

**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: 03/VIC14**

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**  
Applicant

**PHILIP JAMES DOWSLEY**  
Respondent

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

**15 October 2015**

Panel:

David Castle (Panel Chairperson)

Eric Passaris

Karen O'Flynn

Companies Auditors and Liquidators Disciplinary Board  
Level 5, 100 Market Street, Sydney NSW 2000  
Tel: (02) 9911 2970  
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## **GLOSSARY AND INTERPRETATION**

### **GLOSSARY**

<b>Expression</b>	<b>Meaning</b>
AAT	Administrative Appeals Tribunal
Act	Corporations Act 2001 (Cth)
Amended Conditions	The amended conditions imposed by ASIC on the auditor registration of Mr Dowsley on 12 September 2013 as set out in paragraph 13(xii)
Annual Returns	Collectively Mr Dowsley's 2012, 2013 and 2014 auditor annual statements
Auditor False Statements	The "no" answers to the Conditions Question in the Annual Returns
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001 (Cth)
ASIC Determination Submissions	Written submissions by ASIC for the Determination dated 23 March 2015
Application	The application by ASIC made in the SOFAC received by the Board on 31 October 2014
Attachments	The attachments to the SOFAC
Axiom	Axiom Advisors Pty Limited
Board	Companies Auditors and Liquidators Disciplinary Board and, where the context permits, includes a reference to hearings by a panel of the Board including this panel
Mr Cain	Mr Michael Joseph Cain, the reviewing

<b>Expression</b>	<b>Meaning</b>
	auditor
Compliance Question	The question in each Annual Return asking whether the auditor had complied with any registration conditions to which he was subject as set out in paragraph 13(vii)
Conditions Question	The question in each Annual Return asking whether registration as a company auditor was subject to conditions imposed by ASIC as set out in paragraph 13(vi)
Confidential Decision	ASIC v Richard Langley Hill, a decision of the Board dated 9 December 2014 matter number 01/NSW14 and referred to in paragraphs 23-34
Mr Cummins	The assessing and treating psychologist of Mr Dowsley
Depression	The persistent depressive disorder referred to in paragraph 166
Determination	The determination of the Board dated 25 June 2015
Determination Hearing	The hearing of the Application by the Board on 23 March 2015 resulting in the Determination
Mr Dowsley	Philip James Dowsley
Explanation	The explanation given by Mr Dowsley for the Auditor False Statements referred to in paragraph 56
False Statements	Collectively the Auditor False Statements and the SMSF False Statements
Mr Fernandez	Avitus Thomas Fernandez, the subject of the Board Decision in Fernandez

<b>Expression</b>	<b>Meaning</b>
Fiorentino	The Board decision in the matter of ASIC v Pino Fiorentino dated 23 May 2014 matter number 03/NSW13
First Report	The first report of Mr Jeffrey Cummins, psychologist dated 9 February 2015
Hill	Collectively Hill (CALDB) and Hill (AAT)
Mr Hill	Mr Richard Langley Stewart Hill for whom the pseudonym NHPT was used in the AAT from 14 January 2015 to 25 June 2015
Hill (AAT)	The AAT decision in the case of Mr Hill v CALDB and ASIC [2015] AATA 245
Hill (CALDB)	The Board Decision in the matter of ASIC v Mr Hill matter no 01/NSW14 (previously referred to as the Confidential Decision)
Mr McLeod	Jonathan Paul McLeod, the subject of the Board decision in McLeod
McLeod	ASIC v Jonathan Paul McLeod a decision of the Board dated 12 June 2015 matter no 02/QLD14
Medical Reports	Collectively the First Report and the Second Report
NHPT	The AAT decision in NHPT (being the pseudonym for Mr Hill) v CALDB and ASIC [2015] AATA 245 now referred to herein as "Hill (AAT)"
Original Conditions	The original registration conditions imposed by ASIC on the auditor registration of Mr Dowsley on 13 September 2011 as set out in paragraph 13(iv)
Panel	The panel of the Board constituted for the purposes of this Application

<b>Expression</b>	<b>Meaning</b>
Registration Conditions	Collectively the Original Conditions and the Amended Conditions
Respondent Determination Submissions	The written submissions of Mr Dowsley for the Determination handed up at the Determination Hearing
Reports	Collectively the First Report and the Second Report
Response	The written response by Mr Dowsley dated 29 January 2015 to the SOFAC
Review Conditions	Such of the Original Conditions as required Mr Dowsley to have certain of his audits independently reviewed as set out in paragraph 13(iv)(c)
Sanctions Hearing	The further hearing by the Board on 4 August 2015 in relation to sanctions, costs and publicity
s19 Examination	The examination under s19 of the ASIC Act held on 25 July and 1 August 2014 and referred to in paragraphs 13(xxi), (xxii) and (xxiii)
Second Report	The second report of Mr Jeffrey Cummins, psychologist, dated 20 July 2015
SMSF	Self-Managed Superannuation Fund
SMSF False Statements	The "no" answers to the SMSF Question in the SMSF Forms
SMSF Forms	Collectively the application by Mr Dowsley for registration as an SMSF auditor dated 26 April 2013 and his SMSF auditor annual statement dated 14 June 2014
SMSF Question	The question in each SMSF Form asking whether the applicant (paragraph 13(x)) or the SMSF auditor (paragraph 13(xviii)) had failed

<b>Expression</b>	<b>Meaning</b>
	to comply with a condition of their company auditor registration
SOFAC	Statement of Facts and Contentions filed with the Board on 31 October 2014
Training Conditions	Such of the Original Conditions as required Mr Dowsley to undertake the additional training as set out in paragraphs 13(iv)(a) and (b)
Transcript	The transcript of the Hearing
Verdins	R v Verdins [2007] 16 VR 269
Verdins Principles	The principles derived from Verdins and referred to in paragraph 197
Mr Whyte	Craig Whyte, chartered accountant, character witness

### **INTERPRETATION**

Unless otherwise stated:

- (a) references to sections are to sections of the Corporations Act;
- (b) words in the singular include the plural and vice versa;
- (c) the more important expressions and abbreviations used are generally defined in the Glossary as well as when they first appear; and
- (d) references herein to paragraphs are references to paragraphs in this Decision and Reasons.

## DECISION AND REASONS

### Introduction

### The Application

1. This is an application under s1292 of the *Corporations Act 2001 (Cth)* ("Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("Board") by the Australian Securities and Investments Commission ("ASIC") received by the Board on 31 October 2014 ("Application"). By the Application, ASIC asks the Board to cancel the registration of Mr Philip James Dowsley ("Mr Dowsley") (a registered auditor).

2. Section 1292(1)(d) provides:

*"The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this section that, before, at or after the commencement of this section:*

(a) *the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:*

(i) *the duties of an auditor; or*

(ii) *any duties or functions required by an Australian law to be carried out or performed by a registered auditor;*

*or is otherwise not a fit and proper person to remain registered as an auditor;*

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

3. The basis of the Application is set out in the Statement of Facts and Contentions filed with the Board on 31 October 2014 ("SOFAC"). Three contentions were alleged as follows:

Contention 1, that within the meaning of s1292(1)(a)(ia)[second] of the Act, Mr Dowsley has failed to comply with a condition of his registration as an auditor.

Contention 2, that within the meaning of s1292(1)(d) of the Act, Mr Dowsley is not a fit and proper person to remain registered as a company auditor in that:

(a) he knowingly, or in the alternative recklessly, stated in one or more of the following documents he lodged with ASIC that his registration as a company auditor was not subject to conditions imposed by ASIC and/or he had not failed to comply with such conditions, which was false and/or misleading and/or in contrary to the requirements of s1308(2) of the Act:

(i) 2012 Auditor Annual Statement;

(ii) 2013 Auditor Annual Statement;

- (iii) Application for registration as a Self-Managed Superannuation Fund ("SMSF") Auditor dated 26 April 2013;
  - (iv) 2014 Auditor Annual Statement; and
  - (v) SMSF Auditor Annual Statement dated 14 June 2014; and/or
- (b) without proper care and diligence, he made a false and/or misleading statement and/or an omission, which made the document misleading in a material respect, in one or more of the following documents he lodged with ASIC that his registration as a company auditor was not subject to conditions imposed by ASIC and/or he had not failed to comply with such conditions, without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading contrary to the requirements of s1308(4) of the Act:
- (i) 2012 Auditor Annual Statement;
  - (ii) 2013 Auditor Annual Statement;
  - (iii) Application for registration as a SMSF Auditor dated 26 April 2013;
  - (iv) 2014 Auditor Annual Statement; and
  - (v) SMSF Auditor Annual Statement dated 14 June 2014; and/or
- (c) since 31 March 2012, Mr Dowsley has failed to comply with a condition of his registration as an auditor, notwithstanding repeated requests and reminders from ASIC to so comply.

Contention 3, that within the meaning of s1292(1)(d) of the Act, Mr Dowsley has failed to carry out or perform adequately and properly his duties as a company auditor and/or his duties or functions required by Australian law to be carried out or performed by him as a registered company auditor in that:

- (a) he stated in one or more of the following documents he lodged with ASIC that his registration as a company auditor was not subject to conditions imposed by ASIC and/or he had not failed to comply with such conditions, which was false and/or misleading:
  - (i) 2012 Auditor Annual Statement;
  - (ii) 2013 Auditor Annual Statement; and
  - (iii) 2014 Auditor Annual Statement;
- (b) each of the false and/or misleading statements (alternatively one or more of them) referred to in paragraph (a) above was made by Mr Dowsley:

- (i) with knowledge that it was false or misleading in a material particular or that due to an omission of a matter or thing was misleading in a material respect contrary to the requirements of s1308(2) of the Act; or
  - (ii) with knowledge that it could be false or misleading in a material particular or that due to an omission of a matter or thing was misleading in a material respect contrary to the requirements of s1308(2) of the Act; or
  - (iii) without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, contrary to the requirements of s1308(4) of the Act.
4. Mr Dowsley filed a Response dated 29 January 2015 responding to the SOFAC ("Response").
  5. The hearing took place in Melbourne on Monday 23 March 2015 ("Hearing"). Mr Christopher Brown of counsel appeared for ASIC and Mr Trevor Wraight SC appeared for Mr Dowsley. During the Hearing counsel for ASIC handed up and spoke to written submissions in relation to the matter ("ASIC Submissions") as did counsel for Mr Dowsley ("Respondent Submissions").

### **Executive Summary**

6. In general terms Mr Dowsley admits the Contentions other than those alleging dishonesty.
7. So, the contested issues for determination are whether Mr Dowsley engaged in the relevant conduct knowingly or recklessly.
8. Because there were no admissions or direct evidence of dishonesty, ASIC relies on certain facts from which, it contends, the Board is entitled to infer dishonesty on the part of Mr Dowsley.
9. For the reasons which follow, the Board has determined that ASIC has not satisfied it that Mr Dowsley's conduct was dishonest.

### **Evidence**

10. The written evidence adduced by ASIC comprised the following:
  - (a) the SOFAC (including 39 annexures).
  - (b) Witness statement of Michael Joseph Cain dated 27 October 2014.
  - (c) Supplementary witness statement of Michael Joseph Cain dated 8 January 2015.
  - (d) Additional documents filed by ASIC on 12 March 2015 comprising:

- (i) Letter to Mr Dowsley dated 9 January 2014 from Chartered Accountants Australia and New Zealand Re: Quality Review;
  - (ii) Letter to Mr Dowsley dated 22 September 2014 from Chartered Accountants Australia and New Zealand Re: Quality Review Results; and
  - (iii) Institute of Chartered Accountants Tax Invoice #1425097 dated 29 September 2014.
- (e) Screenshots of the electronic ASIC Form 912 ("Annual Statement for an individual auditor") as at March 2012, February 2013 and March 2014.

11. The written evidence adduced by Mr Dowsley consisted of the Response.

12. Mr Dowsley did not provide a statement or give oral evidence.

### **Facts**

13. The relevant facts, none of which is contested, are as follows:

- (i) Mr Dowsley has been continuously registered as a company auditor under the Act or its predecessor legislation since 5 January 1990. His current place of practice is Level 2, 35 Cotham Road, Kew, Victoria 3101.
- (ii) In each of August 2010 and October 2010, ASIC sent Mr Dowsley letters of concern in relation to several audits that he had conducted.
- (iii) In mid 2011, Mr Dowsley attended a hearing at ASIC pursuant to s1289A of the Act in relation to ASIC's concerns.
- (iv) On 13 September 2011, ASIC issued a letter to Mr Dowsley imposing conditions on his registration as an auditor which included the following conditions ("Original Conditions"):
  - (a) *that as member of the Institute of Chartered Accountants in Australia ("ICAA"), in addition to the minimum of 120 hours of continuing professional education over a three year period required by the ICAA that you enrol in the next available Audit and Assurance module of the Chartered Accountants Program and receive a minimum assessment result of a pass on the first attempt prior to 30 June 2012; or*
  - (b) *prior to 31 December 2011, in addition to the minimum of 120 hours of continuing professional education over a three-year period required by the ICAA, enrol and participate in training provided by Task Technology in relation to:*
    - (i) *a two-day fundamentals training course, namely "CaseWare Audit Essentials"; and*

(ii) *a two- to three-day customised audit training course in relation to audit methodology, specifically, training relating to the understanding, interpretation and application of the requirements of the Australian Auditing Standards ("ASAs"). The training should include the following, with an emphasis on audit evidence and documentation requirements:*

- *CaseWare programs for intangibles, impairment, and fair value;*
- *ASA 200 Overall objectives of the independent auditor and the conduct of an audit in accordance with Australian Accounting Standards;*
- *ASA 210 Agreeing the terms of audit engagements;*
- *ASA 230 Audit documentation;*
- *ASA 265 Communicating deficiencies in internal control to those charged with governance and management;*
- *ASA 300 Planning an audit of a financial report;*
- *ASA 320 Materiality in planning and performing an audit;*
- *ASA 450 Evaluation of misstatements identified during the audit;*
- *ASA 500 Audit evidence;*
- *ASA 540 Auditing accounting estimates, including fair value accounting estimates, and related disclosures;*
- *ASA 550 Related parties;*
- *ASA 580 Written representations; and*
- *ASA 620 Using the work of an auditor's expert; and*

(iii) *ASIC requests that you provide documentation to ASIC, prior to 31 December 2011, which verifies:*

- A. *your implementation of the CaseWare Working Papers, Audit Systems Template with Task Technology Pty Ltd; and*
- B. *details of the training completed, specified in paragraphs (i) and (ii) above, with Task Technology Pty Ltd, being the provider of that CaseWare software training; and*

(collectively "Training Conditions").

(c) *in relation to the four (4) audits for which you received the highest audit fees as notified in your Annual Statement for the period ended 4 January 2011:*

(i) *where you are still the auditor for the 2011 financial year; and*

(ii) *the financial reports in question were prepared in accordance with Part 2M.3 or Part 7.8 of the Act;*

*a reviewing auditor be appointed, approved in advance by ASIC, to review the conduct of each of those audits with the reviewing auditor to provide a statement to ASIC by 31 March 2012 as to whether, in the reviewing auditor's opinion, each of the audits in question have been conducted in all material respects in accordance with the ASAs effective as of the date of the audit in question*

("Review Conditions").

(v) By 29 December 2011 Mr Dowsley had achieved:

- (a) substantial compliance with the Training Conditions; and
- (b) very limited compliance with the Review Conditions.

(vi) On 5 March 2012 Mr Dowsley lodged his 2012 auditor annual statement ("Annual Return") in which he wrongly answered "no" to the question ("Conditions Question") "*Is your registration as a company auditor subject to conditions imposed by ASIC?*" ("Auditor False Statement").

(vii) Section 8 of the Annual Return contained a further inquiry (only to be answered after a "yes" answer to the Conditions Question) asking: "*Have you complied with the conditions of your registration at all times during the period of the statement*" ("Compliance Question").

(viii) Because Mr Dowsley answered "no" to the Conditions Question, he was not required to answer the Compliance Question.

(ix) On 5 February 2013 Mr Dowsley lodged his 2013 Annual Return in which he wrongly answered "no" to the Conditions Question, and so was not required to answer the Compliance Question ("Auditor False Statement").

(x) On 26 April 2013 Mr Dowsley lodged his application for registration as an SMSF auditor ("SMSF Form") in which he wrongly answered "no" to the following question (SMSF Question) which appeared on the SMSF Form "*If the applicant is a registered company auditor, has the applicant failed to comply with a condition of their company auditor registration, or have additional conditions been imposed on the applicant's company*

*auditor registration under section 1289A of the Corporations Act 2001?" ("SMSF False Statement").*

- (xi) In that SMSF Form Mr Dowsley gave the following answers to the following questions which immediately preceded the SMSF Question:

*Question: "Is the applicant currently a disqualified person, or has the applicant ever been a disqualified person, within the meaning of section 120 of the Superannuation Industry (Supervision) Act 1993?"*

*Answer: "Yes"*

*Question: "The applicant has made a positive declaration for this question. We may not approve this application if we consider that the applicant has not demonstrated he or she is a fit and proper person. An adequate explanation (to our satisfaction) must be provided for the applicant to be registered as an approved SMSF auditor. Provide explanation below:"*

*Answer: "Details - I was reprimanded and fined \$500 by the ICCA in 1991 after entering into a Part X arrangement in 1991 for 1 day. This was not related to professional activity and I was not disqualified or suspended from practice. I was the most junior partner in a practice of 12 partners that went into administration and subsequent liquidation in 1989/90".*

- (xii) Following correspondence between ASIC and Mr Dowsley, by letter dated 12 September 2013, ASIC amended the Original Conditions so that instead of the Review Conditions, Mr Dowsley was required to provide:

- *By close of business 20 September 2013, the terms of the arrangement and scope of review agreed between you and Mr Michael Cain ("Mr Cain") in relation to his review of your audits noted below;*
- *By close of business 11 October 2013, a statement from Mr Michael Cain, after his review of the following two audits, as to whether, in his opinion, the audits were conducted in all material respects in accordance with the ASAs effective as of the date of the audits in question:*
  - *Cambridge International College (Vic) Pty Ltd (ACN 076 527 529) for the year ended 30 June 2011; and*
  - *National Sids Council of Australia Ltd. (ACN 050 464 616) for the financial year ended 31 March 2013; and*

- *By close of business 6 December 2013, a statement from Mr Michael Cain, after his review of the following two audits, as to whether, in his opinion, the audits have been conducted in all material respects in accordance with the ASAs effective as of the date of the audits in question:*
  - *Java Dale Pty. Ltd. (ACN 077 379 367) for the financial year ended 30 June 2013; and*
  - *Total Care Funeral Plan Pty Ltd (ACN 003 876 622) for the financial year ended 30 June 2013."*

("Amended Conditions").

- (xiii) The Amended Conditions replaced the Review Conditions and required Mr Dowsley, within specified time limits, to provide the terms of engagement of Mr Cain, as review auditor, and statements from Mr Cain after he had reviewed Mr Dowsley's audits of the above 4 specified clients.
- (xiv) On 26 September 2013 Mr Dowsley provided to ASIC a proposed engagement letter with Mr Cain.
- (xv) On 11 October 2013 Mr Cain sent a letter to ASIC attaching his reviews of audits by Mr Dowsley of the first 2 of his 4 specified clients.
- (xvi) In early 2014, ASIC sent various emails to Mr Dowsley regarding his non-compliance with the Amended Conditions, namely that he had failed to provide the two additional auditor review reports from Mr Cain due by 6 December 2013 as specified in the Amended Conditions.
- (xvii) On 6 March 2014 Mr Dowsley lodged his 2014 Annual Return in which he wrongly answered "no" to the Conditions Question and so he was not required to answer the Compliance Question ("Auditor False Statement").
- (xviii) On 14 June 2014 Mr Dowsley lodged his SMSF auditor annual statement ("SMSF Form") in which he wrongly answered "no" to the SMSF Question ("SMSF False Statement").
- (xix) In that SMSF Form Mr Dowsley gave the following answers to the following questions which immediately followed the SMSF Question:

*Question: "Has the approved SMSF auditor become excluded from practice as an auditor (in any auditing capacity) or liquidator, had their registration as an auditor (in any auditing capacity) or liquidator suspended or was subject to any other disciplinary action by one of the following bodies?*

- *Australian Securities & Investments Commission (ASIC)*

- *Australian Prudential Regulation Authority (APRA)*
- *Australian Taxation Office (ATO)*
- *the Companies Auditors and Liquidators Disciplinary Board (CALDB)*
- *the Joint Accounting Bodies (The Institute of Chartered Accountants in Australia, CPA Australia and the Institute of Public Accountants)*
- *Tax Practitioners Board*
- *Association of Taxation Management Accountants (ATMA)*
- *National Tax and Accountants' Association Ltd (NTAA)*
- *SMSF Professionals' Association of Australia Ltd (SPAA)*
- *any other body having authority in Australia or overseas relating to the registration or disciplining of auditors or liquidators"*

*Answer – "Yes"*

*Question: "Provide an explanation if the approved SMSF auditor has failed to comply with the above requirement."*

*Answer: Details – "I was reprimanded and fined \$500 by the ICCA in 1991 after entering into a Part X arrangement in 1991 for 1 day. This was not related to professional activity and I was not disqualified or suspended from practice. I was the most junior partner in a practice of 12 partners that went into administration and subsequent liquidation in 1989/90. The above was disclosed on my application for registration as an SMSF auditor".*

- (xx) On 17 July 2014, ASIC issued a notice pursuant to s19 of the Australian Securities and Investments Commission Act 2001 ("ASIC Act") requiring Mr Dowsley to appear at ASIC for the purposes of an examination ("s19 Examination").
- (xxi) The s19 Examination was held at ASIC on 25 July and 1 August 2014.
- (xxii) During the s19 Examination on 1 August 2014, Mr Dowsley was asked why he did not respond to all of ASIC's correspondence seeking compliance with the conditions imposed on his registration. As a result, the following exchange took place between ASIC Inspector Mr Phillip Armstrong and Mr Dowsley as set out in the SOFAC:

*"MR ARMSTRONG: Okay. Any reason you didn't respond?"*

*MR DOWSLEY: Privilege. The only reason I would have would be that that was quite a busy time at that point to finish off the super fund work from the previous year. I think inevitably it would have blown out to beyond the middle of June. Other than - - -*

*MR ARMSTRONG: You didn't see this as a priority?*

*MR DOWSLEY: Privilege. I did. Maybe I'm not very good at managing priorities, it's a failing.*

*MR ARMSTRONG: Do you recall the emails that were sent to you chasing your response from ASIC staff?*

*MR DOWSLEY: Privilege. Yes.*

*MR ARMSTRONG: But you never replied?*

*MR DOWSLEY: Privilege. Not to all of them.*

*MR ARMSTRONG: You were aware at that time you had conditions still imposed upon your auditor's licence by ASIC.*

*MR DOWSLEY: Privilege. Yes."*

(xxiii) During the same s19 Examination Mr Dowsley was also asked a series of questions about the Annual Returns as follows:

*"MR ARMSTRONG: So none of your contractors use the log-on to lodge forms.*

*MR DOWSLEY: Privilege. No.*

*MR ARMSTRONG: Just yourself. Okay. So on each of those forms, you've answered, "No," on page 5 to any conditions - I'll read it out verbatim off the form, "Is your registration as a company auditor subject to any conditions imposed by ASIC?" On each of these forms you've answered, "No," and lodged them with ASIC. Can you see that?*

*MR DOWSLEY: Privilege. Yes.*

*MR ARMSTRONG: Were you aware when you were completing these forms that you had conditions imposed by ASIC?*

*MR DOWSLEY: Privilege. Yes.*

*MR ARMSTRONG: You had ASIC chasing you up in relation to those conditions.*

*MR DOWSLEY: Privilege. Yes.*

*MR ARMSTRONG: When you completed these forms and lodged them, at that time you hadn't complied with those conditions.*

*MR DOWSLEY: Privilege. Yes.*

*MR ARMSTRONG: So why did you answer, "No"?*

*MR DOWSLEY: Privilege. I think I didn't probably consider the forms when I lodged them. I didn't - it wasn't - I didn't intentionally make that mistake. I'd always lodged the forms in that way and there was no intention to make that error, or mislead anyone. I just didn't think it through. That's - I don't have another answer and I didn't consider it properly at the time.*

*MR ARMSTRONG: For three separate years on three separate occasions?*

*MR DOWSLEY: Privilege. Yes. I think I just wasn't thinking about that when I lodged the forms. I obviously made a mistake.*

*MR ARMSTRONG: You had had regular correspondence from ASIC and with ASIC in relation to this matter in relation to the conditions - - -*

*MR DOWSLEY: Privilege. Yes.*

*MR ARMSTRONG: - - - over a number of years, and when you come to lodge your form in relation to your registration it's something that you didn't consider.*

*MR DOWSLEY: Privilege. I didn't consider it properly. I can't change it"*

- (xxiv) At the time of the s19 Examination, ASIC was not aware of the SMSF Forms so Mr Dowsley was not asked any questions about them.
- (xxv) From the above extracts from his s19 Examination, it is clear that, in relation to the Annual Returns, Mr Dowsley admitted that:
- (a) he answered "no" to the Conditions Question in each of the Annual Returns;
  - (b) he was aware of the Original Conditions and the Amended Conditions ("Registration Conditions") when completing the Annual Returns;
  - (c) he had received considerable correspondence from ASIC in relation to compliance with the Registration Conditions;
  - (d) he had not complied with the Registration Conditions at the time of completing the Annual Returns; and
  - (e) at the date of the s19 Examination he had not complied with the Registration Conditions.
- (xxvi) Each of the Annual Returns was prepared and lodged by Mr Dowsley and included a declaration by Mr Dowsley that to the best

of his knowledge and belief, the information supplied in, and with, the Annual Returns was complete and accurate.

- (xxvii) Each of the SMSF Forms was completed and lodged by Mr Dowsley and contained a declaration by Mr Dowsley that to the best of his knowledge, the information supplied in the SMSF Forms was complete and accurate.
- (xxviii) Each answer to the Conditions Question in the Annual Returns and the SMSF Question in the SMSF Forms was false ("False Statements").

### **The Contentions - Contested and Uncontested**

#### **Uncontested**

- 14. The following Contentions are not disputed by Mr Dowsley. For clarity we have used abbreviations:
  - (a) Contention 1: failure to comply with a Registration Condition.
  - (b) Contention 2(b): lack of fitness and propriety by making the False Statements without reasonable care ("carelessly").
  - (c) Contention 2(c): lack of fitness and propriety by failing to comply with a Registration Condition.
  - (d) Contention 3(a): failure to perform auditor duties adequately and properly by making the Auditor False Statements.
  - (e) Contention 3(b)(iii): failure to perform auditor duties by making the Auditor False Statements without reasonable care ("carelessly").

#### **Contested**

- 15. This left the following contested Contentions, as also abbreviated:
  - (a) Contention 2(a): lack of fitness and propriety by making the False Statements knowingly or, in the alternative, recklessly.
  - (b) Contention 3(b)(i): failure to perform auditor duties adequately and properly by making the Auditor False Statements knowingly.
  - (c) Contention 3(b)(ii): failure to perform auditor duties adequately and properly by making the Auditor False Statements recklessly.
- 16. Thus, as mentioned in paragraph 7, the critical contested issues are whether Mr Dowsley made the False Statements "knowingly" or "recklessly". The SOFAC identifies the facts from which ASIC contends the Board is entitled to infer dishonesty.

#### **Briginshaw**

- 17. In *Briginshaw*<sup>1</sup>, Dixon J said at [361-362]:

*"... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of*

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<sup>1</sup> *Briginshaw v Briginshaw* [1938] 60 CLR 336.

*probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences"*

18. Dixon J continued, particularly with regard to circumstantial evidence, at [368-9]:

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

19. A recent Full Federal Court decision ("*Sullivan*")<sup>2</sup> has clarified that whilst the *Briginshaw* approach is not a principle of law which applies to tribunal proceedings (such as ours) it is a useful tool in assisting a tribunal to reach its decision.
20. Accordingly we accept the *Briginshaw* approach as a useful tool here, where, the allegations are serious and ASIC seeks cancellation of Mr Dowsley's registration.
21. However, the authorities clearly support the proposition that *Briginshaw* does not alter the standard of proof required<sup>3</sup>.
22. In any event, the Board attaches great importance to the statement in *Briginshaw* (referred to in paragraph 18 hereof), of the need to consider whether the facts are susceptible of "some other not improbable explanation" where the evidence relied upon is circumstantial.

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<sup>2</sup> *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93

<sup>3</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170

## **The Confidential Decision ("Hill CALDB")**

23. On 9 December 2014 a differently constituted (except for one member) panel of the Board gave a written decision in a similar matter ("Confidential Decision").
24. The Confidential Decision has now been upheld by the Administrative Appeals Tribunal ("AAT") (on 24 April 2015), which stayed publication until 23 July 2015 and gave the respondent in that case the pseudonym "*NHPT*"<sup>4</sup>. To avoid confusion we will refer to the respondent in that matter as the "auditor".
25. Because of its similarity to this matter, ASIC obtained permission from the AAT for a redacted version of the Board's decision in that matter to be made available to Mr Dowsley and the Board. After the initial hearing and before the Sanctions, Costs and Publicity Hearing, on 23 July 2015 the AAT revoked the stay on publication including the use of the pseudonym, allowing the name of the respondent in that matter to be made public<sup>5</sup>. This means that the reported decision of the AAT in *NHPT* will now be referred to herein as Hill (AAT) and the Confidential Decision will now be referred to herein as Hill (CALDB).
26. In *Hill (CALDB)* the auditor had 4 conditions imposed on his auditor registration requiring additional education to be undertaken. Following the imposition of those conditions and his failure to comply therewith, in 3 successive years he failed to disclose in each auditor annual return that his registration as a company auditor was subject to conditions imposed by ASIC.
27. The contentions in *Hill (CALDB)* can be summarised as follows:
  - (a) Contention 1: failure to comply with auditor registration conditions;
  - (b) Contention 2: failure to perform auditor duties adequately and properly by making the false statements knowingly, recklessly or carelessly;
  - (c) Contention 3: lack of fitness and propriety by making the false statements knowingly, recklessly or carelessly.
28. All contentions were contested. The auditor gave evidence and was cross-examined.
29. The Board in *Hill (CALDB)* set out the evidence given by the auditor at the hearing, in relation to his explanation for failing to disclose that his registration was subject to conditions when signing the auditor annual returns, as follows<sup>6</sup>:

*"150 When Mr Hill was asked directly whether when he signed the Annual Statement in 2011 he knew it to be false answered:*

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<sup>4</sup> *NHPT v Companies Auditors and Liquidators Disciplinary Board and Australian Securities and Investments Commission* [2015] AATA 245

<sup>5</sup> *Richard Hill v Companies Auditors and Liquidators Disciplinary Board and Australian Securities and Investments Commission* [2015] AATA 245.

<sup>6</sup> *Hill (CALDB)* paragraphs 151-152

***"No. I would not sign a form deliberately that I knew to be false. I would not do that. I've been an auditor for 30 years. I would not do that. Yes, I overlooked it, but I did not sign it knowing it was wrong."***

*"151 Mr Hill was also asked whether, when he was about to sign the 2013 return and saw that the answer no had been checked, whether it must have occurred to him that that answer was incorrect.*

*Mr Hill answered:*

***"Well if I'd read that particular section probably, yes I agree with you.***

*ASIC's Counsel:*

*"Are you saying you didn't read it properly?"*

*Mr Hill:*

***"Well, I mean, the fact is that I perused it and obviously that didn't arise in my reading of it, I overlooked it."***

*ASIC's Counsel:*

*"How could it not arise in the circumstances of December 2013 Mr Hill?"*

*Mr Hill:*

***"I don't know I can't answer".***

*ASIC's Counsel:*

*"It must have come to mind that you were subject to conditions?"*

*Mr Hill:*

***"Well I have just said it didn't come to mind so - it didn't come to mind. That's all I can say."***

*ASIC's Counsel:*

*"Can you explain how it could not have?"*

*Mr Hill:*

***"No I can't I overlooked it. If it did, I wouldn't have signed it; I would have changed it. I had nothing to gain from putting "No" nothing at all."***

*Mr Hill was asked the same question in relation to the 2011 form and his answer was:*

***"Well I have the same answer: they didn't, or I wouldn't have signed it."***

30. We summarise the decision of the Board, in *Hill*, as follows:
- (a) Contention 1: established.
  - (b) Contention 2: established as to carelessly or "grossly careless" but not as to knowingly or recklessly<sup>7</sup>.
  - (c) Contention 3: established as to carelessly or "grossly careless" but not as to knowingly or recklessly<sup>8</sup>.
31. Relevantly, for our purposes, the Board accepted the explanation (referred to in paragraph 29 hereof) as negating intentional dishonesty ("knowingly")<sup>9</sup>. The Board dismissed the "reckless" allegation because no question was put to Mr Hill in terms of the recklessness case that had been pleaded, so he was not afforded the opportunity of giving an explanation for his alleged "reckless" conduct<sup>10</sup>.
32. There are factual and procedural differences between *Hill* and this matter. In *Hill*:
- (a) there were 3 statements at issue (all being annual returns);
  - (b) the annual returns were not completed personally by the auditor (but by a staff member) although Mr Hill signed each of them;
  - (c) all issues were disputed and there was a fully contested hearing;
  - (d) Mr Hill gave evidence and was cross-examined; and
  - (e) the "explanation" given by Mr Hill for his conduct was given in cross-examination at the hearing and not in a s19 Examination.
33. There are similarities between *Hill* and this matter:
- (a) there were 3 annual returns over 3 years, in each of which Mr Hill failed to reveal the existence of registration conditions or to answer the question as to compliance; and
  - (b) similar explanations were given as to the reasons for not revealing the existence of the registration conditions in the annual returns.
34. Mr Dowsley accepts the similarity between this matter and *Hill*. This is in support of his argument that a finding here of carelessness or even gross carelessness is open to the Board, as in *Hill*, and that, as in *Hill*, the Board here should not find dishonesty.
35. ASIC submits that the differences between the two decisions are of sufficient significance for the Board to come to a different conclusion in relation to "recklessness or deliberateness".

### **The SMSF Forms**

36. Argument about the importance of the SMSF Forms occupied a substantial part of the Hearing.
37. The reasons for this can be summarised as follows:

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<sup>7</sup> *Hill* (CALDB) paragraphs 166-167

<sup>8</sup> *Hill* (CALDB) paragraph 189

<sup>9</sup> *Hill* (CALDB) paragraph 134

<sup>10</sup> *Hill* (CALDB) paragraphs 152-153

- (a) Mr Dowsley was not asked any questions about these forms in the s19 Examination; and
  - (b) on these forms, Mr Dowsley disclosed previous disciplinary action, but answered "no" to the SMSF Question (see paragraphs 13 (xi) and (xix)).
38. ASIC strongly submitted that as Mr Dowsley did not give evidence at the Hearing and was not asked any questions about the SMSF Forms in the s19 Examination, there was no evidence of an explanation negating dishonesty or recklessness and that we should draw the inference that he did not have such an explanation for answering "no" to the SMSF Question.
39. While not disputing that Mr Dowsley had not given any evidence in relation to the SMSF Forms (either at the s19 Examination or at the Hearing), Mr Dowsley's Counsel made two relevant submissions:
- (a) that ASIC had ample opportunity, before the Hearing, to conduct a further s19 Examination in relation to the SMSF Forms and
  - (b) that in any event, the onus is on ASIC to prove that Mr Dowsley acted knowingly or recklessly, which submission is rejected by us in paragraph 79.

#### **Contention 1**

40. ASIC contends that, within the meaning of s1292(1)(a)(ia)[second] of the Act, Mr Dowsley has failed to comply with a condition of his registration as an auditor.
41. Mr Dowsley does not contest the Contention or the facts in support thereof as set out in the SOFAC.
42. Section 1292(1)(a)(ia)[second] provides as follows:
- "The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this section that, before, at or after the commencement of this section:*
- (a) *the person has:*
    - (ia) *failed to comply with a condition of the person's registration as an auditor;*
- or is otherwise not a fit and proper person to remain registered as an auditor;*
- by order, cancel or suspend for a specified period, the registration of the person as an auditor."*
43. Whilst Mr Dowsley completed the Training Conditions and made some efforts to complete the Review Conditions he has failed to comply with a condition, in that he has failed to lodge the 2 further auditor review reports specified in the Amended Conditions which were required to be provided by 6 December 2013 (paragraph 13(xvi)).

## **Findings on Contention 1**

44. We find that, within the meaning of s1292(1)(a)(ia)[second] of the Act, Mr Dowsley has failed to comply with a condition of his registration as a company auditor in that he has failed to lodge the two further auditor review reports referred to at paragraph 43.
45. We find that Contention 1 is established.

## **Contention 2**

46. This Contention alleges that within the meaning of s1292(1)(d) of the Act, Mr Dowsley is not a fit and proper person to remain registered as a company auditor in that:
- (a) he knowingly or recklessly stated in one or more of the Annual Returns and the SMSF Forms that his registration as a company auditor was not subject to conditions with which he had failed to comply, which was false and/or misleading and/or contrary to the requirements of s1308(2) of the Act; and/ or
  - (b) without proper care and diligence in one or more of the documents referred to he made the same statements which were false and/or misleading and/or contrary to the requirements of s1308(4) of the Act; and/or
  - (c) since 31 March 2012 he has failed to comply with a condition of his registration as an auditor.
47. Section 1292(1)(d) provides:

*"The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this section that, before, at or after the commencement of this section:*

- (d) *the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:*
  - (i) *the duties of an auditor; or*
  - (ii) *any duties or functions required by an Australian law to be carried out or performed by a registered auditor;**or is otherwise not a fit and proper person to remain registered as an auditor;*

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

## **Our approach to Contention 2**

48. As each sub-paragraph of this Contention alleges lack of fitness and propriety, we deal first with "fit and proper" in general terms.

49. We then deal, separately, with the sub-paragraph (a) allegations of "knowingly" or "recklessly". As indicated in paragraph 7, these were the main subjects of dispute between the parties.
50. Next we deal with the sub-paragraph (b) allegation of without proper care and diligence, which is admitted by Mr Dowsley (paragraph 14).
51. Then, we deal with the sub-paragraph (c) allegation of failure to comply with a registration condition, which is also admitted by Mr Dowsley (paragraph 14).
52. Finally, we consider whether any of the conduct we find established renders Mr Dowsley "not a fit and proper person to remain registered as a company auditor".

### **Fit and Proper**

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

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

54. 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 matter being the nature and obligations of the role of a registered auditor<sup>11</sup>.

### **Knowingly**

55. Contention 2 does not contain an express allegation of dishonesty. However, this does not matter if the language otherwise used makes a sufficiently clear allegation of dishonesty. In our view, the matters which allege dishonesty in Contention 2 are those in sub-paragraph (a) that Mr

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<sup>11</sup> Hill (CALDB) paragraph 170

Dowsley knowingly made a false and misleading statement in each of the Annual Returns and SMSF Forms (and/or that he made those statements recklessly).

56. In the s19 Examination Mr Dowsley stated there was no conscious or deliberate intention on his part to mislead or deceive ASIC or anyone else (when being questioned about the Annual Returns). He said, inter alia, "*I think I didn't probably consider the forms when I lodged them. I didn't – it wasn't – I didn't intentionally make that mistake...*" ("Explanation").
57. In making our findings on whether Mr Dowsley made the False Statements knowing they were false, we bear in mind the passage from Dixon J in *Briginshaw* quoted at paragraph 18.
58. The relevant question is whether the evidence adduced by ASIC supports the conclusion of a deliberate decision by Mr Dowsley not to refer to the Registration Conditions when making each of the False Statements or whether the evidence is susceptible of some other "*not improbable explanation*"?
59. In order to establish dishonesty it is necessary to show that Mr Dowsley had some knowledge or belief or intent which according to the standard of the ordinary person, made his actions dishonest (*Macleod v R* [2003] 214 CLR 230).
60. Cases alleging dishonesty may be based upon inference. However, if a case is based upon inference, the matters said to give rise to the inference must be particularised. As Lord Millet said in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 186:

*"It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."*
61. ASIC submits that we should reject the Explanation as being inconsistent with certain facts and that it is open to the Board to infer that the False Statements were made deliberately from the following matters, which we summarise under the following headings:
  - (a) awareness
  - (b) repetition;
  - (c) recent reminders;
  - (d) inconsistency;
  - (e) benefit; and
  - (f) *Jones v Dunkel*.

### **Awareness**

62. ASIC alleges that Mr Dowsley was aware of the Registration Conditions at the time he made each of the False Statements.

63. Mr Dowsley accepts this fact but contends that the fact of awareness does not provide evidence that Mr Dowsley when making the False Statements turned his mind to the existence of the Registration Conditions and made a conscious decision not to disclose them.

### **Repetition**

64. ASIC refers to the 5 separate occasions on which Mr Dowsley made the False Statements over 18 months (March 2012- June 2014) and asks us to conclude that "it is not plausible that all 5 False Statements were a mistake or in error".
65. Mr Dowsley was specifically asked at the s19 Examination about his failure to respond to the Conditions Questions in each of the Annual Returns "*For three separate years on three separate occasions?*" His answer was "*Privilege. Yes. I think I wasn't thinking about that when I lodged the forms. I obviously made a mistake*".
66. Mr Dowsley submits that ASIC "would need to provide evidence to demonstrate that on five separate occasions, he had a belief or intent that made his actions dishonest according to the standard of the ordinary person".

### **Recent Reminders**

67. Mr Dowsley sent an e-mail to ASIC on 29 December 2011 in relation to the Registration Conditions. Yet, approximately 9 weeks later on 5 March 2012, he answered "no" to the Conditions Question in his 2012 Annual Return.
68. Further, on 11 February 2014, ASIC e-mailed Mr Dowsley in relation to the Registration Conditions. Yet, about three weeks later, on 6 March 2014, Mr Dowsley lodged his 2014 Annual Return in which he again answered "no" to the Conditions Question.
69. About 14 weeks later Mr Dowsley lodged the first of his SMSF Forms, in which once again he failed to reveal the Registration Conditions.
70. Mr Dowsley was asked in the s19 Examination whether he "*had had regular correspondence from ASIC and with ASIC in relation to this matter in relation to the conditions...*". Once again his reply was "*I didn't consider it properly. I can't change it*".

### **Inconsistency**

71. Reliance is placed by ASIC on Mr Dowsley's inconsistency in completion of the SMSF Forms. In both such Forms Mr Dowsley gave details of previous disciplinary activity but answered "no" to the SMSF Question (paragraphs 13(xi) and (xix)). ASIC submits that this inconsistency supports the inference that Mr Dowsley's SMSF False Statements were dishonest.
72. Mr Dowsley contends that such inconsistency "is also inconsistent with dishonest intent. It is evidence of a person acting honestly by providing information contrary to his interests when he was not required to do so.

Importantly, it demonstrates a failure to consider the questions on the form without proper care and diligence".

### **Benefit**

73. ASIC also relies on the benefit accruing to Mr Dowsley from the False Statements.
74. ASIC submits that Mr Dowsley would have been aware, as would any auditor, that his registration either as an auditor or as an SMSF auditor may have been refused, or at least delayed had he answered "Yes" to the SMSF Question or, in the case of all the False Statements – would have potentially triggered a chain of enquiry. ASIC submits that this further benefit supports the inference that Mr Dowsley's False Statements were dishonest.

### **"Jones v Dunkel"**

75. ASIC submits that the failure of Mr Dowsley to give evidence at the Hearing entitles the Board to draw the *Jones v Dunkel*<sup>12</sup> inference that any such evidence would be adverse, leaving us with no explanation for the False Statements, in particular the SMSF False Statements.
76. ASIC goes even further and submits that "in the absence of evidence from Mr Dowsley, it is open to the Board to find that the False Statements were deliberate based on the evidence before the Board".
77. The *Jones v Dunkel* principle applies to Board hearings<sup>13</sup>.
78. However, Mr Dowsley submits that while there is an absence of evidence in relation to the SMSF Forms, this does not detract from the onus on ASIC to prove its case – particularly in relation to allegations of such a serious nature as dishonesty (see paragraph 39(b)).
79. However, we do not accept that, as a matter of law, ASIC has an onus to prove its case. As we are a tribunal, and not a court, we are not exercising judicial power and the rules of evidence do not apply. We are required by s1292(2) of the Act to be satisfied that it is appropriate to exercise our powers under that section.
80. In relation to the SMSF Forms, which are not covered by the s19 Examination, the *Jones v Dunkel* inference is not the only inference available.
81. Of significance is the following exchange between a member of the Board and counsel for ASIC:

*"MS O'FLYNN: Mr Brown, is it equally open to the panel to infer that, had Mr Dowsley been asked about the SMS forms (sic) at the time of his section*

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<sup>12</sup> *Jones v Dunkel* [1959] 101 CLR 298

<sup>13</sup> *Gould v CALDB and ASIC* [2008] AATA 814 at [69] to [72]

*19 examination, that he would have given an answer equivalent to the answer that he gave in respect to the annual statements?*

*MR BROWN: It is a possibility, I would have to concede. But if that is the answer, why wasn't it provided in evidence, would be my question to Mr Dowsley."*

82. This exchange indicates that there is an alternative inference available to that pressed by ASIC. On the one hand, we can infer from the lack of any explanation about the SMSF Forms that Mr Dowsley did not have a "*not improbable explanation*" for his failure deliberately to disclose the Registration Conditions or, we can infer that he would have given substantially the same explanation in relation to the SMSF Forms as he gave in relation to the Annual Returns.
83. On the evidence and in light of the submissions, we find it more likely than not that Mr Dowsley would have given the same "*explanation*" in relation to the SMSF Forms as in relation to the Annual Returns – "*I think I didn't probably consider the forms when I lodged them. I didn't – it wasn't – I didn't intentionally make that mistake*" (as quoted in paragraph 56). All the evidence given by Mr Dowsley in the s19 Examination points to inadvertence and carelessness and not to any deliberate attempt to mislead or deceive.

#### **Conclusion on Inferences**

84. The admitted facts of **awareness, repetition and recent reminders** are not inconsistent with the Explanation – being, in summary, inadvertence and carelessness.
85. While it is difficult to understand how Mr Dowsley could have volunteered certain information contrary to his interests on the SMSF Forms on the one hand, but not disclosed the existence of the Registration Conditions on the other, we do not accept that such **inconsistency** overrides the Explanation or is evidence of dishonesty.
86. Similarly, ASIC has failed to establish that any **benefit** accruing to Mr Dowsley from making the False Statements is sufficient to justify the inference that he deliberately intended to mislead or deceive – contrary to the Explanation.
87. We also find that any *Jones v Dunkel* inference is negated by the Explanation and does not prove a consciously dishonest intention by Mr Dowsley to mislead or deceive.
88. Thus we find that the matters relied upon by ASIC referred to in paragraph 61, whether applied separately or cumulatively, are not inconsistent with the Explanation and do not establish that the False Statements were made deliberately.

### **Findings on "Knowingly" in Contention 2(a)**

89. In paragraphs 55 - 60 we have outlined the legal basis on which any finding of "knowingly" would need to be made.
90. We have also found (paragraph 87) that the matters relied upon by ASIC in support of its submission for rejecting the Explanation do not achieve this result, whether applied separately or cumulatively.
91. This leaves the Explanation as evidence that Mr Dowsley did not intentionally mean to mislead or deceive in relation to making the Auditor False Statements.
92. In paragraph 82, we have found that the Explanation also extends to the SMSF Forms.
93. Having carefully considered the evidence, objective facts and circumstances, in view of the "*not improbable explanation*" provided by Mr Dowsley we find that he was not intentionally dishonest in making the False Statements.
94. Accordingly, we find that Mr Dowsley did not make the False Statements knowing they were false ("knowingly") as alleged in Contention 2(a).
95. We find that Contention 2(a) is not established in relation to "knowingly".

### **Findings on "Recklessly" in Contention 2(a)**

96. ASIC contends, in the alternative, that Mr Dowsley was reckless in making the False Statements. That allegation relies upon the same particulars as abovementioned in respect of "knowingly".
97. To establish that Mr Dowsley was reckless in making the False Statements, ASIC must show that Mr Dowsley was aware of the possibility that they could be substantively inaccurate in the manner alleged by Contention 2, that this was impermissible and that he proceeded regardless. The key element for establishing recklessness is whether Mr Dowsley was consciously indifferent to the truth of the answers given. (see *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* [2013] NSWCA 252 at [51])
98. Based on relevant principles, a finding of recklessness would amount to a finding of dishonesty and therefore civil fraud. In *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; 86 ALJR 1183 at [22], it was emphasised that a false statement "*made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud.*"
99. The allegation of recklessness is also a serious matter requiring us to make a finding as to Mr Dowsley's state of mind and the principles in *Briginshaw*, already set out, apply.

100. What must be proved to establish fraud was stated by Lord Herschell in *Derry v Peek* [1889] 14 App Cas 337 at [374] in the following terms:

*"...Fraud is proved when it is shewn that a false representation is being made (1) knowingly (2) without belief in its truth or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief."*

101. For the same reasons as we have found above that the allegation of "knowingly" has not been established, we find that the alternative allegation of "recklessly" has also not been established.

102. These reasons (now adopted by us in relation to "recklessly") are contained in paragraphs 89 - 92 which we here summarise as follows:

- (a) we have found that the matters relied upon by ASIC and summarised in paragraph 61 do not lead us to reject the Explanation;
- (b) we have accepted the Explanation as evidence that Mr Dowsley did not recklessly make the Auditor False Statements; and
- (c) we have accepted that the Explanation also extends to the SMSF Forms.

103. Accordingly we find that Mr Dowsley was not consciously indifferent to whether the False Statements were true or false as alleged in the alternative Contention 2(a).

104. We find that Contention 2(a) is not established in relation to "recklessly".

#### **Findings on "Carelessly" in Contention 2(b)**

105. ASIC contends, as a further alternative under subparagraph (b) of Contention 2, that Mr Dowsley made the False Statements "without proper care and diligence" and "without having taken reasonable steps" to ensure they were not false or misleading.

106. As previously mentioned, Mr Dowsley submits that the Board should make this finding and, alternatively, that the Board could find the actions of Mr Dowsley as "grossly careless" (paragraph 34).

107. As referred to above, the statement by Mr Dowsley in the s19 Examination that he didn't properly consider the Annual Returns when he lodged them, can be characterised by us as careless.

108. Having regard to the lack of evidence by Mr Dowsley of any acceptable reason for his failure to properly consider and answer the Conditions Questions and the SMSF Question, and the submissions of both parties, we find that Mr Dowsley was grossly careless in making the False Statements.

109. Accordingly we find that Mr Dowsley made the False Statements without proper care and diligence and without having taken reasonable steps to ensure they were not false or misleading as alleged in Contention 2(b).
110. Subject to our findings on fitness and propriety, we find that Contention 2(b) is established in relation to "carelessly".

**Findings on failure to comply in Contention 2(c)**

111. This Contention is substantially similar to Contention 1 and is not disputed (paragraph 14).
112. Accordingly, for the same reasons and on the same basis (paragraphs 43 - 44) we make the same finding.
113. Subject to our findings on fitness and propriety, we find Contention 2(c) established.

**Finding on fitness and propriety in Contention 2(b)**

114. Subject to fitness and propriety, we have found that Contention 2(b) has been established (paragraph 109).
115. We have already dealt with "fit and proper" in general terms (paragraphs 53 - 54).
116. The question now is whether Mr Dowsley's conduct, based on the evidence adduced by ASIC with regard to his False Statements, warrants a finding under s1292(1)(d) that Mr Dowsley is "*not a fit and proper person to remain registered as an auditor.*" The following paragraphs (116 - 118) apply specifically to registration as a company auditor, under the Act, but also generally to registration as an SMSF auditor.
117. The requirements for "honesty, knowledge and ability" need to be considered in the light of the nature and obligations of the office of registered auditor. There is no doubt that the law places onerous and important responsibilities on auditors, which include duties of a public nature. The public is entitled to assume that auditors maintain very high professional standards.
118. Registration as a company auditor under the Act also brings with it a consequent set of obligations, responsibilities and privileges. A person, before being registered, must demonstrate competence, fitness and propriety. ASIC regulatory guide 180 states that ASIC will only be satisfied that a person is a fit and proper person to be registered as a company auditor if it is satisfied as to the overall capability, honesty, integrity and good reputation of the applicant. Fitness and propriety is not only a requirement of initial registration but of remaining registered.
119. In addition to dealings with audit clients, Mr Dowsley's role as a registered auditor carries with it requirements as a regulated person with reporting responsibilities under the Act in relation to his auditing roles, to regularly provide information to ASIC. The credibility and robustness of the regulatory process relies upon the trustworthiness and reliability of those

registered to make sure they find out what is required of them at all times and execute those requirements diligently. That is no doubt one of the reasons for requiring fitness and propriety as well as capability to be demonstrated before registration under the Act can be granted.

120. There is no doubt that the findings we have made regarding Mr Dowsley's conduct in relation to the 5 False Statements lodged in 2012, 2013 and 2014, amount to a serious failure which we categorise as grossly careless (paragraph 108).
121. We find Mr Dowsley's evidence (in his s19 Examination) regarding his lack of care in making the Auditor False Statements of serious concern. He was prepared to attest to the accuracy and completeness of his answers without giving them any proper attention. Also, he was prepared to attest to the accuracy and completeness of his answers in the SMSF False Statements without giving them proper attention.
122. That conduct took place for 3 consecutive years and in relation to 5 separate statements. Even in 2014, when he had only recently corresponded with ASIC in relation to the Registration Conditions, he did not make any connection between completion of the Annual Returns, a process critical for the maintenance of his registration as an auditor, and the Registration Conditions. In terms of "fitness", Mr Dowsley has not demonstrated, in the words of *Coke* quoted in *Hughes v Vale*, "*knowledge to know what he ought duly to do*" (at 156).
123. A registered company and SMSF auditor should only attest to the completeness and accuracy of documents to the best of his knowledge where he can ensure that he has verified the relevant contents. If the document so verified does contain an error, it does not automatically follow that there is any impropriety. The words "*to the best of my knowledge*" acknowledge this. However, where the registered company auditor or SMSF auditor takes no steps or insufficient steps to check the accuracy of his answers, there is impropriety.
124. The fact that the three Annual Returns did not disclose that Mr Dowsley's registration was subject to conditions affected ASIC's ability to monitor compliance with those conditions and prevented ASIC from making further enquiries or taking further action under the relevant legislation.
125. This is a matter of great importance because a finding that a person is not a fit and proper person to remain registered as an auditor is very significant. However, the facts here demonstrate a fundamental disregard by Mr Dowsley for observance of a most basic obligation of his office, by making the False Statements and attesting to their accuracy.
126. Mr Dowsley does not challenge our ability to make a finding of lack of fitness and propriety in relation to admitted Contention 2(b).
127. In these circumstances we find, for the purposes of Contention 2(b), that Mr Dowsley is not a fit and proper person to remain registered as a company auditor.

128. We find that Contention 2(b) is established.

### **Finding on fitness and propriety in Contention 2(c)**

129. It follows from what we have just said on fitness and propriety in relation to Contention 2(b) that we make the same finding for the purposes of Contention 2(c).

130. We find that, for the purposes of Contention 2(c), Mr Dowsley is not a fit and proper person to remain registered as a company auditor.

131. We find that Contention 2(c) is established.

### **Findings on Contention 2**

132. Based on the foregoing we make the following findings:

- (a) Contention 2(a) is not established;
- (b) Contentions 2(b) is established;
- (c) Contention 2(c) is established.

### **Contention 3**

133. ASIC's third Contention concerns Mr Dowsley's failure to perform his duties as an auditor under s 1292(1)(d) of the Act and therefore particularises only the Auditor False Statements and not the SMSF False Statements.

134. Contention 3 is as follows:

*"ASIC contends that within the meaning of s1292(1)(d) of the Act, Mr Dowsley has failed to carry out or perform adequately and properly his duties as a company auditor and/or his duties or functions required by Australian law to be carried out or performed by him as a registered company auditor in that:*

- (a) *he stated in one or more of the following documents he lodged with ASIC that his registration as a company auditor was not subject to conditions imposed by ASIC and/or he had not failed to comply with such conditions, which was false and/or misleading:*
  - (i) *2012 Auditor Annual Statement;*
  - (ii) *2013 Auditor Annual Statement; and*
  - (iii) *2014 Auditor Annual Statement;*
- (b) *Each of the false and/or misleading statements (alternatively one or more of them) referred to in paragraph (a) above was made by Mr Dowsley:*
  - (i) *with knowledge that it was false or misleading in a material particular or that due to an omission of a matter or thing was*

*misleading in a material respect contrary to the requirements of s1308(2) of the Act; or*

- (ii) *with knowledge that it could be false or misleading in a material particular or that due to an omission of a matter or thing was misleading in a material respect contrary to the requirements of s1308(2) of the Act; or*
- (iii) *without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, contrary to the requirements of s1308(4) of the Act".*

135. Section 1292(1)(d) is set out in paragraphs 2 and 47.
136. It is well established by the authorities that the Board's role is not to exercise judicial power and does not depend upon it being satisfied to a legal standard of the contraventions or failures, 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 has to be judged by the Board making an evaluative and subjective determination (*ASIC v Allan Gregory Walker* (Decision of the Board, Matter No 06/VIC07) dated 22 December 2008 ("*Walker*").
137. The level of performance which is called for is that of "adequacy"; the standard is that the duty must be performed "properly" and in making the assessment the Board is entitled to have regard to published codes or standards of professional bodies.
138. Our role therefore is to determine whether Contention 3 has been established on the evidence before us i.e. whether Mr Dowsley failed to carry out or perform adequately and properly the duties of an auditor under s1292(1)(d)(i) and (ii).
139. ASIC points to two specific duties of Mr Dowsley, as a registered auditor, which it contends he failed to carry out or perform adequately and properly. The first was the duty to lodge accurate Annual Returns in 2012, 2013 and 2014. The second was a statutory duty to ensure that those returns did not contain information that was false or misleading.
140. Section 1287A of the Act, requires a person who is a registered company auditor, within one month after the end of each 12 month period of registration, to lodge with ASIC a statement in respect of that period. The statement must contain such information as is prescribed under the regulations and must be in the prescribed form. The prescribed form is Form 912A, "Annual statement by an auditor".
141. Mr Dowsley was first registered as an auditor on 5 January 1990. His annual period of registration was from 5 January each year to 4 January in the following year and he was required to lodge an Annual Return within the month following 5 January each year.

142. Mr Dowsley lodged Annual Returns for the years ending 4 January 2012, 2013 and 2014 on the following dates respectively: 5 March 2012, 5 February 2013 and 6 March 2014.
143. In each of those Annual Returns, Mr Dowsley declared that to the best of his knowledge and belief, the information supplied in and with the return was complete and accurate.
144. ASIC contends that in each case that declaration was untrue, because Mr Dowsley's negative answer to the Conditions Question, which resulted in him not having to answer the Compliance Question, was false and misleading.
145. Mr Dowsley admits that each of the Annual Returns was incorrect. He says, however that this was not because of any conscious deliberate or reckless act but was the product of carelessness, or even gross carelessness.

**"Failure to Comply" – Contention 3(a)**

146. As mentioned, Mr Dowsley does not dispute this Contention (paragraph 14).
147. We have found that Contentions 1 (paragraph 45) and 2(c) (paragraphs 113 and 131) have been established.
148. In the absence of any dispute between the parties in relation to these Contentions and on the same basis and same evidence as that on which we have found Contentions 1 and 2(c) established, we also find Contention 3(a) established.

**"Knowingly" – Contention 3(b)(i)**

149. We have found, after extensive discussion, that "knowingly" in Contention 2 (a) has not been established (paragraph 95).
150. We believe the same facts and circumstances are relevant to our consideration of "knowingly" in this Contention 3(b)(i), particularly as this Contention only relates to the Auditor False Statements and not also the SMSF False Statements.
151. Accordingly, based on our findings in paragraph 95, we find that Mr Dowsley did not knowingly make any of the Auditor False Statements contrary to the requirements of s1308(2) of the Act, as alleged in Contention 3(b)(i).
152. We therefore find that Contention 3(b)(i) is not established.

**"Recklessly" – Contention 3(b)(ii)**

153. Having found "knowingly" in Contention 3(b)(i) not established, similar considerations and analysis apply to the way in which we deal with "recklessly".
154. Accordingly, based on our discussion in paragraphs 96 - 102 and our findings in paragraphs 103 - 104, we find that Mr Dowsley did not

recklessly make any of the Auditor False Statements contrary to the requirements of s1308(2) of the Act, as alleged in Contention 3(b)(ii).

155. We therefore find that Contention 3(b)(ii) is not established.

**"Carelessly" – Contention 3(b)(iii)**

156. We have considered this subject thoroughly in relation to Contention 2(b) (paragraphs 105 - 110).

157. Accordingly, based on our finding in paragraphs 108 - 110, we find that Mr Dowsley made the Auditor False Statements without having taken reasonable steps to ensure that they were not false or misleading contrary to s1308(4) of the Act, as alleged in Contention 3(b)(iii).

158. We therefore find that Contention 3(b)(iii) is established.

**Findings on Contention 3**

159. Based on the foregoing we make the following findings:

- (a) Contention 3(a) is established;
- (b) Contentions 3(b)(i) and (ii) are not established;
- (c) Contention 3(b)(iii) is established.

**The Board's finding under section 1292(2)**

160. In light of the contentions established, we have determined that we are satisfied that Mr Philip James Dowsley has failed to comply with a condition of his registration as an auditor, has failed to carry out or perform adequately and properly the duties of an auditor within s1292 of the Act and is otherwise not a fit and proper person to remain registered as an auditor.

**Appropriate orders**

**Sanctions Hearing**

161. On 4 August 2015, the Panel held a hearing ("Sanctions Hearing") in relation to what orders, if any, should be made under s1292(2) of the Act in relation to Mr Dowsley, having regard to our determination that he had failed to carry out or perform adequately and properly the duties of an auditor within s1292 of the Act and is otherwise not a fit and proper person to remain registered as an auditor. Mr Dowsley was represented by Mr Trevor Wraight SC. ASIC was represented by Mr Christopher Brown of counsel and each party filed written submissions with the Board prior to the Sanctions Hearing and, at the Sanctions Hearing, made further oral submissions, and in the case of ASIC, further written submissions.

**Mr Dowsley's Evidence**

162. Mr Dowsley filed written evidence from:

- (a) his assessing and treating psychologist, Mr Jeffrey Cummins ("Mr Cummins"), consulting clinical & forensic psychologist, in the form of reports dated 9 February 2015 ("First Report") and 20 July 2015 ("Second Report") (collectively "Reports"); and
- (b) Mr Craig Whyte, chartered accountant and director of Axiom Advisors Pty Ltd ("Axiom"), chartered accountants ("Mr Whyte") by way of a character reference dated 28 July 2015.

163. Both Mr Cummins and Mr Whyte gave oral evidence and were cross-examined by counsel for ASIC.

### **Summary of Medical Evidence**

164. Mr Dowsley was referred to Mr Cummins, an experienced and highly credentialed forensic psychologist, by his solicitors on 14 January 2015.
165. Mr Dowsley was first seen by Mr Cummins on 20 January 2015 and, as above mentioned, the First Report is dated 9 February, 2015.
166. Mr Dowsley was diagnosed with a "Persistent Depressive Disorder" ("Depression").
167. Mr Dowsley told Mr Cummins that "he believed he started to feel depressed shortly after he began working on his own and in relative isolation as of 1998".
168. In the opinion of Mr Cummins, as stated in the First Report:
- (a) Mr Dowsley has been suffering from Depression "over a number of years and quite possibly dating back as long as 10 years";
  - (b) Mr Dowsley "should be trialled on an antidepressant and also requires psychotherapy provided by either a psychiatrist or psychologist";
  - (c) "there has been a genuine and significant nexus between Mr Dowsley's compromised mental health and his failure to meet the conditions on his registration as a company auditor, as imposed by ASIC. In my opinion he has not intentionally failed to meet these conditions. Rather, as a result of his mental health problems, he has suffered from problems with motivation, inertia, procrastination and self-doubt"; and
  - (d) "his failure to meet the conditions imposed by ASIC should be regarded, in clinical terms, as him displaying reduced moral culpability because of his mental health symptoms".
169. On 20 February 2015 Mr Dowsley was referred to Mr Cummins for treatment by his general practitioner. The general practitioner prescribed the antidepressant medication Lexapro (10 mg daily).
170. On 16 July 2015 this dosage was increased to 20 mg daily.

171. There is some doubt as to when and why Mr Dowsley ceased taking the 10 mg daily, but according to the Second Report, he is now taking the 20 mg daily.
172. Between 20 February 2015 and 4 August 2015, Mr Dowsley has attended Mr Cummins for 12 treatment consultations.
173. In the Second Report, Mr Cummins:
- (a) confirmed the initial diagnosis of Depression;
  - (b) indicated that since taking the increased medication and "attending my rooms regularly for psychotherapy, it is my opinion he is still able to function in his job and he reported he has recently had some success in meeting necessary work related deadlines" ("functional fitness");
  - (c) stated that "In my opinion providing he continues to take the antidepressant and continues to attend for treatment, the public should be adequately protected"; and
  - (d) stated that: "providing Mr Dowsley maintains the current treatment regime, I should be able to report noticeable and significant improvement in his clinical symptomatology within a further 4 to 6 months."
174. In his Evidence in Chief at the Sanctions Hearing, Mr Cummins stated:
- (a) "I am aware of many medical practitioners, as in general practitioners and medical specialists in this state, who are currently significantly medicated in relation to depressive symptomatology and they continue to practice because their symptoms are controlled and managed";
  - (b) "There has been a noticeable improvement in his mental health in recent weeks, that is, in the very recent weeks since he has been on the higher dose of the antidepressant. In my view, his mental health will now continue to improve and I would expect that he will be functioning at quite a different level, as in a much more productive and constructive level within the very near future"; and
  - (c) that in forming his opinions, he began by eliminating "anti-social orientation" and "malingering", so that he "formed the opinion that he (Mr Dowsley) was quite genuine in his presentation" and as a result Mr Cummins formed the opinions referred to in his Reports.
175. While ASIC did not attack the current diagnosis of Depression, its cross-examination of Mr Cummins was based on the following propositions – which form the basis of the ASIC "medical" submissions:
- (a) that the only evidence that Mr Dowsley was suffering from Depression at the time of the False Statements was his self-reporting to Mr Cummins in January 2015;
  - (b) that this self-reporting was unreliable as evidence to Mr Cummins and to the Board that the Depression had existed prior to January 2015;

- (c) that reliance by Mr Cummins on this alleged unreliable self-reporting cast doubt on the opinions of Mr Cummins that:
  - (i) Mr Dowsley was suffering from Depression at the time of the False Statements; and
  - (ii) there was a nexus between the Depression and the making of the False Statements; and
- (d) that there was no reliable evidence (particularly work-related) that Mr Dowsley was presently fit to practise as a registered company auditor and would be fit to practise as such in the future.

176. Under cross-examination, Mr Cummins denied each of these propositions because:

- (a) his opinions were based on assessing and treating Mr Dowsley and on many years of experience, as well as on the self-reporting; and
- (b) in his opinion, the self-reporting by Mr Dowsley was sufficiently reliable to justify and support the opinions held and expressed by Mr Cummins.

#### **Summary of Character Evidence**

177. Mr Whyte, a chartered accountant and director of Axiom Advisors ("Axiom"), gave the following written and oral evidence that:

- (a) he had known Mr Dowsley since 1988, having worked together in a firm of chartered accountants;
- (b) since October 2010, Mr Dowsley, as a sole practitioner, has sub-leased some Axiom office space and trained and inter-acted with some Axiom staff;
- (c) Mr Dowsley audits over 80 Axiom SMSF clients and several other Axiom real estate agents' trust accounts;
- (d) in his opinion, Mr Dowsley "has always maintained high, exacting standards and demonstrated a measured professional and ethical approach";
- (e) in his opinion, the impugned behaviour of Mr Dowsley was "out of character and was not malicious or intended in any way"; and
- (f) until this year he has had some problems with Mr Dowsley meeting deadlines for the audit of SMSF clients, but since about March 2015 there have been no such problems.

## Summary of ASIC's Submissions

178. As abovementioned, ASIC made written submissions before the Sanctions Hearing and oral and supplementary written submissions at the Sanctions Hearing.
179. ASIC referred the Board to the summary of principles applicable to cases under s1292 of the Act as set out by the Board in *Fiorentino*<sup>14</sup> at [997] and by the AAT in *Hill (AAT)* at [18] namely:
- (a) The principal purpose of the proceedings is protective rather than punitive and the guiding principle is protection of the public;
  - (b) The protection of the public includes ensuring that those who are unfit to practise do not continue to hold themselves out as fit to practise;
  - (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 liquidators and 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 considered not 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.
180. ASIC submitted that the protective function of a sanction in this case is clear because legislative compliance by a registered auditor protects the public and the profession. ASIC referred to the observation in *ASIC v McVeigh* (at paragraph [12.7]) that "*the protection of the public includes the maintenance of a system under which the public can be confident that the relevant practitioner and all other practitioners will know that breaches of duty will be appropriately dealt with*". If the conditions regime under s1289A and regulation 9.2.08 of the Corporations Act Regulations is not enforced, the protection of the public and the profession afforded by the regime will be undermined. Accordingly, it is appropriate to protect the public and the profession both by cancelling Mr Dowsley's registration as a protection against his personal deficiencies, and as deterrence from similar laxity and gross carelessness by other registered auditors.

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<sup>14</sup> The Board decision in the matter of ASIC v Pino Fiorentino dated 23 May 2014 matter number 03/NSW13

181. ASIC further submitted that:

- (a) Mr Dowsley's failures are serious and persistent and cancellation can be the appropriate sanction, notwithstanding the absence of a finding of dishonesty (*Fernandez* at 358);
- (b) where there is a finding that a person is not fit and proper, there needs to be some reason why suspension, rather than cancellation, is the appropriate order, and an order for suspension must be based upon a view that at the end of the period of suspension the practitioner will no longer be unfit to practise;
- (c) the Board could not have confidence that Mr Dowsley would be fit to practise at the end of the period of suspension because:
  - (i) he failed to comply with the Registration Conditions which were imposed by ASIC as a result of prior deficiencies in his audit practice;
  - (ii) the Board has held that he was grossly careless in making the False Statements;
  - (iii) such gross carelessness was repeated over a number of years, despite being pursued by ASIC on a number of occasions;
  - (iv) he still fails to comply with the Registration Conditions or to address the deficiencies in his practice;
  - (v) there has been no apparent expression of remorse;
  - (vi) his lack of care in making the False Statements is serious and affected ASIC'S ability to monitor compliance with the Registration Conditions; and
  - (vii) the Board has found he is not a fit and proper person to remain registered as a company auditor.
- (d) There is no evidence that his Depression, as described in the Reports, has ever previously been medically reported, nor that he has been cured or is in sufficient remission to continue practice because:
  - (i) his medication has only recently been doubled; and
  - (ii) Mr Cummins opines that significant improvement may take a further 4 to 6 months treatment.
- (e) In relation to his Depression:
  - (i) there is no reliable evidence that Mr Dowsley has suffered from this illness over the period relevant to his gross carelessness;
  - (ii) there is no reliable evidence of a nexus between the Depression and the making of the False Statements; and

- (iii) the Board should not be satisfied that Mr Dowsley's moral culpability was reduced by reason of his Depression.

### **Summary of Mr Dowsley's Submissions**

182. Mr Dowsley accepts the summary of principles set out in paragraph 179 and addresses these in his submissions.

183. His first submission is that the "seriousness" of his impugned conduct is mitigated by the following:

- (a) there has been no finding of dishonesty;
- (b) the effect of his Depression:
  - (i) pursuant to the *Verdins*<sup>15</sup> Principles, his reduced moral culpability mitigates the seriousness of his conduct and also the need for general and specific deterrence; and
  - (ii) in *McLeod*<sup>16</sup>, the medical evidence was an important factor in the Board imposing the sanction of admonishment rather than suspension.
- (c) the Panel here has found that he has "completed the Training Conditions and made some efforts to complete the Review Conditions" (paragraph 43);
- (d) no client or any member of the public has suffered any harm from his impugned conduct; and
- (e) he has expressed contrition by not contesting any of the contentions, except those alleging dishonesty, and has cooperated with ASIC.

184. He then submits that the public is protected by the fact that:

- (a) he is presently fit to practise in accordance with the evidence of Mr Cummins as his treating psychologist;
- (b) in the opinion of Mr Cummins he will continue to improve provided he maintains his medication and treatment; and
- (c) Mr Whyte, as his character referee, has already noticed an improvement in his timeliness.

### **Issues raised by the submissions**

185. The submissions of both parties raise the following issues:

- (a) the effect of the medical evidence;
- (b) the application of the *Verdins* Principles;

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<sup>15</sup> R v Verdins [2007] 16 VR 269

<sup>16</sup> ASIC v Jonathan Paul McLeod a decision of the Board dated 12 June 2015 matter no 02/QLD14

- (c) the application of *McLeod*;
- (d) the application of *Hill*;
- (e) contrition;
- (f) harm;
- (g) deterrence; and
- (h) audit considerations.

186. While dealing separately with each of these issues, the authorities require us to primarily focus on:

- (a) protection of the public (particularly in relation to suspension); and
- (b) the seriousness of the conduct.

#### **Effect of the Medical Evidence**

187. As above mentioned, ASIC does not dispute the diagnosis of Depression made by Mr Cummins in the Reports (as at January 2015).

188. However ASIC disputes the following opinion evidence of Mr Cummins:

- (a) that Mr Dowsley was suffering from Depression at the time he made the False Statements (commencing in about March 2012) and continually since then;
- (b) that there is a nexus between Mr Dowsley making the False Statements and his Depression;
- (c) that, since taking his medication and treatment, his medical condition has improved;
- (d) that he is presently "functionally fit" to continue practising; and
- (e) that his Depression will continue to improve provided he continues his medication and treatment.

189. The challenges by ASIC to this opinion evidence can be summarised as follows:

- (a) the only evidence available to Mr Cummins in forming his opinions was the self-reporting by Mr Dowsley, which ASIC attacks as unreliable; and
- (b) it is therefore not safe for the Board to rely on these opinions in relation to past conduct, present fitness and future fitness.

190. We have had the benefit of observing Mr Cummins in the witness box and considering his evidence and the manner in which he gave it.

191. As a result, we accept his opinions, (subject to paragraph 195), notwithstanding the ASIC challenges and the fact that Mr Dowsley did not give evidence.
192. We also take into account the fact that ASIC had the opportunity of calling its own medical evidence and, possibly, further accounting evidence.
193. We accept the opinion of Mr Cummins that it is more likely than not that Mr Dowsley was suffering from Depression at the time he made the False Statements and ever since.
194. We also accept that the Depression has caused him to suffer problems for up to the last 10 years with "motivation, inertia, procrastination and self-doubt", such that it contributed to the making of the False Statements and the other impugned conduct.
195. We also accept that his Depression has improved with medication and treatment and will continue to improve provided the medication and treatment continues. However his opinion about "functional fitness" (paragraph 173(b)), qualified by the provisos referred to in paragraph 173(c), does not give us confidence that without further treatment and medication (as per the undertakings in our Orders) he is presently fit to continue practising as a registered company auditor.
196. While Mr Dowsley submits that we should accept Mr Whyte's evidence that he had noticed an improvement recently in the timeliness of the work done by Mr Dowsley, because Mr Whyte is not an auditor and was not called as an expert witness, it is not appropriate for us to have regard to his "opinion" evidence on questions other than "character".
197. However, as above mentioned, we are satisfied on the medical evidence of Mr Cummins, that there has been an improvement in the condition of Mr Dowsley since the commencement of treatment and medication and that he will continue to improve with further treatment and medication.

#### **Application of the Verdins Principles**

198. Counsel for Mr Dowsley submits that *Verdins* and subsequent cases ("the *Verdins* Principles ") are authority for the following relevant propositions:
  - (a) that the Depression suffered by Mr Dowsley reduces his moral culpability for the False Statements and other impugned conduct; and
  - (b) that the Depression also mitigates the need for personal and general deterrence in considering the appropriate sanction.
199. ASIC argues that the *Verdins* Principles, relevantly, only apply where:
  - (a) the Depression existed at the date on which the False Statements were made; and
  - (b) there are no other conclusions reasonably open to the Board.

200. In relation to (a), ASIC repeats its submission that there is no reliable evidence that the Depression existed at the date the False Statements were made.
201. In relation to (b), ASIC submits the alternative explanation available to the Board is carelessness or gross carelessness, as found by the Board.
202. We accept the application and effect of the relevant *Verdins* Principles in this case as set out in paragraph 198.

**Application of *McLeod***

203. The Board decision in *McLeod*, dated 12 June 2015, only became available after our Determination Hearing, so was not referred to in our proceedings or Determination.
204. Mr Dowsley relies on the similarities between the facts and circumstances of that case primarily because of the importance, in *McLeod*, of the medical evidence which had an important bearing on Mr McLeod being admonished (and not suspended) in relation to the 13 contentions found established under section 1292(2)(d).
205. Mr Dowsley submits that the following alleged similarities are relevant:
  - (a) that the illness of Mr McLeod affected his ability to perform his duties properly;
  - (b) that the only contentions found established were those admitted by Mr McLeod;
  - (c) that Mr McLeod "had not engaged in any deliberate or dishonest conduct and had adopted a co-operative approach in the proceedings" and
  - (d) that as a result "a period of suspension was not necessary to serve the public interest or fulfil a protective role but rather an admonishment pursuant to s1292(9) was sufficient".
206. ASIC submits that the following alleged differences are relevant:
  - (a) the physical illness of Mr McLeod was diagnosed as at the time of his impugned conduct, even though his depression (arising from his physical illness) was diagnosed at a later date;
  - (b) Mr McLeod gave evidence about his medical condition and was cross-examined on his evidence;
  - (c) the Board accepted that there was evidence that appropriate steps had been taken to address the offending conduct so that it was unlikely to re-occur;
  - (d) the Board accepted medical evidence that Mr McLeod had now completed treatment and was in remission; and

- (e) there were no continuing unremedied breaches by Mr McLeod.
207. In addition, we note that in *McLeod* lack of fitness and propriety was not established.
208. In light of the above, and for the following main reasons, we do not accept reliance on *McLeod* as justification for the sanction of admonishment, as opposed to suspension or cancellation:
- (a) in *McLeod*, there was no finding of lack of fitness and propriety; and
  - (b) in *McLeod* the evidence established the present fitness and future fitness of Mr McLeod to continue practising as a registered liquidator.
209. Because we have found lack of fitness and propriety against Mr Dowsley, absent compliance with the medical and auditor undertakings referred to hereunder, we are not satisfied that Mr Dowsley is presently fit to practise.
210. Thus, based on all the evidence and findings against Mr Dowsley, we do not consider admonishment or reprimand as appropriate sanctions, leaving us to choose between cancellation and suspension.

#### **Application of *Hill***

211. The similarities and differences between this case and *Hill* are described in paragraphs 32 and 33.
212. ASIC relies on the following differences in support of its submission that the appropriate sanction here should be cancellation rather than suspension (as in *Hill*). This is because Mr Dowsley:
- (a) did not give evidence or subject himself to cross-examination;
  - (b) completed and made the False Statements personally, rather than by delegation (as in *Hill*);
  - (c) has still not complied with all of his Registration Conditions (2 further audits remain to be reviewed by Mr Cain);
  - (d) has not taken steps to remedy the deficiencies in his practice, as indicated by Mr Cain in the 2 audits he has reviewed; and
  - (e) is still suffering from Depression and will only continue to improve if he continues his treatment and medication.
213. Conversely, Mr Dowsley relies on the following differences from *Hill* in support of his submission that the appropriate sanction here should be admonishment rather than suspension (as in *Hill*). Mr Dowsley submits that Mr Hill:
- (a) contested every contention, thereby indicating a lack of contrition; and
  - (b) was not suffering from any medical condition, such as to mitigate the seriousness of his conduct.

214. We have already indicated, above, that we do not feel admonishment is an appropriate remedy in these proceedings and the submissions by counsel for Mr Dowsley have not changed our opinion.
215. Notwithstanding the above submissions by ASIC, based on the medical evidence, discussed above, (which we accept) and the *Verdins* Principles, (which we also accept) we do not accept that the appropriate sanction here should be cancellation rather than suspension. In particular, application of the *Verdins* Principles results in reduced moral culpability for the False Statements and other impugned conduct so that:
- (a) the seriousness of such conduct is mitigated and
  - (b) the need for both general and specific deterrence are mitigated or minimised.
216. However, even though mitigated, the impugned conduct of Mr Dowsley is sufficiently serious for us to consider suspension.
217. Nonetheless, before being satisfied that suspension is the appropriate sanction, we must also be satisfied that after a period of suspension Mr Dowsley will be fit to resume practice as a registered company auditor.
218. This is where the undertakings, discussed below, become of great importance.

### **Contrition**

219. Following *Hill (AAT)*, "genuine acceptance of failure, contrition and remorse are necessary requirements to rehabilitation" (see paragraph 179(f) above).
220. Mr Dowsley submits that his decision not to challenge any of the contentions, except those alleging dishonesty, is evidence of his acceptance, contrition and remorse, in contrast to Mr Hill.
221. On the other hand, ASIC submits that the failure of Mr Dowsley to give evidence and subject himself to questioning is evidence of lack of acceptance, contrition and remorse.
222. Without needing to go into this issue in any detail, the acceptance by Mr Dowsley of all the contentions we have found established does constitute some evidence of contrition and has been taken into account by us as a mitigating factor.

### **Harm**

223. Mr Dowsley submits that the seriousness of his conduct should be reduced by the fact that there have been no client complaints and no one was affected by his impugned conduct.
224. Conversely, ASIC submits that the following "harm" was caused by his False Statements:

- (a) they affected the ability of ASIC to monitor compliance with the Registration Conditions (paragraph 124);
- (b) his failure to comply with the Registration Conditions would have been taken into account by Mr Cain in his report to the ICAA, as stated in Mr Cain's written evidence; and
- (c) had his failure to comply with the Registration Conditions been identified in his application for registration as an SMSF auditor, such registration may not have been granted.

225. Once again, without needing to go into this issue in any detail, we accept that some "harm" was occasioned by the impugned conduct, such as to contribute to its seriousness and has been taken into account by us in considering the appropriate sanction.

### **Deterrence**

226. We accept the proposition, based on the *Verdins* Principles, that his Depression not only reduces the moral culpability of Mr Dowsley but also reduces the need for both general and specific deterrence. We have taken this into account in reaching our decision about the appropriate sanction.

### **Audit Considerations**

227. There are 3 broad categories:

- (a) the False Statements;
- (b) the failure to comply with the Registration Conditions; and
- (c) the deficiencies in his audit practice.

228. We have dealt with the False Statements fully in our Determination.

229. As to (b), ASIC has made much of the fact of his continuing failure to have the two further audit reports reviewed by Mr Cain. However, we are satisfied that from the time of the s19 Examination his reasonable explanation for non-compliance was the legal environment in which he was then operating and the pending proceedings before the Board. But, until Mr Cain has reported on the remaining two audits and these reports have been considered by ASIC, his present "audit" fitness cannot be fully determined. Indeed, in the light of the deficiencies revealed by the existing report to ASIC of Mr Cain on the two company audits he has considered, and on the further report by Mr Cain to the ICAA – both of which are dealt with hereunder – his present "fitness" as a registered company auditor cannot be taken for granted ("audit fitness").

230. In relation to (c), the following considerations apply.

231. While our findings in the Determination in respect of the False Statements were sufficient to establish the relevant contentions, in deciding the appropriate sanction we need to be satisfied of the present audit fitness of Mr Dowsley, in addition to his medical fitness.

232. This requires us to consider the following underlying audit concerns:
- (a) those that led to his s19 Examination – see paragraph 13(ii) and the relevant Attachments to the SOFAC;
  - (b) those expressed by Mr Cain in relation to the 2 audits he reviewed for ASIC pursuant to the Registration Conditions – see paragraph 13(xv) and the relevant Attachments to the SOFAC; and
  - (c) those expressed by Mr Cain in his report to the ICAA – see paragraph 10(c) and the relevant attachments to his supplementary witness statement.
233. These materials indicate serious concerns about the company audits reviewed and reported upon including failing to or failing to document the audit risks, failing to obtain or failing to document the audit evidence obtained or failing to perform certain audit procedures to support the conclusions formed and a failure to comply with Australian Auditing Standards.
234. While some of these failures and deficiencies may be partly explained by his Depression, our concerns about his present audit fitness have not been satisfied by any of the evidence, so that we require his compliance with the "audit" undertakings referred to in our Orders, as well as the "medical" undertakings.

### **Public Protection**

235. 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 s1292(2), is not the ascertainment or enforcement of any legal right, but the determination whether, in the view of the board, taking into account past failures of duties, a defeasible right should continue into the future. No punishment is imposed by reason of any conclusion that duties or functions have not been carried out or performed adequately and properly. Rather, upon being satisfied of past failures of duty, the board is empowered to deal with the continued existence of a statutory right. .... The question of the adequacy and propriety of the carrying out or performance is to be judged by the board by making an evaluative or subjective determination. Having made that evaluative or subjective determination, the board will consider whether the rights of the registered liquidator as to the future are to be changed by the exercise of the power under s1292(2) in the light of all the considerations before it that are considered relevant".*

236. 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 s1292 is of a protective nature and: *"it seems that the protection*

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

237. We agree and refer to the summary by Deputy President Tamberlin in *Hill (AAT)* of the relevant principles to be applied by the Board in exercising its sanction power under s1292 (2) as set out in paragraph 179 above.
238. In this matter the Board has found that Mr Dowsley contravened s1292(1)(a)(ia)[second] by breaching a condition of his registration and failing to perform adequately and properly the duties of an auditor under s1292(1)(d)(i). The Board has also made a finding that Mr Dowsley is otherwise not a fit and proper person to remain registered as an auditor under that sub-section.

### **Cancellation v Suspension**

239. Once a person is found not to be a fit and proper person to remain registered as a company auditor, cancellation may be seen as a logical consequence. However it is clear that the discretion under s1292 is not constrained in its terms and suspension for a period may also be an appropriate sanction having regard to the factors set out in relevant precedents. The other sanctions referred to in s1292(9) are also potentially available.
240. In the Board's decision in *Fernandez*, it was held that an order for cancellation following a finding that Mr Fernandez was not fit and proper to remain registered, was the appropriate order, even though there was no conscious dishonesty or misappropriation of property. Mr Fernandez's failures were found to be serious, and the Board in that matter was unable to conclude that Mr Fernandez would be fit after a period of suspension. The Board in its decision noted that Mr Fernandez' conduct, his explanations and a prior appearance before the Board, were not conducive to drawing a conclusion that Mr Fernandez would be fit after a period of suspension.
241. Mr Dowsley's conduct did not involve the highest level of seriousness as there was no finding that he had engaged in conscious dishonesty or recklessness. Nevertheless where a finding is made that a person is not a fit and proper person to remain registered, there does need to be some reason why suspension, rather than cancellation, would be appropriate.
242. As Reynolds JA said in *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 at [76]:
- "An order for suspension must be based upon a view that at the termination of the period of suspension the practitioner will no longer be unfit to practice because, subject to any limitation imposed on the issue of a practising certificate, his name will then be on the roll of solicitors and he may resume his practice."*
243. Consequent upon our finding that Mr Dowsley is not fit and proper to remain registered as a company auditor, we proceed on the basis that Mr Dowsley should not resume practice as a registered auditor unless there is

some real basis for thinking that he will be fit to resume practise at the end of a period of suspension. In *Fernandez* it was noted that in making a difficult judgment about such a future prognosis, the Board should adopt a clear test which minimises the potential for further risk to the public. In that decision (at paragraph [369]) it was said that the Board should not contemplate a respondent continuing to practise unless it could be confident that he would be fit and proper at the time.

244. We therefore return to the issues we have already discussed as being relevant to deciding upon the appropriate sanction. These issues have led us to formulate the following questions and answers, as necessary precursors to deciding the appropriate sanction. In doing so we are conscious that our primary obligation is to protect the public.

245. The questions are:

- (a) is the impugned conduct sufficiently serious to require suspension or cancellation?
- (b) if so, is the impugned conduct sufficiently serious to require cancellation?
- (c) if not, is suspension, with or without undertakings, the appropriate sanction?

246. Our answer to question (a) is that the impugned conduct is sufficiently serious to require suspension or cancellation. Our reasons are contained in our above analysis of the issues raised by the submissions, but can be summarised as follows:

- (a) we have found such conduct grossly careless and that, as a result, Mr Dowsley is not a fit and proper person to remain registered as a company auditor; and
- (b) even though the "seriousness" of his conduct is mitigated by his Depression, it is still sufficiently serious to require suspension or cancellation;

247. However, our answer to question (b) is that the impugned conduct is not sufficiently serious to require cancellation. Once again our reasons are contained in our above analysis, but can be summarised as follows:

- (a) his moral culpability (affecting both the seriousness of his conduct and the need for general and specific deterrence) is mitigated by his Depression;
- (b) however his Depression casts doubt on his present fitness (both medical and audit) and future fitness to practise as a registered company auditor; but
- (c) the medical evidence indicates that his Depression has improved and should continue to improve with treatment and medication.

248. Our answer to question (c) is that suspension, with the undertakings set out in our Orders, is the appropriate sanction. This is mainly because we are satisfied that upon compliance with the undertakings (both medical and audit) Mr Dowsley will be fit to resume practise as a registered company auditor.

### **Appropriate Undertakings**

249. At the Sanctions Hearing the parties were invited to make written submissions about appropriate undertakings for the Panel to take into account in reaching any decision about the fitness of Mr Dowsley to continue to practise after suspension or admonishment.

250. As directed by the Panel, ASIC provided its submissions on both bases, first, and subsequently so did Mr Dowsley.

251. ASIC's draft undertakings, are substantially the same following either suspension or admonishment.

252. These draft undertakings (consequent upon suspension) are attached as Annexure "A" hereto and cover the following subjects:

- (a) complying with the remaining Registration Conditions;
- (b) during the suspension period, sending a copy of this Decision to all briefing parties before taking any audit work or audit related work not requiring registration as a company auditor;
- (c) completing further education;
- (d) providing ongoing medical reports; and
- (e) providing audit review reports post suspension.

In the following paragraphs, but not in our Orders, we have used the same numbering for each undertaking as in "A".

253. Mr Dowsley makes the following submissions about these draft undertakings:

- (a) he has no objection to the undertaking as to complying with the current conditions (1);
- (b) he objects to the undertaking as to notification (2) as being "unnecessary and overly punitive";
- (c) he agrees to do an additional 10 hours of face-to-face CPE in audit related matters, instead of 25 hours as proposed (3);
- (d) he agrees with the undertakings as to ongoing medical treatment (4,5 and 6) but he does not agree to an independent psychiatrist in addition to his treating psychologist;
- (e) he agrees with the following undertakings as to audit reviews post suspension: 8,9,10 and 13;

- (f) in (11), "materially" should be substituted for "properly"; and
  - (g) in (12), 5 business days should be substituted for 3.
254. Because undertakings were not discussed between the parties before or at the Sanctions Hearing, our decisions in relation to undertakings have been made without further input from, or discussions by, either of them.
255. We generally agree that, in order to establish fitness to resume practise, any period of suspension would need to be accompanied by appropriate undertakings as to both:
- (a) medical concerns; and
  - (b) audit concerns.
256. Accordingly we generally agree that 4 out of the 5 subjects covered by the draft undertakings are appropriate. We believe the notification requirement (2), during suspension, is unduly onerous and unnecessary.
257. Before dealing with each of these draft undertakings, we need to consider whether the Board should have any ongoing role as provided for in the draft undertakings.
258. In the draft undertakings:
- (a) the medical reports (both before and after the period of suspension) must be submitted to the Board as well as to ASIC. Also, if either or both of the medical reports "fail to certify that Mr Dowsley is fit to practise or certifies that he is only fit to practise in a limited way" then the Board will be reconvened to consider "any further orders" (5.1);
  - (b) if the audit reviewer does not state that the audits have been conducted properly in accordance with the specified requirements, then Mr Dowsley will join with ASIC to request the Board to convene a directions hearing of the parties to consider any further order (11); and
  - (c) If Mr Dowsley fails to comply with any of these undertakings "the Board may make orders pursuant to s1292(9) of the Act"
259. In accordance with normal practice, it is neither practicable nor appropriate for the Board to be further involved in any proceedings, after our Decision has been delivered. In particular, the following considerations apply:
- (a) ASIC is the appropriate authority to deal with all administrative matters concerning the registration of company auditors; and
  - (b) the terms of the current members of the Panel may well have expired, prior to any further application coming before the Board.
260. Accordingly, in the undertakings required as part of our Orders, we have deleted any reference to any ongoing role for the Board, so ASIC is the appropriate authority to take any necessary administrative or enforcement action.

261. Except in relation to any ongoing role for the Board, we consider the undertakings appropriate, in principle, but subject to the following comments:
- (a) no change needs to be made to (1);
  - (b) we believe undertaking (2) is not necessary or desirable, so has been deleted;
  - (c) in (3) we think it reasonable that, in addition to the normal CPE requirements, Mr Dowsley will, within 12 months, complete an additional 25 hours of audit related CPE of which at least 15 hours is face-to-face;
  - (d) in (4), (5) and (6) because of the importance of ensuring that he is medically fit to resume practise, we think it reasonable to require the engagement of an independent psychologist (but not psychiatrist) to report, in addition to his treating psychologist. We have substituted an independent psychologist for an independent psychiatrist because, having generally accepted the evidence of Mr Cummins, we believe an independent psychologist to be more appropriate than an independent psychiatrist;
  - (e) as indicated in paragraphs 259 and 260, because it is inappropriate for the Board to have any ongoing role in these proceedings, we have left any appropriate administrative and enforcement action to ASIC. It is also appropriate that all reports be sent to ASIC alone and not also to the Board;
  - (f) in (9) and (11), we have substituted the more usual requirement for the audits to be conducted "in all material respects" instead of "properly"; and
  - (g) in (12) it is reasonable that the notification to ASIC should be within 5 business days instead of 3.

### **Decision**

262. Based on the foregoing considerations and analysis we find that suspension, supported by the undertakings set out in our Orders, is the appropriate sanction.
263. As noted above, the medical undertakings should ensure that at the end of the period of suspension Mr Dowsley will be medically fit to return to practise as a registered company auditor.
264. Similarly, the audit undertakings should remedy the deficiencies in his audit knowledge and systems and the ongoing monitoring should ensure that any further deficiencies in his audit practice are identified, enabling them to also be remedied.
265. It remains only to determine an appropriate period for the suspension.

266. While the impugned conduct of Mr Dowsley is of the same order as that found by the Board in *Hill*, the seriousness of the conduct of Mr Dowsley is mitigated by his Depression so that we consider six (6) months, combined with the undertakings, the appropriate period of suspension.

### **Orders**

267. For the reasons set out above, we have decided to exercise our powers under s1292 of the Act and accordingly order:

- (a) that the registration of Philip James Dowsley as an auditor be suspended for a period of six (6) months from the date this order takes effect, which will be 14 days from the date hereof; and
- (b) that Mr Dowsley will give the following undertakings to the Board in writing within 14 days of the date on which this Order takes effect:

#### **Undertaking as to Current Conditions on Audit Registration**

- (1) He will, within 30 days of the date of the Order, take all reasonable steps to fully comply with the Amended Conditions attached to his registration as a company auditor (as detailed in ASIC's letter to him dated 12 September 2013). That is, he will engage Mr Michael Cain or such other registered company auditor, as agreed in writing by ASIC in advance ("Review Auditor"), to conduct a review of the two audit files referred to in the third dot point of the Amended Conditions, namely Java Dale Pty Ltd (ACN 077 379 367) for the financial year ended 30 June 2013 and Total Care Funeral Plan Pty Ltd (ACN 003 876 622) for the financial year 30 June 2013. The Review Auditor is to provide a statement to ASIC as to whether, in the Review Auditor's opinion, each of the audits has been conducted in all material respects in accordance with the Australian Auditing Standards (effective as of the date of the audits).

#### **Undertaking as to Further Education**

- (2) In addition to the normal minimum annual requirement for continuing professional education to which he is subject, Mr Dowsley will at his own expense successfully complete within 12 months of the date of this Order at least 25 hours of professional training about audit-related matters, of which at least 15 hours must involve face to face teaching. The training provider and the training content to be approved in writing in advance by ASIC. Mr Dowsley is to notify ASIC in writing of successful completion (supplying supporting third party documentation) by no later than 4 weeks after completion of the education.

#### **Undertakings as to Ongoing Medical Treatment**

- (3) He will, at his own expense, not earlier than 60 days and no later than 30 days prior to the conclusion of the period of suspension,

obtain reports from his treating psychologist and an independent psychologist ("Psychologist") as to whether he is fit to practise either generally or in a limited way ("Medical Reports"). The terms of engagement of the Psychologist shall include a copy of and direction to comply with the requirements of Federal Court of Australia Practice Note CM7 "Expert witnesses in proceedings in the Federal Court of Australia".

- (4) He will provide a copy of the Medical Reports to ASIC no later than 14 days prior to the conclusion of the period of suspension. In the event that either or both of the Medical Reports:
  - (A) fails to certify that Mr Dowsley is fit to practise, or certifies that he is only fit to practise in a limited way Mr Dowsley acknowledges that ASIC is entitled to take such action as it thinks fit as a result thereof; or
  - (B) certifies that he is fit to practise, the report is to provide details as to the treatment regime (if any) that Mr Dowsley is to follow to ensure that he remains fit to practise ("Treatment Regime").
- (5) Mr Dowsley will comply with the Treatment Regime.
- (6) Mr Dowsley will, at his own expense, obtain and provide to ASIC, on no later than the date 12 months from the conclusion of the period of suspension, a certification from each of his treating psychologist and the Psychologist that he remains fit to practise.

#### **Undertaking as to Audit Reviews Post Suspension**

- (7) He will, at his own expense, engage a registered company auditor, subject to paragraph (9) below ("Peer Reviewer") to review the next 4 company audits for which he is responsible following the resumption of his status as a registered company auditor as soon as practicable after completing those audits and, in any event no later than 3 months after completing the audits. If Mr Dowsley has not completed 4 company audits within 6 months following resumption of his status as a registered company auditor, he will engage the Peer Reviewer to review such audits as have been completed by him during that period and engage the Peer Reviewer to review the remaining company audits as soon as practicable after completing each audit and, in any event no later than 3 months after completing each audit.
- (8) The Peer Reviewer will:
  - (A) provide an opinion as to whether the audits reviewed in accordance with Mr Dowsley's undertaking in paragraph (7) have been conducted in all material respects in accordance with Australian Auditing Standards, Australian

Auditing Guidance Statements and applicable professional requirements; and

- (B) provide to Mr Dowsley and to ASIC a statement ("Peer Reviewer's Statement") setting out his/her opinion as to these matters and the reasons for that opinion as soon as practicable after Mr Dowsley completes the audits referred to in paragraph (7).
- (9) The engagement of the Peer Reviewer and his/her terms of engagement must be approved in writing by ASIC before they are engaged to conduct the review. To enable ASIC to consider whether the proposed Peer Reviewer should be engaged, Mr Dowsley must, within 30 days of the expiration of the period of suspension, provide to ASIC a curriculum vitae of the proposed Peer Reviewer and a draft of the terms of engagement.
- (10) In the event that the Peer Reviewer's Statement does not state that the audits have been conducted in all material respects in accordance with Australian Auditing Standards, Australian Auditing Guidance Statements and applicable professional requirements, Mr Dowsley acknowledges that ASIC is entitled to take such action as it thinks fit as a result thereof.
- (11) He will, on becoming aware of any non-compliance with any of the above undertakings notify ASIC in writing within 5 business days of such non-compliance occurring. Mr Dowsley acknowledges that in the event that he fails to comply with any of these undertakings, ASIC is entitled to take such action as it thinks fit in relation to any such non-compliance.
- (12) The documents required to be provided to ASIC by virtue of these undertakings are to be directed to the attention of Senior Executive Leader, Financial Reporting & Audit team, ASIC, Level 5, 100 Market Street, Sydney 2000 and service of those documents is also to be effected by email to the attention of [doug.niven@asic.gov.au](mailto:doug.niven@asic.gov.au).

David Castle  
Panel Chairperson

15 October 2015

## **Annexure "A"-ASIC Draft Undertakings**

The following draft undertakings are provided by the Applicant pursuant to the direction of the Panel made 4 August 2015 that the Applicant provide an indication of the undertakings that the Applicant would consider satisfactory in the event that the Panel decides to impose a period of suspension on the Respondent.

Mr Dowsley is required to give the following undertakings to the Board in writing within 14 days after this order takes effect:

That Mr Dowsley will do the following acts:

### **Undertaking as to Current Conditions on Audit Registration**

1. He will, within 30 days of the date of the order, take all reasonable steps to fully comply with the Amended Conditions attached to his registration as a company auditor (as detailed in ASIC's letter to him dated 12 September 2013). That is, he will engage Mr Michael Cain or such other registered company auditor, as agreed in writing by ASIC in advance ("Review Auditor"), to conduct a review of the two audit files referred to in the third dot point of the Amended Conditions, namely Java Dale Pty Ltd (ACN 077 379 367) for the financial year ended 30 June 2013 and Total Care Funeral Plan Pty Ltd (ACN 003 876 622) for the financial year 30 June 2013. The Review Auditor is to provide a statement to ASIC as to whether, in the Review Auditor's opinion, each of the audits have been conducted in all material respects in accordance with the Australian Auditing Standards (effective as of the date of the audits).

### **Undertaking as to Notification**

2. He will, during the period of suspension, prior to being engaged by an existing or potential client, either directly or via a new employer, to perform any audit and/or audit related work (such as review work) for which registration as an auditor under the *Corporations Act 2001* is not required, provide to the client or the new employer as the case may be a copy of the Determination and orders in this matter.

### **Undertaking as to Further Education**

3. In addition to the normal minimum annual requirement for continuing professional education to which he is subject, Mr Dowsley will at his own expense successfully complete within 12 months of the date of the order at least 25 hours of professional training about audit-related matters. The education must involve face to face teaching. The training provider and the training content to be approved in writing in advance by ASIC. Mr Dowsley is to notify ASIC in writing of successful completion (supplying supporting third party documentation) by no later than 4 weeks after completion of the education.

In respect of acts to be done by him following the resumption of his status as a registered company auditor:

### **Undertaking as to Ongoing Medical Treatment**

4. He will, at his own expense, not earlier than 60 days and no later than 30 days prior to the conclusion of the period of suspension, obtain reports from his treating psychologist and an independent psychiatrist ("Psychiatrist") as to whether he is fit to practise either generally or in a limited way ("Medical Reports"). The terms of engagement of the Psychiatrist shall include a copy of and direction to comply with the requirements of Federal Court of Australia Practice Note CM7 "Expert witnesses in proceedings in the Federal Court of Australia".
5. He will provide a copy of the Medical Reports to the Board and to ASIC no later than 14 days prior to the conclusion of the period of suspension. In the event that either or both of the Medical Reports:
  - 5.1 fail to certify that Mr Dowsley is fit to practise, or certifies that he is only fit to practise in a limited way, he will join with ASIC to request the Board to convene a directions hearing as soon as practicable to consider any further orders; and
  - 5.2 certify that he is fit to practise, the report is to provide details as to the treatment regime (if any) that Mr Dowsley is to follow to ensure that he remains fit to practise ("Treatment Regime").
6. Mr Dowsley will comply with the Treatment Regime.
7. Mr Dowsley will, at his own expense, obtain and provide to the Board and to ASIC, on no later than the date 12 months from the conclusion of the period of suspension, a certification from each of his treating psychologist and the Psychiatrist that he remains fit to practise.

### **Undertaking as to Audit Reviews Post-Suspension**

8. He will, at his own expense, engage a registered company auditor, subject to paragraph 10 below ("Peer Reviewer") to review the next 4 company audits for which he is responsible following the resumption of his status as a registered company auditor as soon as practicable after completing those audits and, in any event no later than 3 months after completing the audits. If Mr Dowsley has not completed 4 company audits within 6 months following resumption of his status as a registered company auditor, he will engage the Peer Reviewer to review such audits as have been completed by him during that period and engage the Peer Reviewer to review the remaining audits as soon as practicable after completing each audit and, in any event no later than 3 months after completing each audit.
9. The Peer Reviewer will:
  - 9.1 provide an opinion as to whether the audits reviewed in accordance with Mr Dowsley's undertaking in paragraph 8 have been properly conducted in accordance with Australian Auditing Standards, Australian Auditing Guidance Statements and applicable professional requirements; and

- 9.2 provide to Mr Dowsley and to ASIC a statement ("Peer Reviewer's Statement") setting out his/her opinion as to these matters and the reasons for that opinion as soon as practicable after Mr Dowsley completes the audits referred to in paragraph 8.
10. The engagement of the Peer Reviewer and his/her terms of engagement must be approved in writing by ASIC before they are engaged to conduct the review. To enable ASIC to consider whether the proposed Peer Reviewer should be engaged, Mr Dowsley must, within 30 days of the expiration of the period of suspension, provide to ASIC a curriculum vitae of the proposed Peer Reviewer and a draft of the terms of engagement.
  11. In the event that the Peer Reviewer's Statement does not state that the audits have been properly conducted in accordance with Australian Auditing Standards, Australian Auditing Guidance Statements and applicable professional requirements, then Mr Dowsley will join with ASIC to request the Board to convene a directions hearing of the parties to consider any further orders.
  12. He will, on becoming aware of any non-compliance with any of the above undertakings notify the Board and ASIC in writing within 3 business days of such non-compliance occurring. Mr Dowsley acknowledges that in the event that he fails to comply with any of these undertakings, the Board may make orders pursuant to s1292(9) of the *Corporations Act* 2001.
  13. The documents required to be provided to ASIC by virtue of these undertakings are to be directed to the attention of Senior Executive Leader, Financial Reporting & Audit team, ASIC, Level 5, 100 Market Street, SYDNEY 2000 and service of those documents is also to be effected by email to the attention of [doug.niven@asic.gov.au](mailto:doug.niven@asic.gov.au).