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/QLD14

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

JONATHAN PAUL MCLEOD
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.

12 JUNE 2015

Panel:

Maria McCrossin (Panel Chairperson)

Robert Ferguson

Karen O'Flynn

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DECISION AND REASONS

Introduction

The Application

1. This is an application under s1292 of the Corporations Act 2001 ("the Act") lodged on 13 May 2014 with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC"). By the application, ASIC asks the Board to cancel or suspend the registration of Mr Jonathan Paul McLeod ("Mr McLeod") (a registered liquidator).

Relevant background

2. Mr McLeod has been a registered liquidator pursuant to s1282 of the Act since 13 January 1999, and since 3 June 2005, he has been registered as an official liquidator pursuant to s1283 of the Act. He has worked in accounting practices or conducted his own accounting practice since 1986.

3. He conducts and continues to conduct his practice as a registered liquidator through the firm of McLeod & Partners (QLD) Pty Limited ("McLeod & Partners") and he is a director of McLeod & Partners. The firm's principal place of business is in Brisbane. From 2005 to date Mr McLeod has undertaken and supervised over 1,000 insolvency appointments, including in excess of 350 voluntary administrations.

4. The alleged conduct referred to in the Statement of Facts and Contentions ("SOFAC") filed by ASIC took place in respect of external administrations by Mr McLeod of 17 companies, comprising 9 Voluntary Administrations and 8 Creditors Voluntary Liquidations.

5. The Respondent has filed a response in the proceedings dated 18 July 2014 responding to the SOFAC.

6. The hearing commenced on Tuesday 25 November 2014 and continued for 3 days. Mr Scott McLeod of counsel ("ASIC's counsel") appeared for ASIC and Mr Jonathan Priestley of counsel ("Mr Priestley") appeared for Mr McLeod.

The SOFAC

Structure of the SOFAC and references to "breach" of statutory provisions

7. ASIC contends that the conduct alleged in the 24 Contentions pleaded and particularised demonstrates that:

> "*(a) in the case of each External Administration, Mr McLeod has failed to carry out and perform adequately and properly the duties of a liquidator or the duties and functions required by the Act to be carried out or performed by a liquidator;*

(b) by reason of the failings, McLeod is not a fit and proper person to remain registered as a liquidator;

(c) the number and range of failures shows systemic deficiencies in McLeod's practice;

(d) in the case of each External Administration, the failures are sufficient to warrant admonishment or reprimand; and

(e) in several cases, and certainly when all are considered collectively, the failures justify cancellation or suspension of Mr McLeod's registration as a liquidator."

8. While it is of course clear from the application filed and the introductory paragraphs of the SOFAC that this is a matter brought under s1292 of the Act, the 24 Contentions in the SOFAC do not separately plead the alleged acts and/or omissions of Mr McLeod by reference to the wording of s1292(2)(d) of the Act but rather plead *breaches* of specific legislative provisions and professional codes. For example Contention 1 states:

"*By failing to investigate the affairs of AAR, properly or at all, including possible voidable transactions carried out by the director of AAR during the period September 2011 to April 2012, Mr McLeod:*

(a) acted in breach of Section 438A(a) of the Act, in that he failed to properly investigate the affairs of AAR;

(b) acted in breach of clause 25.5 of the 2011 IPA Code;

(c) failed to act diligently as required by Section 130.1(b) APES110; and/or

(d) acted in breach of Section 180(1) of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that Section."

9. There then follow three pages of factual particulars relating to Contention 1 that include the material allegations of fact which ground the contention made. Each of the 24 contentions is drafted in a similar fashion.

10. The SOFAC includes a table summarising details of the 24 contentions being alleged and states *"Mr McLeod's conduct is the subject of specific contentions which are set out in summary in the following table, identifying the provisions alleged to be breached by his conduct, and the role held by Mr McLeod at the time (being voluntary administrator (VA) or creditors' voluntary liquidator (CVL)."* That table does not refer to s1292 of the Act.

11. The inclusion of references within contentions to particular legislative provisions, as well as published professional standards applicable to liquidators such as the IPA Code, is an established practice in SOFACs drafted by ASIC and filed with the Board. Generally these references are useful as they provide a starting point for consideration of the question of

whether the matter complained falls within the ambit of the phrase *"duties of a liquidator"* in s1292 (2)(d) of the Act. They also provide a framework within which the Board and the Respondent may consider the conduct alleged in terms of the appropriate standard to be met and assist to inform the evaluative and subjective determination to be made.

12. However, it is important that the drafting of the SOFAC does not confuse such references to legislative and other duties with the questions being dealt with in the proceedings under s1292 of the Act, which in this case was whether Mr McLeod failed to carry out, or perform adequately and properly, the duties and functions of a liquidator or is otherwise not a fit and proper person to be registered.

13. When, as in this matter, the contentions in the SOFAC are drafted so as to make allegations of "*breach"* of various legislative provisions, particularly without any concomitant reference to the duty under s1292(2) of the Act in respect of which this Board has jurisdiction, confusion may well arise on the part of a respondent as to what is being alleged and the claims to be answered, particularly as it is likely that a respondent will have little, if any, familiarity with or prior experience of, proceedings under s1292 of the Act.

Pre-hearing application to amend SOFAC

14. In this matter, the references in the contentions in the SOFAC to "*breaches"* of s180 of the Act were the subject of an application by the Respondent prior to the commencement of the hearing. Mr Priestley submitted that those contentions that alleged that Mr McLeod acted in breach of s180(1) of the Act could be construed as an allegation of a breach of that section because of use of the word *"breach"* in the drafting. He submitted that these allegations implied that the Board would be required to make a finding as to whether Mr McLeod had breached s180 of the Act which would be outside the Board's jurisdiction involving as it would an exercise of judicial power. We agree with this submission.

15. There is no doubt that a liquidator or administrator, who becomes an officer of the relevant corporation (s9 of the Act) upon his appointment to either of those offices, must, when acting on behalf of the company, exercise his duties in accordance with the duty of care and diligence set out in s180(1) of the Act. Whether the liquidator has exercised an appropriate level of diligence having regard to the duty in s180 of the Act is a matter relevant for the Board to consider in making its subjective and evaluative assessment under s1292(d)(2) of the Act of what proper professional practice required to be done having regard to the relevant legislative framework and published professional standards. In the Board's decision in *ASIC v Pino Fiorentino* ("*Fiorentino") (Decision of the Board dated 24 June 2014 Matter Number 03/NSW13) at 238* it was said:

"In our view, compliance with statutory obligations such as those imposed by s180, may be considered by the Board as part of the ultimate

question, namely whether the performance by a liquidator of his or her duties or functions has been adequate and proper."

16. However the Board does not have jurisdiction to make a finding as to whether Mr McLeod breached s180 of the Act and to the extent that was not clear on the face of the pleadings in the SOFAC in these proceedings, the matter required addressing.

17. Prior to the commencement of the hearing the Board directed ASIC to amend the SOFAC so that all references to Mr McLeod acting in breach of s180 of the Act were to be read as replaced with the words: "*The Respondent did not exercise his powers and discharge his duties with the degree of care and diligence required by Section 180(1) of the Act"*.

18. In the context of making our determination, we have adopted a similar approach with regard to all of the legislative provisions referred to in the SOFAC and approached our assessment under s1292 of the Act in accordance with the established principles as set out below.

Paragraph 2.2 SOFAC and each of the 24 Contentions

19. Paragraph 2.2 of the SOFAC states that ASIC brings the application on the basis of conduct by Mr McLeod in external administrations of 17 companies. The first two sub-paragraphs of paragraph 2.2 make the contentions that:

    (a) in the case of each External Administration, Mr McLeod has failed to carry out and (sic) perform adequately and properly the duties of a liquidator or the duties and functions required by the Act to be carried out or performed by a liquidator;

    (b) by reason of the failings, Mr McLeod is not a fit and proper person to remain registered as a liquidator;

20. These two sub paragraphs anchor the 24 contentions that follow to the relevant questions we must consider under s1292(2)(d) of the Act, assuming ASIC establishes a case on the facts alleged in each contention. Sub paragraph (a) of paragraph 2.2 requires us to consider two questions, namely whether Mr McLeod failed to carry out the duties of a liquidator/administrator and whether Mr McLeod failed to perform adequately and properly the duties or functions of a liquidator/administrator.

21. Sub-paragraph (b) of paragraph 2.2 alleges that *"by reason of the failings"*, Mr McLeod is not fit a proper to remain registered. We have dealt with the allegation in paragraph 2.2(b) of the SOFAC in paragraphs 276 – 299 hereof.

22. Finally, for the sake of completeness, Paragraph 2.2(c), (d) and (e) of the SOFAC further contended that:

    "(c) the number and range of failures showed systemic deficiencies in Mr McLeod's practice;

(d) when all of the contentions are considered collectively, the failures (if established) would justify cancellation or suspension of Mr McLeod's registration as a liquidator under the Corporations Act; and

(e) each of the alleged failures would be sufficient to warrant admonishment or reprimand."

23. The above three matters will be relevant to the question of the appropriate orders under s1292 of the Act, if any, following determination of whether any of the contentions have been established.

24. We have included the above comments regarding the drafting of the SOFAC and the basis of the approach we have taken in construing the allegations because it is an important precept of natural justice "*that the person accused should know the nature of the accusation made*"[1]. That must involve the SOFAC alleging either an act or omission with which the Board is authorised by the Act to deal and providing sufficiently detailed pleadings and particulars so that the Respondent knows the case he must answer. Without reference to the words in paragraph 2.2, each of the 24 contentions in the SOFAC would not clearly plead an act or omission with which the Board is authorised to deal under s1292(2)(d) of the Act and this is exacerbated by each of the 24 contentions referring to breaches of other legislation which could be construed as allegations of breach of those statutory provisions with which the Board is not authorised to deal. The Respondent's legal representatives construed and responded to the allegations on the appropriate basis, however clear and precise drafting of the SOFAC would have assisted case preparation and a more timely and cost effective determination in this matter.

Summary of the status of contentions made in SOFAC by the conclusion of the hearing

25. During the course of the hearing ASIC withdrew Contentions 5, 7, 8 and 9.

26. Mr McLeod admitted the facts of Contentions 3, 6, 10, 11, 12-19, and 22 and in respect of Contentions 3, 10, 11 (except for (b) and (c)), 12-17 and 22, Mr McLeod also conceded that he had not performed his duties adequately and properly in terms of s1292 of the Act.

27. The facts of Contentions 6, 18 and 19 were therefore admitted but it was not conceded they amounted to a breach of s1292 of the Act.

28. Contentions 1 and 2, 4, 11 (b) and (c), 20, 21, 23 and 24 were denied.

The Board's approach under Section 1292 of the Act

29. The Board's jurisdiction under s1292 of the Act will only arise if it is satisfied of certain matters set out in that section and where, in the

[1] Byrne v Kinematograph Renters Society [1958]1 WLR 762 at 784; also Carter v NSW Netball Association [2004] NSWSC 737 (inadequate particulars and other defects)

exercise of its discretion, it considers that particular orders are appropriate.

30. Relevantly, s1292(2) of the Act provides:

> *"(2) The Board may, if it is satisfied on an application by ASIC 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:*
>
> *...*
>
> *(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."*

31. Therefore, notwithstanding that in relation to 10 of the contentions Mr McLeod concedes that his conduct did not meet the standard required of him under s1292(2)(d) of the Act the terms of the section require the Board to form its own view on that issue.

The Board's task in assessing whether Mr McLeod failed to carry out or failed to perform adequately and properly the duties of a liquidator/administrator

32. If the facts alleged in relation to each of the contentions are established on the balance of probabilities (that being the applicable civil standard) the first two questions we must decide under s1292(2)(d) of the Act in relation to each of the 24 contentions in these proceedings is whether we are satisfied that Mr McLeod, has either failed to carry out or perform adequately and properly the duties of a liquidator or any duties and functions required by an Australian law to be carried out or performed by a registered liquidator.

33. The relevant authorities make it clear that the Board's role under s1292 of the Act is not to exercise judicial power and does not depend upon it being satisfied, to a legal standard, of alleged contraventions or failures to comply, or to determine such a matter. Rather, the question for the Board is the adequacy and propriety of the carrying out or performance of the relevant duty and that is to be judged by the Board by making an evaluative and subjective determination *ASIC v Allan Gregory Walker ("Walker") - Decision of the Board dated 22 December 2008 Matter Number 06/VIC07 at (para 7.3(b).*

34. In its decision in *ASIC v Avitus Thomas Fernandez ("Fernandez") – Decision of the Board dated 29 October 2013 Matter Number 02/VIC13 at para 48*, the Board reviewed the relevant authorities and captured a series of propositions relevant to the nature of the question to be determined under s1292(2)(d)(ii) of the Act and the role of the Board in considering that question as follows:

> *(a) "first, whilst sub-paragraph (2)(d)(ii) requires assessment of the level and standard of performance of "duties or functions", the latter phrase, (particularly "functions") is broad. Tamberlin J referred to the assessment as relating to the sufficiency of "the acts or omissions of the administration" of "the functions of the office" and of "the quality of the performance of the office". It must follow that it is not necessary, in every case under s 1292, for ASIC to identify a specific "duty" required to be performed by a registered liquidator. See also Re Vouris; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq) (2003) 177 FLR 289; (2003) 47 ACSR 155 at [100];*
>
> *(b) secondly, the level and standard of performance of the duty or function needs to be tested against a relevant benchmark. The benchmark is "professional standards";*
>
> *(c) thirdly, the assessment calls for acquaintance with professional standards, which is why the task is entrusted to the Board. The Board can be taken to be imbued with knowledge of professional standards. The task of determining the relevant accepted professional standards is a task within the expertise of the Board;*
>
> *(d) fourthly, the level of performance called for is that of "adequacy"; the standard is that the duty or function must be performed "properly";*
>
> *(e) fifthly, in making its assessment, the Board is entitled to have regard to published codes or standards of the professional bodies. The accepted professional standards may be found by the Board to be set by, or alternatively reflected in published standards or codes;*
>
> *(f) sixthly, the assessment will also involve having an intelligent understanding of the purposes that the provisions of the Corporations Act were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved."*

Duties of a liquidator as administrator of the company and the distinction between s1292(2)(d)(i) and s1292(2)(d)(ii) of the Act

35. In the SOFAC, ASIC submitted that its contentions in the SOFAC might be differently allocated to sub-clauses (i) or (ii) of s1292(2)(d) of the Act

depending on the construction that may be adopted of those two sub-clauses. As already set out, s1292(d)(i) of the Act refers to *"the duties of a liquidator"* and s1292(d)(ii) of the Act to *"any duties or functions required by an Australian law to be carried out or performed by a registered liquidator."*

36. This distinction and the case law in relation to it was also considered in the Board's decision in *Fernandez at 28-37*, where the following was said regarding whether the duties and functions in s1292(2)(d)(ii) of the Act include the duties and functions of an administrator:

> *"28. On its face, sub-paragraph 1292(2)(d)(i) would appear to include all things which could properly be regarded as a duties or functions of "a liquidator". Against that background, there would appear to be two potential constructions of sub-paragraph (ii):*
>
> *(a) Duties and functions which, pursuant to an Australian statute[2], are explicitly required to be performed by a "registered liquidator" acting as a liquidator;*
>
> *(b) Duties and functions which, pursuant to an Australian statute, are required to be performed by a registered liquidator, regardless of the capacity in which he or she acts (for example, when acting as an administrator).*
>
> *29. In our view, the second alternative is clearly the preferred construction. The first construction would add little to the scope of sub-paragraph (i), beyond the addition of "functions". The second would permit sub-paragraph (ii) to embrace duties and functions which, whilst not properly characterised as "duties or functions of liquidators" are duties and functions which, by virtue of an Australian law, are required to be performed by a registered liquidator, e.g. duties and functions of administrators and receivers (see s418 and s448B of the Corporations Act).*
>
> *30. This approach makes good sense. The Act provides that certain important offices (such as the offices of administrator or receiver) can only be performed by registered liquidators. Section 1292 bestows jurisdiction on the Board to cancel the registration of registered liquidators. It would seem most odd if the Board could only do so when the liquidator had failed to perform duties or functions which are strictly those of a liquidator but could never do so when the failure related to the duties or functions of an administrator or receiver, notwithstanding that those duties can only be performed by a person who is a registered liquidator.*
>
> *31. The authorities support this view.*

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

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

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

33. *This decision was approved by Tamberlin J in Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board (2006) 59 ACSR 698 at 710*[3].

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

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

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

> *"Paragraph (d)(i) refers to the duties of the office of liquidator occupied by the person. Paragraph (d)(ii) refers to the duties or functions of other offices that, under Australian law, may only be carried out or performed by a registered liquidator. The offices of the latter class that are of present relevance are those of an administrator and of an administrator of a deed of company*

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

arrangement (DOCA), in each case under Pt 5.3A of the Law (or of the Act).

[5] Only a registered liquidator may consent to be appointed, and act, as:

- *liquidator of a company: s 532(1) of the Act;*
- *administrator of a company under Pt 5.3A of the Act: s 448B of the Act;*
- *administrator of a deed of company arrangement under Pt 5.3A of the Act: s 448B of the Act."*

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

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

37. In our view and having regard to the above discussion of the authorities, the Board's jurisdiction to consider whether Mr McLeod, being a person registered as a liquidator, has failed to carry out or perform adequately and properly any duties or functions of an administrator in connection with the company administrations the subject of this application arises under s1292(2)(d)(ii) of the Act. In relation to those Contentions that relate to performance of his duties as liquidator, the Board has jurisdiction under s1292(2)(d)(i) of the Act.

The role and obligations of an Administrator

38. In considering the question in respect of each contention of whether Mr McLeod failed to perform adequately and properly the duties or functions of an administrator, measured by reference to relevant professional standards, we have had regard to both the statutory and general law

obligations of an administrator as well as the relevant professional codes. In *Fernandez* at para 198 the Board discussed the sources of those various obligations and said:

"198. Taking all these matters together, an administrator is an agent and an officer of the corporation, obliged to act in the interests of, and administer and apply the company's property for the benefit of, others. The administrator is subject to statutory duties in Pt 2D.1 and fiduciary duties. The administrator obtains sole jurisdiction over the company's property, with the task of promoting the object stated in s435A and is obliged to act impartially as among all relevant parties. The administrator must be both independent and impartial and that independence and impartiality must be manifest. Specific functions and duties, including the obligation to make the declaration of relevant relationships and indemnities (s436DA) and to convene the first creditors meeting (s436E), need to be understood in that context."

39. The question of the adequate and proper performance of Mr McLeod's duties and functions must be assessed in the context of the nature of the administrator's role, summarised above. The Board said, in its decision in *Fiorentino at paras 237 and 238*:

"237. In carrying out the task the Board may consider whether a liquidator has performed his or her statutory obligations such as those imposed by s180. We doubt whether s1292 contemplated a mechanical evaluation by the Board of the 'adequacy' of performance of 'duties' such as those in s180. The duty under s180, whilst undoubtedly a duty of a liquidator is (in substance) a duty to exercise powers and discharge duties with reasonable care and diligence. If s1292 required the Board literally to assess the adequacy of performance of 'duties' of this kind, the question for the Board would be whether the liquidator had carried out or performed adequately and properly the duty to exercise reasonable care and diligence.

238. In our view, compliance with statutory obligations such as those imposed by s180, may be considered by the Board as part of the ultimate question, namely whether the performance by a liquidator of his or her duties or functions has been adequate and proper."

40. We have adopted this approach in considering whether Mr McLeod has performed his duties adequately and properly in terms of s1292(2)(d) of the Act and we have considered the statutory obligations and duties referred to in the contentions as part of the ultimate question of whether Mr McLeod has performed his duties adequately and properly.

Fit and proper under Section 1292(2)(d) of the Act

41. The third question we are asked to consider under s1292(2)(d) of the Act is whether Mr McLeod is fit and proper to remain registered as a liquidator. Our reasons and finding on this question are set out in paragraphs 276-299.

Summary and grouping of Contentions 1-24

42. The SOFAC grouped the contentions (at page 2) as follows (those contentions withdrawn by ASIC have been excluded):

    (a) Contentions 1, 2 and 3 relating to the administration of All Area Rentals Pty Ltd (in liquidation) ACN 123 204 688 ("AAR");

    (b) Contentions 4, 6 and 10 relating to Mr McLeod's administration of PDK Properties Pty Ltd ACN 124 418 079 ("PDK");

    (c) Contentions 11-16 alleging a failure by Mr McLeod to make proper and adequate declarations of indemnities and relevant relationships in respect of Pacific Blue Cruisecat Pty Ltd (deregistered) ACN 104 729 151 ("PBC"); D&J Edwards Pty Ltd (deregistered) ACN 120 497 001 ("DJE"); Debcon Constructions (Qld) Pty Ltd (deregistered) ACN 123 033 581 ("DCQ"); Halliday Holmes Qld Pty Ltd (deregistered) ACN 084 547 688 ("HHQ") and OTR Logistics Pty Ltd ACN 118 400 294 ("OTR");

    (d) Contention 17 – alleged failure to consider disqualification in respect of Future Profit CPA Pty Ltd (deregistered) ACN 104 365 657 ("FPC");

    (e) Contentions 18 and 19 – alleged failures to open a liquidator's bank account in respect of All Terrain Bobcat Hire Pty Ltd (deregistered) ACN 106 204 522 ("ATBH") and Bellbird Transport Pty Ltd (deregistered) ACN 134 649 380 ("BBT");

    (f) Contentions 20 and 21 – alleged failure to table DIRRIs in respect of FPC, Futureprofit Property Investments Pty Ltd (deregistered) ACN 126 719 211 ("FPI"), International Mining Supplies Pty Ltd (deregistered) ACN 132 286 509 ("IMS"); BBT, Taboo Designs Pty Ltd (deregistered) ACN 080 848 139 ("TD"); and ATBH;

    (g) Contention 22 – alleged failure to lodge reports of suspected misconduct in respect of the administrations of FPC, PBC and Cruise Cat Marine Pty Ltd (deregistered) ACN 114 953 454 ("CCM"); and

    (h) Contentions 23 and 24 - alleged failure to provide adequate information for approval of remuneration in respect of the administrations of ATBH, FPC, BBT, IMS, FPI and incorrectly reporting and/or failing to report relevant material information to creditors for approval of remuneration in respect of the administration of ABG.

The Witnesses

43. There were three statements by Mr McLeod tendered by his counsel in these proceedings. Mr McLeod was cross-examined over the course of two days of the hearing. Overall we found him to be an honest and

credible witness and we accept the evidence that he has provided in these proceedings.

Contentions 1, 2 and 3 – All Area Rentals Pty Ltd ("AAR")

44. Contentions 1, 2 and 3 relate to Mr McLeod's role as a voluntary administrator of AAR. The chronology of events relevant to these contentions may be summarised as follows:

    (a) AAR was registered on 20 December 2006 and its registered office prior to Mr McLeod's appointment as Voluntary Administrator was Gateway Financial Partners Pty Ltd Level 6/97 Creek St, Brisbane.

    (b) AAR's principal place of business was 141 Burnside Road, Yatala, Queensland. AAR operated a business of leasing earthmoving equipment. The Director and Shareholder of AAR was Michael Edmonds.

    (c) On 22 February 2012, AAR was placed into Voluntary Administration, and Mr McLeod was appointed as Voluntary Administrator.

    (d) On 23 February 2012 Mr McLeod issued a first report to creditors.

    (e) On 5 March 2012 the first meeting of creditors took place.

    (f) On 19 March 2012, Mr McLeod issued the Second Report to Creditors.

    (g) On 28 March 2012, the Second Meeting of Creditors took place.

    (h) The minutes recording the resolutions passed at the Second Meeting of Creditors noted that a Deed of Company Arrangement ("DOCA") was to be executed by AAR.

    (i) However, a DOCA was not subsequently executed and as a result, on 20 April 2012, AAR was taken to be voluntarily wound up.

    (j) Mr McLeod received remuneration of $20,000 as the voluntary administrator.

    (k) Mr McLeod was removed as the liquidator of AAR by an order of Jessup J. in the Federal Court of Australia, ceasing as liquidator of AAR on 19 June 2013. The fact that Mr McLeod was removed as liquidator and the fact of the legal proceedings that resulted in his removal were not relevant to the proceedings before this Board.

Contention 1

45. Contention 1 alleges that Mr McLeod, as voluntary administrator of AAR, failed to investigate the affairs of AAR, properly or at all, including possible voidable transactions carried out by a Director of AAR during the period September 2011 to April 2012 as detailed in the

particulars in the SOFAC which, with some minimal paraphrasing, we have set out in full below.

Contention 1 refers to the requirements of s438A (a) of the Act, clause 25.5 of the 2011 IPA Code, and s130.1(b) of APES 110 and/or s180 (1) of the Act.

Contention One - Particulars

46. The pleadings particularised the manner in which it was alleged Mr McLeod had failed to investigate properly or at all in the following way:

SOFAC 14.1

Mr McLeod knew or ought to have known from the information available to him by the time the second report to creditors was issued on 19 March 2012 that:

(a) AAR was (besides a nominal amount of cash at the bank) an assetless administration (SOFAC para 14.1);

(b) Between the period 30 June 2011 to 22 February 2012, AAR's trade debtors had purportedly been reduced from $699,959.44 to nil (SOFAC para 14.1);

(c) The director of AAR had not provided information or explanation in relation to AAR's debtors;

(d) ASR provided a cheque for $20,000 to Mr McLeod as administrator of AAR by way of an indemnity payment;

(e) The director of AAR had authority to sign a cheque on behalf of ASR;

(f) AAR and ASR had the same ultimate shareholder;

(g) AAR and ASR had the same registered office and had directors whose respective names and addresses suggested they were husband and wife;

(h) AAR and ASR had the same principal place of business and were both trading from the same premises;

(i) AAR and ASR appeared to have corresponding unsecured creditor claims;

(j) Creditors of AAR had been transferred to ASR;

(k) Telephone numbers of AAR had been transferred to ASR.

SOFAC 14.2

That during the Haulotte proceedings, Mr McLeod gave evidence that he had been aware from 22 February 2012 that some creditors of AAR had been transferred to ASR. Further, Mr McLeod said he had concerns,

believing there "was a phoenix going on with ASR" but he did not specify in the AAR Second Report that assets had been transferred from AAR to ASR because "I don't raise the offence lightly". Mr McLeod was also aware that Mr Edmonds was discussing AAR's debt with Haulotte after the second meeting of creditors.

SOFAC 14.3

Having regard to the information set out in paragraph 14.1, of which he should have been aware, Mr McLeod, as a reasonably competent liquidator, should have:

(a) conducted proper enquiries as to why the debtors had decreased between 30 June 2011 and 22 February 2012;

(b) conducted proper enquiries into the reasons why debts had been paid by ASR trade debtors into AAR's former bank account; (14.3b and 14.5 SOFAC);

(c) acted with a higher level of suspicion and made proper enquiries into the apparent transfer of AAR debtors and creditors to ASR;

(d) not agreed to transfer the telephone number to ASR;

(e) conducted a director search before or shortly after appointment which would have revealed that Mr Edmonds was also a director of Uplift Access and if this had been done, within an appropriate time, Uplift Access would not have been out of external administration and payments of $100,000 made by AAR to Uplift Access may have been identified.

SOFAC 14.4

Despite the information provided to Mr McLeod, including the level and apparent reduction of trade debtors and despite having meetings and access to Mr Edmonds, AAR's accountant and Mr Cliff (ASR's solicitor and Mr McLeod's solicitor), there is nothing on Mr McLeod's file for AAR which records or indicates whether Mr McLeod:

(a) made any enquiries or any written request to any party (including Mr Edmonds and AAR's accountant) seeking explanation of the level and apparent reduction of trade debtors and why payments for ASR were being made into AAR's bank account; or

(b) carried out any proper investigations in relation to AAR's trade debtors or the reasons for the cessation of AAR's business.

SOFAC 14.5

A reasonably competent liquidator would have conducted a director search before or shortly after his appointment (on 22 February 2012) revealing that Mr Edmonds was a director and shareholder of Uplift Access Pty Ltd. Had the search been conducted within an appropriate time, a reasonably competent liquidator would have:

(a) ascertained that Uplift Access had been the subject of a Deed of Company Arrangement from 15 September 2011 to 7 March 2012), under which AAR and Mr Edmonds were guarantors and the second largest creditor was the Australian Taxation Office (after the debt owed by the director of AAR); and

(b) conducted further enquiries of the AAR bank statements in his possession for 1 September 2011 to 30 December 2011 (annexure 197) revealing that the following payments totalling $100,000 had been made by AAR in amounts and dates which corresponded with payments due under the Uplift DOCA (the 15th day of each month):

(i) 15 September 2011, "payment" of $30,000 with the handwritten annotation "UPLIFT TAX";

(ii) 14 October 2011 (a Friday when payment would have been due on Saturday) "Payment of $20,000;

(iii) 15 November 2011, "payment" of $20,000; and

(iv) 15 December 2011, "Final Payment" $30,000.

SOFAC 14.6

Mr McLeod failed to conduct a director search until 15 March 2012, by which time the Uplift DOCA was fully effectuated and Uplift Access was out of external administration, and he did not extend his investigation. There is no record of any enquiries into Uplift Access or the justification for AAR making payments under the Uplift Access DOCA.

47. Finally paragraphs 14.7, 14.8 and 14.9 the SOFAC contended that the matters particularised provided grounds to suspect that the director of AAR, Mr Edmonds, had effected various transactions regarding ASR, AAR and Uplift Access Pty Limited ACN 123 204 642 ("Uplift Access"), potentially in breach of director duties, resulting in ASR taking over AAR's business, including a transfer of assets from AAR to ASR for no apparent consideration as well as voidable transactions under s588FA, s588FDA and/or s588FE of the Act and if Mr McLeod had properly investigated the affairs of AAR, he would have ascertained the matters particularised in Contention 1 which would have led him to reasonably suspect and investigate these two matters (i.e. the potentially voidable transactions and the transactions in breach of directors duties including a transfer of assets) and that in not doing so Mr McLeod failed to act as a reasonably competent liquidator.

48. On the basis of what is set out in paragraph 19 hereof regarding paragraph 2.2 of the SOFAC, Contention 1 therefore alleges that Mr McLeod has failed to carry out or perform adequately and properly duties or functions to be carried out or performed by him in his capacity as the administrator, by failing to investigate the affairs of AAR, properly or at all, including possible voidable transactions carried out by a director of AAR during the period September 2011 to April 2012.

49. The particulars plead two distinct factual bases for the allegation in Contention 1 that Mr McLeod did not conduct a proper investigation of AAR. The first is that Mr McLeod did not identify and take steps to investigate the takeover of AAR's business by ASR (including the transfer of assets for no apparent consideration) potentially in breach of director's duties as particularised in paragraphs 14.1-14.4 of the SOFAC. The second is that Mr Edmonds had effected various transactions regarding AAR, ASR and Uplift Access resulting in transactions voidable pursuant to s588FA, s588FDA and/or s588FE of the Act. The particulars in support of this allegation are contained in the SOFAC in paragraphs 14.5 and 14.6 as set out above. We have considered and made findings with respect to each of these matters separately in order to draw our conclusion with respect to Contention 1.

Summary of evidence on Contention 1

50. There was evidence adduced which was not in issue between the parties, that was consistent with and supported both factual allegations in Contention 1. This evidence included the following:

    (a) On 22 February 2012 Mr McLeod had conducted searches of AAR and also obtained an ASIC current and historical search extract of ASR that revealed that ASR was incorporated on 26 June 2008. ASR operated from the same premises and the same registered office as AAR. The sole director of ASR was Ms Tracey Edmonds ("Ms Edmonds"), who lived at the same address as the director of AAR, Mr Michael Edmonds "Mr Edmonds"). Uplift Access was the sole shareholder of ASR until 21st February 2012;

    (b) On 22 February 2012 Mr McLeod had received a funding authority for $20,000 in the name of Ms Edmonds, but signed in the name of Mr Edmonds;

    (c) On 24 February 2012 Mr McLeod had received an email from his lawyer forwarding a list of AAR creditors received from the email address *info@allrentals.com.au* and stating that the list was updated because certain creditors had been paid. The email from info@allarearentals carried a footer advertising *All Site Rentals* (ASR);

    (d) On the 24 February 2012, Mr McLeod had received from his solicitor Mr Dale Cliff ("Mr Cliff"), forwarded from an ASR email address, a further updated list of AAR creditors;

    (e) In Mr McLeod's file for the AAR administration there was an MYOB *"Payables Reconciliation"* report for ASR dated 22 February 2012 ("ASR Reconciliation"). The ASR reconciliation set out amounts purportedly owed to creditors of ASR that corresponded to the amounts relating to ten creditors listed in the AAR creditors list and included amounts from as early as 1 January 2011 although ASR was not incorporated until 13 September 2011; and

(f) Mr McLeod's file contained a *"Director's Statement of Company's Business, Property, Affairs and Financial Circumstances"* dated 22 February 2012 signed by Mr Edmonds ("Directors Statement"). The Directors Statement set out that besides available cash of $1,568, AAR held no assets at the date of Mr McLeod's appointment.

51. There was further evidence in Mr McLeod's statement of 24 November 2014 and which emerged in cross examination as follows:

(a) By the time the second report to creditors was due to be issued Mr McLeod had become aware of the existence of potential voidable transactions and possible breaches of s180-183 of the Act (directors duties), including the possibility of phoenix activity. This was documented by Ms Jen Tao's ("Ms Tao") memorandum. Ms Tao's investigations were summarised in a memo entitled *"Investigations conducted with respect to the Second Report to Creditors dated 19 March 2012"*. The memo was undated but Mr McLeod's unchallenged evidence was that he received it prior to finalising the Second Report to Creditors of AAR. This memo referred to *"potential phoenix activity"* and Mr McLeod's evidence in cross examination was that he reported s180-183 of the Act breaches in the second report to creditors based on the information in Ms Tao's memorandum which he must have read before finalising the second report to creditors. The memo also contained a commentary under the headings *"Unfair preferences" Sections 588FA and 588F* and "*Unreasonable Director-Related transactions" Section 588FDA.* Under the first heading reference was made to the review of bank statements for AAR for the six months preceding the administrator's appointment that revealed payments made from the company's bank account totalling $539,122.99 that *"may display some indicia of preferential payments"* and noting that further investigation including possible reconstruction of the company's financial statements would be required by the liquidator to establish, inter alia, any potential defences available to the recipients of the funds pursuant to s588FG of the Act. Under the second heading it noted relevantly, that the company's balance sheet as at 30 June 2011 indicated that the company had trade debtors of $699,959.44, but that the director's statement indicated that the company had no realisable assets as at the date of the Administrator's appointment, and that a liquidator, if appointed would conduct further investigations into the debtors;

(b) Mr McLeod's statement also referred to investigation he had undertaken regarding the possible misconduct of the directors arising from the circumstances in which balances in respect of trade debtors appeared to have been reduced and circumstances in which possible phoenix activity may have occurred;

(c) When Mr McLeod was cross examined on the subject of whether he had made any enquiries of Mr Edmonds in relation to the

reduction of debtors of AAR, Mr McLeod said that he did ask Mr Edmonds about the reduction of debtors and where the money had gone. When asked whether he recalled making any enquiries or written request to AAR's accountants seeking an explanation of the level and the apparent reduction of trade debts, Mr McLeod said that he had asked the company's accountants for a copy of the MYOB file as well as having sent an email on 24 February 2012 to Slade Gateway (accountants for AAR) making a demand for records. There was a further email on 28 February 2012 from Ms Tao following up that request and finally an email on the 15 March 2012 from Ms Tao to Jared Slade requesting by the close of business that day copies of the company's financial records and the company's bank statements for the preceding six months. Mr McLeod also referred to a discussion he had with the accountant and Mr Edmonds somewhere between the 9th and 14th March 2012. Mr McLeod's evidence was that, although he had inadequate information, that Ms Tao was making efforts to obtain, he nevertheless had sufficient information to clearly show that there had been a reduction in debtors of AAR and so referred to this in the second report to creditors;

(d) Mr McLeod's statement set out details of the voidable transaction investigation he had carried out. His statement annexed a ledger printout of all payments from the company's bank accounts from which Ms Tao had identified various payments that may have constituted preference payments and which included the payments totalling $100,000 referred to in paragraph 14.5(b) of Contention 1, which it has subsequently been ascertained were payments to the related entity Uplift Access Pty Ltd ("Uplift Access");

(e) Mr McLeod also set out in his statement his usual practice of undertaking a review of the bank statements, particularly during the relation back period, to identify any unusual payment that may then be the subject of further investigation. In the AAR administration there was a detailed review of those bank statements and possible preference payments had been identified as a result, including the payments made to Uplift Access. The payments were highlighted in shaded blocks in the bank statements and totalled $623,959.18. The total amount was reduced to $539,122.99 in the second report to creditors to take into account deductions of amounts Mr McLeod did not consider would constitute recoverable preferences;

(f) Mr McLeod's evidence was that he was unaware at the time of the creditors' reports and the undertaking of the preference review that the reference in one of the bank statements to *"Uplift"* was a reference to a related entity of AAR being Uplift Access. He said that he would not normally review every single notation in the bank statements and then conduct searches to ascertain whether the wording may relate to a similar sounding name of a related entity of the director. However the possibility of those specific payments (to Uplift) being preference payments and potentially available to

creditors was identified and was included in the sum of $539,122.99 noted in the second report to creditors; and

(g) In cross examination Mr McLeod was asked why he waited until 15 March 2012 to conduct a director's search. He said that normally he wanted the information included in his report to creditors to be as up to date as possible.

First factual allegation

52. It was not in issue between the parties that there was evidence that Mr Edmonds had effected various transactions regarding AAR, ASR and Uplift Access, potentially in breach of director duties and as alleged in the SOFAC. The further basis of the allegation was that the transactions potentially in breach of director's duties had resulted *"in the takeover by ASR of AAR's business, including the transfer of assets from AAR to ASR"* and that Mr McLeod should have been aware of this. This matter was in issue between the parties.

53. The allegation that some creditors of AAR had been transferred to ASR is found in the SOFAC and the evidence in support is based on 3 answers given by Mr McLeod in his evidence in the Haulotte Australia Pty Limited and All Area Rentals and Another Proceedings in the Federal Court of Australia on 1 June 2012 ("Haulotte proceedings"). The transcript evidence from the Haulotte proceedings ("the Haulotte transcript") was:

(a) p144 lines 5-10 of the Haulotte transcript:

"Yes, you were aware that All Site Rentals had assumed some creditors of All Area Rentals?----Yes"

(b) page 173 lines 5-15 of the Haulotte transcript:

"Right. Does this letter suggest to you that there is an issue of a phoenix going on here with All Site Rentals? ----I reported that in my second report, phoenix activity.

That there was a phoenix? Yes

That there was a phoenix going on with All Site Rentals---- Absolutely, breach of directors duties, Section 180-183.

(c) page 173 line 25 of the Haulotte transcript where it said:

You don't say there, do you that assets have been transferred or anything has been transferred from All Area Rentals to All Site Rentals, do you?---No

54. In cross-examination ASIC's counsel took Mr McLeod to another part of the Haulotte transcript as follows:

"You knew didn't you, Mr McLeod that from at least 22 February All Site Rentals had assumed the trade creditors of All Area Rentals?----It had assumed trade creditors?

Yes?----No

From 22 February?---Not all of them, no. The ATO was a creditor it didn't assume its debt.

It didn't assume the ATO?...No.

It didn't assume Haulotte's debt either?----That's right, apparently no, that's right.

No, but All Site Rentals did assume debts of All Area Rentals. Do you agree with that?---some debts

Some debts, a significant number of debts… I don't know quantum but it is probably 20 to 25 creditors that had assumed their debts."

55. Counsel for ASIC asked Mr McLeod whether based on the Haulotte transcript evidence set out in paragraph 55, ASR had assumed some debts of AAR. Mr McLeod's response was that *"debts"* was understood by him to be creditors not debtors and that he was aware that some creditors of AAR had been transferred to ASR and that he issued an addendum report to that effect. Mr McLeod clarified his understanding of the evidence he had given in the Haulotte proceedings, stating that what had in fact been transferred from AAR to ASR were debts owed by AAR, that is to say, liabilities of AAR, not assets. Other than the Haulotte transcript references set out in paragraphs 54 and 55 and Mr McLeod's answers in cross-examination, ASIC did not adduce any other evidence on this point.

56. There was confusion in the drafting of the SOFAC as to this allegation as well as during the cross examination of Mr McLeod. The SOFAC in paragraph 14.2 refers to Mr McLeod's evidence in the Haulotte proceedings that *"creditors"* were transferred which would suggest a transfer to ASR of liabilities rather than assets and then based on the reference to this evidence the SOFAC alleges that Mr McLeod did not specify in the AAR second report to creditors that *"assets"* had been transferred from AAR to ASR. Then in paragraph 14.7 of the SOFAC the point is picked up again as a transfer of *assets* with no additional reference to the evidentiary basis of the allegation.

57. In closing submissions Mr Priestley made the point that the evidence did not identify any asset of AAR that became an asset of ASR and the SOFAC was incorrect in asserting otherwise, presumably he said, based on a misunderstanding by ASIC of the transcript in the Haulotte proceedings. Counsel for ASIC did not refer to this evidence in closing submissions nor adduce or refer to any other evidence of an asset of AAR becoming an asset of ASR. We accept the explanation given by Mr McLeod in his evidence in cross-examination regarding the answers he had given in the Haulotte proceedings and we find that the evidence does

not establish that there were any assets of AAR which were transferred to ASR.

58. That this matter was not established by the evidence significantly impacts the first factual basis for the case ASIC sought to make in Contention 1 that Mr McLeod did not conduct a proper investigation because he did not identify as part of that investigation a take-over of AAR's business by ASR, including a transfer of assets from ASR to AAR for no apparent consideration. The facts particularised in paragraph 14.1 of the SOFAC do not have relevance to the question of the adequacy and propriety of Mr McLeod's investigation unless the fact alleged in paragraph 14.2 of the SOFAC that there was a transfer of assets is shown to have occurred. Likewise the allegations in paragraph 14.3 of the SOFAC of what Mr McLeod should reasonably have done in order to conduct a proper investigation would only be relevant to consider if a transfer of assets from AAR to ASR was shown to have occurred.

59. For the reasons set out we have formed the view that ASIC has not established the facts grounding its case on this aspect of Contention 1.

Second factual allegation

60. The second material factual allegation that grounds Contention 1 is that Mr Edmonds had effected various transactions regarding AAR, ASR and Uplift Access, potentially in breach of director duties resulting in transactions voidable pursuant to s588FA, s588FDA and/or s588FE of the Act. The particulars in support of this allegation are contained in paragraphs 14.5, and 14.6 of the SOFAC set out above. In summary, they are that Mr McLeod failed to conduct a director search until 15 March 2012 by which time the Deed of Company Arrangement ("DOCA") for Uplift Access was fully effectuated and that if he had conducted proper enquiries he would have been aware of the 4 payments amounting to $100,000 set out in the SOFAC that had been paid by AAR to Uplift Access under the DOCA.

61. The evidence adduced in the proceedings showed that Mr McLeod was aware that Mr Edmonds had potentially effected potentially voidable transactions (paragraph 51(a) above) and in respect of this limb of Contention 1 the factual basis for the contention has been established.

62. Mr McLeod denied that he had not conducted a proper investigation of the potentially voidable transactions.

63. As noted above Mr McLeod gave evidence that he conducted a voidable transactions review as part of his investigation into the affairs of AAR and he set out in some detail in his statement the process his staff followed in undertaking that review. His statement annexed copies of the bank statements showing payments highlighted that were included in the sum notified to creditors in the second report to creditors as potential preference payments.

64. The evidence (see paragraph 51(f) above) also showed that the amount of $100,000 referred to in the SOFAC, although not identified as payments to Uplift Access was identified as part of the $539,122.99 in potential preference payments identified to creditors in Mr McLeod's Second Report to Creditors.

65. ASIC alleged that a reasonably competent liquidator would have conducted a director search before or shortly after being appointed. It was alleged that this would have revealed that Mr Edmonds was a director and shareholder of Uplift Access and Mr McLeod would then have been able to ascertain that Uplift Access was subject to a DOCA under which Mr Edmonds and AAR were guarantors and the second largest creditor was the ATO. He would then, it was alleged, have been in a position to conduct further enquiries of the AAR bank statements in his possession revealing that payments totalling $100,000 had been made by AAR in amounts and dates which corresponded to payments due under the Uplift Access DOCA as set out in paragraph 14.5(b) of the SOFAC.

66. Mr McLeod's evidence was that he usually conducted a director search just before the creditors meeting was scheduled in order to ensure that it was as up to date as possible. He was cross-examined on this issue and gave further evidence about the impact of ascertaining earlier the association between Mr Edmonds, Uplift Access and AAR. He said that in the normal course he would have written to the related entity if they were a debtor of the company, but not just for the sake of notifying them he had been appointed as administrator over a related entity.

67. ASIC framed this contention by reference to the obligations of an administrator pursuant to s438A (a) of the Act, clause 25.5 of the 2011 IPA Code, and s130.1(b) of APES 110 and/or s180(1) of the Act.

68. Section 438A(a) of the Act provides:

> *"As soon as practicable after the administration of a company begins, the administrator must:*
>
> > *(a) investigate the company's business, property, affairs and financial circumstances; and"*

69. Clause 25.5 of the IPA Code refers to the legislative requirements regarding investigating and reporting to creditors. It states that the practitioner's primary duty is owed to the company's creditors who are entitled to rely upon the expert opinion of the administrator. It states that in reporting, the administrator must investigate the company's business, property and affairs. The administrator must also form an opinion as to which of the three alternative outcomes to the administration would be in the creditors' interest.

70. Section 130.1(b) of APES 110 provides that the principles of professional competence and due care impose the obligation on all members to *"act*

diligently in accordance with applicable technical and professional standards when providing Professional Services".

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

180(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation, as the director or officer.

72. In relation to the first question of whether Mr McLeod failed to investigate, the evidence demonstrates that Mr McLeod had conducted a review of possible preference payments as set out above. The evidence does not therefore support a finding that Mr McLeod failed to investigate the affairs of AAR including possible voidable transactions carried out by Mr Edmonds.

73. The second question is whether Mr McLeod failed to properly investigate the affairs of AAR. To the extent the evidence demonstrates he may not have, the question for this Board is whether that omission amounted to not performing his duties adequately and properly under s1292(d)(2)(ii) of the Act having regard (*inter alia*) to his statutory duty to investigate, the obligations imposed on him by s180 of the Act and the relevant professional codes.

74. We have considered the evidence and the matters alleged against Mr McLeod in Contention 1 in support of the contention that he did not conduct a proper investigation in relation to potentially voidable preferences in the AAR administration. In our view ASIC has not established any relevant omission in relation to Mr McLeod's conduct in investigating the potential voidable transactions. The creditors obtained relevant information in the second report to creditors regarding the amount of the payments which had been made to Uplift Access, and it was not shown that conducting the director's search at an earlier point in the administration would have resulted in any different outcome, nor that the creditors missed out on any relevant or material information as a result of the way in which Mr McLeod conducted the investigation.

75. As it may be relevant to the question of costs in these proceedings we record our view that the evidence adduced in Contention 1 was consistent with Mr McLeod having applied a significant level of care and diligence to the investigation of AAR. He had processes in place within his firm to ensure that relevant enquiries were conducted so far as possible within the time frames available and a devolution of authority that enabled him to delegate investigative tasks to staff with apparent effectiveness. By the time the second report to creditors was due to be issued Mr McLeod

had become aware of the existence of potential voidable transactions, the possibility of phoenix activity and possible breaches of s180-183 of the Act, which were matters ASIC asserted would have been the outcomes had he conducted a proper investigation.

76. We find that Contention 1 is not established.

Contention 2

77. Contention 2 alleges that Mr McLeod failed to report and/or failed to accurately and adequately report relevant and material information in the AAR Second Report to Creditors ("AAR Second Report") as detailed in the particulars set out below. There are five paragraphs of particulars pleaded in respect of Contention 2.

78. Paragraph 15.1 alleges two facts that are not in issue between the parties. The first was that Mr McLeod had a meeting with AAR and its director Mr Edmonds and his accountant prior to Mr McLeod's appointment as administrator and the second, that in his second report to creditors Mr McLeod stated that he had received adequate books and records to properly explain the majority of transactions and the position of the company.

79. Paragraph 15.2 and 15.3 appear in fact to be one paragraph. They allege that despite Mr McLeod's knowledge of the transfer of assets from AAR to ASR for no apparent consideration and the transfer of debtors, outlined in paragraphs 14.1 and 14.2 of the SOFAC, Mr McLeod stated in the AAR second report;

    (a) the "reasons for failure" (of AAR) were poor cash flow and trading losses;

    (b) there were potential unfair preferences amounting to approximately $539,122.99;

    (c) there were potentially breaches of Sections 180-183 of the Act.

80. Paragraph 15.4 continues:

    "However, despite claiming to hold sufficient books and records Mr McLeod failed:

    (a) to provide a preliminary analysis and comments regarding the decrease in trade debtors from $699,659.44 at 30 June 2011 to nil at the date of his appointment; and

    (b) to accurately comment on and/or make mention of the activity concerning the transfer of assets from AAR to ASR for no apparent consideration."

    and (paragraph 15.5) in so doing Mr McLeod failed:

    (a) "to provide the creditors with an adequate report required by Section 439A(4) of the Act;

(b) to set out a preliminary analysis and commentary regarding AAR's historical financial results as required by clauses 25.6.2 and 25.6.3 of the 2011 IPA Code;

(c) to exercise his powers and discharge his duties diligently;

(d) to act as a reasonably competent liquidator."

81. On the basis of what is set out in paragraph 20 regarding paragraph 2.2 of the SOFAC, Contention 2 alleges that Mr McLeod has failed to carry out or perform adequately and properly duties or functions to be carried out or performed by him in his capacity as the administrator, by failing to report and/or failing to accurately and adequately report relevant and material information in the AAR Second Report.

82. The factual bases for the allegation in Contention 2 that Mr McLeod failed to accurately and adequately report relevant and material information in the AAR Second Report are contained in paragraphs 15.2 and 15.4 of the SOFAC. The facts relied on by ASIC for the alleged inadequacy of the report are:

(a) the transfer of assets from AAR to ASR [15.2,15.4(b)];

(b) the transfer of debtors from AAR to ASR (15.2); and

(c) the failure to provide a preliminary analysis of the reduction in trade debtors from AAR to ASR despite claiming to have sufficient records [15.4(a)].

83. We have already made a finding that a transfer of assets from AAR to ASR for no apparent consideration has not been established by the evidence.

84. The second allegation of fact underpinning Contention 2 was *"the transfer of debtors"* (from AAR to ASR). Paragraph 15.2 of the SOFAC cross-refers to paragraphs 14.1 and 14.2 of the SOFAC for particulars in support of that allegation. However, those paragraphs of the SOFAC in fact refer to a transfer of creditors to ASR. A transfer of debtors of AAR to ASR, if established, would be consistent with a transfer of assets from AAR to ASR but the facts particularised in support of that factual allegation refer in fact to a transfer of creditors to ASR. We were not referred to any evidence of debtors being transferred to ASR. We find that there is no evidence establishing that there was a transfer of debtors from AAR to ASR.

85. The third allegation was that the report was inadequate because Mr McLeod claimed to hold sufficient books and records and did not provide a preliminary analysis of the reduction in trade debtors from AAR to ASR despite claiming to have sufficient records.

86. It was not in issue between the parties that Mr McLeod did state in his report that he had sufficient books and records to explain the majority of transactions and position of the company. The context of the statement

he made was not included as part of the allegation of fact in paragraph 15.4 and is relevant. That disclosure, made to creditors on page 9 of the AAR Second Report was as follows:

"*Upon my appointment, I sought to obtain all books and records of the company from all known sources pursuant to Section 438A of the Corporations Act 2001. I advise that I contacted the director of the company as well as the company's accountant regarding the delivery of the company's books and records to me pursuant to Section 438C of the Corporations Act 2001. To date, I have received the Director's statement of Company's business, Property, Affairs and Financial Circumstances as at 22 February 2012, copies of the company's comparative financial statements as at 30 June 2009, 30 June 2010 and 30 June 2011 and copies of the company's bank statements for the six months period prior to my appointment."*

87. The AAR Second Report, at page 11 under the heading Trade Debtors also included the following statement:

"The Director's Statement shows that the company has no trade debtors that were due and payable as at the date of completing same.

My investigations into the company's books and records to date indicates that the company had no realisable debtors as at the date of my appointment despite the company's balance sheet as at 30 June 2011 indicating that the company had trade debtors of $699,959.44. I have discussed this issue with the director and requested that he provide me with an explanation as to the current level of debtors as at the date of my appointment. To date I have note (sic) received any written response from the director and accordingly, my investigation is continuing".

88. On the basis of the information included in the report and extracted above we do not conclude that Mr McLeod did claim to hold sufficient books and records in a manner that would suggest he had all of the relevant books and records of the company. In addition his report expressly noted the reduction in trade debtors referred to in 15.4(a) of the SOFAC and stated that activities were in train to obtain further information.

Finding on Contention 2

89. On the basis of the evidence adduced in relation to Contention 2 by reference to the case as particularised by ASIC, we are not satisfied that ASIC has established that Mr McLeod relevantly failed to accurately and adequately report relevant and material information in the AAR Second Report.

90. We find that Contention 2 is not established.

Contention 3

91. Contention 3, alleges that Mr McLeod failed to lodge with ASIC a report concerning suspected past misconduct when it appeared to Mr McLeod

that a past or present officer, or employee, or member of AAR may have been guilty of an offence in relation to AAR as required by s438D(1) of the Act.

92. The SOFAC refers to the requirements of s438D(1) and s180(1) of the Act and Part B of RG16 as examples of the standard for conduct in his role as administrator which it is alleged Mr McLeod did not meet.

93. Mr McLeod has admitted to the facts of Contention 3 and has also conceded that in failing to lodge a s438D report he did not act adequately and properly as required by s1292(2)(d) of the Act.

94. By adopting this approach, Mr McLeod has, in effect, admitted the material allegation in Contention 3, the evidence supporting that allegation and the contentions made by ASIC that the facts establish a failure by Mr McLeod to carry out or perform adequately and properly the duties and functions of a liquidator or administrator.

95. Section 438D(1) of the Act and Part B of Regulatory Guide G16 make clear the mandatory requirement to lodge a report about suspected offences as soon as practicable after the administrator becomes aware of such conduct.

96. In our view the appropriate standard of care and diligence required of company officers by s180(1) of the Act demands compliance with the provisions of the Act. The reporting of suspected offences to ASIC is significant as it underpins ASIC's capability to effectively discharge its own supervisory role in respect of companies and their officers and underscores the importance of administrators and liquidators being cognisant of and ensuring observance with their statutory obligations in this regard.

97. In our view, for the reasons given, Mr McLeod in failing to lodge with ASIC a report concerning suspected past misconduct when it appeared to him that a past or present officer, or employee, or member of AAR may have been guilty of an offence in relation to AAR as required by s438D(1) of the Act, failed to carry out his duties adequately and properly in terms of s1292(2)(d)(2) of the Act.

98. We find that Contention 3 is established.

PDK Properties Pty Ltd (PDK) (Contentions 4 - 10)

99. Contentions 4 -10 of the SOFAC relate to Mr McLeod's role as a voluntary administrator in the affairs of PDK.

100. The background facts with respect to PDK, not in issue between the parties are as follows:

(a) PDK was registered on 14 March 2007;

(b) PDK's principal place of business was 3/92 Marine Pde Kingscliff NSW;

(c) PDK operated a business of property development and property management;

(d) On 11 April 2011 PDK was placed into voluntary administration and Mr McLeod was appointed as the Voluntary Administrator;

(e) On 11 April 2011 Mr McLeod issued the First Report to Creditors;

(f) On 21 April 2011 the first meeting of creditors took place;

(g) On 18 May 2011, Mr McLeod issued the Second Report to Creditors ("PDK Second Report");

(h) On 27 May 2011 the second meeting of creditors took place. At this meeting, Mr McLeod advised the creditors that on 26 May 2011 issues had been raised by a creditor, SafeSparks Electrical, which Mr McLeod need further time to investigate, and it was resolved to adjourn the meeting until 10 June 2011;

(i) On 2 June 2011 Mr McLeod sent an Addendum Report to Creditors ("PDK Addendum Report"), setting out the results of his further investigations into the issues raised by Safe Sparks Electrical;

(j) On 10 June 2011 the adjourned creditors meeting was further adjourned until 24 June 2011. On 24 June 2011 at the reconvened meeting, it was resolved that a DOCA dated 22 June 2011 be executed by PDK;

(k) On 13 July 2011 the DOCA was executed by PDK, its directors and Mr McLeod;

(l) Mr McLeod received remuneration of $30,800.00 as voluntary administrator of PDK; and

(m) On 25 October 2012 the DOCA was wholly effectuated. Mr McLeod received remuneration of $8,786.36 as the Deed Administrator, and paid dividends of $52,028.52 to the unsecured creditors of PDK.

Contention 4

101. Contention 4 alleges that Mr McLeod, as voluntary administrator, failed to investigate the affairs of PDK, properly or at all.

102. The SOFAC refers to the requirements of s438A(a) and/or s180(1) of the Act and/or s130.1(b) of APES 110 and/or Clause 25.5 of the 2011 IPA Code as examples of standards for conduct of Mr McLeod's role as administrator in investigating the affairs of PDK that were not met.

103. The facts in paragraphs 17.1 to 17.11 of the SOFAC were admitted by Mr McLeod. Those paragraphs referred to details of background information contained in Mr McLeod's files, including details of searches conducted, information on what was included in Mr McLeod's second report to creditors of PDK, including the recommendation that PDK be

wound up, and details of the letter received on 26 May 2011 from the solicitor representing SafeSparks Electrical alleging that there were possible preferential payments to Mr Cleary, a Director of PDK and that between October 2009 and July 2010 each of the three directors of PDK had transferred one of the residential units that PDK had developed into the names of their wives at less than market value.

104. Paragraph 17.12 alleges that the only evidence on Mr McLeod's file for the PDK administration, in relation to investigating or considering the issue of possible uncommercial transfers, is an undated handwritten note of property values, the property search of land and property owned by PDK and a copy of a transfer from Metricon Qld Pty Ltd to PDK.

105. Mr McLeod denied the allegation in paragraph 17.12 of the SOFAC. In his Supplementary Response dated 4 August 2014 ("Supplementary Response") it was noted that the PDK Addendum Report was prepared and reproduced from notes that evidenced investigation and consideration of the matters set out in paragraph 17.12 of the SOFAC and additionally, the Respondent referred to documents contained in McLeod & Partners Storage Box no 524 of the PDK Administration.

106. The further facts set out in paragraphs 17.13 – 17.15 of the SOFAC were also admitted by Mr McLeod. Those paragraphs referred to the information that was included by Mr McLeod in the PDK Addendum Report, and in particular set out the unreasonable director-related transactions Mr McLeod had identified in the report.

107. Paragraph 17.16 of the SOFAC, denied by Mr McLeod in his Supplementary Response alleged that the PDK file did not contain records of his inquiries and investigations as set out in sub-paragraphs (a)-(g) of 17.16 of the SOFAC.

108. Mr McLeod admitted paragraphs 17.17-17.19 of the SOFAC. These paragraphs alleged as follows:

> *17.17 that as at 18 May 2011 which was the date Mr McLeod issued the second report to creditors, Mr McLeod knew or ought to have known from the information available to him that;*
>
> *(a) the accounts as at 30 June 2009 revealed that work in progress worth $2,240,161.72 had reduced to nil, while all other assets and liabilities remained the same as the previous year;*
>
> *(b) PDK purportedly ceased to trade its business and property development and management on 30 June 2010;*
>
> *(c) The directors proposed a DOCA in which they contributed $25,000.*
>
> *17.18 that, as at 2 June 2011, when the PDK addendum report was submitted to creditors Mr McLeod knew or ought to have known from the information available to him that:*

(a) directors had potentially received more than $900,000 in unreasonable director related transactions; and

(b) properties had been transferred to directors or their wives for approximately $720,000 less than market value (Annexure 203).

17.19 the circumstance set out in paragraphs 17.17 and 17.18 provide grounds to suspect that the directors had effected various transactions regarding PDK, potentially in breach of director duties resulting in voidable transactions.

109. Paragraphs 17.20-17.21 of the SOFAC which alleged that having regard to the information Mr McLeod had in relation to PDK's work in progress and transfers of funds and properties to the benefit of directors a reasonably competent liquidator would have conducted proper enquiries and maintained documentation regarding those matters, were denied by Mr McLeod on the basis that he did make enquiries and maintain documentation.

110. Paragraph 17.22, also denied by Mr McLeod, alleges that Mr McLeod failed to investigate or to properly investigate the business, property affairs and financial circumstances of PDK by:

(a) failing to investigate the decrease in PDK's work in progress from 2008 to 2009 having regard to the fact that the total liabilities remained unchanged for that period;

(b) failing to conduct timely and adequate investigations into the assets of PDK having regard to the fact that PDK operated a business of property development and property management;

(c) failing to conduct timely and adequate investigations into voidable transactions;

(d) only conducting minimal investigation after a creditor alerted him to the relevant issues.

111. Finally the SOFAC contends that if Mr McLeod had properly investigated the affairs of PDK including its trading and related party dealings he would have ascertained the circumstances referred to in the particulars to Contention 4, and reasonably suspected the matters referred to in the SOFAC.

112. Mr McLeod denied Contention 4and asserted that the Respondent did ascertain the matters identified and recommended that the company be placed into liquidation *"where the issues I have identified in this report can be further investigated and potentially pursued"*.

113. As in relation to Contentions 1 and 2, the evidence adduced by ASIC and in particular whether the evidence supported the material facts on which the Contention was based consumed a significant part of the hearing of this matter.

Box 524 (Exhibit H)

114. The preliminary issue around which the debate centred in relation to Contention 4 was the existence of a box of documents of McLeod & Partners ("Box 524") relating to the PDK administration and referred to in paragraph 57 of the Supplementary Response.

115. Mr McLeod's statement dated 16 September 2014 is relevant to Box 524. There he said;

> "*I refer to paragraph 17.12 of the SOFAC which states that the only evidence on my file in relation to investigating or considering the issue of possible uncommercial transfers was an undated handwritten note of property. That is not the position. The subsequent PDK addendum report referred to in paragraph 17.13 summarises my investigations prior to the issue of that report and was transcribed from my notes and the notes of my staff at the time, albeit I haven't retained all of those notes. However, I note that when I reviewed the SOFAC whilst preparing my response, I could not follow why there were no further materials in the ASIC documents in respect of such investigation. I then carried out further enquiries in my office and located a box of documents relating to the financial affairs of PDK on 30 July 2014. I immediately contacted my solicitors and within the next 24 hours we notified the legal representatives of ASIC that the box had been located. A copy of the letter from my solicitors to ASIC dated 31 July 2014 is set out at JM11. I also attach JM12 which contains file notes of Mr Bill Karageozis and some of the working papers of some of those investigations. The file notes calculate the quantum of the claim which could be pursued against the directors and their wives. I therefore deny that my addendum report and file notes do not contain any recording of those matters set out in paragraphs 17.16(a)-(g) and say, in fact that those matters were considered as part of my investigations and reported upon to creditors. The documents can be inspected as part of my storage box number 524 of the administration which is now in the control of ASIC."*

116. In cross-examination Mr McLeod was questioned in relation to Box 524. Mr McLeod confirmed that all relevant documents that he had located that demonstrated an investigation or the consideration of possible uncommercial transactions had been exhibited to his statement. Counsel for ASIC took Mr McLeod to Annexure 12 of his statement and asked him whether they were handwritten documents attributable to Mr Karageozis (Mr McLeod's employee). Mr McLeod said that not all of them were, that one of the documents was delivered by Mr Gillies (a director of PDK) after Mr McLeod had reported him to ASIC for not complying with notices to produce books and records.

117. Mr McLeod's evidence was that on 27 May 2011 he received three boxes from Mr Gillies as a result of Mr Gillies' compliance with an ASIC order to produce and the document that was annexure 12 to his statement was included in the documents he received.

118. In his evidence in cross-examination, Mr McLeod provided some contextual background to the course of his investigation of PDK. He said that at the time, Mr Gillies and the two other directors of PDK were in dispute. Mr Gillies had kept all the records and the other two directors operated the business. Mr McLeod stated that without access to the records held by Mr Gillies, which he had been unsuccessful in obtaining, his investigations had been frustrated so he had taken the step of reporting the matter to ASIC and sought ASIC's assistance to obtain the records from Mr Gillies. This resulted in him receiving documents from Mr Gillies on 27 May 2011 and, as a result, he was able to do an addendum report to creditors within 7 days.

119. In relation to the first document in exhibit 12 to Mr McLeod's statement, which was a file note prepared by Mr Karageozis Mr McLeod's evidence was that he did not have it prior to preparing the PDK Second Report, but it was prepared prior to issuing the PDK Addendum Report.

ASIC's application for adjournment

120. On the final day of the hearing ASIC applied for an adjournment of the hearing. Referring to the evidence given in cross-examination by Mr McLeod regarding Box 524, ASIC submitted that Mr McLeod's evidence was the first occasion that it had been brought to ASIC's attention that the author of the second document in exhibit 12 to Mr McLeod's statement was Mr Gillies and that it had been received by McLeod & Partners on 27 May 2011.

121. ASIC submitted that a considerable foundation for Contention 4 as framed was a lack of investigation, particularly before the issuing of the PDK Second Report on 18 May 2011 and that as ASIC had only just been made aware of the document identified as Mr Gillies' settlement sheet, having been in the box received from Mr Gillies on 26 May 2011, it should be entitled to explore that evidence (to establish its authenticity and/or presumably call further evidence) as Mr McLeod's statement had not made it clear that the document was not one generated by his own office.

122. Mr Priestley pointed out that ASIC had been aware, from 31 July 2014 when the additional box of documents was delivered to ASIC with a covering letter from Mr McLeod's solicitors identifying the documents, of the existence of the additional documents. He also submitted that there is no onus or obligation on Mr McLeod to *"spell it out in the clearest possible language"* in his statement.

123. Mr Priestley described the documents at annexure 12 to Mr McLeod's statement dated 16 September 2014 ("Mr McLeod's first statement") as the highlights of Box 524 relevant to Mr McLeod's alleged inadequate investigation of the transfers of the property and loans. He submitted that on its face the settlement sheet could not possibly be mistaken for a file or working note of the administration and that nor could a number of the other documents included at annexure 12 of Mr McLeod's first statement

124. Finally, Mr Priestley submitted that the adjournment should not be granted because based on what ASIC had submitted regarding the material nature of the document and the need to explore its implications by way of further investigation, Contention 4 could not be established based on the evidence adduced in the proceedings.

125. ASIC's final submission in support of the application for adjournment was that as a matter of procedural fairness it should be granted as it was necessary to enable ASIC to investigate what was a critical point.

The panel's ruling on ASIC's adjournment application

126. The Board declined to grant an adjournment and indicated that it would include its reasons in this determination.

127. We accept Mr McLeod's evidence in cross-examination already referred to regarding the difficulties he had encountered obtaining documents from Mr Gillies, his application to ASIC for assistance and the subsequent receipt of documents which led him to issue the PDK Addendum Report. We also accept his evidence regarding the location of Box 524 after becoming aware of the allegations in the SOFAC regarding a failure to investigate or adequately investigate the affairs of PDK and his prompt despatch of those documents to ASIC in July 2014.

128. The ramifications to ASIC's case on Contention 4 of the Board refusing the adjournment application were significant and as evidenced by the transcript of the proceedings, the adjournment application received the Board's due consideration prior to our ruling made on the day that the application should be refused.

129. The reasons for this ruling were as follows:

    (a) The Board was not persuaded by ASIC's submission that an adjournment in order to conduct additional investigation, was justified on the basis that Mr McLeod's first statement (paragraph 22) did not make clear that the second document at annexure 12 of that statement was a document received from Mr Gillies and not a document created by Mr McLeod's firm. Mr McLeod's first statement at paragraphs 24 and 25 sets out relevant detail about how and when additional documents were recovered and specifically states that those additional records included the property dealings which became the subject of his PDK Addendum Report. ASIC was therefore fully apprised of the fact that further documents had been located, was provided with those documents well in advance of this hearing and was on notice by paragraph 22 of Mr McLeod's first statement that those additional documents were specifically relevant to the basis for Mr McLeod's denial of Contention 4.

    (b) ASIC did not clarify what the purpose of its enquiries in relation to the settlement sheet document would be and it was difficult to envisage what evidence could advance its position given that the

allegation in Contention 4 relied on inadequate investigation and record keeping on the part of Mr McLeod.

(c) ASIC's Counsel asserted it would be procedurally unfair not to be granted an adjournment and Mr Priestley submitted it would be unfair to his client for an adjournment to be granted. In our view the fact that ASIC did not make any enquiries of Mr McLeod between receiving the additional documents on 31 July 2014 and its cross examination of Mr McLeod at the hearing of these proceedings made ASIC's assertion of unfairness problematic and was a factor in the decision to refuse the application particularly given the delay and additional costs such an adjournment would be likely to involve.

(d) ASIC apparently reviewed the additional documents received on 31 July 2014 and there was no impediment to it making further enquiries of Mr McLeod regarding the contents of the box prior to the hearing. There was a period of nearly four full months between the time it received the documents from Mr McLeod and the hearing taking place. During that time ASIC could have advanced the matter that was the subject of the adjournment application. If ASIC had identified the need to file additional evidence the Board's procedures would have permitted such an application to be made.

Finding on Contention 4

130. The first part of the allegation in Contention 4 was that Mr McLeod failed to investigate the affairs of PDK. Based on the evidence adduced and the submissions made we find that this allegation is not established.

131. The second allegation in Contention 4 was that Mr McLeod failed to properly investigate the affairs of PDK because he failed to conduct proper enquiries and maintain documentation regarding the reasons for reduction of PDK's work in progress; the transfers of funds to directors; and the transfers of properties to directors or their wives at undervalue.

132. In closing submissions in respect of Contention 4, Counsel for ASIC submitted that:

(a) Mr McLeods evidence was inconsistent because the PDK Second Report represented that he was in possession of the company register, yet in re-examination by Mr Priestley, Mr McLeod identified one of the documents received from Mr Gillies in Box 524 as the company register.

(b) it was unclear what documentation Mr McLeod had at the time of the Second Report to Creditors of PDK and what he received by way of additional documentation on 26 May 2012 and therefore the explanation Mr McLeod had given was inadequate to rebut the contention made.

(c) in the period leading up to the PDK Second Report Mr McLeod made no proper enquiries of Mr Ahrens, the referring accountant,

in respect of the affairs of PDK, including any proper investigation of the decrease in WIP prior to the PDK Second Report on the basis that there was no investigation regarding the reduction in WIP and Mr McLeod's excuse was there was a dispute between the directors. Mr McLeod could have made enquiries of Mr Ahrens regarding the reduction in WIP despite not having additional documents from Mr Gillies at that time.

133. Mr Priestley submitted in respect of Contention 4:

(a) that it was not open to ASIC to ask the Board to make a finding that there was an inconsistency between Mr McLeod's evidence regarding when he received the company register of PDK;

(b) that any evidentiary onus on Mr McLeod to show that his investigation was inadequate had been satisfied by the evidence given by Mr McLeod as to why his investigation was stymied; and

(c) of the three issues raised by ASIC as demonstrating an inadequate investigation, i.e. the property transfers to the wives, the reduction in WIP and the loan account, the reduction in WIP and the transfers represented different sides of the same coin as the reduction in WIP results from the property transfers when a development is complete.

134. We have considered the submissions from each of the parties and note our views as follows:

(a) We are not persuaded that there is inconsistent evidence from Mr McLeod as to when he received the company register of PDK and we do not make that finding.

(b) We do not regard Mr McLeod's explanation regarding why the investigation was hampered until the 26 May 2012 as inadequate to rebut ASIC's contention. Having regard to the evidence regarding Box 524 and the circumstances which led to Mr McLeod receiving additional documents from Mr Gillies on 26 May 2012 and issuing the PDK Addendum Report there is clearly a cogent explanation as to why there did not appear to be a great deal of documentation or time spent investigating the affairs of PDK prior to the issue of the second report to creditors.

(c) The evidence does not support a finding that had Mr McLeod made further enquiries of Mr Ahrens with regard to the reduction of WIP prior to the issue of the Second Report to the Creditors, it would have advanced the position in any way, particularly having regard to the fact that the reduction in WIP and the property transfers were inversely related.

135. We find that Box 524 did contain further working papers of the PDK administration, including PDK documents received from Mr Gillies on 26 May 2012. Accordingly, we are not prepared to make a finding that

the McLeod & Partners PDK file did not contain any record of the matters set out in 17.16 (a)-(g) of the SOFAC as alleged.

136. In our view the evidence adduced regarding Mr McLeod's investigation of the affairs of PDK demonstrates that Mr McLeod was fully aware he needed to obtain further documents to enable him to discharge his obligation to investigate under s438A(a) of the Act and he was diligent in the attempts he made to obtain the further documentation from PDK, including by invoking ASIC's assistance, with the result that he did eventually receive material that enabled him to report more fully to the creditors in respect of the uncommercial transactions and he did so promptly within seven days of receiving the additional documentation.

137. We find that Contention 4 is not established.

Contention 5

138. Contention 5 was not pressed.

Contention 6

139. Contention 6, admitted by Mr McLeod alleges that in seeking creditor approval for retrospective remuneration at a meeting of creditors of PDK on 24 June 2011, Mr McLeod failed to provide the creditors of PDK with a remuneration report concerning work completed by Mr McLeod from the period 27 May 2011 to 24 June 2011.

140. Contention 6 identified s449E(7) and s180(1) of the Act and clause 15.3.3 of the 2011 IPA Code as sources of the obligations on administrators that were relevant to the question for this Board of whether Mr McLeod did not adequately and properly perform his duties and functions as an administrator in terms of s1292(2)(d)(2) of the Act.

141. Mr McLeod admitted the facts of this Contention which were as follows:

    (a) In the PDK Second Report Mr McLeod included a remuneration report in support of approval by creditors for remuneration of $19,800;

    (b) At the PDK creditors meeting which took place on 27 May 2011, a resolution was passed to approve remuneration to Mr McLeod of $19,800;

    (c) At the further PDK creditors meeting which took place on the 24 June 2011 ("the further creditors meeting"), following the PDK Addendum Report which Mr McLeod circulated following the receipt of documents from Mr Gillies on 26 May 2011, a resolution was passed to approve further remuneration for Mr McLeod of $11,000 *"regarding his additional investigations, addendum report and reconvened meetings of creditors….with such funds being calculated on a time basis in accordance with the rates for McLeod & Partners."*; and

(d) There was no remuneration report included with the PDK Addendum Report or otherwise circulated to creditors prior to the further creditors meeting.

142. Section 449E(7) of the Act provides as follows:

"Before remuneration is determined under paragraph (1)(b) or (1A)(b), the administrator must:

(a) prepare a report setting out:

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

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

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

(b) give a copy of the report to each of the company's creditors at the same time as the creditor is notified of the relevant meeting of creditors."

143. The obligation imposed on administrators by s449E(7) of the Act is a mandatory one. Mr McLeod admitted to not having provided a remuneration report but did not concede it amounted inadequate and improper performance of his duties in terms of s1292(2)(d)(2) of the Act.

144. In closing submissions counsel for ASIC described Mr McLeod's failure to provide the remuneration report to creditors in accordance with his duty under s449E (7) of the Act as a *"fundamental breach from an experienced liquidator"*. The amount of additional remuneration was disclosed to and approved by the creditors at the meeting, and even though the failure to provide the additional remuneration report was clearly not in accordance with his statutory obligation, and also in our view indicated that Mr McLeod did not act with the level of diligence required by the applicable technical and professional standards, it was not in our view a *"fundamental breach"* having regard to the context in which it occurred.

145. In not conceding that Mr McLeod's conduct amounted to inadequate and improper performance of duties in terms of s1292(2)(d)(2) of the Act, the Respondent's position was that although the conduct demonstrated a failure to meet the applicable technical and professional standards, it did not, of itself, establish a failure to carry out or perform adequately and properly the duties of a liquidator under s1292(2)(d)(2) of the Act.

146. In the Board's decision in *Fiorentino*[4] the question of whether the failure of a liquidator to give notice to a particular creditor in breach of Regulation 5.6.12(1)(a) of the Corporations Act Regulations would in every case, constitute a failure under s1292(2)(d) of the Act, was

[4] Fiorentino para 246

considered. The Board expressed doubt that in all cases it would because a breach may have occurred through error, it could be *de minimus*, or the circumstances of a particular breach may lack substance. In making their finding that the conduct in question did constitute a failure to perform adequately and properly the duties of a liquidator under s1292(2)(d)(2) of the Act the fact that the failure of Mr Fiorentino to provide the relevant notice was a matter of significance was relevant[5].

147. The legislative requirement in s449E(7) of the Act is a statutory codification of an aspect of the general law requirement for transparency and full disclosure by administrators that stems from their obligation to act in the interests of others as an agent and officer of the corporation as a fiduciary.

148. Having regard to the nature of an administrator's role and the obligations of that office full disclosure must not only be given to creditors but must also be seen to be given and this is achieved by attention to and compliance with the provisions of the Act and relevant codes which clearly set out the obligations of administrators when undertaking company administrations and in particular their obligations with respect to communication with creditors. There has been a significant focus by both industry bodies and ASIC on the need for strict compliance with remuneration requirements and guidelines based on the theme that disclosure is paramount and in the public interest. Within that context it is reasonable to expect that all registered liquidators understand the significance of proper disclosure of remuneration and therefore appreciate the need for strict compliance with the legislative and industry requirements in place from time to time.

149. For these reasons we have formed the view that the failure to provide the additional remuneration report to creditors in the PDK administration was not in accordance with Mr McLeod's statutory and professional obligations and, in our view, was significant and amounted to inadequate and improper performance of Mr McLeod's duties in terms of s1292(2)(d)(2) of the Act.

150. We find that Contention 6 is established.

Contention 7

151. Contention 7 was not pressed.

Contention 8

152. Contention 8 was not pressed.

Contention 9

153. Contention 9 was not pressed.

[5] Fiorentino para 254

Contention 10

154. Contention 10 alleges that Mr McLeod failed to lodge with ASIC a report concerning suspected past misconduct when it appeared to Mr McLeod that a past or present officer, or employee, or member of PDK may have been guilty of an offence in relation to PDK as required by s438D(1) of the Act.

155. Contention 10 refers to the requirements of s438D(1) of the Act, Part B of RG16 and/or s180(1) of the Act as examples of standards for conduct of Mr McLeod's role as administrator of PDK that were not met.

156. Mr McLeod has admitted the facts of Contention 10 and has also conceded that in failing to lodge a s438D report he did not act adequately and properly in terms of s1292(2)(d) of the Act.

157. By adopting this approach, Mr McLeod has, in effect, admitted the material allegation in Contention 10, the evidence supporting that allegation and the contentions made by ASIC that the facts establish a failure by Mr McLeod to carry out or perform adequately and properly the duties and functions of a liquidator or administrator.

158. We repeat our comments in paragraphs 95 and 96 hereof and adopt that reasoning in respect of this Contention.

159. In our view, for the reasons given, Mr McLeod in failing to lodge with ASIC a report concerning suspected past misconduct when it appeared to him that a past or present officer, or employee, or member of PDK may have been guilty of an offence in relation to PDK as required by s438D(1) of the Act, failed to perform his duties adequately and properly in terms of s1292(2)(d)(2) of the Act.

160. We find that Contention 10 is established.

Contentions 11-16 - alleged failure to make proper declarations of indemnities and relevant relationships

161. Each of these Contentions alleges a failure on the part of Mr McLeod to make proper and adequate declarations of indemnities and relevant relationships ("DIRRI"). Except for particulars (b) and (d) of Contention 11 which are denied, Mr McLeod admits the facts of these Contentions and concedes that the conduct amounted to inadequate and improper performance of his duties in terms of s1292(2)(d)(2) of the Act.

162. Our findings below in respect of each of the Contentions include a summary of the relevant facts.

Contention 11

163. Contention 11 alleges that Mr McLeod failed to disclose to creditors in the DIRRI details:

    (a) concerning the nature of his "relevant relationship" with Mrs O'Sullivan, (who was at all relevant times a director of both PBC

and Cruise Cat Marine Pty Ltd ACN 114 953 454 (deregistered) ("CCM"); and

(b) of his appointment to CCM on 14 April 2008, less than 12 months before his appointment to PBC.

164. The facts in relation to this Contention that are admitted are as follows:

(a) On 14 April 2008, Mr McLeod was appointed as voluntary administrator of CCM. At this time the director of CCM was Mrs O'Sullivan, the shareholder of PBC;

(b) Mr McLeod was then appointed as voluntary administrator of PBC on 26 March 2009 less than twelve months after his appointment to CCM. At this time Mrs O'Sullivan was the sole director of PBC;

(c) Mr McLeod's previous appointment to CCM was a *"relevant relationship"* within the meaning of s60(1)(a) of the Act, because CCM and Mrs O'Sullivan were "*associates*" of PBC within the meaning given by s11 of the Act;

(d) On 27 March 2009, in the DIRRI accompanying the PBC first report, McLeod did not disclose his appointment to CCM, although the DIRRI stated that he had undertaken a proper assessment of risks to his independence;

(e) Apart from a *"pre-appointment checklist"* dated 25 March 2009 noting a conflict of interest with the company accountant, Mr McLeod's file for the PBC administration did not contain documentation relevant to the circumstances of his appointment or why and how the decision to accept the appointment was reached, nor anything to indicate he had undertaken enquiries of the staff of McLeod & Partners concerning possible conflicts of interest or lack of independence;

(f) On 28 April 2009 a creditor of PBC sent a letter to Mr McLeod stating that he had failed to declare his appointment to CCM and on that date Mr McLeod performed a search of the ASIC register in relation to Mrs O'Sullivan There is no record on Mr McLeod's file for the PBC administration of an earlier search of Mrs O'Sullivan;

(g) On 30 April 2009 in the PBC Second Report to creditors Mr McLeod disclosed the previous appointment to CCM but did not make a new DIRRI; and

(h) The second meeting of creditors took place on 12 May 2009 and the minutes did not record the tabling of a further DIRRI to creditors.

165. Contention 11 identified s436DA of the Act and Clauses 6.8, 6.14(b) and 6.14.3 of the 2008 Code ("2008 Code") and/or s180(1) of the Act as sources of the obligations placed on administrators that were relevant to the question for this Board of whether Mr McLeod did not adequately

and properly perform his duties and functions as an administrator in terms of s1292(2)(d)(ii) of the Act.

Matters in issue in relation to Contention 11

166. Mr Priestley submitted that Mr McLeod denied sub-paragraphs (b) and (d) (to the extent it referred to sub-paragraph (b)) of Contention 11 on the basis that the relevant information referred to was included in the Second Report to Creditors ("PBC Second Report"). As already noted the Contention was otherwise conceded.

167. Section 436DA(5) of the Act requires an administrator to update a DIRRI by making a replacement declaration either as soon as practicable after becoming aware of an error in the declaration or if the DIRRI has become out of date.

168. Clause 6.14(b) of the 2008 Code was effective from 31 December 2007. It sets out the requirement to provide creditors with a DIRRI at the earliest possible opportunity and includes details of what must be set out therein.

169. Section 60 of the Act defines a declaration of relevant relationships (DIRRI) as follows:

> *(1) In this Act, a **declaration of relevant relationships**, in relation to an administrator of a company under administration, means a written declaration:*
>
> *(a) stating whether any of the following:*
>
> *(i) the administrator;*
>
> *(ii) if the administrator's firm (if any) is a partnership-a partner in that partnership;*
>
> *(iii) if the administrator's firm (if any) is a body corporate – that body corporate or an associate of that body corporate;*
>
> *has or has had within the preceding 24 months, a relationship with:*
>
> *(iv) the company; or*
>
> *(v) an associate of the company; or*
>
> *(vi) a former liquidator, or former provisional liquidator, of the company; or*
>
> *(vii) a person who is entitled to enforce a security interest in the whole or substantially the whole, of the company's property (including any PPSA retention of title property; and*

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

170. Clause 6.14 (b) of the IPA Code largely reflects what is set out in s60 of the Act.

171. While Mr McLeod did include details of the relevant relationship in the PBC Second Report, he did not include the information required by s60(b) of the Act i.e. a statement of his reasons for believing that none of the relevant relationships resulted in him having a conflict of interest or duty.

172. Mr Priestley submitted that including the relevant information in the PBC Second Report was capable of satisfying Mr McLeod's obligation to re-issue the DIRRI. However, the information provided in the PBC Second Report which it was submitted constituted the replacement DIRRI, did not include all of the information required by s60 of the Act and clause 6.14(b) of the IPA code as it did not set out the administrator's reasons for believing that none of the relevant relationships would result in the administrator having a conflict of interest or duty.

173. On that basis we have formed the view that the evidence does not support the view that Mr McLeod has satisfied his obligation to disclose relevant relationships in accordance with the provisions of the Act in terms of this Contention even if disclosure in the second report to creditors does satisfy the obligation to make a DIRRI, which in our view it would not given s60(1)(b) of the Act and clause 6 of the 2008 Code in particular the requirement to use the template DIRRI referred to in clause 6(iv).

Finding on Contention 11

174. The Board's decision in *Fernandez* contains a detailed discussion of the purpose of s436DA of the Act[6]. That discussion refers to the purpose of the requirement in s436DA(2) of the Act to make a DIRRI as being to ensure that creditors are properly informed about any matters that may affect the independence of the administrator so that they can consider and make an informed decision about whether to remove an administrator and substitute another.

175. Based on the relevant authorities as to the role and responsibilities of an administrator (see paragraph 38 hereof) and the purpose of s436DA of the Act, we have formed the view that Mr McLeod did not adequately and properly perform his duties and functions in terms of s1292(2)(d)(2) of the Act when he omitted to declare in the DIRRI his relevant relationships with CCM and Mrs O'Sullivan and did not issue a replacement DIRRI updating the creditors with the relevant information when the matter was brought to his attention.

176. ASIC also relied on three provisions of the 2008 Code in respect of Contention 11. Clause 6.8 of the 2008 Code provides that practitioners

[6] Fernandez para 199ff

must not take an appointment if they have had a Professional Relationship with the insolvent during the previous two years. Professional Relationship is not defined in the Code but is clearly referring to commercial relationships between the professional firm and the insolvent in the 2 years prior. It is stated in the provision that the purpose of this restriction is to avoid any perception of a lack of independence of the Practitioner. Clause 6.14(b) of the 2008 Code, as noted above, sets out the requirement to provide creditors with a DIRRI at the earliest possible opportunity and includes details of what must be set out therein. Finally clause 6.14(3) states that if a practitioner becomes aware that the DIRRI is out of date or there is an error, then a practitioner must update the DIRRI and provide it to Creditors with the next communication to creditors and table the DIRRI at the next meeting of creditors.

177. The sections of the 2008 Code dealing with Independence and Remuneration came into effect on 31 December 2007 and the balance of the Code came into effect on 21 May 2008.

178. Relevant contextual provisions of the Code include:

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

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

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

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

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

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

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

(iii) "*Practitioners must not take an appointment if they have had a Professional Relationship with the insolvent during the previous two years. The purpose of this restriction is to avoid any perception of a lack of independence of the*

Practitioner. This is referred to as 'the two year rule."(Section 6.8)

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

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

179. In our view a reasonably competent liquidator proposing to accept an appointment in April 2008 would have appreciated the importance of making disclosures of relevant relationships in the DIRRI in accordance with the Act or the 2008 Code. The 2008 Code, although only recently having come into force, at the time mandated both that a practitioner "must not" take an appointment if they have had a Professional Relationship and the form of DIRRI to be completed for all insolvency appointments. Mr McLeod did not appear to be aware of either of these requirements and in our view a reasonably competent liquidator would ensure he was familiar with these requirements.

180. In the alternative to the 2008 Code, ASIC pleaded in Contention 11 that Mr McLeod did not in terms of s1292(2)(d)(2) of the Act carry out his duties adequately and properly because he did not exercise his powers and discharge his duties with the degree of care and diligence required by s180(1) of the Act. In our view the appropriate standard of care and diligence required of company officers by s180(1) of the Act demands compliance with the Act and the mandatory requirements of the 2008 Code then in force, particularly having regard to an administrator's duties to creditors as a fiduciary and his obligation to act impartially as among all relevant parties.

181. Mr McLeod has accepted that the conduct in question was not in accordance with accepted practice.

182. In our view Mr McLeod did not adequately and properly perform his duties and functions as an administrator by failing to disclose to creditors in the DIRRI details of the nature of his relevant relationship with Mrs O'Sullivan and his appointment to CCM on 14 April 2008, less than 12 months prior to his appointment to PBC.

183. We find that Contention 11 is established.

Contention 12

184. Contention 12 alleges a failure to disclose in the DIRRI to creditors of PBC the identity of an indemnifier or third party funder and the extent and nature of the indemnity.

185. Mr McLeod has admitted the facts of Contention 12 and has also conceded that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d)(ii) of the Act.

186. The relevant facts are as follows:

    (a) On 26 March 2009 Mrs O'Sullivan signed a *"funding authority"* stating that $3,000 funding would be provided to Mr McLeod.

    (b) Mr McLeod's pre-appointment checklist noted "*Upfront funding by third party."*

    (c) However the PBC DIRRI dated 27 March 2009 did not refer to funding provided by the director/shareholder of $3,000 but stated that Mr McLeod had not been provided with an indemnity in relation to the administration.

    (d) Mr McLeod received the $3,000 as *"Third party contribution from the director"* on 15 April 2009.

    (e) There is no evidence of disclosure to creditors of the payment.

187. ASIC alleged that the non-disclosure of the funding authority and subsequent payment did not comply with the requirements of s436DA(2)(b) of the Act and Clause 6.14(d) of the 2008 Code and s180(1) of the Act.

188. Section 436DA(2)(b) of the Act provides that as soon as practicable after being appointed an administrator must make a declaration of indemnities.

189. Clause 6.14(d) of the 2008 Code mandates disclosure of the identity of each indemnifier and the extent and nature of each indemnity (other than statutory indemnities) in the DIRRI as well as any payment made by or for the insolvent on account of the practitioner's remuneration and disbursements. This clause reflects an aspect of a fundamental principle governing the role and position of administrators that they be and are seen to be independent. The requirement to disclose upfront payment of fees in the codes is a reflection of the requirement for manifest impartiality and independence in the context of the first meeting of creditors to enable an assessment of whether to retain or replace the appointed administrator. In our view the requirements of these provisions of the IPA code reflect the relevant professional standard and Mr McLeod did not meet this standard when he did not disclose the identity of the indemnifier or the extent and nature of the indemnity.

190. In the alternative to the IPA Code, ASIC pleaded in Contention 12 that Mr McLeod did not carry out his duties adequately and properly because he did not exercise his powers and discharge his duties with the degree of care and diligence required by s180(1) of the Act. In our view the appropriate standard of care and diligence required of company officers by s180(1) of the Act demands compliance with the Act and the mandatory requirements of the 2008 Code, particularly having regard to the administrator's duties to creditors as a fiduciary and his obligation to act impartially as among all relevant parties.

191. The facts pleaded in Contention 12 demonstrate that creditors were not made aware of this information in the DIRRI circulated by Mr McLeod and so did not have information which was relevant to their consideration of whether to seek a substitute administrator at the first meeting of creditors.

192. As noted in respect of Contention 11, the Board's decision in *Fernandez* contains a detailed discussion of the purpose of s436DA of the Act[7] referring to the purpose of the requirement in s436DA(2) of the Act being to ensure that creditors are properly informed about any matters that may affect the independence of the administrator so that they can consider and make an informed decision about whether to remove an administrator and substitute another.

193. If the company, through the actions of its director, provides an administrator with an amount on account of costs, the administrator may be (or may be seen to be) beholden to the directors. Creditors are entitled at the very least to be aware of this type of information prior to considering whether to seek to substitute an administrator.

194. For the reasons set out above we have formed the view that Mr McLeod did not, in terms of s1292(2)(d)(2) of the Act, adequately and properly perform his duties and functions as an administrator of PBC when he failed to disclose to creditors in the DIRRI, the identity of an indemnifier or third party funder and the extent and nature of the indemnity.

195. We find that Contention 12 is established.

Contention 13

196. Contention 13 is in the same terms as Contention 12 except that it relates to DJE.

197. Mr McLeod has admitted to the facts of Contention 13 and has also conceded that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d) of the Act.

198. The relevant facts are as follows:

[7] Fernandez para 199ff

(a) On 27 January 2010, Mr Edwards, the director of DJE signed a funding authority to Mr McLeod for $10,000;

(b) On 29 January 2010 in the DIRRI accompanying the DJE First Report to Creditors Mr McLeod stated that he had not been indemnified in relation to this administration other than any indemnities he may be entitled to under statute but that he had been partially funded from a third party for his costs in undertaking the Voluntary Administration;

(c) The DIRRI did not disclose the identity of that third party funder nor the amount of or extent of the funding.

199. There was no other evidence that Mr McLeod disclosed this information to creditors.

200. We refer to and repeat our comments in relation to Contention 12 in paragraphs 188-193 above. In our view that reasoning applies in relation to Contention 13 and we have formed the view that Mr McLeod did not, in terms of s1292(2)(d)(2) of the Act adequately and properly perform his duties and functions as an administrator of DJE when he failed to disclose to creditors in the DIRRI, the identity of an indemnifier or third party funder and the extent and nature of the indemnity.

201. We find that Contention 13 is established.

Contention 14

202. Contention 14 is in the same terms as Contention 12 and 13 except that it relates to DCQ.

203. Mr McLeod admits the facts in Contention 14 and concedes that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d) of the Act.

204. The relevant facts are as follows:

(a) On 10 May 2010, Mrs Conti (a Director of DCQ) signed a funding authority to Mr McLeod for $15,000.

(b) On 11 May 2010 Mr McLeod received $15,000 from Ahrens accounting. Payment was made to Mr McLeod on 10 May 2010.

(c) On 11 May 2010, in the DIRRI accompanying the DCQ First Report to Creditors. Mr McLeod stated that he had been partially funded by a third party for costs in undertaking the voluntary administration but did not reveal the identity of the indemnifier or funder nor the amount of funding and there is no evidence that those matters were disclosed to creditors in breach of s436DA(2)(b) of the Act and Clause 6.14(d) of the 2008 Code.

205. We refer to and repeat our comments in relation to Contention 12 in paragraphs 188-193 above. In our view that reasoning applies in relation

to Contention 14 and we have formed the view that Mr McLeod did not, in terms of s1292(2)(d)(2) of the Act adequately and properly perform his duties and functions as an administrator of DCQ when he failed to disclose to creditors in the DIRRI, the identity of an indemnifier or third party funder and the extent and nature of the indemnity.

206. We find that Contention 14 is established.

Contention 15

207. Contention 15 is in the same terms as Contentions 12-14 except that it relates to HHQ.

208. Mr McLeod admits the facts of Contention 15 and concedes that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d) of the Act.

209. The relevant facts are as follows:

    (a) On 31 August 2009, Mr Hughes (a director of HHQ) signed a funding authority to Mr McLeod for $16,500. On 01 September 2009 Mr McLeod received $16,500 from Ahrens accounting.

    (b) On 01 September 2009, in the DIRRI accompanying the HHQ First Report to Creditors Mr McLeod advised that he had been partially funded by a third party for costs in undertaking the Voluntary Administration but he did not reveal the identity of the funder nor the extent of the funding and there is no evidence that those matters were disclosed to creditors in breach of s436DA(2)(b) of the Act and Clause 6.14(d) of the 2008 Code.

210. We refer to and repeat our comments in relation to Contention 12 in paragraphs 188-193 above. In our view that reasoning applies in relation to Contention 15 and we have formed the view that Mr McLeod did not, in terms of s1292(2)(d)(2) of the Act adequately and properly perform his duties and functions as an administrator of HHQ when he failed to disclose to creditors in the DIRRI, the identity of an indemnifier or third party funder and the extent and nature of the indemnity.

211. We find that Contention 15 is established.

Contention 16

212. Contention 16 is in the same terms as Contention 12-15 except that it relates to OTR.

213. Mr McLeod admits the facts of Contention 16 and concedes that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d) of the Act.

214. The relevant facts are as follows:

(a) On 07 June 2010 in the DIRRI accompanying the OTR First Report to Creditors, Mr McLeod stated that he had been partially funded by a third party for costs in undertaking the Voluntary Administration but did not reveal the identity of the funder or the amount of funding provided;

(b) On Mr McLeod's file there was a copy of a cheque for $19,800 from Australian Business Strategy and the insolvency receipt records the amount as "a Third Party Contribution";

(c) There is no evidence that Mr McLeod disclosed to creditors the identity of the indemnifier or funder, or the amount of the funding.

215. We refer to and repeat our comments in relation to Contention 12 in paragraphs 188-193 above. In our view that reasoning applies in relation to Contention 16 and we have formed the view that Mr McLeod did not, in terms of s1292(2)(d)(2) of the Act adequately and properly perform his duties and functions as an administrator of OTR when he failed to disclose to creditors in the DIRRI, the identity of an indemnifier or third party funder and the extent and nature of the indemnity.

216. We find that Contention 16 is established.

Contention 17

217. Contention 17 alleges that by failing to properly consider whether he was disqualified from consenting to act as liquidator of Future Profit CPA Pty Ltd (deregistered) ACN 104 365 657 ("FPC"), in circumstances where Mr McLeod had previously held the position of officer of FPC within two years of his appointment as liquidator of FPC, and in the absence of any creditor's resolution or leave of the court to do so, Mr McLeod did not comply with s532(2)(c)(i) of the Act by consenting to act when he was disqualified from doing so and Clause 6.8 of the 2008 Code; and/or did not act diligently as required by s180 (1) of the Act.

218. The relevant facts are as follows;

(a) From 14 May 2008 to 20 June 2008, Mr McLeod was appointed as the voluntary administrator of FPC, and from 20 June 2008 to 23 June 2008 he was the administrator of the Deed of Company Arrangement (DOCA) on behalf of FPC. The DOCA was wholly effectuated on 23 June 2008 and FPC returned to registered status;

(b) On 21 December 2009, Mr McLeod was appointed as liquidator of FPC in a creditors' voluntary winding up;

(c) At the time of accepting the appointment as liquidator of FPC, Mr McLeod was an officer of FPC within the meanings of s9 and s532(6)(b) of the Act as he had been the company's voluntary administrator and deed administrator within the previous two years;

(d) There was no evidence that Mr McLeod had either obtained the leave of the Court to act as the liquidator of FPC as required by

s532(2)(c) of the Act, or that the creditors had passed a resolution under s532(5) of the Act stating that s532(2)(c) of the Act did not apply to FPC or that ASIC had given a direction to Mr McLeod that s532(6)(b) of the Act did not apply.

219. Mr McLeod's pre appointment conflict check document dated 21 December 2009 noted the previous appointments however there is no evidence Mr McLeod took any steps in consequence of the identification of that issue.

220. It was alleged that Mr McLeod acted as a liquidator of FPC when he was disqualified from doing so under s532(2)(c) of the Act.

221. Mr McLeod admits the facts of Contention 17 and concedes that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d) of the Act.

222. Section 532(2)(c) of the Act provides as follows:

> *(2) Subject to this Section, a person must not, except with the leave of the court, seek to be appointed, or act, as liquidator of a company…*
>
> > *(c) if:*
> >
> > *(i) the person is an officer or employee of the company (otherwise than by reason of being a liquidator of the company or of a related body corporate)*
>
> *(6) [Where person taken to be office employee or auditor] For the purposes of sub section 2, a person is taken to be an officer, auditor or employee of a company if:*
>
> > *(a) the person is an officer, employee or auditor of a related body corporate; or*
> >
> > *(b) except where ASIC, if it thinks fit in the circumstances of the case, directs that this paragraph does not apply in relation to the person-the person has, at any time within the immediately preceding period of 2 years, been an officer, employee, auditor or promoter of the company or related body corporate.*

223. Clause 6.8 of the 2008 Code provides that practitioners must not take an appointment if they have had a Professional Relationship with the insolvent during the previous two years. The purpose of this restriction is to avoid any perception of lack of independence of the Practitioner. This is referred to as the "*two year rule*".

224. Both s532 (2)(c) of the Act and Clause 6.8 of the IPA Code reflect an aspect of a fundamental principle governing the role and position of, in this case the liquidator, to be and to be seen to be independent. The

requirement not to take an appointment, similar to the requirement on administrators discussed in Contention 12 to disclose upfront payment of fees, is another embodiment of the general law requirement for manifest impartiality and independence on the part of a liquidator arising from the liquidator's obligation to act in the interests of others as an agent and officer of the corporation and as a fiduciary.

225. In *Breen v Williams* (1996) 186 CLR 71 at 113 Gaudron and McHugh JJ referred to fiduciary obligations in these terms:

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

226. Having regard to the nature of an administrator's role and the obligations of that office it is manifestly important for administrators to observe the requirements of the professional codes and the Act which enshrine the independence of the office. In our view Mr McLeod failed in this regard and was not sufficiently diligent in terms of his obligations under s180(1) of the Act about ensuring that his appointment to FPC complied with the relevant IPA code and legislative requirements so that the requirement for independence embodied in the IPA code and the Act were satisfied. For the reasons set out we have formed the view that Mr McLeod failed to act adequately and properly in terms of s1292(2)(d)(i) of the Act when he proceeded to act as liquidator of FPC in circumstances where he had previously held the position of officer of FPC within two years of his appointment as liquidator of FPC.

227. We find that Contention 17 is established.

Contentions 18 and 19

228. Contention 18 alleges that by failing to open a liquidator's general account in the name of ATBH and deposit all money received into that account within seven days after it had been received, Mr McLeod did not comply with Regulation 5.6.06(1) of the Corporations Regulations 2001; and/or s180(1) of the Act.

229. The relevant facts are as follows:

(a) On 03 December 2010 ATBH was placed into creditor's voluntary liquidation and Mr McLeod was appointed as the creditors voluntary liquidator.

(b) McLeod & Partners operated a holding account with NAB entitled *"McLeod & Partners (QLD) Pty Ltd Holding Account"* and on 16 December 2010, Mr McLeod deposited into it the sum of $13,456.65.

(c) On 24 December 2010 Mr McLeod opened a further NAB account being an external administration account in the name of ATBH.

(d) There is no evidence that any earlier steps were taken to open a separate liquidator's account for the ATBH administration;

(e) Mr McLeod did not pay all monies received by him for the ATBH administration into a liquidator's general account not later than 7 days after it had been received, in breach of regulation 5.6.06(1).

230. The same allegation is made in Contention 19 in respect of Mr McLeod's administration of BBT.

231. The relevant facts in respect of Contention 19 are as follows:

(a) On 02 June 2010 BBT was placed into creditor's voluntary liquidation and Mr McLeod was appointed as liquidator;

(b) On 09 November 2010 Mr McLeod requested NAB to open an external administration account for BBT. There is no evidence of any earlier steps taken to open a liquidator's general account;

(c) On 09 November 2010 Mr McLeod transferred $4,843.75 from *"mp holding account"* to the BBT liquidator's general account; and

(d) Mr McLeod did not pay all the monies received by him for the BBT liquidation into a liquidator's general account not later than 7 days after it had been received, in breach of regulation 5.6.06(1).

232. Mr McLeod admitted the facts of Contentions 18 and 19 but did not concede that they amounted to a failure to adequately and properly perform the duties of an administrator under s1292(2)(d)(i) of the Act.

233. In his closing submissions counsel for ASIC described Mr McLeod's failure to deposit the funds into a liquidators general account within 7 days of receipt as the breach of a fundamental obligation.

234. In the case of Contention 18, the correct act occurred one day outside the time period mandated by the Corporations Regulations, on Christmas Eve in fact. Counsel for ASIC submitted that even one day was too late as a liquidator needs to be aware of and have an understanding of time periods.

235. Contention 19 on the other hand, involved a period of over 5 months delay between receiving the funds and depositing them in an appropriate account as required by regulation 5.6.06.

236. We have discussed in the context of our previous findings in this determination the importance of the administrator's role with respect to the company's property and his obligations as a fiduciary. A description of the role and obligations of a liquidator is contained in *ASIC v Edge (2007) 211 FLR 137,* where Dodds-Stretton J said (at 44ff):

> *"[44] The extensive powers vested exclusively in the liquidator entail a corresponding vulnerability in the creditors, members and the public. The liquidator is a fiduciary on whom high standards of honesty impartiality and probity are imposed both by the Act and*

general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith".

237. Even though the evidence was that Mr McLeod conducted a sub-account and was able to ascertain how much of that account belonged to each administration at all times before it was deposited in a proper account, it is our view based on general law principles, that an administrator's responsibility when dealing with company funds is a strict one. An element of that obligation is compliance with proscriptive legislative and regulatory obligations. Mr McLeod's evidence did not reveal that there was any process in place within his firm which would assure compliance with the requirement for these monies to be transferred in the 7 day period and, in our view, a reasonably competent liquidator must have such processes in place to ensure compliance with regulatory requirements. For those reasons, even though in relation to Contention 18 the money was deposited only one day outside the time frame, we have formed the view that the conduct particularised in Contentions 18 and 19 demonstrates a failure to perform adequately and properly the duties of a liquidator under s1292(2)(d)(2)(i) of the Act.

238. We find that Contentions 18 and 19 are established.

Contention 20

239. Contention 20 alleges that by failing to table a DIRRI at the first meeting of Creditors of each of FPC, FPI, IMS Group, BBT, TD and ATBH, Mr McLeod did not comply with s506A(4) of the Act and Clause 6.14.1 of the 2008 Code and/or s180(1) of the Act.

240. Mr McLeod's statement dated 16 September 2014 stated that it was his usual practice to table the creditors report at the meetings. There was no challenge to this evidence.

241. We accept that the creditors reports were tabled at the meetings and the DIRRIs were attached to these reports.

242. The complaint made in the Contention was that the DIRRIs were not *"tabled"* and the particulars in support of the allegation were that the minutes of the relevant meetings did not record the tabling of the DIRRI and that the obligation on Mr McLeod was that the DIRRI needed to be tabled separately on the basis that the Act referred to it as a specific document and it should be tabled as a specific document.

243. ASIC further submitted in its final written submissions that the information contained in the DIRRI enables creditors to make an informed decision about whether to exercise their statutory right to replace the incumbent external administrator/liquidator because of concerns about independence and s506A(4) and 436DA(4) of the Act expressly provide that the DIRRI *"must be tabled at the meeting"* and that the Respondent's practice at the time was plainly deficient and demonstrated a failure to act as a reasonably competent liquidator.

244. Mr Priestley submitted that the DIRRI was tabled as it was annexed to the creditor's report that in each case was tabled at the meetings.

245. Mr Priestley further submitted that there is no definition of *"table"* in the legislation and that the ordinary meaning of the word is *"bring to the notice of"*. He also made the point that there is no separate requirement to minute the tabling of the DIRRI. We note that whether there was a requirement to minute the tabling of the DIRRI is a separate question and while the fact that tabling of the DIRRI was not minuted may be relevant circumstantial evidence, it is not material to the allegations made in Contentions 20 and 21.

246. Finally, Mr Priestley submitted that the respective creditors had received the creditors report with the DIRRI annexed in advance of the relevant meetings and had attended the meetings for the purpose of discussing the report and that this process should be construed as tabling of the document.

247. Clause 6.14.1 of the 2008 Code (which applied until 31 December 2010) provided as follows:

"The DIRRI must:

- *be provided with the first communication to creditors;*
- *be provided no later than with the notice of the first meeting of creditors and*
- *be tabled at the first meeting of creditors."*

248. We are not persuaded that ASIC has demonstrated that the DIRRIs of each of the companies referred to in Contention 20 were not *"tabled"* at the respective relevant meetings nor that the words of s436DA(4) of the Act specify that separate tabling of the DIRRI is required. The fact that the DIRRIs were not tabled and minuted separately to the creditors' reports to which they were annexed does not in our view, in the absence of any other facts demonstrate that they were not tabled at the meeting in the ordinary sense of the meaning of that word which is to present formally for discussion or consideration at a meeting.

249. We find that Contention 20 is not established.

Contention 21

250. Contention 21 alleges that Mr McLeod failed to table a DIRRI at the first meeting of creditors of AAR on 5 March 2012. However, for the same reasons as set out in Contention 20, we find that this Contention is not established because the evidence does not establish that Mr McLeod did not table the DIRRI at the meeting which is the material fact grounding the allegation in this Contention.

251. Although Contention 21 refers to the 2008 Code as the relevant professional standard against which Mr McLeod's conduct is to be

considered, it is in fact the 2011 IPA Code ("2011Code") that was applicable at the relevant time. Clause 6.15.5 of the 2011 Code is in the same terms as Clause 6.14.1 of the 2008 Code, but with the addition of the following sentence *"the tabling of the DIRRI must be included as an agenda item and in the minutes."* While Mr McLeod's conduct, when considered against this standard, may have fallen short of the mandatory requirement in the Code, it has not been necessary for us to consider this issue as the material allegation of fact in this Contention was not established and indeed the relevant edition of the Code was not referred to or relied on by ASIC in drafting the Contention or prosecuting its case.

252. We find that Contention 21 is not established.

Contention 22

253. Contention 22 alleges that by failing to lodge with ASIC a report concerning suspected past misconduct, when it appeared to Mr McLeod that a past or present officer, or employee, or member of each of FPC, PBC, CCM, DCQ, HHQ, OTR and ABG, may have been guilty of an offence in relation to the company, Mr McLeod did not comply with s438D(1) of the Act, Part B of Regulatory Guide RG16 and/or s180(1) of the Act.

254. Mr McLeod admits the facts of Contention 22 and concedes that those facts establish a failure by him to carry out or perform adequately and properly the duties and functions of a liquidator or administrator in terms of s1292(2)(d) of the Act.

255. The facts not in issue in relation to this Contention may be summarised as follows:

    (a) In the FPC First External Administration, in the FPC second report to creditors dated 10 June 2008 Mr McLeod stated that, based on his initial investigations, its officers and senior management may have committed a contravention of s588G(1) of the Act - failure to prevent insolvent trading. Despite his statement to the creditors Mr McLeod failed to lodge a report notifying ASIC of a possible offence, as required by s438D(1) of the Act.

    (b) In the PBC Second Report to creditors dated 30 April 2009 Mr McLeod stated that, based on his initial investigations, its officers and senior management may have committed a contravention of s588G of the Act - failure to prevent insolvent trading. He further stated that pending any further recovery of records from the company, he would consider recommending that a contravention of s438B of the Act - Failure to deliver to the Administrator all books and records in the director's possession that relate to the company, has occurred. Despite his statement to the creditors Mr McLeod failed to lodge a report notifying ASIC of possible offences, as required by s438D(1) of the Act.

(c) In the CCM second report to creditors dated 12 May 2008, Mr McLeod stated that, based on his initial investigations, its officers and senior management may have committed a contravention of s588G of the Act - failure to prevent insolvent trading and s286 of the Act -failure to retain financial records. Despite his statement to the creditors Mr McLeod failed to lodge a report notifying ASIC of the suspected offences, as required by s438D(1) of the Act.

(d) In the DCQ Second Report to creditors dated 3 June 2010 Mr McLeod stated that, based on his initial investigations its officers and senior management may have committed a contravention of s588G of the Act - failure to prevent insolvent trading and contravention of s438B of the Act - failure to deliver books and records. Despite his statement to the creditors Mr McLeod failed to lodge a report notifying ASIC of the suspected offence, as required by s438D(1) of the Act.

(e) In the HHQ Second Report to creditors dated 25 September 2009 Mr McLeod stated that, based on his initial investigations, its officers and senior management may have committed a contravention of s588G of the Act - failure to prevent insolvent trading. Despite his statement to the creditors, Mr McLeod failed to lodge a report notifying ASIC of this possible offence, as required by s438D(1) of the Act.

(f) In the OTR Second Report to creditors dated 01 July 2010, Mr McLeod stated that, based on his initial investigations its officers and senior management may have committed a contravention of s588G of the Act - failure to prevent insolvent trading and a contravention of Section 438B of the Act - failure to deliver to the Administrator all books and records in the director's possession that relate to the company. Despite his statement to the creditors Mr McLeod failed to lodge a report notifying ASIC of possible offences, as required by s438D(1) of the Act.

(g) In the ABG Second Report to creditors dated 18 August 2011 Mr McLeod stated that, based on his initial investigations its officers and senior management may have committed a contravention of s588G of the Act - failure to prevent insolvent trading. Despite his statement to the creditors Mr McLeod failed to lodge a report notifying ASIC of the possible offences, as required by s438D(1) of the Act.

256. Section 438D(1) of the Act and Part B of Regulatory Guide RG16 make clear the mandatory requirement to lodge a report about suspected offences as soon as practicable after the administrator becomes aware of such conduct and this was not done in respect of the seven companies the subject of this Contention, even though the relevant reports to creditors had identified the existence of possible offences.

257. In our view the appropriate standard of care and diligence required of company officers by s180(1) of the Act demands compliance with the

provisions of the Act. The reporting of possible offences to ASIC is relevant to the effectiveness and capability of ASIC's discharge of its own supervisory role in respect of companies and their officers and underscores the importance of administrators and liquidators being cognisant of and ensuring observance with their statutory obligations in this regard.

258. For these reasons we have formed the view that by failing to lodge with ASIC a report concerning suspected past misconduct, when it appeared to Mr McLeod that a past or present officer, or employee, or member of each of FPC, PBC, CCM, DCQ, HHQ, OTR and ABG, may have been guilty of an offence in relation to the company, Mr McLeod did not carry out his duties adequately and properly in terms of s1292(2)(d)(2) of the Act.

259. We find that Contention 22 is established.

Contention 23

260. Contention 23 alleges that Mr McLeod either incorrectly or inadequately reported relevant and material information in relation to his remuneration in the first report to creditors of ATBH, IMS Group, FPC, FPI and BBT, in breach of s499(7) of the Act, clauses 13.3.2 and 13.3.3 of the 2008 Code or clauses 15.3.2 and 15.3.3 of the 2011 IPA Code as applicable and/or s180(1) of the Act.

261. In respect of ATBH, IMS Group, FPC, FPI and BBT the particulars pleaded that Mr McLeod had referred to the preparation of a s439A creditor report, which is a report applying to circumstances where a company is under administration whereas each of the companies was not in administration.

262. Further, in the ATBH second report to creditors dated 21 June 2011 the remuneration report referred to "*conducting searches regarding patents and trademarks*" and correspondence with former solicitors regarding patents" – whereas there is no evidence that ATBH owned any patent or trademark, nor that any such searches were conducted by Mr McLeod to identify the patent or trademark.

263. ASIC's contention was that the remuneration reports contained a misdescription of the information contained in the report of the work that would be required because they referred to s439 reports instead of s497 reports and its main submission on this Contention was that the reference to the incorrect section (which Mr McLeod admitted) misinformed creditors and was careless and not a "*one off*", "*demonstrating a failure to act with a degree of competency as a liquidator*". ASIC confirmed that it did not complain with respect to this Contention about the quantum of work the subject of the partially incorrect description.

264. Mr Priestley submitted that even though the Corporations Act section reference was incorrect the information provided in the remuneration reports was descriptively correct as the work involved for a voluntary

administration under s439A of the Act is similar to that performed for a creditor's voluntary liquidation under s497 of the Act.

265. In respect of the reference in ATBH to "*conducting searches regarding patents and trademarks and correspondence with former solicitors regarding patents*" Mr Priestley noted in his written submissions that Mr McLeod acknowledged that including this item of work was done in error. In his final written submissions Mr Priestley pointed out that the erroneous reference to patent work constituted two items out of a total of twelve with the total estimate of costs for all twelve items combined being $523.00.

266. We have considered the evidence and the submissions from each of the parties in respect of this Contention. Not every breach of an Act or Code will amount to not acting adequately and properly under s1292(2)(d)(2) of the Act and we refer to the comments in paragraph 146 hereof. In the Board's decision in *ASIC v Alan Godfrey Topp - Decision of the Board dated 15 April 2014 Matter Number 06/NSW13* ("*Topp")*[8] it was said:

> *'A failure by a liquidator or administrator to lodge a form in breach of a provision of the Act or regulations may not, itself amount to a failure to carry out or perform adequately and properly the duties of a liquidator (or administrator). Section 1292 appears to contemplate that the "failure" required to be established will be of some significance: Davies v Australian Securities Commission (1995) 59 FCR 221 at 233. Whilst no doubt, it is always important to comply with statutory obligations to lodge forms, there may be circumstances involving minor failures or failures resulting from genuine errors or understandable breakdowns of systems which would not amount to a failure to carry out duties and functions adequately and properly for the purposes of s1292.'*

267. In our view the facts of Contention 23 represent a minor failure on the part of Mr McLeod and we are not persuaded, particularly having regard to the Board's comments in *Topp* and *Fiorentino* that they establish a sufficiently significant matter on which to base a finding under s1292(2)(d)(ii) of the Act.

268. We find Contention 23 is not established.

Contention 24

269. It was alleged that Mr McLeod's remuneration report in this liquidation provided incorrect information to creditors in relation to Mr McLeod's remuneration because it included reference to work not required or not likely required to be performed. The task referred to was an allowance of $1700 for work associated with GEERS including correspondence, notification spreadsheet, quotation and distributions. However, the Directors statement showed that there were no employee creditors.

[8] Topp para 23

270. ASIC's contention was that the inclusion of the task set out above having regard to the state of affairs of the company, (i.e. no current employees) was incorrect and unwarranted and there was no justification for including the entry.

271. ASIC further submitted that the Respondent's submission that the ABG Second Report contained an estimation of possible costs in relation to the GEERS item should be rejected because the requirement in s449E(7)(a)(i) of the Act provides that the report needs to include matters that will enable the company's creditors to make an informed assessment as to whether the proposed remuneration is reasonable and the inclusion of work that is not required does not allow creditors to make an informed assessment. Further, the section provides, inter alia, that the report must set out a summary description of major tasks performed or likely to be performed and the evidence in this instance demonstrated that there were no employee creditors or any employee related claims at the time of the second report and there was therefore no foundation for including the GEERS item in the report. If an employee issue arose at a later date, the Respondent would not have been restricted from seeking approval for such costs from creditors at an appropriate time.

272. Mr Priestley submitted that the Contention 24 was misconceived because the estimate that was provided was of possible costs and was part of a process of informing creditors of estimated possible future costs to enable them to decide between a DOCA or liquidation. If it transpired that there were no employees then no costs would be incurred. He submitted that the position was that the administrator could not rule out the possibility that issues may transpire regarding unknown employees that would need to be dealt with by the liquidator and pointed out that this evidence was given by Mr McLeod in cross examination and was not challenged.

273. The GEERS entry the subject of this Contention appeared on page 6 of Mr McLeod's remuneration report in respect of ABG as one task of a listing of major tasks to be completed should the company be wound up. The estimated fees were $1,700 of a total estimate of fees of $27,500 in the event the company was wound up.

274. We have considered the evidence and the parties' submissions on Contention 24. We are not persuaded that the evidence relied on is sufficient to show that Mr McLeod did not comply with s449 E (7) of the Act or the relevant clauses of the IPA Code (13.3.3 and 15.3.3). In our view there was a possibility, even though it did not appear that there were employee creditors, that such claims could emerge and would need to be dealt with if the company were wound up. ASIC made the point that if that did transpire it was open to Mr McLeod to seek creditor approval for such costs at a later time. However that approach would entail incurring significant additional cost relative to the amount being claimed and so adopting this approach would not necessarily be in the interests of creditors, particularly considering that the prospective fees included in

the remuneration report represent an estimate and are not charged to creditors unless they are in fact incurred.

275. We find that Contention 24 is not established.

Not a fit and proper person under Section 1292(2)(d)

ASIC's closing submissions on fitness and propriety and paragraphs 2.2, 6.7 and 6.8 of the SOFAC

276. In his closing submissions referring to the "not fit and proper to remain registered as a liquidator" ("not fit and proper") allegation under s1292(2)(d) of the Act, Counsel for ASIC referred to paragraphs 6.7 and 6.8 of the SOFAC and stated that ASIC relies on *"the supplementary provisions in s1292(2)(d)"* that a person is *"otherwise not a fit and proper person"*. He then referred to the general observations made by the Board in its decision in *ASIC v Levi ("Levi") Matter Number 02/NSW12 dated 2 July 2014* on fitness and propriety under s1292 of the Act and in particular at pages 107 to 108 of that decision. There the Board confirmed that the reference to *"otherwise not a fit and proper person to remain registered as a liquidator"* provides a separate basis for the Board to cancel or suspend a liquidator's registration and that the relevant test of fitness and propriety is set out in *Hughes and Vale Pty Ltd v. The State of New South Wales (No. 2)* (1955) 93 CLR 127 ("*Hughes and Vale*").

277. This was the full extent of ASIC's submissions at the hearing on the allegation that Mr McLeod was not a fit and proper person to remain registered as a liquidator.

278. As well, however, there was ASIC's contention in paragraph 2.2 of the SOFAC that *"by reason of the failings, Mr McLeod is not a fit and proper person to remain registered as a liquidator"*. Paragraph 2.2 of the SOFAC might be construed as seeking a finding on the third alternative in s1292(2)(d) of the Act on the basis of the whole of the conduct established against Mr McLeod although no submissions were made to this effect.

279. In response to ASIC's submissions regarding the "*not fit and proper*" allegation, Mr Priestley characterised ASIC's position as being "*that if you are against them on "adequate and proper" that's set out in s1292, then you should fall back on the "not fit and proper" category which appears after s1292(2)(d)(i) and (2)(d)(ii) of the Act* ".

280. Mr Priestley's characterisation of ASIC's *not fit and proper* contention was not challenged by ASIC.

281. As there were no other submissions, we have, for the sake of completeness, considered *the not fit and proper* allegation on both possible bases. That is to say:

    (a) in terms of the way it was put by Mr Priestley in the transcript i.e. as an alternative possible finding under s1292(2)(d)(2) of the Act in respect of those contentions where the Board has found that the

conduct alleged under either s1292(2)(d)(i) or (ii) of the Act was not established which would include Contentions 1, 2, 4, 20, 21, 23 and 24; and

(b) based on the interpretation available under paragraph 2.2 of the SOFAC.

Is the standard in s1292(2)(d) of the Act equivalent to not being fit and proper?

282. We agree that a finding under s1292(2)(d) of the Act that Mr McLeod is *"not fit and proper to remain registered as a liquidator"* is a distinct finding under s1292(2)(d) of the Act for the reasons set out below.

283. ASIC submitted that the words "*or is otherwise not a fit and proper person to remain registered as a liquidator"* have been construed as an alternative precondition to the failures to perform duties as provided in sub paragraphs (i) and (ii) [of s1292(2)(d) of the Act] and cited the matter of *Gould v CALDB (2009)71 ACSR 648[102]*. It contended that it relied on the *"supplementary provision in s1292(2)(d) for a person who is not otherwise a fit and proper person."*

284. The Board's decision in *Fernandez*[9] sets out a useful discussion of the authorities on the question of whether the standard in s1292(2)(d)(i) and (ii) of the Act is equivalent to not being fit and proper. In preferring and adopting the views of Hill J in *Davies v Australian Securities Commission*, (1995) 59 FCR 221, the Board expressed the view that the dicta of Lindgren J in *Gould* (referred to by ASIC in the SOFAC) was inconsistent with the authorities:

> *50. "With respect, we doubt whether the discussion of the issue in Gould at [101 to [104] can stand with the authority, most importantly the views of the High Court in Albarran.*
>
> *51. In Davies v Australian Securities Commission, (1995) 59 FCR 221, Hill J considered a submission that s1292(1)(d) of the Law, (the predecessor to the present s1292(1)(d) of the Act), did not permit a finding only of failure to carry out or perform the duties referred to in sub-paras (i) and (ii) without a finding that the failure was such as to bring about the conclusion that the person so failing was not a fit and proper person to remain registered as an auditor.*
>
> *52. In rejecting the argument at page 233, he said*[10]*:*
>
> *"there is an obvious difficulty in the construction which is urged on his behalf. Had the legislature intended that it be necessary before s1292(1)(d) was attracted that it be shown that a registered person was not a fit and proper person to be an auditor, it would have been easy for the legislature to have merely stipulated in s1292(1)(d) that the person be found not to have been a fit and proper person to remain registered. It would have been*

[9] Fernandez para 49-59
[10] See also *Re Young and Companies Auditors and Liquidators Disciplinary Board* (2000) 35 ACSR 83 (AAT) at [5]-[7].

unnecessary to have mentioned the specific matters in cl (i) and (ii) of the sub-clause. This is a difficulty in the way of the construction urged by counsel for Mr Davies at least as great as the difficulty thrown up by the use of the words 'or is otherwise' for the construction adopted by the tribunal.

I think the better interpretation is that for s1292(1)(d) to be attracted there are three separate and independent alternatives. The first is a failure to carry out or perform adequately and properly the duties of an auditor. The second is a failure to carry or perform adequately and properly the duties or functions referred to in sub-para (ii) and the third and alternative requirement is that it be shown that the registered person is not a fit and proper person to remain registered. If the words 'or is otherwise' have any significance at all it is to express a legislative view that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered as an auditor. To the extent that there are cases which do not warrant cancellation or suspension, these may be dealt with either by the general discretion conferred upon the board in s1292(1) or the power to impose a lesser disciplinary punishment contained in s1292(9)."

53. *We consider that the High Court in Albarran applied the same approach in stating that the words "otherwise not a fit and proper person" in s1292(2)(d) "expanded or added to" sub-paragraphs (i) and (ii).*

54. *In other words, a failure to carry out or perform adequately and properly the duties of a liquidator or duties and functions of an administrator within s1292(2)(d)(i) and/or (ii) may be established whether or not such failure is sufficiently serious to establish that the person is not a fit and proper person to remain registered.*

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

"[102] The words 'or is otherwise not a fit and proper person to remain registered as a liquidator' provide an alternative to the criteria that precede in sub-paras (i) and (ii). Paragraph (d) must, however, be read as a whole. Its criteria can be analysed as follows (I will refer only to para (i) but the same analysis applies to para (ii)):

(1) failure to perform adequately and properly the duties of a liquidator; or

(2) being otherwise not a fit and proper person to remain registered as a liquidator.

The word 'otherwise' shows that the provision takes it for granted that a failure of the kind described in (1) will, without more, demonstrate that the person is not a fit and proper person to remain registered as a liquidator."

285. In line with the approach set out in *Fernandez* ,we follow the approach in *Davies* and not the approach in *Gould* referred to in the SOFAC, namely, that to the extent that the phrase *"or is otherwise"* has any significance at all, it is to express a legislative view that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered, but circumstances may well occur where a person has failed to carry out or perform adequately and properly the duties or functions of a registered liquidator without that failure demonstrating that he or she is not a fit and proper person.

First possible basis for considering "Not Fit and Proper" allegation under s1292(2)(d)of the Act

286. In relation to the first possible way in which the application for a finding that Mr McLeod was not fit and proper to remain registered was put by ASIC, we agree with Mr Priestley's submission that it is not open to us on the facts before us to make such a finding in respect of Contentions 1, 2, 4, 6, 20, 21, 23 and 24 that Mr McLeod is not a fit and proper person to remain registered as a liquidator. If the interpretation apparently proposed by ASIC was correct it is in our view misconceived to ask the Board, in the absence of any other evidence, to make a finding on the third limb of s1292(2)(d) of the Act in circumstances where we have found that the conduct alleged against the Respondent as falling within s1292(2)(d)(2)(i) or (ii) of the Act has not been established. The authorities do not support such a view and as a matter of procedural fairness Mr McLeod would be entitled to particulars of the basis such a matter is alleged in circumstances where the conduct particularised has not been established.

Second possible basis for considering "Not Fit and Proper" allegation under s1292(2)(d) of the Act

287. The second possible basis on which ASIC alleged Mr McLeod is not fit and proper to remain registered as a liquidator was the whole of the conduct established against Mr McLeod. We were referred in ASIC's closing submissions to the general test set out in *Hughes and Vale* of *"honesty, knowledge and ability"*.

The meaning of fit and proper

288. The pre-eminent authority on the meaning of *"fit and proper person"* is *Hughes and Vale*, 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 its 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"

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

290. Mr Priestley, in closing submissions, pointed out that there has been no dishonesty on the part of Mr McLeod, nor any element of him engaging in conduct for the purpose of illegitimate or unfair personal gain. He further submitted that there has been no suggestion that Mr McLeod has overcharged or done work that was not necessary or that he was biased towards a certain outcome. We agree that these matters are relevant considerations in applying the test set out in *Hughes and Vale.*

Honesty knowledge ability

291. The concepts of *"honesty, knowledge and ability"* in the test set out in *Hughes and Vale* have been held to be flexible concepts. In this context they must be informed by the nature and obligations of a registered liquidator.

292. There was no evidence in this matter that Mr McLeod did not satisfy the first concept of fitness and propriety, being honesty and it is of course the case that honesty is an essential requirement for the proper performance by liquidators of their professional duties.

293. Honesty is also relevant to our view on the second concept of the test in *Hughes and Vale*, knowledge. To perform the role of a liquidator adequately one must have the knowledge 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. We are not satisfied merely on the basis of the evidence before us that any of the matters in respect of which Mr McLeod's conduct has been found not to meet the standard of adequacy and propriety under s1292(2)(d) of the Act also demonstrate that he lacks knowledge to properly deal with and account for property or retain the trust of those whose interests were affected.

294. The third concept under the test is ability.

295. In respect of most of the matters found to be established against him in these proceedings, Mr McLeod conceded that his conduct fell below the standard required by s1292(2)(d) of the Act. Mr McLeod's evidence was that he had taken steps to address these failures by reviewing and implementing changes to his processes to ensure they did not recur in future. In our view this fact is relevant to an assessment of Mr McLeod's ability *vis a vis* the test in *Hughes and Vale*.

296. In terms of the general test set out in *Hughes and Vale* and particularly having regard to the purpose of the test also set out in *Hughes and Vale* namely *"to give the widest scope for judgment and indeed for rejection"*, we would not for the reasons set out, form the view that the aspects in which Mr McLeod has failed to adequately and properly carry out the duties and functions of a liquidator as established in Contentions 3, 6, 10-19 and 22 demonstrate that Mr McLeod is otherwise not a fit and proper person to remain registered.

297. As noted the standard for a finding under s1292(2)(d)(2)(i) or (ii) of the Act is not equivalent to not being a fit and proper person to remain registered (see *Davies*, *Albarran*). In the Board's decision in *Fernandez*, following consideration of *Davies* and *Albarran*, it was said that the failure to carry out or perform adequately and properly the duties or duties and functions of a liquidator within s1292(2)(d)(2)(i) or (ii) of the Act may be established *"whether or not such a failure is sufficiently serious to establish that the person is not fit and proper to be registered"*.

298. The authorities discussed above clearly support the view that the standard applicable to the third limb of s1292(2)(d) of the Act is not equivalent to the first two limbs however there was no additional evidence adduced or submissions made by ASIC as to which matters established against Mr McLeod may be sufficiently serious to ground an additional finding that he is not fit and proper to be registered. As noted this may simply be because the case was not being put on this basis. However, if it was being put on this basis we do not find that the Contention has been established having regard both to the test in *Hughes and Vale*, and the evidence and submissions before us.

299. For the reasons set out we find that the third limb of s1292(2)(d) of the Act, namely that Mr McLeod is otherwise not a fit and proper person to remain registered has not been established on either of the two possible bases that this allegation may have been made by ASIC.

The Board's finding under section 1292(2)

300. In light of the contraventions established, we have determined that we are satisfied that Mr Jonathan Paul McLeod has failed to carry out or perform adequately and properly the duties of a liquidator within s1292(2)(d) of the Act.

Appropriate orders

Sanctions Hearing

301. On 27 April 2015, the Panel held a hearing in relation to what orders, if any, should be made under s1292(2) of the Act in relation to Mr McLeod, having regard to our determination that he had failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of s1292(2) of the Act ("the Sanctions Hearing"). Mr McLeod was represented by counsel Mr Jonathan Priestley. ASIC was represented by counsel, Mr Scott McLeod and each party filed written submissions with the Board prior to the hearing which we have considered in deciding the appropriate orders to be made in this matter.

302. A preliminary matter raised by Mr Priestley was the Respondent's position in relation to the applicability of dicta in the High Court decision in *Barbaro v The Queen* [2014] HCA 2 (12 February 2014) (*"Barbaro")* to the proceedings before CALDB. In *Barbaro,* the High Court found, in the context of criminal proceedings, that there was no want of procedural or other unfairness in the trial judge's refusal to receive submissions from the prosecutor about the range of available sentences because *neither the prosecution nor an offender's advisers can do anything more than proffer an opinion as to an appropriate sentence - it is for the sentencing judge alone to decide what sentence will be imposed* (*majority at p47*).

303. Mr Priestley submitted that based on subsequent cases that had considered whether that dicta in *Barbaro* applied in civil proceedings he did not take the position that ASIC should be precluded from making submissions to the Board on sanction, however the Board should disregard those submissions.

304. Since the Board's decision in *ASIC v William James Hamilton ("Hamilton") – Decision of the Board dated 3 April 2014 Matter Number 04/NSW13* (in which *Barbaro* was considered in a quite different context) the applicability of the relevant dicta in *Barbaro* to proceedings other than criminal proceedings has been considered in a number of different contexts, including by the Federal Court in the area of competition law[11], corporate regulation[12], industrial law[13] and vocational regulation[14]. In all of these matters the Federal Court judges rejected the potential application of *Barbaro* to the civil proceedings before them.

305. In the decision of *Legal Profession Complaints Committee v Love* [2014] WASC 389 *("Love"),* the West Australian Supreme Court stated that the role of the Legal Profession Complaints Committee should not be equated with the role of prosecutor in a criminal prosecution as the roles are not relevantly analogous, in particular, the object of a disciplinary proceeding is not punishment of the practitioner but protection of the

[11] ACCC v Energy Australia Pty Ltd [2014] FCA 336 [113][152]
[12] ASIC v Newcrest Mining Ltd [2014] FCA 698 [7]
[13] Fairwork Ombudsman v Crystal Carwash Pty Ltd (No 2) [2014] FCA 827 [51]
[14] Tax Practioners Board v Dedic [2014] FCA 511 [3]

public[15]. In *Love* it was held that nothing said in *Barbaro* precluded the court in that matter from receiving or having regard to submissions from the Legal Profession Complaints Committee as to the appropriate disposition of the matter[16].

306. Having regard to the cases referred to (while recognising that the terms of s1292(2) of the Act make it clear that what order, if any, is to be made in the proceedings is a matter for the Board) the current state of the authorities does not in our view provide a basis for either precluding ASIC from making submissions on sanction or not considering those submissions when forming our view as to the appropriate orders to be made.

307. Accordingly we proceed in this matter on the basis that it is appropriate for us to hear and consider submissions on sanction from both parties.

Summary of ASIC's submissions on sanction

308. ASIC's submissions on sanction directed the Board to each of the Contentions that were found by the proceedings to be established, namely Contentions 3, 6, 10, 11-16, 17, 18, 19 and 22.

309. In summary these contraventions involved:

(a) failing to lodge reports with ASIC as required by s438D(1) regarding suspected offences as soon as practicable after the administrator became aware of such conduct (numerous);

(b) not providing an addendum remuneration report to relevant creditors pursuant to s449E of the Act;

(c) various failures to make proper declarations of indemnities and relevant relationships (DIRRI) to relevant creditors;

(d) failing to properly consider disqualification from consenting to act as a liquidator in circumstances where Mr McLeod had previously been an officer of the relevant company within 2 years of his appointment as liquidator; and

(e) failing to open a liquidator's general account within the specified 7 day period in compliance with Regulation 5.6.06(1) of the Corporations Act (2 instances).

310. ASIC referred the Board to paragraph 18 of the AAT decision in *NHPT and Members of the Companies, Auditors and Liquidators Disciplinary Board* [2015] AATA 245 ("NHPT") where Deputy President Tamberlin has conveniently summarised the relevant principles to be applied when deciding an appropriate sanction under s1292(2) as follows:

(a) "The principal purpose of the proceedings is protective rather than punitive and the guiding principle is protection of the public;

[15] Love @ paragraph 76
[16] Love @ paragraph 79

(b) the protection of the public includes ensuring that those who are unfit to practice do not continue to hold themselves out as fit to practice;

(c) the protection of the public includes deterrence;

(d) it also includes the maintenance of a system under which the public can be confident that practitioners will know that breaches of duty will be appropriately dealt with and that the regulatory regime applicable to auditors is effective in maintaining high standards of professional conduct;

(e) the impact of the Board's orders on the practitioner is to be given limited consideration, as the prime concern of the Board is the protection of the public;

(f) relevant matters include the respondent's recognition and acceptance of the breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary requirements to rehabilitation; and

(g) if a respondent is not considered fit and proper, suspension is not appropriate unless the Board can be confident that the respondent would be fit and proper after the period of suspension."

311. Having regard to the above principles ASIC submitted that the following factors were relevant:

(a) The Respondent's extensive experience as a registered liquidator which made it even more incumbent on him to be aware of his fundamental duties and obligations and what is required of him to perform those duties adequately and properly;

(b) the contraventions were not merely technical failures but were serious omissions that involved thirteen separate external administrations and spanned a period of approximately four years;

(c) although there is evidence that the Respondent subsequently sought to implement procedures to address the matters identified, the Board must assess the conduct at the time the non-compliance arose; and

(d) that the contraventions evidence a continuing failure by the respondent to meet obligations which are central to giving creditors confidence that the liquidator acts in their interests.

312. ASIC submitted that the Respondent's failures were significant and serious and considered as a whole justify a suspension of Mr McLeod's registration for a period of no less than 24 months.

313. ASIC also sought an order for an undertaking, draft terms of which it provided to the Board, for an independent peer review to be conducted of Mr McLeod's next six company administrations together with a

requirement for an additional forty hours of continuing professional development training within the next twelve months in the areas of insolvency practice and practice management training.

Mr McLeod's evidence and submissions on sanction

314. Mr McLeod filed written evidence from:

(a) his solicitor Mr Hayter annexing inter alia, media releases by ASIC referring to details of enforceable undertakings entered into between ASIC and three other registered liquidators and data regarding numbers of s438D rports filed and numbers of company administrations publically reported by ASIC between 2009 - 2014;

(b) himself, detailing a medical condition that he was diagnosed with and received treatment for during the period in which the contraventions occurred. Mr McLeod's statement annexed a medical report from Dr Henry Douglas ("Dr Douglas") dated 13 April 2015 providing further details regarding his illness and the impacts of the treatment over the relevant period; and

(c) three character references from Mr Porter QC, Mr Hayes, barrister and Mr Martin, solicitor.

315. Mr Priestley made the following submissions:

(a) The evidence regarding Mr McLeod's medical condition was relevant to the Board's consideration because the period when Mr McLeod was unwell and sought medical assistance leading to diagnosis and treatment, largely coincided with the period in which the contraventions established occurred;

(b) It would be open to the Board, based on the medical report of Mr McLeod's treating doctor, to form a view that Mr McLeod's serious illness, diagnosed and treated in the period that the matters the subject of ASIC's contentions were on foot at his firm, had significantly affected his capacity to work over the relevant time. He referred in particular to the report of Dr Douglas which stated:

"This situation caused anxiety and depression for him especially during 2011 and 2012…"

and in the last paragraph of that report;

"In summary Mr McLeod was unwell for many months in 2009 and 2010. He thought that most of his symptoms of fatigue, anxiety and slowed cognition were related to work and home issues. He sought appropriate medical assistance. He was found to have a serious cancer….".

(c) Dr Douglas' report finally noted that the treatment phase following diagnosis had a range of acute impacts on Mr McLeod's health which required a recovery period and were very stressful for Mr McLeod and that Mr McLeod is currently in remission.

(d) Mr McLeod had admitted all of the 13 contentions that the Board found established, except for part of Contention 11. The fact of his early admission to a significant number of the contentions demonstrates his contrition and willingness to accept responsibility for omissions properly alleged.

(e) In relation to what were referred to by the parties as the systemic deficencies (being the contentions established regarding the repeated omissions to submit s438D reports to ASIC and to make appropriate disclosures in the DIRRIs) the evidence before the Board is that Mr McLeod has introduced appropriate procedures to ensure the statutory requirements are now complied with. The fact that Mr McLeod has taken steps to address these issues within his practice to ensure there are no future omissions demonstrates his contrition for the conduct established.

(f) Although relevant s438D reports were not filed in each of the the instances alleged in the SOFAC, in each case Mr McLeod had identified in the relevant creditors reports that there were grounds to suspect offences may have been committed by directors. Mr McLeod's omission therefore was not to have failed to ascertain and identify to creditors the existence of grounds to suspect offences had occurred, but was limited to failing to satisfy the legislative requirement under s438D to also file a report with ASIC, based on a misunderstanding on his part that additional facts and evidence to those normally grounding a suspicion of an offence are required to activate the obligation under s438D. Once he became so aware he adjusted his internal office procedures to ensure a s438D report is always filed in matters where he makes a disclosure of a suspected offence on the part of a company or its directors, to creditors.

(g) The opinion of the referees while not definitive is a relevant matter for the Board to take into account.

(h) There was no allegation of dishonesty against Mr McLeod nor any allegation that his conduct was deliberate or motivated by potential personal gain.

316. Mr Priestley referred the Board to the statistics published by ASIC between 2009 and 2014 on the relatively low numbers of Section 438D reports filed compared to the number of voluntary administrations conducted, summarised in Mr Hayter's affidavit, in support of a submission that the insolvency industry has not traditionally regarded the obligation to report under s438D as arising at the threshold now adopted by Mr McLeod as a result of the contentions made by ASIC in these proceedings.

317. Mr Priestley also referred the Board to the evidence annexed to Mr Hayter's affidavit detailing particulars of the enforceable undertakings ASIC accepted in the Coad, Tuckwell and Thompson matters. In none of those matters did the undertakings given involve a period of suspension

as ASIC contends for in this matter even though all of those matters involved failures to properly investigate - allegations that were made by ASIC in this matter, but not ultimately established.

318. In terms of the Board's power under s1292(2)(d), Mr Priestley directed the Board to the decision in *ASIC v Dean Royston McVeigh ("McVeigh") – Decision of the Board dated 19 January 2008 Matter Number 10/VIC08*. At paragraph 13.1 of *McVeigh* the Board stated;

"*As to the question of whether an order should be made at all, we note that we are not obliged to act even when we have found that any contention has been established…"*

319. Mr Priestley relying on the authority of *McVeigh* submitted that in the circumstances of this case it would be appropriate for the Board to make no sanction order under s1292(2)(d). He referred to Mr McLeod's cooperative approach to dealing with the proceedings, his early admissions in respect of the contentions that were established, the fact that there was no harm that had been established as a result of the offending conduct and the impact of Mr McLeod's medical condition at the time, as relevant supporting considerations. Further, a media release setting out the findings of the Board, as is the usual practice, and to which Mr McLeod does not object, would have the appropriate deterrent and protective effect.

320. Mr Priestley invited the Board to bear in mind that the consequence of making an order under s1292 in this matter would be that Mr McLeod could not recover any of his costs from ASIC because of the wording of s223 of the Australian Securities and Investments Act 2001 (Cth) ("ASIC Act") which precludes a claim for costs by a respondent if the Board makes an order under s1292(2) of the Act. Mr Priestley submitted that this would be unfair in circumstances where Mr McLeod has in effect "*won*" against ASIC on the disputed matters.

321. In the alternative to the submission that the Board make no order under s1292(2)(d), Mr Priestley submitted that if the Board is minded to make an order under s1292 of the Act a period of suspension would not be required to meet the objective of protection of the public and a public reprimand or admonishment would serve the appropriate protective and deterrent objective.

The Boards findings on Sanction

322. The function being performed by the Board in exercising powers under s 1292(2) was described by the Full Court of the Federal Court in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 233 ALR 37 (at paras 44 and 45) as follows:

"*The purpose or object of the inquiry undertaken by the board, in exercising the power conferred by s 1292(2), is not the ascertainment or enforcement of any legal right, but the determination whether, in the view of the board, taking into account past failures of duties, a defeasible right*

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

323. It is common ground that the principle that guides the Board in exercising powers is protection of the public. We note that in *Re Young and CALDB (2000) 34 ACSR 425* that the *AAT* said (at para 80), that the jurisdiction created by Section 1292 is of a protective nature and: "*it seems that the protection of the public should be the principal determinant of a proper order but that this may be achieved by an order affecting registration of the person in question. In other words, deterrence is an element of public protection."*

324. We agree and refer to the summary by Deputy President Tamberlin in *NHPT* of the relevant principles to be applied by the Board in exercising its sanction power under s1292 (2) as set out in paragraph 310 above.

325. The Board has found in this matter that Mr McLeod failed to perform adequately and properly the duties of a liquidator in respect of 13 of the 20 contentions pressed in the SOFAC.

326. Having regard to the relevant principles as summarised in *NHPT*, we consider that the following factors are relevant to forming our view as to what if any, sanction is appropriate under s1292(2):

    (a) The thirteen contentions established against Mr McLeod were admitted by him (with the minor exception of an aspect of contention 11). In our view this demonstrates Mr McLeod's recognition and acceptance of his omissions as well as his willingness to improve and his cooperative approach to these proceedings.

    (b) Mr McLeod denied 11 allegations in the SOFAC. None of these allegations were ultimately established against him, 4 having been withdrawn by ASIC in the course of the hearing. From the manner in which Mr McLeod conducted his defence it is clear to us that he expended significant time and resources towards understanding the basis of the allegations made before formulating his position on the contentions that he admitted and those he denied. In our view this demonstrated Mr McLeod's professional attitude and approach, his willingness to recognise, accept and deal with failures where they had occurred and his positive attitude to achieving compliance with his statutory obligations as a registered liquidator.

(c) That Mr McLeod's illness and the effects of the treatment during the period would have had a detrimental impact on his normal capacity to carry out his duties and is likely to have relevantly affected his performance over the period between mid 2008 and 2012 when the conduct occurred. The medical report from Dr Douglas confirms that Mr McLeod has now completed treatment and is in remission.

(d) The three character referees submitted to the Board from Mr Mark Martin QC, Mr Paul Hayes and Mr Porter all attest to Mr McLeod's integrity, good character, diligence, ethics and professionalism. We have given credit to the evidence of each of those persons, all with significant credentials who expressed confidence in Mr McLeod's future commitment to ensuring that there will be no repeat of omissions such as those that occurred.

(e) The evidence annexed to Mr Hayter's affidavit detailing particulars of the enforceable undertakings ASIC accepted in the Coad, Tuckwell and Thompson matters and the number of s438D reports lodged with ASIC during the period 2009-2014 compared to the number of company administrations reported. In our view the indicative data going to industry practice with regard to lodging s438D reports is relevant. In relation to the Coad, Tuckwell and Thomson matters, Mr Priestley submitted that in none of those matters did the undertakings given involve a period of suspension as ASIC contends for in this matter even though all of those matters involved failures to properly investigate, an allegation not established in these proceedings. While we agree that proportionality is a relevant consideration we note that ASIC does not have any power to suspend the registration of a liquidator. The fact that the allegations of failing to investigate made against Mr McLeod were not established in these proceedings is relevant at least in so far as the overall conduct established against Mr McLeod is significantly less serious than that initially alleged by ASIC and is not relevantly analogous to the matters of Coad, Thomson and Tuckwell.

(f) The evidence that Mr McLeod has taken steps within his practice to address the issues identied by the contraventions established, as this is relevant to the utility of sanction orders to be made such as undertakings, as well as demonstrating Mr McLeod's willingness to accept the findings made and address those issues cooperatively.

(g) that Mr McLeod is a senior practitioner and the law demands a high standard of compliance with statutory and general law duties and obligations.

(h) that Mr McLeod has not previously been the subject of any complaints or disciplinary proceedings.

327. Mr Priestley argued that the fact that Mr McLeod would be unable to recover any of his costs from ASIC if the Board made a sanction order was relevant for the Board to consider in deciding whether any order under s1292(2) was appropriate. He put this submission on the basis that the effective outcome of the proceedings had been that Mr McLeod was the successful party and that in the normal course costs follow the cause and should be awarded to Mr McLeod, but could not be so awarded under s223(2)(b) of the ASIC Act unless the Board does not make an order under s1292(2).

328. The fact that the only contentions established against Mr McLeod were admitted by him does not in our view amount to Mr McLeod having "*won*" the proceedings. Even when allegations are admitted by a respondent the Board must conduct a hearing, in order to consider the parties' submissions and usually evidence to make its assessment of the relevant conduct within the meaning of s1292 of the Act. For these reasons, even if the impact of the operation of s223 of the ASIC Act was relevant to a consideration of whether a sanction order under s1292(2) should be made, and in our view it is clear from the words of s1292(2) that is not so limited, we would not be persuaded by the arguments put.

329. As to the question of whether an order under s1292(2) of the Act should be made at all we have formed the view that an order is appropriate in this case.

330. The contentions that have been established demonstrate failures which were sufficiently persistent and numerous that, even having regard to the ameliorating factors raised on Mr McLeod's behalf, it would not be in the public interest for there to be no order in this matter.

331. While we do regard the exercise of our power under s1292(2) to impose a sanction justified, the sanction imposed must in our view reflect all of the relevant circumstances in order to be in the public interest and to properly address the Board's protective role.

332. In the Board's decision in *McVeigh* it was said:

> "*The question of what order we should decide to make is to be answered by reference to the merits of the individual case, although we accept that in a general sense it is desirable that there be a consistencey of approach by the Board in the application of sanctions under the Act. There are definite limits on the value of reference to other cases since each turns on its own facts. There can be a range of factors which mean that even though the words used to describe other cases may indicate that the nature of the contentions was similar nevertheless the actual matters established may be rather different. Such factors can include not only the objective circumstances of the particular case but also less tangible matters such as a respondent's recognition and acceptance of breaches of duty, attitude to compliance with professional standards generally and willingness to improve."*

333. Mr McLeod's conduct concerning the DIRRIs and s438D lodgements while serious, particularly because of its persistent nature over a sustained period was not however deliberate or in any way calculated to place his own interests above those of creditors in the relevant administrations.

334. In our view, it is reasonable to infer that Mr McLeod's illness affected his capacity to attend to his professional duties during the relevant period with his usual level of attention.

335. The coincidence of the diagnosis of a serious illness and the acute effects of the treatment which ensued, with the period in which the contentions that were established occurred, has weighed significantly in our view as to the reason many of the omissions occurred and therefore what sanction is necessary both to serve the public interest and effectively fulfil our protective role.

336. The impression we have formed that Mr McLeod has a professional attitude to his work and is generally diligent and responsive, was consistent with the evidence of his referees all of whom have known Mr McLeod over a long period.

337. Mr McLeod's statements set out the steps he has taken to implement updated procedures to address the omissions that occurred. In paragraph 11 of his statement dated 21 April 2015 Mr McLeod said "*I have learnt from my mistakes and understand the necessity to be vigilant in supervising my staff, implementing systems to ensure compliance with my statutory obligations as an insolvency practitioner and to ensure to keep up to date with any new developments within the insolvency industry. There has been a focus as a result of my involvement in these proceedings in reviewing and assessing the performance not only of my staff but also myself, and the precedent systems we have utilised in the office. I have also arranged for a senior insolvency practitioner to check my precedents and checklists to ensure best practice compliance and I intend to continue to arrange ongoing peer review of my administrations and processes. I believe that the practices I now have in place will ensure that I am not involved in any future systematic problems in insolvency administrations as identified in the proceedings particularly relating to my s438D reports and DIRRI.*"

338. We have considered whether, in light of the omissions that occurred and having regard to the specific circumstances in this matter, a period of suspension of Mr McLeod's registration as a liquidator is necessary to serve the public interest and/or to fulfil our protective role.

339. We have formed the view that a period of suspension would do no more to serve the public interest or provide a superior protective effect than would an order under s1292(9) of the Act admonishing Mr McLeod for the contraventions established.

340. To admonish, according to the Macquarie Dictionary[17] definition, amounts to a "*mild reproof for a fault*", to "*caution*" or to "*recall or incite to duty; remind*". In large part, Mr McLeod's "*fault*" was not to recognise that a serious medical diagnosis and its ensuing treatment would for a period of time affect his ability to discharge his professional duties to the standard required. We recognise that not all of the lapses established can be explained or excused by the fact of Mr McLeod's illness at the time. However, Mr McLeod has not engaged in any deliberate or dishonest conduct and has adopted a cooperative approach throughout the proceedings including making early admissions in respect of 13 of the contentions, which were the only contentions ultimately established against him. Further, the totality of the conduct comprising the 13 contraventions established against Mr McLeod is far less serious than the conduct initially alleged in the SOFAC and based on which ASIC sought a cancellation or suspension of Mr McLeod's registration. Mr McLeod has provided evidence to the Board that he has revised his procedures to address the systemic issues identified by ASIC's investigations and it is apparent that Mr McLeod has taken his involvement in these proceedings very seriously. In particular we refer to the excerpt from his statement set out in paragraph 337 above. All of these factors in our view go to the merits of this case and the question of what order we should decide to make as discussed in *McVeigh (see paragraph 332 above).*

341. In our view our protective function is satisfied in this matter by an order admonishing Mr McLeod which, while recognising the specific circumstances at play, serves as a reproof to him for the lapses established. It further serves the public interest as a reminder to the insolvency profession as a whole that practitioners who may find themselves in a similar position cannot ignore the likelihood that their ability to carry out their professional duties to the standard required will be relevantly affected, and must be urged in their duty to address the need for appropriate arrangements to be implemented in such circumstances so as to uphold the high level of responsibility they have assumed to carry out their duties as a liquidator registered under the Act adequately and properly, at all times.

342. Finally on the question of whether undertakings are appropriate in this matter we have formed the view that they would not serve any additional useful purpose. ASIC submitted that two undertakings would be appropriate. The first undertaking proposed that there be an independent third party appointed to peer review the next six company administrations conducted by Mr McLeod. In our view such an order is not justified by the findings we have made in these proceedings, both in light of Mr McLeod's evidence that he has already revised his procedures in respect of the omissions identified and because Mr McLeod admitted to all of the omissions established and readily recognised the need to improve and address deficiencies identified well before any determination in these proceedings was made . Such an order would impose a significant costs burden on Mr McLeod and in the absence of

[17] Macquarie Concise Dictionary Third Edition

any findings by this Board that Mr McLeod's investigative procedures were not adequate as was alleged, we are not prepared to order that such an undertaking be provided to ASIC.

343. As to the second undertaking proposed by ASIC that Mr McLeod undertake an additional 40 hours professional training in the next year, we are not persuaded that such an undertaking would enhance the protective effect of the Board's order for admonishment in this matter and we are not minded to order that this undertaking be given.

344. The evidence in these proceedings is consistent with Mr McLeod having taken his involvement in these proceedings as a very serious matter and as a salutary reminder of his obligation as a registered liquidator to continually focus on the proper fulfilment of his professional duties. This is echoed by his referee Mr Hayes who said that Mr McLeod is *"adamant he will not fall short in the future"*. To require the undertakings for additional professional training would in our view place an unjustifiable and undue burden on Mr McLeod both in terms of time and costs, when he already has significant continuing professional development obligations to fulfil annually in circumstances where there is no obvious or stated additional protective element achieved.

345. Taking into account all of the matters referred to above and the relevant principles to be applied we consider that the facts in this matter justify the exercise of the facultative power granted by subsection 1292(2) of the Act but in such a way as to rely upon the ameliorative provisions of s1292 (9) of the Act to order that Mr McLeod be admonished by this Board.

Orders

346. We order as follows:

(a) That Mr Jonathan Paul McLeod is admonished by this Board under s1292 (9) of the Act.

Notice

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

Maria McCrossin 12 June 2015

Panel Chairperson