(d) The reliance by Mr Levi on alleged instructions of Mr Louttit as authorising the conduct in the First and Second Transactions show him not to be a fit and proper person because the said denial is false;

(e) The version of events given by Mr Levi was false.

413. In other words, the Contention is directed at events taking place before these proceedings. It focuses upon (a) the fact that Mr Levi initially admitted the misappropriation but later asserted to ASIC that Mr Louttit had authorised the use of the funds and (b) the falsity of Mr Levi's version of events.

414. No objection was taken by Mr Levi to Contention 5(b) as a matter of principle. In our view, there is no difficulty in this regard as the allegation was clearly particularised as part of the case (cf *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 269; *Barwick v Council of the Law Society of New South Wales* [2004] NSWCA 32 at [90]*ff*, [103]*ff*).

415. In our view, Contention 5(b) is established. We have found that Mr Levi dishonestly misappropriated Biseja funds for his personal benefit and that he dishonestly falsified Biseja records. We have found that he admitted the misappropriation. We have accepted, generally, the evidence which Mr Louttit gave in these proceedings.

416. It must follow from our findings that, in responding to ASIC's claim, the version of events put forward by Mr Levi is false. We have found that the March Biseja Claim and the October Biseja Claim were documents which Mr Levi created to support his version of events. Mr Levi's version of events was, in the circumstances, not only dishonest but must have been deliberate in the sense that Mr Levi must have planned a false story (involving the fabrication of documentary records).

417. We should add that this is not simply a case where the Board has preferred one of two competing versions of events, where it is possible for the Board to find that Mr Levi's assertions involve an honest mistake or lapse of recollection. This is a case where there is a direct and irreconcilable conflict of evidence and there is no real possibility of honest mistake. It is a case where it was necessary to consider which of Mr Levi or Mr Louttit was deliberately untruthful.

418. We have decided that Mr Levi's version of events is false, in the sense of deliberately untruthful: *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 271–272. ASIC relies upon that falsity in this case as an additional basis for a finding that Mr Levi is not a fit and proper person to remain registered as a liquidator.

419. We consider that Contention 5(b) is established.

(vi) Sixth Contention. Mr Levi failed to ensure that proper records were kept of the First Transaction and/or the Second Transaction and each of them.

420. As to the Sixth Contention, we accept the general thrust of Mr Levi's submissions and reject this Contention.

421. In the course of submissions, we questioned Mr Priestley as to the nature of the obligation which was breached by Mr Levi in failing to ensure that proper records were kept of the First and Second Transaction.

422. Mr Priestley's ultimate submission on this issue was that if we found the Transactions were legitimate, there would have been a pretty significant oversight in not recording the significant payments being made to Mr Levi, when he was the person having day-to-day control, albeit not having ultimate responsibility, for the receivership.

423. On this basis, the question does not arise, because we have not found that the Transactions were legitimate. We should add that the Contention would fail, in any event, both as a matter of obligation and as a matter of fact. As to the question of obligation, ASIC failed to identify the source and nature of the alleged obligation. We agree with Mr Levi's submissions in this regard. Mr Louttit was the person with responsibility for keeping accurate records. As to the question of fact, if Mr Levi's case is accepted, Mr Louttit told him he would fix up the records.

424. We consider that this Contention is not established.

H. Do one or more of the Contentions establish that Mr Levi is not a fit and proper person to remain registered as a liquidator?

425. ASIC contends that Mr Levi is not a fit and proper person to remain registered as a liquidator within the meaning of section 1292(2)(d) of the Act on the grounds set out in the six Contentions.

426. ASIC contended that the conduct summarised in the SOFAC at paragraphs 2 to 25 related to Mr Levi's honesty and integrity and competence and compromises his fitness to remain registered as a liquidator.

427. ASIC submitted that Mr Levi had clearly acted with deceit or conscious impropriety, or with intent to gain improper benefit or advantage for himself, and with carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all was made by him to carry out the duties and obligations of his office imposed by the Act. ASIC drew attention to the fact that Mr Levi made the application to be registered as a liquidator on 24 April 2009, approximately 3 weeks after the First Transaction.

428. No submissions were made on behalf of Mr Levi in relation to the "fit and proper person" test and as to whether, if the Contentions were established against him, he would satisfy the test.

(i) "Fit and proper person".

429. As already indicated, ASIC brings this Application relying upon the "fit and proper person" limb of s 1292(2) of the Corporations Act.

430. Section 1292(2) relevantly provides:

> "(2) The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section:
>
> (a) the person has:
>
> (i) contravened section 1288; or
>
> (ii) ceased to be resident in Australia; or
>
> (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
>
> (i) the duties of a liquidator; or
>
> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
>
> or is otherwise not a fit and proper person to remain registered as a liquidator;
>
> by order, cancel, or suspend for a specified period, the registration of the person as a liquidator."

431. The reference to "fit and proper person" provides a separate basis from the other matters in s 1292(2)(d) for the Board to cancel or suspend a liquidator's registration: *Davies v Australian Securities Commission* (1995) 59 FCR 221 at 295. Mr Levi did not contend otherwise.

432. ASIC relied upon the oft-cited authority *Hughes and Vale Pty Ltd v. The State of New South Wales (No. 2)* (1955) 93 CLR 127 ("*Hughes*"), particularly the following passage in the judgment of Dixon CJ, McTiernan and Webb JJ (at 156-7):

> "The expression "fit and proper person" is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty, knowledge and ability: "honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it" - *Coke.* When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it

would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances: *R. v. Hyde Justices* (1912) 1 KB 645, at p 664"

433. ASIC relied upon *Hughes* in submitting that honesty was an essential element for a person to be a "fit and proper person".

434. The passage in *Hughes* encapsulates the essence of the concept of a "fit and proper person". The expression is employed as a test for capacity to perform an office or role in a wide variety of circumstances. Whilst there are three facets to the test, "honesty, knowledge and ability", these are flexible concepts. The "honesty, knowledge and ability" required will be informed by the nature of the office concerned.

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

436. The role of a liquidator is, without question, one which involves a high degree of responsibility and trust. A liquidator is invested with control of a corporation for the purpose of recovery and realisation of its property and the distribution of the proceeds to those entitled, usually creditors. The relationship between liquidator and corporation is a classic fiduciary relationship, involving reliance and trust. In *Pace v Antlers Pty Limited* (1998) 26 ACSR 490 at 501, Lindgren J approved the following extract from McPhersons *The Law of Company Liquidations* (3rd ed, 1987), at pp 214-15:

> "From the practical point of view it does not seem to matter much whether the liquidator is treated as a trustee in the strict sense or simply as an agent, for in either capacity he occupies a fiduciary position in relation to the company, its creditors and contributories. This imposes upon him certain obligations identical with those resting upon trustees, agents, and directors, one of which is that he is bound to act honestly and to exercise his powers *bona fide* for the purpose for which they are conferred and not for any private or collateral purpose. In addition, two further duties of major importance follow from his fiduciary relationship: these are (a) that he must not allow his private interest to come into conflict with his duty, and (b) that in discharging his duties he must at all times act with complete impartiality as between the various persons interested in the property and liabilities of the company".

437. Liquidators are also subject to the obligations imposed under section 182 of the Corporations Act, not to improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation.

438. Whilst not determinative, ASIC has issued Regulatory Guide 186 in relation to Liquidator Registration, dealing with ASIC's policy in registering a liquidator. That Guide includes:

> "We will only be satisfied that you are a fit and proper person to be registered as a liquidator if we are satisfied as to your honesty, integrity, good reputation and personal solvency."

439. And:

> "When we consider ... whether you are 'otherwise' a fit and proper person to be registered as a liquidator, we will specifically consider whether *a person* has the honesty, integrity, good reputation and personal solvency that we think a registered liquidator must have in view of:
>
> (a) The fiduciary nature of a registered liquidators' duties and functions when appointed as an external administrator;
>
> (b) The fact that registered liquidators as external administrators often have control of very large amounts of money, other property, financial facilities and financial obligations that belong to third parties; and
>
> (c) The need for a registered liquidator's words and actions to be regarded with complete trust by persons who deal with them in their capacity as an external administrator."

440. As to the meaning of "honesty", ASIC relied upon the dictum of Palmer J in *Hall v Poolman* (2007) 65 ACSR 123 at 193-194 (approved by Goldberg J in *Re McLellan; The Stake Man Pty Ltd v Carroll* (2009) 76 ACSR 67; [2009] FCA 1415 at [190]):

> "[325] In my view, when considering whether a person has acted honestly for the purposes of a defence under ss1317S(2)(b)(i) or 1318 of the CA, the court should be concerned only with the question whether the person has acted honestly in the ordinary meaning of that term, that is, whether the person has acted without deceit or conscious impropriety, without intent to gain improper benefit or advantage for himself, herself or for another, and without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all has been (sic) to carry out the duties and obligations of his or her office imposed by the Corporations Act or the general law."

441. In our view, it really cannot be a matter of debate (and it did not appear to be in dispute) that honesty is an essential requirement for the proper performance by liquidators of their professional duties. Liquidators are required to act honestly in the performance of their professional

responsibilities, but particularly when dealing with company property. Liquidators must be capable of being trusted with the control of a company's property. They must be capable of being trusted to deal with that property only as authorised by law and in the interests of those entitled.

442. In a sense, this is not only a matter of character, but also capacity. To perform the role of a liquidator adequately one must have a capacity to properly deal with and account for the corporation's property and the capacity to be trusted and retain the trust of those whose interests are affected[40]. Whether regarded as a matter of character or capacity, the requirement of honesty is an essential attribute for a person for the proper performance of the office of liquidator.

443. Assessment of whether a person is a "fit and proper" person to remain registered may involve assessment of likely future conduct. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; [1990] HCA 33 Toohey and Gaudron JJ said (at 380):

> "36. The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.
>
> 37. Whether the fitness and propriety of a licensee to hold a commercial licence are sufficiently ascertained by reference to its character or reputation, or must be ascertained by reference to the conduct of its affairs and activities, is a question the answer to which must be found by implication from the provisions of the Broadcasting Act dealing with the grant, renewal and revocation or suspension of a commercial licence and from the activities to be undertaken pursuant to the licence."

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[40] Cf *Re Su and the Tax Agents Board of South Australia* (1982) 82 ATC 4284, at 4286.

(ii) Is Mr Levi a "fit and proper person" to remain registered?

444. In our view, the misappropriation of company funds is, by any standards, a serious act of dishonesty. Having regard to the nature of a liquidator's office, as described above, commission of such an act is, as a general matter, inconsistent with being a "fit and proper person" to remain registered as a liquidator[41].

445. The misappropriations in the present case were particularly serious in the context of the profession with which we are presently concerned. They were carried out by Mr Levi in his professional capacity. He misappropriated funds from a company in receivership whilst he was a senior member of the receiver's staff. Biseja was totally reliant upon the receiver (and his staff) to deal with and account properly for its assets and property.

446. The timing of the misappropriations is relevant. Mr Levi was in the process of seeking registration as a liquidator at the time of the First Transaction and had been registered by the time of the Second Transaction. We believe, as a result, that he would have had a heightened awareness of the significance of the office of liquidator and of the obligations of that office, particularly the requirement to act honestly and to discharge the trust imposed upon him. It cannot seriously be doubted that Mr Levi would have had the fullest appreciation of the nature of his obligations in relation to Biseja's funds and the seriousness of his actions (particularly in view of the experience to which he referred in his application to be registered). If he did not, in a sense, that only makes things worse.

447. In our view, the fact that Mr Levi carried out misappropriations on two occasions, some six months apart, is relevant. In other words, this was not a single incident where Mr Levi had a momentary lapse. He committed the first misappropriation in April 2009. There was no indication that he regretted his actions or attempted to restore the funds thereafter. Six months later, having built up a much larger tax debt, he repeated his wrongdoing.

448. On the evidence, there was nothing which diminished or mitigated the seriousness of Mr Levi's conduct. The fact that Mr Levi was having difficulty paying his tax provided no justification for, or mitigation of his conduct. Whilst, at times, self-employed taxpayers may encounter problems in meeting their taxation obligations, those obligations are a fact of life and taxpayers must make provision, one way or another, to ensure that those obligations can be met – and met in a way which does not involve misappropriating other people's money.

449. There appeared to be a suggestion that Mr Levi's predicament resulted from the fact that he was retained as a contractor rather than a PAYG

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[41] Cf *Re Su and the Tax Agents Board of South Australia* (1982) 82 ATC 4282, at 4286-7.

employee. We are not sure that Mr Levi intended to rely upon this as relevant to the issue whether he was a fit and proper person. If he did, we reject any such submission. First, this matter is simply irrelevant as a justification for misappropriation of funds. Secondly, it was Mr Levi's responsibility to arrange his affairs in a way which enabled him to comply with his taxation obligations. If he found it impossible to do so whilst retained as a contractor, he should have insisted upon being retained as a PAYG employee or, if Mr Louttit refused to oblige, he should have sought employment elsewhere.

450. In any event, we have some doubts about Mr Levi's grievances in this regard. We note that Mr Levi sent a letter to ASIC on 21 May 2009 in support of his application to become registered as a liquidator enclosing extracts from JLA's human resources manual noting:

> "the firm has engaged external HR consultants to provide strategic and operational advice on the firm's human resourcing capabilities, gaps and requirements. This has resulted in an enhancement of the firm's policies and procedures with respect to the hiring and retaining of professional and administrative staff."

451. We consider that the misappropriations by Mr Levi in the circumstances outlined above show that Mr Levi is lacking in an essential attribute for the proper performance of the office of liquidator. The seriousness of his acts of dishonesty and the fact that there was not simply one isolated incident means that it is inappropriate to assume (and the community could not be confident) that the conduct will not recur.

452. We consider that the matters established on each of Contentions 1 and 2 alone demonstrate that Mr Levi is not a fit and proper person to remain registered as a liquidator.

453. Mr Levi's further actions in falsifying the Biseja records (Contention 3) confirm that Mr Levi is not a fit and proper person to remain registered. These actions show, again, that Mr Levi's dishonesty was not a momentary lapse. The initial falsifications show that Mr Levi hoped to avoid detection at the time. The later falsifications confirm that Mr Levi was still attempting to avoid detection and responsibility for his actions well after the event (in August 2010).

454. In our view, the deliberate falsification of records for the purpose of concealing his initial acts of dishonesty reveals that Mr Levi has a character which is fundamentally inimical to fitness to practise as a liquidator.

455. We consider that the matters made out in Contention 3 demonstrate that Mr Levi is not a fit and proper person to remain registered as a liquidator.

456. Mr Levi's further actions in denying that he had admitted misappropriation and putting forward a false version of events to ASIC (Contention 5(b))

provides an additional basis for concluding that Mr Levi is not a fit and proper person to remain registered as a liquidator. Having admitted his wrongdoing to Mr Louttit (albeit in a limited way initially) and having repaid the moneys he had taken, Mr Levi decided to create a false story. It is obvious that he did this in order to deflect blame from himself and avoid the consequences of his actions. This shows that Mr Levi is persistently dishonest. His actions provide an additional reason to conclude that Mr Levi is a seriously dishonest person unsuitable to be practising as a liquidator.

457. We consider that the matters made out in Contention 5(b) demonstrate that Mr Levi is not a fit and proper person to remain registered as a liquidator.

458. Overall, whether considered individually or together, the matters in Contentions 1, 2, 3 and 5(b) demonstrate that Mr Levi is not a fit and proper person to remain registered as a liquidator.

I. Appropriate orders

459. On 26 June 2013, the Panel held a hearing in relation to what orders, if any, should be made under s 1292 of the Act in relation to Mr Levi, having regard to our determination that he was not a fit and proper person to remain registered as a liquidator.

460. We should note that when we handed down our determination on 14 June 2013, we directed that the hearing on sanctions, publication and costs would take place on 26 June 2013. On 19 June 2013, Mr Levi's solicitors wrote to the Board seeking an adjournment of the 26 June hearing, substantially on the basis that counsel briefed had insufficient availability to prepare the matter. The Chairperson held a Pre-Hearing Conference in relation to that issue on 21 June 2013. At that conference, it emerged that a significant concern for Mr Levi was the issue of publication. The Chairperson indicated that the issue of publication would not be dealt with on 26 June, but indicated that the hearing would otherwise proceed, at least on the question of sanctions. However, the Chairperson also indicated that this would not foreclose any application by Mr Levi on 26 June for a further opportunity to be heard or raise any matter in relation to sanctions, should he wish.

461. At the hearing on 26 June 2013, Mr Sutherland SC made submissions in relation to sanctions. At the close of those submissions, he confirmed that he did not seek any further opportunity to put any additional matters to the Board on the question of sanctions.

462. A further hearing will take place in relation to the question of publicity and costs.

463. As to the question of sanctions, Mr McNally SC and Mr Priestley on behalf of ASIC submitted, in essence, that cancellation of Mr Levi's registration was inevitable, in the light of our findings.

464. Their submissions emphasised the nature and extent of our findings. We do not need to set these out again in chapter and verse. Suffice to say that we have made findings that Mr Levi engaged in serious acts of dishonesty in misappropriating funds, in falsification of records in order to disguise misappropriation and in putting forward a false version of events after having admitted the misappropriation to Mr Louttit. Mr Levi's dishonesty was not an isolated lapse, but involved dishonesty on a number of occasions over a period of time. We have found that Mr Levi has been persistently dishonest, that it is inappropriate to assume (and the community could not be confident) that his conduct will not recur and that his actions show that he has a character which is fundamentally inimical to fitness to practise as a liquidator.

465. ASIC submitted that cancellation was inevitable in the light of these findings, particularly given the fact that the principal objective of the proceedings was protection of the public. ASIC submitted that the position was analogous to the position of solicitors and made reference to a number of authorities which have held that striking off rather than suspension is appropriate in cases involving serious misconduct of the present type (see in particular, *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 and *Queensland Law Society Inc v Carberry* [2000] QCA 450).

466. Mr Sutherland SC submitted, in essence, that the Board ought not cancel but rather ought suspend Mr Levi's registration. Mr Sutherland noted that whilst Mr Levi maintained his instructions as to the facts, nevertheless, in making submissions on sanctions, he accepted that he was restricted by our findings.

467. He sought to distinguish the cases dealing with solicitors on the basis that solicitors have a particular and peculiar position of trust vis-à-vis the public and also vis-à-vis the courts. He submitted that in concluding that the community could not be confident that Mr Levi's conduct would not recur, the Board was adopting the wrong approach and that the question should be: is there any reason to draw an inference that the conduct would recur? He submitted that the events in question were isolated when compared to Mr Levi's previous and subsequent conduct. He submitted that Mr Levi had conducted some 18 liquidations since becoming a liquidator himself and, in relation to the major one, he had been subjected to a detailed audit by ASIC and this had revealed no complaints.

468. He noted that Mr Levi had repaid in full the amounts in question. He submitted that, in the above circumstances, the Board should provide some light at the end of the tunnel for a young man in circumstances where his conduct should be seen as confined to the period of the events in question.

469. We accept ASIC's submissions that cancellation of Mr Levi's registration is the appropriate order in the circumstances of the present case.

470. The High Court has confirmed that the power exercised by the Board is "an evaluative and discretionary power in the protection of the public" (see *Albarran v Members of the CALDB* (2007) 231 CLR 350 at [29], adopting the language of the Full Court of the Federal Court). In our view, protection of the public is a primary consideration in determining whether we should exercise our powers and if so, in what way. Protection of the public, in this sense, involves both direct protection against further default by the respondent concerned and also the protection to be obtained by dissuading others from acting in a similar way. This emerges from the following passage in the judgment of Mahony JA in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 440-1 (which, whilst concerned with the discipline of solicitors, is nonetheless instructive in the present context):

> "What, then, are the purposes of the orders to be made and the considerations to be taken into account? It has frequently been said that disciplinary procedures and the orders made in the course of them are directed not to the punishment of the solicitor but to the protection of the public. This, of course, is true. The protection of the public has been described as, for example, the primary purpose or a primary object of such proceedings: *Walter v Council of Queensland Law Society Inc* (1988) 62 ALJR 153 at 157E; 77 ALR 228 at 235; *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 270 per Deane J; or one of the primary objects of the proceedings and the orders made: see *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 251. In the relevant sense, the protection of the public is in my opinion not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors and has, in this sense, the purpose of publicly marking the seriousness of what the instant solicitor has done."

471. We have found that Mr Levi is not a fit and proper person to remain registered as a liquidator. The nature of Mr Levi's conduct means that cancellation is required. Suspension would be inappropriate. In our view, Mr Levi's repeated and persistent dishonesty means that the only appropriate means of serving the purpose of protection of the public (in the above sense) is to cancel Mr Levi's registration.

472. We do not agree with Mr Sutherland that unless it can be shown that there is reason to infer that the conduct will recur, we should not cancel. As we have found, Mr Levi's conduct demonstrates a character which is fundamentally inconsistent with fitness to practise as a liquidator. It would be inappropriate to suspend Mr Levi's registration for some particular period, based upon nothing more than speculation that this proclivity may disappear within such period.

473. The approach of the Queensland Court of Appeal in *Queensland Law Society Inc v Carberry* [2000] QCA 450 is apposite. In that case, the Tribunal had found that the respondent had acted where there was a potential conflict of interest but it was not satisfied that the respondent deliberately preferred the interest of someone other than his own client. It went on to find that the respondent's attention to instructions "displayed a lack of competence and ignorance" and that "in the circumstances of the potential conflict of interest, the interests of others were inadvertently or accidentally advanced". The Tribunal suspended the respondent from practice for 12 months. In the Court of Appeal, at para [40] and following, Moynihan SJA and Atkinson J said:

> "**[40]** The Tribunal did not provide any reasons in support of its decision to suspend the respondent from practice for 12 months and require that he attend and successfully complete a practice management course. Once it has been determined that a solicitor is unfit to practice, a suspension, even coupled with an order to satisfactorily complete a practice management course, could only apply in exceptional circumstances: *Attorney-General v Bax* ante at 20; *Ziems v Prothonotary of the Supreme Court of New South Wales* ante at 268; *Mellifont v Queensland Law Society Incorporated* [1981] 1 Qd R 17 at 30-31. An order for suspension should be based on a view that, at the termination of a period of suspension, the practitioner will no longer be unfit to practice: *The Law Society of New South Wales v McNamara*, NSWCA No 160 of 1979, 7 March 1980, approved in *Mellifont v The Queensland Law Society Inc* ante at 31.
>
> **[41]** The course of conduct found against the practitioner and the explanations he proffered for it, are not conducive of a conclusion that, at the termination of the period, the respondent would be no longer unfit to practice and it is not in the public interest that he should be permitted to do so. The fact that his name has been removed from the Roll of Solicitors does not prevent the respondent in the future re-establishing his credentials and worthiness to be a solicitor and readmitted."

474. With respect, we consider this approach (applied in a case involving far less serious conduct than the present) is appropriate in the exercise of discretions under s 1292. We consider that Mr Levi is not a fit and proper person to remain registered as a liquidator. We have no basis for concluding that that position will change within some particular period.

475. We do not agree with Mr Sutherland that there is a meaningful basis for distinguishing the cases dealing with solicitors relied upon by ASIC. The obligations and duties of solicitors and liquidators are not the same but honesty and trustworthiness are essential to the performance of both roles. The level of honesty and trustworthiness required of a liquidator cannot be of such an attenuated character that serious acts of dishonesty, such as

occurred in the present case, may be dealt with by a period of suspension. Mr Levi's conduct in the present case was fundamentally at odds with proper performance of the office of liquidator, to such a degree that cancellation of his registration is demanded.

476. The fact that Mr Levi's dishonesty was confined to a particular period is hardly persuasive when, that period extended effectively from April 2009 (his first misappropriation) to at least 2011 (the time at which he advanced a false version of events and denied having admitted misappropriation). In any event, as we have noted above, the acts of dishonesty were repeated and persistent; there was not a single momentary lapse. Whilst Mr Sutherland made reference to absence of complaint about Mr Levi's conduct following the ASIC audit, there was no evidence about this. And even if there was evidence of this, it would not alter our view that cancellation was required, having regard to the seriousness of the conduct which actually took place.

477. Accordingly, in all the circumstances, we consider that cancellation of Mr Levi's registration is necessary and appropriate.

Decision

478. For the reasons set out above, we have decided to exercise our power under s 1292 of the Act to cancel the registration of Darren Mark Levi as a liquidator.

Date of effect of order

479. No submissions were made at the sanctions hearing in relation to the appropriate time at which our order is to come into effect. 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).

480. By letter dated 26 June 2013, Mr Levi's solicitors requested that we determine that our order not come into effect for a period of 28 days after it is made, in order to permit Mr Levi to make an application to the Administrative Appeals Tribunal. ASIC has not raised any issue regarding Mr Levi's request (although strictly, the request ought to have been made at the sanctions hearing on 26 June).

481. We consider that it is appropriate, in any event, to delay the date upon which our order comes into effect, at least for the purpose of permitting Mr Levi to make transitional arrangements for Mr Levi's appointments. In all the circumstances, we consider that it is appropriate to accede to Mr Levi's request that our order will not come into effect for a period of 28 days.

482. Mr Levi's solicitors also requested that the notice of our decision not be formally lodged or published in the Gazette pending a decision on publicity. This confuses two different issues. The Board is under a statutory

obligation to lodge the notice of its decision and cause to be published in the Gazette a notice setting out the decision. The argument yet to be considered on publicity will relate to whether it is appropriate for the Board to take additional steps to publicise the Decision.

Notice

483. Within fourteen days of the date hereof, formal notice of this Decision will be given to Mr Levi under s 1296(1)(a) of the Act, 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

484. We order:

(a) That the registration of Mark Darren Levi as a liquidator be cancelled;

(b) That this order will come into effect 28 days after the date hereof.

Howard K. Insall SC
Chairperson of the Panel

2 July 2013
Sydney

Counsel for the Applicant	Mr Jonathon Priestley (6 to 9 May 2013) Mr Greg McNally SC (26 June 2013)
Solicitor for the Applicant	Ms Rashpal Hartmann of ASIC
Counsel for the Respondent	Mr Robert Sutherland SC and Mr Steven Golledge
Solicitor for the Respondent	Mr John Sutton of Armstrong Legal

GLOSSARY

AET	Australian Executor Trustees Limited (ACN 007 869 794)
Application	The application made by ASIC in the SOFAC for Mr Levi to be dealt with by the Board under s1292
ASIC	Australian Securities and Investments Commission
Bacchus	Bacchus and Associates Pty Limited
ASIC Submissions	ASIC's outline of submissions
ATO	Australian Taxation Office
BAS	Business Activity Statement
Biseja	Biseja Pty Limited (Receiver and Manager Appointed) (ACN 003 016 144)
Board	Companies Auditors and Liquidators Disciplinary Board
Corporations Act	Corporations Act 2001
First Invoice	JLA's first invoice on the Biseja matter in the sum of $90,454.10, relating to September 2008
First Transaction	$22,737.87 was paid by cheque from the Biseja Receivership Account into Mr Levi's account with the ATO in respect of Mr Levi's personal tax liability which had been assessed.
Hearing	The hearing of the Application
GST	Goods and Services Tax
Gospa	Gospa Pty Limited
Holden	Holden Street Pty Limited
ICAA	Institute of Chartered Accountants in Australia
JLA	Jamieson Louttit & Associates (which is the trading name of a company known as ACN 120 764 365 Pty Limited)
March Biseja Claim	Exhibit 10 – Biseja Split Mar-09
Mr Cavanagh	Mr Shannon Cavanagh, a director of Bacchus
Mr Golledge	Mr Steven Golledge
Mr Levi	Mr Mark Darren Levi
Mr Linton	Mr Michael Linton
Mr Louttit	Mr Jamieson Andre Louttit
Mr Priestley	Mr Jonathon Priestley
Mr Sutherland	Mr Robert Sutherland SC
Ms Koka	Ms Amelia Ruby Koka
Ms Ratcliffe	Ms Jessica Ratcliffe

October Biseja Claim	Exhibit 2, Tab 23 – Biseja Split Oct-09
Panel	The panel of the Board constituted to deal with the Application
Second Transaction	$69,022.00 was paid by cheque from the Biseja Receivership Account into Mr Levi's account with the ATO on account of Mr Levi's personal tax liability which had not been the subject of a formally issued notice of assessment.
SOFAC	Amended Statement of Facts and Contentions filed with the Board on 22 April 2013
The Biseja Receivership Account	The Biseja ANZ Business Cash Account (4805-17307)
Tresedar	Tresedar Pty Limited (ACN 003 377 642)