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: 01/NSW15

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

RANDALL CLINTON JOUBERT
Respondent

Note regarding application for review of decision by the Administrative Appeals Tribunal

On 17 May 2016 Mr Joubert applied to the Administrative Appeals Tribunal ("AAT") for a review of the Board's decision as to the sanction imposed by the Board. The AAT placed a temporary stay on the implementation of the Board's decision (subject to conditions) until the matter has been reviewed by the AAT. That temporary stay included a temporary stay in respect of the publication of a notice in the Gazette and the publication of the Board's Decision and Reasons including on the Board's website. On 21 July 2016 the AAT lifted the temporary stay in respect of the publication of a notice in the Gazette and the publication of the Board's Decision and Reasons including on the Board's website. The stay in respect of the implementation of the Board's decision remains in place pending a substantive hearing by the AAT of Mr Joubert's appeal on a date to be set.

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

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Applicant

RANDALL CLINTON JOUBERT
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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.

11 May 2016

Panel:

Maria McCrossin (Panel Chairperson)

Bruce Gleeson

Karen O'Flynn

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DECISION AND REASONS

Introduction

The Application

1. This is an application under s1292 of the Corporations Act 2001 ("the Act") lodged on 16 February 2015 with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC"). ASIC contended that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d) of the Act and is not a fit and proper person to remain registered as a liquidator within the meaning of ss1292(2)(d) of the Act. By the application ASIC asked the Board to cancel or suspend the registration of Mr Randall Clinton Joubert ("Mr Joubert") (a registered liquidator).

2. Sub-section 1292(2)(d) of the Act provides:

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

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

   (i) the duties of a liquidator; or

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

   or is otherwise not a fit and proper person to remain registered as a liquidator;

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

3. The basis of the application is set out in the Statement of Facts and Contentions ("SOFAC"). The initial SOFAC was filed with the Board on 16 February 2015. Following revisions to the SOFAC after the hearing commenced, the matter was adjourned to allow the Respondent time to consider and respond. An amended SOFAC incorporating the revisions tendered at the hearing was filed by the Applicant on 3 August 2015 ("Amended SOFAC"). The Amended SOFAC is considered in further detail below.

Relevant Background

4. Mr Joubert has been a registered liquidator pursuant to s1282 of the Act since 22 May 2006. Since November 2008, Mr Joubert's principal place of practice has been Joubert Insolvency, Suite 101, Level 1, 5 Elizabeth St Sydney. Mr Joubert is a sole practitioner.

5. The misconduct relied upon by ASIC is alleged to arise out of the facts and circumstances of 5 creditors' voluntary liquidations ("CVL's"), namely:

   (a) Endeavour Cleaning Group Pty Ltd (ACN 119 155 672) ("ECG")

(b) ACN 121 404 073 Pty Ltd (formerly World of Timber Pty Ltd (ACN 121 404 073)) ("WOT")

(c) Aleksandra Holdings Pty Ltd (ACN 120 460 433) ("AH")

(d) Provenzano Marble and Granite Pty Ltd (ACN 074 102 597) ("PMG")

(e) Zagoonda Pty Ltd (ACN 103 768 841) (formerly Criniti's Pty Ltd) ("ZAG")

6. Mr Joubert filed a Response in the proceedings dated 17 April 2015 and a Revised Response on 17 August 2015 following the Amended SOFAC.

7. The hearing commenced on Monday 27 July 2015. It was adjourned on 28 July 2015 and reconvened for a further 4 days on 24, 29 and 30 September and 26 November 2015. Mr Peter Russell of counsel ("Mr Russell") appeared for ASIC and Mr Doran Cook of counsel ("Mr Cook") appeared for Mr Joubert.

The SOFAC

Summary of Contentions

8. The initial SOFAC filed with CALDB alleged 53 separate contentions that Mr Joubert's conduct did not meet the standard required by ss1292(2)(d) of the Act and/or that he was not fit and proper to remain registered as a liquidator within the meaning of that section. Many of those contentions particularised more than one allegation of misconduct in support of the contentions advanced.

9. An overview of the allegations made in the contentions in the initial SOFAC may be summarised as follows:

(a) That in respect of a number of the company liquidations, Mr Joubert's declarations of independence, relevant relationships, and indemnities ("DIRRIs") were deficient for not disclosing a relevant relationship (Contentions 1 & 2) and the existence of alleged indemnities in Mr Joubert's favour (Contentions 3-6, 7-9) and because they had not been updated to reflect payment of fees (Contentions 10-13).

(b) That Mr Joubert lodged deficient forms with ASIC as follows; Forms 524 (in so far as he did not disclose certain matters including the payment of his fees and full details of unsecured creditors) (Contentions 14-16, 37-41); Forms 533 (insofar as he did not report possible breaches of s286 of the Act (Contentions 17-21, 22, 37-41); Annual reports insofar as they contained false statements (Contentions 23-25).

(c) That Mr Joubert did not undertake adequate and proper investigations in respect of the relevant companies (Contentions 26-30).

(d) That Mr Joubert had inadequate systems in place to ensure accurate and proper information was provided to ASIC and creditors (Contentions 31-35).

(e) That Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in relation to a letter he sent to the ATO in the ZAG

liquidation which was deficient and/or contained false and misleading statements (Contention 36).

(f) That Mr Joubert was not a fit and proper person to remain registered as forms lodged with ASIC and information sent to creditors contained false and misleading statements (Contentions 37-41).

(g) That Mr Joubert did not send "*Day One*" correspondence within two business days of being appointed liquidator of the relevant companies (Contentions 42-45).

(h) That Mr Joubert did not use the former name of ACN 121 404 073 (i.e. WOT) in certain correspondence (Contention 46).

(i) That Mr Joubert opened a bank account in the name of deregistered company AH (includes a not fit and proper allegation) (Contention 47).

(j) That Mr Joubert allegedly displayed a "*cavalier*" approach (Contentions 48-52). and

(k) That Mr Joubert is not a fit and proper person to remain registered as a liquidator (Contention 53).

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

10. A number of the contentions in the initial SOFAC included allegations that Mr Joubert had dishonestly (conscious and/or reckless) engaged in the conduct alleged.

11. When the Amended SOFAC was filed allegations that Mr Joubert had engaged in dishonest conduct were withdrawn with respect to Contentions 5, 6, 9, and 14. In each of these contentions the allegation that Mr Joubert had engaged in the relevant conduct without due care and diligence was maintained.

12. With respect to Contentions 3, 4, 7 and 8 the Applicant clarified that there was no allegation of dishonesty being made, only that the relevant DIRRI was false insofar as the information particularised.

13. With respect to Contentions 15 and 16, the Amended SOFAC withdrew the allegations of conscious dishonesty, and maintained the two further allegations in the alternative that Mr Joubert had made false declarations recklessly and/or without due care.

14. With respect to Contentions 17, 23 and 25 the allegations of conscious dishonesty and/or recklessness were withdrawn with respect to one of a number of dishonesty allegations made within those contentions and the alternative without due care and diligence allegations were maintained.

15. With respect to Contention 24 the allegations of dishonesty (conscious and reckless) were withdrawn in 3 of the 4 dishonesty allegations initially made in that contention and the alternative without due care and diligence allegations were maintained.

16. Allegations of dishonesty (either conscious or reckless) were therefore maintained within 19 of the 46 contentions that remain pressed following the filing of the Amended SOFAC being Contentions 1, 2, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 36, 37, 38, 39, 40, 41 and 47 ("Remaining Dishonesty Allegations").

17. ASIC withdrew Contentions 11, 48, 49, 50, 51, 52 and 53 in their entirety by the Amended SOFAC.

Respondent's application to strike out the Amended SOFAC insofar as it maintained allegations of dishonesty

18. When ASIC filed the Amended SOFAC the Respondent's counsel Mr Cook applied to strike out the allegations of dishonesty (conscious and/or reckless) that were maintained by ASIC in the Amended SOFAC.

19. The Respondent's application was based on procedural fairness. Mr Cook submitted that the introduction of facts by the Amended SOFAC that had not previously been particularised with respect to the allegations of dishonesty (conscious and/or reckless) after Mr Joubert's case had been opened and the ASIC witnesses cross-examined, made the matters introduced impossible to deal with properly in the context of an ongoing hearing. Mr Cook submitted further that the Board must either strike out the remaining allegations of dishonesty or, if not so minded, provide Mr Joubert with a sufficient opportunity to put on additional evidence and if necessary re-examine the ASIC witnesses having regard to the revisions to the particulars of the dishonesty.

20. The Respondent made it clear that he was not making an application for adjournment as he wished the hearing to proceed then if possible, but that could occur fairly only if the Board was prepared to strike out all of the remaining dishonesty allegations given that ASIC had been on notice of the deficient pleadings since February 2015 and had not amended its SOFAC until after the hearing commenced.

21. Mr Russell submitted on behalf of ASIC that fairness was a two way street. First, at neither of the pre-trial directions hearings had the issue of insufficient particulars been raised by the Respondent with CALDB. Second, ASIC had maintained its position from the outset that it had properly drawn the pleadings. By not formally raising the matter and seeking a direction from the Board prior to the hearing the Respondent, if he did suffer any prejudice (which was not conceded by ASIC), had contributed to the current position.

22. The Panel decided not to grant the Respondent's application but the proceedings were adjourned to allow Mr Joubert time to deal with any matters raised by the revised pleadings. The Panel informed the parties that it would deliver its reasons for deciding not to grant the Respondent's application as part of its written determination.

Board's reasons for not granting strike out application

23. As noted, the basis of Mr Joubert's application to strike out the remaining dishonesty allegations was that it would have been procedurally unfair for the Board to require him to defend those allegations when there had been material

amendments to the factual particulars grounding the allegations after the Respondent's case had opened. The amendments to the SOFAC had come about following concerns expressed by the Panel on the first day of the hearing regarding the sufficiency of the pleadings grounding the dishonesty allegations in the initial SOFAC. With reference to Contentions 14, 15 and 16 (being the allegations of failing to lodge Forms 524 with ASIC) as examples, Ms O'Flynn asked ASIC's counsel Mr Russell to outline the basis of the dishonesty case that was being advanced by the particulars set out. In response, ASIC maintained that the particulars sufficiently grounded a conscious dishonesty case and that the relevant contentions had been properly particularised. The Panel's view differed however and it directed ASIC to reconsider the dishonesty pleadings and if amendments to the SOFAC followed as a result they were to be submitted before the cross-examination of Mr Joubert was scheduled to commence. ASIC subsequently provided a table of proposed revisions to the SOFAC that substantially reduced the original scope of the dishonesty allegations and resulted in amendments to the SOFAC as summarised in paragraphs 11-17 hereof. The amendments introduced the additional factual particulars with respect to the Remaining Dishonesty Allegations that were the subject of the Respondent's strike out application.

24. Paragraph 4.2(e) of the CALDB Practice Manual August 2014 edition ("*CALDB Manual*") expressly states that if an Applicant intends to submit that a Respondent has been guilty of dishonesty, conscious wrongdoing or similar serious wrongdoing, it is essential that that case be clearly alleged in the SOFAC and that the matters upon which the allegation is based be fully particularised. The CALDB Manual notes that a case of dishonesty may be based on inference but the matters upon which the Board will be asked to infer dishonesty or wrongdoing must be fully particularised. Mr Russell had submitted in his opening that other than two matters of dishonesty alleged, ASIC's case in respect of the dishonesty allegations relied on inferences to be drawn by the Panel. Finally, the CALDB Manual states that if an alternative non-dishonesty case is maintained the SOFAC must clearly **and separately** articulate and particularise that alternative case. The CALDB Manual refers to the Board's decision in *Fiorentino*[1].

25. The Panel gave serious consideration as to whether it would be unfair for Mr Joubert to be required to answer the Remaining Dishonesty Allegations.

26. In our view it could not be said that Mr Joubert would have been taken by surprise by the introduction of the additional particulars as the revisions to the SOFAC did not result in the introduction of new or more serious allegations. In fact, a number of the serious allegations in the SOFAC relating to conscious dishonesty had been withdrawn as a result of the amendments. Moreover, the cursory review of the proposed revisions to the SOFAC that the Panel was able to undertake the day the amendments were submitted revealed that the revisions did not appear to introduce any new facts although the manner in which the dishonesty was particularised had changed. In *R v Lewis*[2] it was held that a notice that was insufficiently particularised may be "*cured*" by providing further particulars at the hearing, or by abandoning claims not properly foreshadowed,

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[1] *ASIC v Pino Fiorentino (Decision of the Board dated 24 June 2014 Matter Number 03/NSW13)("Fiorentino")* at [954-958]
[2] *R v Lewis* [1994] 1 QD R 613 at [623-625]

subject to the qualification that if the amendments will cause a change of direction, sufficient time for additional preparation or advice should be allowed[3]. Based on these considerations, we formed the view that any potential unfairness to Mr Joubert resulting from the events and developments at that point in these proceedings would be adequately addressed by a period of adjournment which was consequently granted.

27. The decision on the Respondent's application to strike out the amendments to the SOFAC did not involve a consideration of the sufficiency or otherwise of the particulars that were added or indeed the sufficiency generally of the pleadings to ground the allegations made in the Amended SOFAC. This is because that was not a matter relevant to weigh in the decision then being made, based as it was on the question of procedural fairness arising from the amendments to the SOFAC after the hearing had commenced.

28. The sufficiency of the pleadings setting out the basis of the case against the Respondent is, though, a relevant and necessary consideration for this Panel. Our approach to deciding whether a particular contention has been established involves an initial review of the pleadings and particulars in respect of that contention to ensure that the facts if proved demonstrate a *prima facie* case against the Respondent. We have already noted that there were dishonesty allegations within 19 of the 46 contentions ultimately maintained by ASIC. Within those 19 contentions there were allegations of either conscious dishonesty and/or recklessness often based on several separate sets of facts particularised within a specific contention. The general law requirements for pleadings alleging dishonesty are more exacting than for non-dishonesty allegations. The threshold requirements for dishonesty pleadings are that they are sufficiently clear as to what is being alleged and that sufficient particulars of the dishonest acts are provided in the originating document setting out the claim. Having regard to the stricter requirements for pleadings that allege dishonesty, we reviewed the pleadings in respect of the Remaining Dishonesty Allegations as a preliminary exercise in order to assess their sufficiency against these basic general law requirements. We turn now to our analysis of this issue.

Remaining dishonesty allegations in the Amended SOFAC

29. Relevant legal precedent is unequivocal regarding the requirement to plead dishonesty allegations clearly and with particularity. It is a general rule of practice that applies to disciplinary proceedings generally[4] and for that reason has been incorporated as a requirement in the CALDB Manual.

30. In its decision in *Hill*[5] the Board referred to and discussed the following authorities in the context of the sufficiency of a dishonesty pleading in the *Hill* SOFAC:

> "[*114] An allegation of dishonesty must be made "clearly and without ambiguity": Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee (1945) 72 CLR 37 at 63 (Latham CJ).*

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[3] *Romeo v Asher* (1991) 100 ALR 515 *Egan & Davis v Harradine* (1975) 6 ALR 507 *and see Justice in Tribunals 2nd edition para 10.16*

[4] *Puryer v Legal Services Commissioner* [2012] QCA 300 at [16]-[22]

[5] *ASIC v Richard Langley Stewart Hill (Decision of the Board dated 9 December 2014 Matter Number 01/NSW14) ("Hill")* at [114-118]

[115] In Fortescue Metals Group Ltd v Australian Securities and Investments Commission (2012) 247 CLR 486; (2012) 291 ALR 399; [2012] HCA 39, the High Court said, at [26]:

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

[116] While this statement was made in relation to an allegation of deceit, it is clear that the principle applies generally to allegations of dishonesty. The rule requiring dishonesty to be pleaded clearly and with particularity is a general rule of practice: Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279 per Mason CJ and Gaudron J at [285]; Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] Ch 250, at [268]. It is not restricted to courts of strict pleading: Minister for Crown Lands v Tweed Byron Aboriginal Land Council (1990) 71 LGRA 201. The rule is applicable to disciplinary tribunals, see for example: Puryer v Legal Services Commissioner [2012] QCA 300 at [16]-[22].

[117] The requirements for clarity and particularity "do not require that the word 'fraud' or the word 'dishonesty' must necessarily be used ... The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal": Buckley LJ in Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] Ch 250, at [268].

[118] 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'."*

31. In the proceedings before us the remaining dishonesty allegations were to be found in Contentions 1, 2, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 36, 37, 38, 39, 40, 41 and 47 of the Amended SOFAC.

32. How the Amended SOFAC set out the Remaining Dishonesty Allegations was significant in weighing whether the requirements for clarity and sufficient particularity were satisfied by the pleadings. Those requirements embody the Applicant's obligation to set out how and why dishonesty is being alleged in order to provide the Respondent with a fair and complete opportunity to respond. The Amended SOFAC set out each of the 53 contentions briefly at the start of the document under the heading *"List of Contentions"* and included references to later paragraphs that set out the factual particulars and allegations in respect of the conduct, including the alleged dishonest conduct. The effect of that format in our view was that it was not apparent on the face of the contentions as they appeared in the Amended SOFAC which of them included the Remaining Dishonesty Allegations. Nor was it clear on the face of the contentions how many separate incidents of dishonest conduct were particularised within any specific contention. In order to ascertain that information, it was necessary to refer to the later paragraphs in the Amended SOFAC that were cross-referenced. The exercise of identifying which contentions included allegations of dishonesty in both the initial SOFAC and in the Amended SOFAC was not therefore straight forward. Further matters that contributed to this position included:

    (a) Language used in the pleadings was often imprecise and unclear as to what was being alleged. This created a degree of confusion as to whether dishonesty was in fact being alleged (for example it was necessary for ASIC to clarify at the hearing that contentions 3, 4, 7 and 8 did **not** contain any allegations of dishonesty).

    (b) In contentions where dishonesty was alleged, the specific particulars that pertained to conduct that was consciously dishonest as opposed to reckless was not distinguished.

    (c) The conduct particularised with respect to the Remaining Dishonesty Allegations was the same conduct particularised in respect of the alternative lack of due care and diligence allegations even though the establishment of these matters would require different evidence[6].

33. The matters identified and described in paragraph 32 hereof in our view fundamentally affect the integrity of the dishonesty allegations made in the Amended SOFAC. These matters were common to all of the Remaining Dishonesty Allegations. In our view they would have made it very difficult for the Respondent to readily conclusively identify the extent of the dishonest conduct being alleged against him.

34. Having regard to the general law requirements and the emphasis placed by the authorities to which we have referred on the importance of the requirement for pleadings alleging dishonesty to clearly, specifically and distinctly set out the facts that would show (if proved) that dishonest acts had occurred, we have formed the view for the reasons stated that the dishonesty claims particularised in the Amended SOFAC did **not** satisfy those threshold requirements.

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[6] *Three Rivers District Council v Bank of England (no3)* [2003] 2 AC 1 at [186]

35. As this finding is based on matters that are common to each of the dishonesty allegations in the Amended SOFAC we find that **all** of the dishonesty allegations in the Amended SOFAC were not sufficiently pleaded.

Other aspects of dishonesty pleadings – facts to be pleaded if inferences are relied on

36. There are two further matters regarding the dishonesty allegations that are worthy of comment as they affected a substantial number of the dishonesty allegations and contributed substantially to the overall lack of clarity in the pleadings.

37. All but two of the conscious dishonesty allegations in the Amended SOFAC relied on the Panel drawing an inference from the facts alleged that dishonest conduct had occurred. According to the authorities set out in paragraph 30 hereof, in order to justify such an inference there must be a fact pleaded which *tilts the balance"* and justifies inferring an act occurred that was "*not consistent with honesty"*[7]. In our view, following analysis of the dishonesty pleadings in order to form our views on their sufficiency, the facts particularised in respect of most if not all of the conscious dishonesty allegations did not particularise such a fact or facts and insofar as that was the case, the pleadings of conscious dishonesty based on inference were also defective on this basis.

Other aspects of dishonesty pleadings - the pleading form "knew or ought to have known"

38. The second issue was the manner in which the various conduct that was alleged to be dishonest was particularised by the inclusion of the words "*Mr Joubert knew of or ought to have known of or suspected…"* or similar phrasing in Contentions 1, 2, 15, 16, 17, 19, 20, 23, 36, 37 and 47. This "formula" was also used in Contentions 38, 39, 40 and 41 although in relation to these Contentions there are additional particulars set forth in support of the dishonesty allegations therein that did not adopt wording or wording similar to "*knew or ought to have known*". Contentions 18, 21, 24 and 25 are the only contentions that do not include wording or wording similar to "*knew or ought to have known*" in pleading the specific dishonesty alleged in those contentions.

39. The pleading form "*knew or ought to have known*" was considered by Millet J in *Armitage v Nurse*[8] who, citing the decision in *Belmont*[9] to which we have already referred [at 117] in paragraph 30 hereof, said "*[Belmont] ….is authority for the proposition that an allegation that a defendant "**knew or ought to have known"*** (emphasis added) *is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud. It is not treated as making two alternative allegations i.e. an allegation (i) that the defendant actually knew with an alternative allegation (ii) that he ought to have known; but rather a single allegation that he ought to have known (and may even have known – though it is not necessary to allege this).*"

[7] Paragraph 30 hereof at [118]
[8] *Armitage v Nurse* [1998] Ch 241 at [p257]
[9] *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 ("*Belmont*") per Buckley JLJ at [268]

40. The High Court of Australia considered these issues in *Forrest* and in *Fortescue* [10] in the context of considering the appropriateness of pleadings relating to alleged conduct of Fortescue Metals Ltd. With respect to the relevant pleadings in that matter the High Court observed that on their face the allegations "*mixed two radically different and distinct ideas: that Fortescue knew that the statements were false (it had no genuine basis for making them) and that Fortescue* ***should have known*** *that the statements were false (it had no reasonable basis for making them*)". Having identified this issue the High Court referred to the confusion in ASIC's statement of claim between the allegations of fraudulent conduct and the allegations of negligent misrepresentations[11] and said[12]:

"*[25] This is no pleader's quibble. It is a point that reflects fundamental requirements for the fair trial of allegations of contravention of law. It is for the party making those allegations (in this case ASIC) to identify the case which it seeks to make and to do that clearly and distinctly. The statement of claim in these matters did not do that.*

[26] Contrary to ASIC's submissions in this Court, a case of fraud cannot properly be seen as a "fallback" claim to be made against the possibility that the party accused of engaging in misleading or deceptive conduct by publishing notices in relation to a financial product may seek to characterise them as statements of opinion, not fact. It is fundamental, and long established, that if a case of fraud is to be mounted, it should be pleaded specifically and with particularity[13]. A pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity. If an alternative case of misleading or deceptive conduct is to be advanced, it is necessary to identify that claim as separate from the allegation of fraud. And for the purposes of the misleading or deceptive claim the pleader must identify what it is alleged that the impugned statements conveyed to their intended audience. Of course there may be circumstances in which it is appropriate to plead alternative cases of misleading or deceptive conduct or alternative cases of fraud and misleading or deceptive conduct. But it is greatly to be doubted that it will ever be appropriate to pile, one on top of the other, as many alternative allegations as were made in this case. Doing so risks contravention of what, in Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in Liquidation)[14], Isaacs and Rich JJ said was "the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him" which requires that "pleadings should state with sufficient clearness the case of the party whose averments they are."

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[10] *Forrest v Australian Securities and Investments Commission (ASIC)("Forrest"); Fortescue Metals Group Ltd v Australian Securities and Investments Commission* ("*Fortescue*") [2012] HCA 39 at [22]
[11] *Forrest* Ibid footnote 10 at [23 and 24]
[12] *Forrest* Ibid footnote 10 at [25 and 26]
[13] *Wallingford v Mutual Society* (1880) 5 App Cas 685 at [697 701 704 and 709]; *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at [285] ; [1990] HCA 11
[14] *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in Liquidation)* (1916) 22 CLR 490 at [517] ; ("*Gould and Birbeck*")

41. A key matter considered relevant by the High Court in reaching its conclusion in *Fortescue*[15] on the sufficiency of the pleadings was the lack of clarity created by mixing the different concepts of what may constitute "knowledge" as alternative allegations within the pleading. As a feature also of many of the dishonesty allegations in the Amended SOFAC (there are only 4 of the 19 contentions not affected by this issue) this matter also weighed significantly in forming our view in respect of those allegations, that ASIC did not sufficiently identify the dishonesty case which it sought to make.

Conclusion on sufficiency of the dishonesty pleadings in the Amended SOFAC – further comment

42. As noted we have concluded based on the relevant applicable law, that the dishonesty allegations that remained in the Amended SOFAC (i.e. contained in Contentions 1, 2, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 36, 37, 38, 39, 40, 41 and 47) did not properly ground a prima facie case of dishonesty against Mr Joubert as they were not pleaded with sufficient clarity and particularity. We have also already referred to the fact that the dishonesty allegations were not pleaded in accordance with clause 4(e) of the CALDB Manual and we make the observation that the requirements set out therein simply reflect the general law requirements for dishonesty allegations to be clearly articulated and particularised. In our view that would properly involve any allegations of dishonesty being discretely and fully particularised as a primary contention in the SOFAC.

43. In concluding our views on this matter we have been cognisant both of the need not be constrained by an overly technical approach and our role under s1292 which "*does not turn on our being satisfied as to a legal standard. It may be that the failure to carry out and perform a relevant duty is an offence, however that is not what we are called upon to determine by the terms of s1292*[16]". In the context of the Board's overriding obligation to ensure procedural fairness, we pay heed though to "*the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him*". That requires that "*pleadings should state with sufficient clearness the case of the party whose averments they are*[17]". We have sought therefore to evaluate the sufficiency of the allegations in a manner consistent with the common law requirements for pleading and prosecuting dishonesty in civil matters in order to ensure that an appropriate framework of procedural fairness underpins our approach.

44. It follows from our finding that none of the Remaining Dishonesty Allegations in the Amended SOFAC will be further considered in concluding our findings and determination with respect to Contentions 1, 2, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 36, 37, 38, 39, 40, 41 and 47.

Status of the alternative allegations of a lack of due care and diligence

45. A final matter arising from our findings with respect to the dishonesty allegations is the status of the alternative allegations contained in Contentions 1,

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[15] *Fortescue* Ibid footnote 10 at [23]
[16] *ASIC v Allan Gregory Walker - Decision of the Board dated 22 December 2008 Matter Number 06/VIC07 ("Walker")* at [7.3(b)]
[17] *Gould and Birbeck* Ibid footnote 14 at [517]

2, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 36, 37 38, 39, 40, 41 and 47 that Mr Joubert acted without due care and diligence. Having regard to our finding that the dishonesty allegations made in each of these contentions were not sufficiently pleaded, the effect of which is that this Panel will not make findings in relation to those allegations, we have formed the view that there is no impediment to considering and making findings with respect to the *alternative negligence* allegations, each of which is now capable of being considered as though a separately particularised and distinct allegation. We propose to proceed on this basis in respect of Contentions 1, 2, 15, 16, 17,18, 19, 20, 21, 23, 24, 25, 36, 37 38, 39, 40, 41 and 47.

The Board's approach under Section 1292 of the Act

Onus

46. The relevant authorities make it clear that the Board's role under s1292 of the Act is not to exercise judicial power and does not depend upon it being satisfied, to a legal standard, of alleged contraventions or failures to comply with legislative requirements, professional standards or the common law, as the case may be. Rather, the question for the Board is the adequacy and propriety of the carrying out or performance of the relevant duty and that is to be judged by the Board by making an evaluative and subjective determination[18].

47. In the context of addressing the Board's task, ASIC submitted that there is nothing in either the Act or the Australian Securities and Investments Commission Act 2001 ("ASIC Act") that ascribes an "*onus*" on any party to proceedings before CALDB - all that is required for the Board to exercise its powers under ss1292(2) is for it to be "*satisfied*" of the matters referred to in the sub-section after having provided the parties with an opportunity to appear at a hearing held by the Board and to make submissions to, and adduce evidence before, the Board in relation to the matter.

48. Section 218(2) of the ASIC Act imposes on the Board an express obligation to observe the rules of natural justice. It is undoubtedly the case that a respondent has the right to proper notice of the case being made and the facts alleged in support of that case. In practical terms this does in our view place an onus on ASIC to present the basis of its case. It is with advertence to this obligation that the CALDB Manual clearly sets out what is required of ASIC if it intends to submit to the Board that a respondent has been guilty of dishonesty, conscious wrongdoing or similar serious wrongdoing. As a matter of practicality, ASIC has the job of satisfying us of the existence of the facts it alleges.

The Briginshaw approach and its application to these proceedings

49. In terms of our approach under s1292, the process of "*satisfying*" ourselves that a liquidator should be dealt with under ss1292(2), before exercising any of the administrative powers conferred on us by s1292, involves us forming a view as to whether the various facts alleged in the Amended SOFAC ground the allegations of misconduct and then deciding based on the available evidence whether we are satisfied that the conduct alleged occurred. The relative seriousness of the purported conduct found to be established clearly has a

[18] *Walker* Ibid footnote 16 at [para 7.3(b)]

significant bearing on the ultimate sanction that may be imposed under s1292 and so underscores the need for us to approach our evaluation appropriately and in a manner consistent with the rules of procedural fairness.

50. In *Briginshaw*[19] Dixon J said at 361-362:

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

51. 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.*"

We hereinafter refer to the approach described by Dixon J in *Briginshaw*[20] set out in paragraphs 50-51 hereof as "the *Briginshaw* approach".

52. There is authority to suggest that the *Briginshaw* approach will apply in disciplinary proceedings in which allegations of a serious nature are made and where serious consequences may follow, although there is no principle requiring its application *Jackson (previously known as Subramaniam) v Legal Practitioners Admissions Board [2006] NSWSC 1338; Bannister v Walton* (1993) 30 NSWLR 699 at [711-712]. In *Polglaze v Veterinary Practitioners Board* [2010] NSWCA 4 Justice of Appeal Baston commented at [18-19]:

"*[18] The argument that the Tribunal failed to comply with the Briginshaw principle should be rejected….because….those principles do not apply routinely*

[19] *Briginshaw v Briginshaw* (1938) 60 CLR 336 ("*Briginshaw*")
[20] *Briginshaw* Ibid footnote 19

just because the matter involves a complaint of disciplinary misconduct or unsatisfactory misconduct."

"*[19] The facts which were in issue in this case did not give rise to any matter of gravity with respect to the character or behaviour of the practitioner. It is therefore not to be assumed that there was any requirement on the Tribunal to be satisfied to the level of comfort which the Briginshaw principle requires.*"

53. The Full Federal Court in its recent decision in *Sullivan*[21] clarified that while *Briginshaw* was not a principle of law that applied to tribunal proceedings per se "*some findings of fact, however, have been long recognised as calling for considerable caution before being made and for care being exercised in respect to the evidence upon which the finding is made. Findings as to a party or a witness having engaged in fraud or having lied are but examples*".

54. In *Sullivan* the conclusion that the *Briginshaw* approach did not necessarily apply to disciplinary proceedings was based on the reasoning that *Briginshaw* is a rule of evidence derived from curial proceedings and the Administrative Appeals Tribunal ("AAT") is not bound by the rules of evidence; nor does a party before that Tribunal bear the onus of proof, let alone an onus to establish facts to a particular standard[22]. On this point the judgment further states[23] "*Moreover, the submission fails to also recognise the fact that the procedure of the Tribunal is within its own discretion. What procedure the Tribunal decides to follow in any particular case, and whether the Tribunal decides to apply or inform itself by reference to the common law rules of evidence, is a matter which has been left by the Legislature to the Tribunal itself to determine.*"

55. The joint judgment of Flick and Perry JJ in *Sullivan* outlined several legal safeguards that already exist to manage the potential for an excess of power on the part of the AAT when making findings of fact upon evidence untested in cross-examination as well as unexplained findings. In light of those constraints their Honours considered there was no need to endorse any further constraint on the AAT such as a general "*principle of law*" [that the *Briginshaw* approach was always to be applied]. They said[24]:

"*[119] Although the Tribunal is not obliged to accept evidence which is not contradicted by means of cross-examination or otherwise, it has long been recognised that the rejection of such evidence may amount to a denial of procedural fairness….Equally, a failure to provide adequate or any reasons for rejecting unchallenged evidence may constitute an error of law….These are but two of the already accepted means whereby this Court can ensure that the Tribunal is not given an untrammelled power to make findings of fact free of all judicial scrutiny. Without being exhaustive, another constraint is the need for findings to be neither "irrational" nor "illogical." A "failure rationally to consider probative evidence", it has been said, "is not the same kind of error as a simple mistake of fact": Minister for Immigration and Multicultural Affairs v Epeabaka [1999] FCA 1 at [26] per Black CJ, Von Doussa and Carr JJ.*

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[21] *Sullivan v Civil Aviation Authority* [2014] FCAFC 93 (Flick and Perry JJ at [111])
[22] *Sullivan* Ibid footnote 21 at [115]
[23] *Sullivan* Ibid footnote 21 at [115-116]
[24] *Sullivan* Ibid footnote 21 at [119–121]

[120] Within these already accepted principles, the Tribunal is otherwise free to make findings of fact which cannot be set aside by this Court. When making findings of fact which have "serious" consequences to a party or "grave" consequences, the Tribunal is free to consider the evidence and other materials before it. The more centrally relevant a particular fact may be to the decision reached, the Tribunal it may be accepted would express greater caution in evaluating the factual foundation for the decision to be reached. The absence of any cross-examination on the evidence and the absence of any indication being given to a party that such evidence is under challenge, may well be factors taken into account initially by the Tribunal and thereafter by this Court on "appeal".

*[121] Cases may be found where the Tribunal has applied Briginshaw. But these cases are nothing more than the Tribunal proceeding, perhaps, in a manner which applies the common law rules of evidence. The provisions of s33(1)(c), it will be recalled, simply provide that the Tribunal is not "**bound**" to apply those rules; it is not a prohibition upon the Tribunal applying those rules if it sees fit.*"

56. The dicta of Flick and Perry JJ in *Sullivan* is a useful discussion of the legal framework within which a consideration of the *Briginshaw* approach may be relevant and appropriate in administrative proceedings such as those that come before the CALDB. In the *Sullivan* decision at first instance[25] Jagot J, had held that the principle embodied by *Briginshaw*, i.e. that there is a rational relationship between the seriousness of the fact to be found and the strength of the material sufficient to prove that fact, is a tool available to the AAT to assist it in reaching the correct or preferable decision in the context of administrative decision making. The usefulness of this tool will depend on the facts of the case. In some cases, use of this tool will be unnecessary. In others, conscious advertence to the principle may assist in ensuring the process of reasoning used does not suffer from a "*want of logic*" or "*faulty reasoning*".

57. ASIC submitted that if this Panel were to insist on the strict application or guidance of the *Briginshaw* approach in making our findings in this matter we would likely be diverted from our statutory task or function under ss1292(2) of the Act. While we have considered and agree with ASIC's submissions with regard to our exercise of power under ss1292(2) we do not think that such a conclusion necessarily follows. While our legislative mandate makes it clear we are not bound by the rules of evidence, it also requires us to observe procedural fairness. This necessarily obliges us to make our findings of fact based upon material that is logically probative. In this regard, various rules of evidence will often provide a useful guide and framework. We agree with the Respondent's submission that, in this case, were we to have considered the dishonesty allegations included in many of the contentions, the *Briginshaw* approach would have been an appropriate reference for evaluating the evidence in support of those allegations to ensure that the rules of procedural fairness were properly observed in connection with the hearing as required by ss218(2) of the ASIC Act. We consider that this approach would be entirely consistent with the dicta of Perry and Flick JJ in *Sullivan* as discussed above and that it provides a sound basis for ensuring that in forming a view as to whether we are "*satisfied*" as

[25] *Sullivan v Civil Aviation Authority* [2013] FCA 1362

required by s1292 of the Act our findings of fact that lead to our conclusion have been made on a rational and logically probative basis.

58. As matters have transpired the allegations to be considered in the context of the contentions alleged by ASIC do not include the allegations of dishonesty although Mr Joubert's credit was in issue in the proceedings and in respect of this matter the *Briginshaw* approach is an appropriate reference for evaluating the evidence.

59. The remaining allegations in the Amended SOFAC while they do not now include dishonesty allegations, are nevertheless serious allegations and, in accordance with the obligations referred to in paragraph 57 hereof, we have approached the task of making our findings of fact with reference to the civil standard of proof and based upon material that is logically probative. We have paid regard to the rules of evidence insofar as they provide a framework for, and useful guidance with respect to, considering the evidence adduced.

The Witnesses

60. There were eight statements tendered by the Applicant in these proceedings.

61. There were four statements tendered by the Respondent in these proceedings.

62. At the request of ASIC Mr Stephen Lawrence Barnett ("Mr Barnett") was summonsed to give evidence.

63. Mr Joubert was cross-examined by ASIC in the proceedings.

64. Mr Stavros Tsakalos ("Mr Tsakalos") and Mr Barnett were cross-examined by the Respondent in the proceedings.

65. Ms Bianco Davis ("Ms Davis") was examined in the proceedings.

Matters concerning Mr Joubert's credit and the weight of his evidence

66. Mr Joubert's credit was an issue in these proceedings. ASIC submitted that Mr Joubert could not be believed. One basis of this submission was that the absence of documents on Mr Joubert's files "*beggared belief*" having regard to the important statutory obligations cast on him by reason of his position as a registered liquidator. The absence of many file notes and other records on Mr Joubert's files does not in our view provide a proper basis on its own to make an adverse finding with respect to Mr Joubert's credit because it does not constitute a sufficient factual foundation for such a finding in terms of the *Briginshaw* approach.

67. Mr Joubert's evidence regarding his practice with respect to file notes was that he did not necessarily make file notes of telephone conversations or keep a record of his thought processes when reaching decisions and in his cross-examination he confirmed that his practice was not necessarily to keep file notes and nor did he did recall specifically instructing his staff to adopt that practice. That evidence has had a bearing on the weight we have been prepared to place on Mr Joubert's evidence where there is no corroborating contemporaneous documentary evidence (see paragraph 87 hereof) and is a matter on which we

have further commented in the context of the reasons for our findings in respect of some of the contentions.

68. Another factor relevant to the weight we have been prepared to place on Mr Joubert's evidence (see paragraph 87 hereof) was his limited capacity to recall relevant events. The lack of many contemporaneous aide-memoires to assist his reconstruction of events was a significant lacuna which contributed to our overall view on the reliability of his evidence.

69. A further matter relevant to Mr Joubert's credit that arose during the hearing was certain evidence, adduced by ASIC in the cross-examination of Mr Joubert, that ASIC submitted showed that Mr Joubert had back-dated certain correspondence and "*backfilled*" file checklists ("the credit evidence"). The questions asked of Mr Joubert in cross-examination that led to the emergence of this evidence had been challenged by Mr Joubert's counsel on the basis of relevance as their subject matter was not particularised in the SOFAC and the impact was potentially serious as the evidence raised the possibility of serious misconduct on the part of Mr Joubert. The Panel had allowed the questions to proceed on the basis that Mr Joubert's answers may be relevant to the question of his overall credit and possibly to the contentions regarding inadequate systems and processes. Based on the evidence that emerged the Panel took the view that there were anomalies raised by the evidence that had not been addressed by the close of evidence in this matter. As it was evidence in respect of which the Panel was being asked by ASIC to make a finding with a potentially serious impact on Mr Joubert, the Panel wished to clarify Mr Joubert's response to that evidence.

70. When the anomalies raised by the credit evidence were raised with the parties' counsel just before closing submissions Mr Cook made submissions some of which went to further matters of evidence from Ms Davis that were apparently relevant to the interpretation of that evidence and which were not traversed in her statement already before the Board. The Panel indicated that a further statement from Ms Davis would be accepted addressing the evidence about which Mr Cook had made submissions. The tender of this further statement ultimately resulted in the case being reopened as ASIC made an application to cross-examine Ms Davis regarding her additional evidence.

71. The case was re-opened on the basis that ASIC's cross-examination of Ms Davis was to be confined to the matters to which she had deposed in her supplementary statement and the two evidentiary issues that had arisen from the credit evidence namely:

    (a) the apparent discrepancy between Ms Davis' stated dates of employment by Joubert Insolvency and letters appearing on Joubert Insolvency files that refer to her apparent presence at the firm outside the time-frame of her employment (including the proposition that those letters may have been prepared and placed on the file on a date after the date which appears on those letters); and

    (b) the submission by ASIC that the evidence demonstrated that certain file checklists must have been "*backfilled*" because the dates those documents record as having been printed are later in time than the dates which appear

against the activities completed. These checklists comprised the following:

- WOT - checklist document with print date notation of 20 September 2010. Mr Joubert appointed as liquidator of WOT 15 October 2009.

- AH - checklist document with print date notation of 23 September 2010. Mr Joubert appointed as liquidator 17 December 2009.

- PMG - checklist document with print date notation 21 July 2011 (ASIC's review of Mr Joubert's files took place between 26-28 July 2011). Mr Joubert appointed as liquidator of PMG 28 June 2010.

- ZAG - checklist document with print date notation 3 September 2010. Mr Joubert appointed as liquidator of ZAG on 5 January 2010.

The evidence of Ms Davis

72. When the hearing reconvened there were two further signed statements from Ms Davis. The first dated 15 October 2015 had been prepared by Mr Joubert's lawyer and provided to the Board before the hearing and the other was a statement that ASIC had prepared after also conferring with Ms Davis. An unsigned version of the second statement was provided to the Board the day before the further hearing and a signed (but different) version dated 25 November 2015 was provided to the Panel at the outset of the hearing on 26 November 2015. A debate ensued between the parties about whose witness Ms. Davis was, whether the statements had been tendered to the Board and whether ASIC could cross-examine Ms Davis. The matter was ultimately resolved on the basis that Ms Davis was called to give evidence and each party permitted to ask questions regarding her statements.

73. Ms Davis was a credible and helpful witness. She confirmed that she commenced employment with Mr Joubert in April 2010 and her statement annexed a copy of her employment contract with Joubert Insolvency dated 16 March 2010. Prior to commencing employment with him she did not have any accounting or insolvency experience. She did not recall doing any work relating to Mr Joubert's files prior to the commencement of her employment by him. Prior to commencing employment with Mr Joubert, she was employed by Kalfus Legal, a firm which co-tenanted office space with Joubert Insolvency. Her employment with Kalfus Legal commenced on 7 November 2008 and concluded on 8 November 2010. After commencing work with Joubert Insolvency in April 2010 she continued employment with Kalfus Legal until November 2010. She confirmed that she had never been employed by Mr Pateman, whose business also occupied offices in common with Joubert Insolvency and Kalfus Legal at the relevant times. In her statement Ms Davis said that when employed by Kalfus Legal (before commencing employment with Mr Joubert) she was instructed by her employer to perform minor administrative tasks for the co-tenants of the office including answering the telephone, taking messages and signing for deliveries. Permissible tasks were limited to those that did not impinge on her work for Mr Kalfus and she did not actually recall undertaking any such minor tasks for Mr Joubert.

74. Ms Davis summarised her duties with Joubert Insolvency once she had commenced employment with Mr Joubert as involving tasks assisting with creditors' queries, obtaining books and records and storing and reviewing them, sometimes attending at the offices of a company being wound up, completing forms to ASIC, as well as completing some template documents. Ms Davis said that Mr Joubert instructed her about how to perform tasks including teaching her how to use the templates and she confirmed that she did not run her own matters but worked closely with him. She did not recall that there was a formal process for obtaining instructions from him, nor for having regular meetings regarding the progress of matters but said rather that there were files stored in one place and Mr Joubert would ask her to "*pick one up and go through it.*"

75. Ms Davis was taken to copies of letters dated between 17 September 2009 and 5 November 2009 that were annexed to her statement ("*relevant correspondence*"). The relevant correspondence comprised 5 letters from Mr Joubert's files that referred to Ms Davis as though she were an employee of Joubert Insolvency even though the dates of all 5 letters preceded that employment (although not Kalfus Legal) and were the letters (comprising the first aspect of the credit evidence referred to in paragraph 69 hereof) alleged by ASIC to have been back-dated. Ms Davis said she had no independent recollection of the letters including details of who prepared them or the events to which they related. In her further oral evidence she said that she did not believe she would have drafted any of the relevant correspondence when employed by Kalfus Legal because they were not tasks that would have been fast and quick and therefore in accordance with instructions from Mr Kalfus. Neither did she recall ever being told her name would be referred to in the relevant correspondence.

76. As to the file checklists ("*the checklists*") comprising the second aspect of the credit evidence, which were alleged to be back-filled, Ms Davis said in her statement that she had no independent recollection of them although she recognised her own handwriting in two of the checklists and also the layout of the checklists but did not have an independent recollection of the events or the subject matter of the checklists. Ms Davis said that these checklists would be completed as part of the finalisation of a matter as a method of review to check tasks had been performed. She could not recall whether when she started that process of review the checklists were already partly completed but she did remember that the checklists were used to cross check what had been done on a matter.

77. Mr Cook's submissions on the relevant correspondence, being the first aspect of the credit evidence, addressed the apparent back-dating of the correspondence by positing a theory as to how Ms Davis' name may have come to be included in the relevant correspondence that would not require an inference that Mr Joubert did not and could not have sent those letters on the dates they bore as ASIC was asking us to infer. There was no direct evidence that supported Mr Cook's theory and we have discounted it, although we recognise that the submission was made in the context of demonstrating that there were plausible alternative explanations for the apparent discrepancies in the relevant correspondence. ASIC submitted that the lack of any evidence that the relevant correspondence had ever been sent supported the inference that the relevant letters were not sent on the dates they bear.

78. As to the second aspect of the credit evidence, being the checklists, Ms Davis' evidence made it clear that at least insofar as she utilised the checklists (based on Mr Joubert's direction), it was to perform a file review at the conclusion of a matter. Mr Russell appeared to accept that Ms Davis' evidence therefore provided a plausible explanation as to why the dates that appeared at the bottom of the checklists post-dated the date references in the checklists which had been made by hand (thereby at first blush suggesting the checklists had been backfilled for a possibly discreditable purpose). Mr Russell's submission on the checklists became that Ms Davis' evidence confirmed that the checklists were backfilled even though Mr Joubert's evidence had been that the checklists were supposed to be a contemporaneous record of the management of the file.

79. Dealing with the checklists evidence first we think that the evidence of Ms Davis explains the apparent discrepancy between the dates appearing at the bottom of the checklists and the earlier handwritten dates that appear on those checklists. ASIC submitted that the discrepancy between Ms Davis' evidence and Mr Joubert's previous evidence as to the way in which the checklists were used was an issue relevant to the credit of Mr Joubert as a witness. The discrepancy between their evidence is certainly an actual example of the potential for weakness in Mr Joubert's evidence that we have already identified in paragraph 68 hereof based as it so often was, in the absence of a file record, on a reconstruction of what he thought would have occurred because he could not remember and had no aid from his file in that regard.

80. Although Ms Davis also had limited recollection she was a credible witness and in our view her evidence regarding the checklists was more persuasive than Mr Joubert's evidence on that topic. In our view it is entirely plausible that the checklists were used in the way Ms Davis described and when the evidence that the date appearing at the bottom of the checklists post-dates the handwritten entries is considered in the context of her evidence, the suspicion aroused by the apparent conflict in the dates evaporates. For these reasons we have formed the view that the checklists evidence does not bear on Mr Joubert's credit. It is nevertheless a further example of the unreliability of his evidence generally because neither his memory nor his written records were sufficient to enable him to recall accurately the details of these matters which, in terms of the approach to his evidence set out in paragraph 87 hereof, has resulted in us placing limited weight on his evidence in this matter.

81. As to the first aspect of the credit evidence being the relevant correspondence Ms Davis' evidence did not assist in clarifying why her name appeared in that correspondence at a time when she was not employed by Mr Joubert. She did not appear to have a detailed recollection of specific matters that had occurred within the timeframe of her employment with Kalfus Legal or Joubert Insolvency. It was not in issue that Ms Davis was an employee of one of the co-tenants with whom Mr Joubert shared premises at the time the correspondence was sent and she was known to Mr Joubert at the relevant time. Although Ms Davis in her statement said that the tasks she performed to assist the other businesses were minor administrative tasks including answering the telephone, taking telephone messages and taking and signing for deliveries, we note that there were three emails tendered that were consistent with her having performed more involved tasks for Mr Joubert before being formally employed by him. The first is an email (dated 23 February 2009) to Mr Joubert from Ms Davis

where she wrote "*Michael Ellis returned my call and confirmed he is proceeding with liquidation. He said that he sent the forms on Saturday so we should receive them either today or tomorrow*." The second is a an email of the same date, sent by Mr Joubert to Ms Davis which said "*Hi Bianco, here is the electronic list of creditors*" and attached to that email was a twelve page document entitled "*Listing of Creditors*" which included the names and addresses of 338 creditors. The third email is dated 19 January 2009 from Ms Davis to Mr Joubert which attached a copy of a letter dated 19 January 2009 signed by Mr Joubert and a s439A Report to Creditors for the second meeting of creditors comprising 27 pages and also signed by Mr Joubert.

82. Against this factual background, we were being asked to draw an inference, that because Ms Davis' name appeared in the relevant correspondence, Mr Joubert must have prepared those letters at a later time and back-dated them. This inference relied on the following matters:

    (a) That Ms Davis was not employed by Mr Joubert until a date later than the date span of the relevant correspondence; and

    (b) An absence of evidence in Mr Joubert's files demonstrating that the relevant correspondence had been despatched.

83. As to (a) in paragraph 82 hereof, while the evidence established that Ms Davis was not employed by Mr Joubert over the dates referred to in the relevant correspondence, she was employed by his co-tenant Mr Kalfus. Further, although Ms Davis did not recollect performing other than minor administrative tasks for Mr Joubert, the emails we have referred to in paragraph 81 hereof, which were all written at the beginning of 2009, i.e. a number of months before the dates appearing on the relevant correspondence, would be consistent with an inference that Ms Davis was performing more than minor administrative tasks on behalf of Mr Joubert before she was formally employed by him.

84. As to (b) in paragraph 82 hereof, we refer to and repeat our comments in paragraph 66 hereof with respect to proposing a negative proposition (i.e. the absence of evidence) as the factual foundation for a finding with respect to Mr Joubert's credit. Further, we note that Mr Joubert gave evidence, which was not challenged, that a record of daily correspondence sent by the firm was kept as a separate written record from the matter files tending to contradict the inference we were being asked to draw that the absence of evidence on the matter files meant that the correspondence had not been sent.

85. *The Briginshaw* approach as we have discussed, demands that an inference that serious conduct has occurred should only be drawn where there is a rational relationship between the seriousness of the fact to be found and the strength of the material sufficient to prove that fact. Having regard to the matters we have raised in paragraphs 81-84 hereof we conclude that there is not a sufficient factual foundation for the inference that Mr Joubert prepared the relevant correspondence and back-dated it.

86. It therefore follows from our findings that neither aspect of the credit evidence establishes a basis for an adverse finding regarding Mr Joubert's credit.

The weight of Mr Joubert's evidence

87. Mr Joubert was cross-examined over the course of one and a half days. Mr Joubert had very limited, independent recollection of the events the subject of these proceedings. In those circumstances we have approached the assessment of Mr Joubert's evidence in the proceedings as follows:

    (a) we have preferred evidence provided by contemporaneous documentation;

    (b) where Mr Joubert's evidence was inconsistent with contemporaneous documentation we have not placed weight on his evidence;

    (c) where there was no contemporaneous documentation to corroborate Mr Joubert's version of events, we have had regard to the consistency of his evidence with any other available evidence and assessed the weight that should be placed on Mr Joubert's evidence in light of that other evidence. If there was no other available evidence we have placed little if any weight on Mr Joubert's evidence depending on the specific context and for the reasons we have set out as relevant to that context.

Contentions 1 and 2

Failure to declare a relevant relationship in WOT and AH DIRRIs

88. With respect to Contentions 1 and 2 of the Amended SOFAC, ASIC alleges that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he either failed to disclose and/ or made a false declaration (by omission) in the initial DIRRIs sent to creditors of WOT and AH regarding a relevant relationship with Ms Karen Foster ("Ms Foster") in accordance with the requirements of ss506A(2) of the Act and Clause 6.14 of the IPA Code of Professional Practice 2008 Code ("2008 Code") *("DIRRI relationship declaration omissions").* The relevant particulars allege that Mr Joubert without due care and diligence falsely declared in the WOT and AH DIRRIs (sent on 6 November 2009 and 17 December 2009) that neither he nor his firm within the preceding 24 months had any relevant relationships with WOT or AH, their associates or formerly appointed insolvency practitioners. This was allegedly false by reason of Mr Joubert's prior relationship with Ms Foster who as a director of ECG, to which he had been appointed as liquidator on 15 October 2009, was an associate of WOT and AH within s11 of the Act, therefore constituting a relationship within the meaning of ss60(2) of the Act which should have been disclosed to the relevant creditors.

89. Contentions 1 and 2 include allegations that Mr Joubert made the relevant false declarations dishonestly. For the reasons set out in paragraphs 29-44 hereof we have formed the view that these allegations are not pleaded sufficiently and in accordance with our comments in paragraph 45 hereof we have limited our consideration of Contentions 1 and 2 to the question of whether Mr Joubert made the relevant declarations without due care and diligence as alleged.

90. In response to Contentions 1 and 2 Mr Joubert:

    (a) Contended that ASIC's interpretation of the definition of a "*relevant relationship*" for the purposes of ss60(2) of the Act was mistaken and that Mr Joubert did not have a relevant relationship that required disclosure

under that section simply because s11 of the Act states that if the primary person is a body corporate the "*associate*" reference includes a reference to the director or secretary of the body. Mr Joubert asserted that he did not have a relationship with Ms Foster simply because he was the liquidator of another company to which Ms Foster was also appointed as director.

(b) Denied that he made the DIRRI relationship declaration omissions without due care and diligence but admitted to a lack of due diligence in failing to identify the fact that he was a liquidator of another company of which Ms Foster was a director and referred to his statement which deposed to the state of his recollection of the relevant events.

91. The allegations in Contentions 1 and 2 present the following issues for the Panel's consideration:

(a) Was there a "*relevant relationship*" that should have been disclosed to the creditors of WOT and AH in the DIRRIs that Mr Joubert sent on the 6 November 2009 and 17 December 2009 respectively and if so, did Mr Joubert fail to disclose those relevant relationships?

(b) Were the DIRRIs sent to creditors in the WOT and/or AH creditors' voluntary liquidation's ("CVL") false?

(c) Did Mr Joubert act without due care and diligence in making the WOT and AH DIRRIs?

Relevant facts

92. The background evidence relevant to a determination of the above issues in respect of Contentions 1 and 2 was largely not in issue between the parties and may be summarised as follows:

(a) In or about October 2009, Mr Joubert discussed ECG with Mr David Cassaniti ("Mr Cassaniti") and Mr Amir Attia ("Mr Attia") of CAP Accounting and provided a quote to CAP Accounting to wind up ECG.

(b) On 25 September 2009 Mr Joubert sent a letter addressed to the directors and secretary of ECG enclosing relevant draft documentation and guides to assist ECG's directors and secretary to place ECG into liquidation by way of a CVL.

(c) On 15 October 2009, Mr Joubert received an email from CAP Accounting attaching various documents for the liquidation of ECG that included Ms Foster's authorisation as ECG's director (dated 25 September 2009) for Mr Joubert to convene a meeting of members on behalf of the ECG Board regarding the proposal to place ECG into liquidation and approve Mr Joubert as liquidator, a Notice of Meeting of Directors dated 25 September 2009 signed by Ms Foster, Notice of General Meeting of members scheduled on 15 October 2009 regarding a special resolution to voluntarily wind up ECG and an ordinary resolution to appoint Mr Joubert as liquidator and an undated company extract.

(d) On 15 October 2009 Ms Foster chaired and signed a copy of minutes of meeting of members of ECG resolving that ECG would be wound up voluntarily and to appoint Mr Joubert as liquidator.

(e) On 15 October 2009 Mr Joubert sent out a "*Circular to Creditors*" advising of his appointment as ECG's liquidator and giving notice of the meeting of creditors to be held on 27 October 2009. The circular enclosed a number of documents including the documentation and forms necessary to convene a meeting of creditors, a DIRRI signed by Mr Joubert, a list of creditors and a remuneration report for the period 15 October 2009 to the completion of the liquidation.

(f) On 19 October 2009, Mr Joubert sent Notices to deliver Books of Company to the Liquidator, pursuant to s530B of the Act, to CAP Accounting and Ms Foster.

(g) Sometime prior to 1 October 2009 Mr Joubert also had discussions with Mr Cassaniti and Mr Attia of CAP Accounting regarding the liquidation of WOT. On 1 October 2009 Mr Joubert sent a letter addressed to the directors and secretary of WOT enclosing relevant draft documentation and guides to assist the WOT directors and secretary to place WOT into liquidation by way of a CVL.

(h) On 6 October 2009, in emails between Mr Joubert and Mr Charlie Duardo of CAP Accounting ("Mr Duardo") regarding WOT, Mr Duardo asked Mr Joubert to "*change the paperwork*" to note Ms Foster as the director from 15 June 2009. Mr Joubert told Mr Duardo he could only do that if he had the company search showing Ms Foster as a director at the relevant time and he asked for the search which was later sent to him.

(i) On 6 November 2009 the members of WOT resolved to wind up WOT voluntarily and appointed Mr Joubert as the liquidator.

(j) On 6 November 2009, Mr Joubert sent Ms Foster a "*Notice to Deliver Books of Company to the Liquidator*" in relation to WOT pursuant to s530B of the Act.

(k) On 6 November 2009, Mr Joubert sent out a "*Circular to Creditors*" advising of his appointment as WOT's liquidator. The circular included the documentation and forms necessary to convene a meeting of creditors, a DIRRI signed by Mr Joubert, a list of creditors and a remuneration report for the period 6 November 2009 to the completion of the liquidation. The DIRRI was signed by Mr Joubert and declared that neither he nor his firm had within the preceding 24 months any relationships with WOT, its associates or formerly appointed insolvency practitioners; and that he had not been indemnified in relation to the WOT administration other than indemnities he may be entitled to under statute.

(l) On 25 November 2009 Mr Joubert signed an amended DIRRI which disclosed that from about 1 October 2009 Ms Foster was also a director of another company of which he was liquidator, namely ECG.

(m) In December 2009 Mr Joubert met with Mr Cassaniti of CAP Accounting to discuss his potential appointment as liquidator of AH.

(n) On 10 December 2009 Mr Joubert obtained an ASIC organisational search for AH which recorded Ms Foster as a current director of AH.

(o) On 10 December 2009 Ms Foster chaired and signed a copy of minutes of meeting of members of AH resolving that AH would be wound up voluntarily and to appoint Mr Joubert as liquidator.

(p) Between 10 and 16 December 2009 Mr Joubert partly completed and signed a document entitled "*Pre-Appointment checklist – Conflicts and Disqualifications*" for AH in which no conflicts were noted under the heading "*check that the proposed appointee is not disqualified from acting in terms of:*"…. On the back page of that checklist there was a pro-forma email for circulation to staff to check for conflicts. This pro-forma had been completed with relevant details of AH including the name of Ms Foster as director which name had been circled.

(q) On about 17 December 2009 Mr Joubert sent a letter enclosing "*Notice to deliver*" books of Company to the Liquidator pursuant to s530B of the Act to each of CAP Accounting and Ms Foster.

(q) On 17 December 2009 Mr Joubert sent out a "*Circular to Creditors*" advising of his appointment as liquidator of AH. The circular included the documentation and forms necessary to convene a meeting of creditors, a DIRRI signed by Mr Joubert, a list of creditors and a remuneration report for the period 17 December 2009 to the completion of the liquidation. The DIRRI was signed by Mr Joubert and declared that neither he nor his firm had had, within the preceding 24 months, any relationships with AH, its associates or formerly appointed insolvency practitioners; and that he had not been indemnified in relation to the AH administration other than indemnities he may be entitled to under statute.

93. Based on the above facts it was alleged in the Amended SOFAC that as at 6 November 2009 and 17 December 2009 when Mr Joubert sent the circular to creditors of WOT and AH respectively including the DIRRI, he had a relevant relationship with Ms Foster, who was also a director of ECG, that he should have disclosed in the DIRRIs in accordance with ss506A(2) of the Act and Clause 6.14 of the 2008 Code

Was there a "relevant relationship" that should have been disclosed to the creditors of WOT and AH in the DIRRIs that Mr Joubert sent on the 6 November 2009 and 17 December 2009 respectively and if so did Mr Joubert fail to disclose those relevant relationships?

94. Mr Joubert's Amended Response asserts that ASIC has misinterpreted the definition of a "*relevant relationship*" in ss60(2) of the Act. Mr Cook addressed this issue in written submissions to the Panel. His starting point was that Mr Joubert did not have a relevant relationship with Ms Foster by reason of his appointment as liquidator of WOT, of which she was a director. He submitted that a liquidator does not enter into any relationship with the directors of a company to which he is appointed as his relationship is with the company, not

the directors and, by the necessity of the role he occupies, he is independent of the directors and owes them no duties or allegiance. Mr Cook submitted that ASIC's misapprehension arose because it makes an impermissible "*double jump*" with respect to the definition of "*relevant relationship*" in the Act. That is to say that because Mr Joubert had a relationship with ECG (of which Ms Foster was also a director) and because Ms Foster was an associate of ECG (being a director of ECG), Mr Joubert had a relationship with an associate of WOT. Mr Cook submitted that this was simply wrong and the association Mr Joubert had with ECG and the association Ms Foster had with ECG did not create an association between Mr Joubert and Ms Foster.

95. Mr Cook further submitted that the same outcome followed from an analysis of Clause 6.14 of the 2008 Code which requires a practitioner to disclose "*prior personal and business relationships with the insolvent or an associate of the insolvent*". He submitted that Mr Joubert did not have either a personal or business relationship with Ms Foster and to the extent it is suggested that he had one by reason of his appointment to a company as a liquidator of which Ms Foster was a director, that suggestion was wrong on the basis set out in paragraph 94 hereof.

96. ASIC's submissions relevant to this point referred to the Board's decision in *Fiorentino*[26] where the Board considered the provisions of s506A of the Act and Clause 6.14 of the 2008 Code and the requirement to disclose relevant relationships.

97. The discussion of the current law and policy in respect of DIRRI disclosures set out in *Fiorentino*[27] is instructive. Referring to s506 the Board said:

"[*776] We note that the section involves serious obligations and that a failure to comply with its requirements amounts to an offence. Further, we note that an erroneous belief of the absence of a relationship (following reasonable inquiries) is only relevant as a defence in the case of prosecution. In other words, the obligation to make disclosure appears to be one of strict liability.*

[777] Section 9 of the Act states that "declaration of relevant relationships" has the meaning given in s60. Relevantly, s60(2) provides:

> *"(2) In this Act, a **declaration of relevant relationships**, in relation to a liquidator of a company, means a written declaration:*
>
> *(a) stating whether any of the following:*
>
> *(i) the liquidator;*
>
> *(ii) if the liquidator's firm (if any) is a partnership—a partner in that partnership;*
>
> *(iii) if the liquidator's firm (if any) is a body corporate—that body corporate or an associate of that body corporate;*
>
> *has, or has had within the preceding 24 months, a relationship with:*

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[26] *Fiorentino* Ibid footnote 1 at [774-791]
[27] *Fiorentino* Ibid footnote 1 at [776-788]

(iv) the company; or

(v) an associate of the company; or

(vi) a former liquidator, or former provisional liquidator, of the company; or

(vii) a former administrator of the company; or

(viii) a former administrator of a deed of company arrangement executed by the company; and

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

[778] We note that the Board recently considered the purpose and requirements of administrators' DIRRIs in ASIC v Fernandez [02/VIC13 – 29 October 2013]. At [213], the Panel noted the underlying rationale for requiring administrators' DIRRIs was the need to provide creditors with relevant information:

> *"[213] A key step in the administration process is the opportunity, at the first meeting of creditors, to consider whether to remove an administrator and substitute another. Creditors will often have limited information relevant to that decision. The provision will not be meaningful if information relevant to the decision is withheld from those empowered to make the decision".*

[779] We note, further, that administrators' DIRRIs received some recent consideration ASIC v Franklin [2014] FCA 68. At [15] *and following, Davies J referred to the explanatory memorandum relating to the introduction of the provisions requiring DIRRIs and said:*

> *"[15] The explanatory memorandum stated that it was proposed "to address concerns about the independence of administrators by requiring administrators to declare any "relevant relationships" which "will allow creditors to make a more informed decision about whether to replace the administrator": at [4.71]. Paragraphs [4.72] and [4.73] state:*
>
> > *'[4.72] The declarations will be provided to creditors with the notice of the first meeting of creditors. The categories of relationship that an administrator is required to declare are targeted around those parties that have the power to initially appoint an administrator. While conflicts may arise due to relationships with other parties, it considered that a relationship with these parties would pose a particular concern for creditors, and as such the administrator should be required to disclose them and explain why they do not amount to a conflict of interest or duty. While a conflict may not arise at law, the existence of such a relationship may be one factor for creditors to take into account when considering whether to replace the administrator. A key theme of the reforms in this Bill is to provide creditors with better*

information and more power to manage external administration processes.

[4.73] The question of whether a 'relevant relationship' exists between an administrator and another person will be a matter of fact and degree. However, the term should be interpreted in light of the object of the provision to alert the creditors to relationships that may not give rise to a conflict, but which may be relevant in considering whether to replace the administrator. This would include relationships where a conflict might be perceived to exist in the absence of full disclosure. It does not require the disclosure of trivial interpersonal connections.'

[16] The legislation enacted gives effect to that policy by imposing the duty on administrators to disclose relationships, whether or not they are potentially disqualifying, coupled with the duty to provide reasons as to why those relationships do not, in the administrator's view, result in a conflict of interest or duty. The declaration thus provides an important safeguard for creditors, if only because ***they are entitled to assume that any professional, personal or business relationship between the administrator or his/her firm and the company or its associates will be disclosed to them****".* (emphasis added)

[780] In our view, the issues in the present case are analogous to those arising in relation to administrators' DIRRIs. We note that the Explanatory Memorandum to which Davies J referred in ASIC v Franklin continued, at paragraph 4.76, as follows:

"[4.76] In light of the changes to the process for commencing creditors' voluntary liquidation, included at Part 3 of Schedule 1 of this Bill, stakeholders have raised concerns that similar concerns about the independence of liquidators may arise in relation to that proceeding. Accordingly, the requirement to disclose relevant relationships has been extended to liquidators in a creditors' voluntary liquidation. The requirement to disclose indemnities has not been extended to liquidators, given the different nature of that proceeding."

[781] Thus, in the present case, the first item on the agenda at the 16 April 2008 meeting of creditors was to consider whether to retain the liquidators appointed by the members. In order for creditors to have given meaningful consideration to that issue, they needed information relevant to that question.

[782] Section 506A, read with s60, rather assumes that a liquidator providing a DIRRI will have considered whether or not he or she has a conflict and will have determined that question in the negative; it is to be assumed that a conflicted liquidator would not accept the appointment in the first place. Nevertheless, it must be the case that s506A applies even where a liquidator has decided to take the appointment where he or she does have a conflict. No doubt, in such a case, it would be difficult or impossible for the liquidator to provide valid reasons for a belief of absence of conflict (s60(2)(b)). But the liquidator must nonetheless provide a DIRRI.

[783] The critical matter upon which the requirement to disclose depends is the existence of a "relationship".

[784] We were not referred to any authority which specifically addresses the meaning of "relationship" in the context of liquidators' DIRRIs.

[785] Mr Russell submitted that the Act was deliberately ambiguous in referring to any "relationship" and not limiting the concept to a business relationship or personal relationship. He submitted that the concept had to be understood in the light of the purpose of the section, namely to promote transparency and to require disclosure of any matter which could constitute a conflict of interest or duty or a perception thereof. He submitted that whilst attendance by a liquidator at meetings with a director or other officers might not, in itself, constitute a "relationship" for the purposes of the section, here, the circumstances went beyond merely introductory meetings, to an involvement by the liquidator in strategy concerning the potential liquidation of ERB and the retaining of counsel to advice in that regard.

[786] As already indicated, the meaning of "relationship" in s506A must be considered in the light of the objects which the section was designed to serve. Those objects are to ensure disclosure of information which will permit the creditors to understand any material connection (whether or not involving a conflict) between the liquidator and the company, which may affect their decision to confirm the liquidator's appointment.

[787] Having said that, the term "relationship" was specifically used in the section, rather than some wider concept such as "contact". Thus, there must be a sufficient association between the liquidator and the company (or other party) to warrant the description of a "relationship". This would ordinarily require some active involvement by the liquidator rather than merely passive contact. Whether contact amounts to "a relationship" requiring disclosure will depend upon the nature and extent of the contact and the role played by the liquidator.

[788] It is entirely normal for contact of an introductory and informational kind to occur between a liquidator and the company or its directors prior to a winding up, particularly in the case of a voluntary winding up. For instance, directors will often meet the liquidator to explore the appropriateness of winding up. The liquidator may outline the process and the likely consequences of a winding up. There may be some discussion concerning alternative options. In our view, such contact would not normally constitute a "relationship" for the purposes of the section. Such contact is of a neutral kind and bound up with a foreshadowed liquidation. It does not involve a liquidator taking an active role in the company's or directors' affairs, except with regard to the liquidation itself. Creditors would expect contact of this sort and would not regard it as a matter relevant to their choice of liquidator. But if a liquidator becomes more deeply involved in the company's internal pre-liquidation affairs and provides any significant advice about how the company could organise its pre-liquidation affairs, this is likely to constitute a relevant "relationship."

98. Having considered the parties' submissions and the relevant legal framework in relation to the question of whether based on the facts in this matter there was a relationship that Mr Joubert was required to disclose to the creditors of WOT

and AH in the DIRRIs that Mr Joubert sent on the 6 November 2009 and 17 December 2009 respectively, we have concluded that there was.

99. In reaching our conclusion we have considered the argument submitted by the Respondent that the association Mr Joubert had with ECG and the association Ms Foster had with ECG was not sufficient to create a relevant relationship between Mr Joubert and Ms Foster because it was based on an impermissible "*double jump*" in the definitions in the Act.

100. In our view this argument is flawed. Section 9 of the Act simply states that *declaration of relevant relationships* has the meaning given in s60. Relevantly, ss60(2) provides:

> "*(2) In this Act, a **declaration of relevant relationships**, in relation to a liquidator of a company, means a written declaration:*
>
> *(a) stating whether any of the following:*
>
> *(i) the liquidator;*
>
> *(ii) if the liquidator's firm (if any) is a partnership—a partner in that partnership;*
>
> *(iii) if the liquidator's firm (if any) is a body corporate—that body corporate or an associate of that body corporate;*
>
> *has, or has had within the preceding 24 months, a relationship with:*
>
> *(iv) the company; or*
>
> *(v) an associate of the company; or*
>
> *(vi) a former liquidator, or former provisional liquidator, of the company; or*
>
> *(vii) a former administrator of the company; or*
>
> *(viii) a former administrator of a deed of company arrangement executed by the company; and*
>
> *(b) if so, stating the liquidator's reasons for believing that none of the relevant relationships result in the liquidator having a conflict of interest or duty.* "

101. The definition in ss60(2) would have required Mr Joubert as liquidator of WOT and AH to disclose his association with Ms Foster in the preceding 24 months if that association constituted a "*relationship*". Mr Cook argued as noted that a liquidator's relationship with a company to which he is appointed as liquidator does not extend to a relationship or obligations to its directors and it was therefore incorrect to assert that there was any relevant relationship between Mr Joubert and Ms Foster within ss60(2).

102. Whether or not that proposition is correct (although we do not think it is correct) there was more to Mr Joubert's association with Ms Foster than was encompassed by Mr Cook's proposition; Ms Foster as the director of WOT and

AH had been responsible for signing the documents relevant to Mr Joubert's appointment as liquidator to both companies, a matter admitted by Mr Joubert. In his evidence in cross-examination Mr Joubert agreed that a reason that he formed the view that he needed to disclose his relationship with Ms Foster in the Amended WOT and AH DIRRIs was that she was involved in the decision to appoint him. Further, he agreed that one of the bases upon which he had agreed to undertake the liquidations of each of the companies of which Ms Foster was a director was that he was expecting to be paid by her. In our view those facts give rise to aspects of his specific relationship with Ms Foster as a director of the relevant companies, about which creditors were entitled to be informed.

103. The Board, in its decision in *Fiorentino*[28], concluded that the question of what may constitute a relationship for the purposes of ss506A must be considered in light of the objects that the section was designed to serve, namely to ensure disclosure of information that will permit creditors to understand any material connection (whether or not that involves a conflict of interest) between the liquidator and the company, which may affect their decision to confirm the liquidator's appointment. Our view, that Mr Joubert's relationship with Ms Foster was an association that ought to have been disclosed, is supported by the commentary in the Explanatory Memorandum referred to in the Board's decision in *Fiorentino*[29] that the categories of relationship that were being targeted by the revised DIRRI obligations being proposed included parties who have the power initially to appoint an administrator. In our view the comments in the Explanatory Memorandum relating to the introduction of the provisions requiring DIRRIs, although referring to administrator's DIRRIs, are equally applicable to liquidator's DIRRIs being, as they are, based on the rationale that any relationship with those parties could pose a particular concern for creditors such that an administrator (or liquidator) should be required to disclose them and explain why they do not amount to a conflict of interest or duty.

Were the DIRRIs sent to creditors in WOT and AH "false"?

104. Throughout the SOFAC the word "*false*" has been used to describe documents that were alleged to be incorrect, in some instances in the context of an allegation of dishonesty and in other instances simply on the ground that the relevant document or form did not accurately represent certain facts.

105. The Macquarie Dictionary[30] definition of "*false*" includes the following:

> "*1. not true or correct; erroneous*
> *2. uttering or declaring what is untrue*
> *3. deceitful, treacherous, faithless*
> *4. deceptive; used to deceive or mislead*
> *5. not genuine*"

106. In *Holt v Cameron* (1979) 27 ALR 311 King CJ noted at [page 315] that the word "*false*" is capable of meaning merely "*incorrect*" or "*inaccurate*".

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[28] *Fiorentino* Ibid footnote 1 at [774-788]
[29] *Fiorentino* Ibid footnote 1 at [779]
[30] The Macquarie Dictionary, Sixth Edition - October 2013

107. Having regard to the Macquarie Dictionary definition and supported by the case authority cited we have proceeded in this decision on the basis that any findings we make on the evidence that a document was not true or correct, while amounting to a finding that the document was false, does not carry with it any greater connotation that may be derived from another of the accepted ordinary meanings of false as set out in paragraph 105 hereof, that there was any deceit or dishonesty involved.

108. Adopting this approach we have considered whether the initial DIRRIs made by Mr Joubert with respect to WOT and AH were "*false*" as alleged. Based on our conclusion that both those DIRRIs should have included a disclosure of Mr Joubert's relevant pre-existing relationship with Ms Foster, we conclude that each of the DIRRIs was false.

Did Mr Joubert act without due care and diligence in making the WOT and AH DIRRIs?

WOT (Contention 1)

109. It was common ground that by the time Mr Joubert issued the WOT DIRRI on 6 November 2009, he was aware that Ms Foster was a director of ECG. We have already made a finding that the WOT DIRRI was false, in the sense that it was incorrect, because Mr Joubert's relationship with Ms Foster was a "*relevant relationship*" that should have been disclosed to creditors (see paragraph 108 hereof). The remaining question for consideration in respect of this allegation therefore is whether, based on the evidence, Mr Joubert made the false WOT DIRRI without the appropriate standard of due care and diligence required of him as statutory officer under s180 of the Act.

110. In *ASIC v Dunner*[31] Middleton J said*:*

"*[27] Insolvency practitioners are subject to standards imposed by:*

(a) Part 2D.1 of the Act (as officers of a corporation, because administrators, liquidators and receivers are all included in the definition of "officer" in s9 of the Act);

(b) equitable principles applicable to fiduciaries, including a duty to avoid conflicts of interest; and

(c) industry codes.

[28] As officers, liquidators and receivers are subject to the same statutory duty of care and diligence as directors under s180 of the Act.

[29] Specifically in relation to liquidators, I note that a liquidator is appointed and paid to exercise a particular professional skill, and a high standard of care and diligence is required in the performance of their duties: Pace v Antlers Pty Ltd (in liq) (1998) 80 FCR 485 at 497; 26 ACSR 490 at 501 ("Pace").

[30] In Pace at FCR 499; ACSR 503, Lindgren J stated that a liquidator:

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[31] *ASIC v Dunner* (2013) FCA 872 at [27-30]

... must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. "All the circumstances" will include the facts that a liquidator is a person practising a profession, that a liquidator holds himself or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work. "All the circumstances" will also include the fact that some decisions and courses of action which a liquidator is called upon to consider will be of a business or commercial character, as to which competent liquidators acting with due care, but always without the benefit of hindsight, may have differences of opinion."

111. As noted by his Honour, s180 of the Act is a legislative source of the liquidator's duty to act with care and diligence.

112. In *Australian Securities and Investments Commission v Adler*[32] Santow J made the following comment highlighting that the relevant conduct is to be assessed objectively:

"*In determining whether a director has exercised reasonable care and diligence one must ask what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances if he or she was acting on their own behalf.*"

113. There are other sources of a liquidator's duty to act with care and diligence, one of which is found in the Code of Ethics for Professional Accountants ("APES 110") issued by the Accounting Professional and Ethical Standards Board. At the relevant time in 2009 it provided:

"*130.1 The principle of professional competence and due care imposes the following obligations on Members:*

(a) To maintain professional knowledge and skill at the level required to ensure that Clients or employers receive competent professional service; and

(b) To act diligently in accordance with applicable technical and professional standards when providing their services."

114. In the Board's decision in *Fiorentino*[33], the Board considered the disclosure provisions in ss506A(2) of the Act and observed that they involved serious obligations, a failure to comply with which amounts to an offence.

115. Mr Joubert denied making a false statement in the WOT DIRRI without due care and diligence but admitted a lack of due diligence in failing to identify the fact that as at 6 November 2009 he was a liquidator of another company of which Ms Foster was a director.

116. Mr Joubert's supplementary statement dealt with the WOT DIRRI. Mr Joubert's evidence was that he did not have a present recollection of signing the initial DIRRI in relation to WOT. He deposed to the existence of the amended DIRRI

[32] *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at [372(4)]
[33] *Fiorentino* Ibid footnote 1 at [774 to791]

dated 25 November 2009 on the WOT file. This was also Mr Joubert's evidence in cross-examination.

"*Q. Did you know at the time you sent the first DIRRI that Ms Foster was also a director of – this is the first DIRRI for WOT – was also a director for ECG and that you were required to declare it in that first DIRRI?*

A. I don't recall."

117. As discussed in *Fiorentino*[34], the relevant DIRRI disclosure obligations are serious obligations and the standard expected of professional liquidators is high.

118. In our view it is reasonable to expect having regard to the high standards expected of liquidators that a registered liquidator in Mr Joubert's position appropriately exercising his duty of care and diligence in the circumstances of Contention 1 would have ensured he was aware of the applicable technical and professional standards regarding DIRRI disclosures and would therefore have carefully turned his/her mind to the existence of possible relevant relationships having regard to those requirements before finalising a DIRRI to creditors. A reasonably competent liquidator who did that with the objective of ensuring full transparency to creditors of any relevant pre-existing relationships, whether or not they presented a conflict of interest or a potential conflict of interest to the appointed liquidator would, in our view, have deemed a disclosure regarding his relationship with Ms Foster as falling within the relevant requirements.

119. Mr Joubert simply does not recall his state of knowledge at the time he made the first WOT DIRRI. However, the relevant documentary evidence, which was not in issue, demonstrates that when Mr Joubert sent out the first WOT DIRRI on 6 November 2009, he was aware of facts and circumstances from which, in our view, he should reasonably have formed the opinion that there was a relevant pre-existing relationship that required disclosure. Indeed, the fact that Mr Joubert prepared an amended WOT DIRRI on 25 November 2009, only a few weeks later corroborates the proposition that if he had turned his mind to the matter of disclosure when he made the first WOT DIRRI he would have formed the view that there was a relevant pre-existing relationship to be disclosed.

120. We are satisfied that the evidence established with respect to Contention 1 demonstrates that Mr Joubert failed to exercise the degree of care and diligence of a reasonably competent liquidator when he did not disclose his relationship with Ms Foster to WOT creditors on 6 November 2009 and in so doing failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

AH (Contention 2)

121. We refer to and repeat our discussion of the relevant legislative and general law duties of a liquidator to act with due care and diligence in paragraphs 109-113 and paragraph 118 hereof.

122. The facts and evidence relevant to this allegation are set out in paragraph 92 hereof. The documentary evidence shows that:

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[34] *Fiorentino* Ibid footnote 1 at [774-791]

(a) Mr Joubert had formed the view by 25 November 2009, only 22 days before he sent the DIRRI to creditors of AH on 17 December 2009 that his relationship with Ms Foster was a relevant disclosure that should be made in an amended DIRRI for WOT (although whether he sent the amended DIRRI was in issue); and

(b) the pre appointment checklist on the AH matter prepared sometime between 10 and 16 December 2009 included a hand written notation "*Karen Foster*" as director, which name had been circled.

123. Yet, the AH DIRRI sent to creditors on 17 December 2009 did not make disclosure of a relevant pre-existing relationship with Ms Foster. While it is possible in relation to Contention 1 that Mr Joubert simply did not turn his mind to the issue of whether there was a relevant pre-existing relationship that required disclosure in the WOT DIRRI, the evidence in respect of the AH DIRRI demonstrates Mr Joubert's knowledge of the existence of the relevant relationship in question in the broader sense described by Devlin J in *Armstrong v Strain*[35] when he said:

> "*A man may be said to know a fact when he has been told it and pigeon holed it somewhere in his brain where it is more or less accessible in case of need. In another sense of the word a man knows a fact only when he is fully conscious of it. For an action of deceit there must be knowledge in the narrower sense; and conscious knowledge of falsity must always amount to wickedness and dishonesty. When judges say therefore, that wickedness and dishonesty must be present, they are not requiring a new ingredient for the tort of deceit so much as describing the sort of knowledge which is necessary.*"

124. The lack of disclosure of a relationship with Ms Foster in the AH DIRRI despite the additional facts reveals a more serious omission on Mr Joubert's part than evidenced by Contention 1.

125. As already noted in the context of Contention 1 it is in our view reasonable to expect that a registered liquidator appropriately exercising his duty of care and diligence would carefully turn his/her mind to the existence of possible relevant relationships before finalising a DIRRI to creditors with the objective of ensuring full transparency to the creditors of any relevant pre-existing relationships, whether or not they present a conflict of interest or a potential conflict of interest.

126. Mr Joubert does not recall the relevant circumstances nor could he provide an explanation as to why the AH DIRRI did not make disclosure of his relationship with Ms Foster. However, it is clear from the documentary evidence that even if it had not been him but one of his employees who had identified the relevance of the relationship with Ms Foster, or if it had been him and he had forgotten, had he referred to the AH file before signing off on the AH DIRRI, that information would have been brought to his attention.

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[35] *Armstrong v Strain* [1951] 1 TLR 856 *(affirmed on appeal)*:[1952] 1 KB 232 at [871] *and cited with approval in Wood v Balfour* [2011] NSWCA 382

127. We are satisfied that the evidence established with respect to Contention 2 demonstrates that Mr Joubert failed to exercise the degree of care and diligence of a reasonably competent liquidator when he did not disclose his relationship with Ms Foster to AH creditors in the AH DIRRI sent on 17 December 2009 and in so doing failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Findings on Contentions 1 and 2

128. For these reasons we find that Contentions 1 and 2 are established insofar as they allege that Mr Joubert acted without due care and diligence when he failed to disclose a relevant relationship with Ms Foster in the WOT and AH DIRRIs respectively.

129. We find that Contentions 1 and 2 are established.

Contentions 3-6

130. In Contentions 3, 4, 5 and 6 ASIC alleged that within the meaning of ss1292(2)(d)(i) of the Act, Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he failed to disclose indemnities received in the initial DIRRIs to creditors and/or made false declarations in relation to the CVLs which took place in WOT (Contention 3); AH (Contention 4); PMG (Contention 5); and ZAG (Contention 6). It was common ground that none of the DIRRIs issued in respect of the above companies disclosed the existence of an indemnity.

131. The obligation of a liquidator to declare an indemnity in the DIRRI arose at the relevant time with respect to Contentions 3-6, from the provisions of the 2008 Code at Clause 6.14(d).

132. Relevant clauses of the 2008 Code which were then in force are as follows:

> *Clause 4.2* *Defined Terms - "Indemnity refers to any payment made as well as arrangement whereby payments are promised"*
>
> *Clause 6.14* *Declaration of Independence and Relevant relationships (DIRRI) - "Disclosure of interests or relationships that create a lack of independence, or a perception of a lack of independence, does not remedy or cure the situation. The provision of a DIRRI is a process for identifying relationships that are not threats to independence but need to be disclosed to creditors to ensure transparency. Declarations of relevant relationships and Declarations of Indemnities are required under the Corporations Act in certain instances. It is intended that the provision of a DIRRI in the template prepared by the IPA meets, and goes beyond those statutory requirements.*
>
> *…For all corporate… appointments (excluding receiverships and member's voluntary liquidations), at the earliest practical opportunity, the practitioner* ***must*** *(emphasis added) provide to creditors a DIRRI comprising:*
>
> *…(d) A declaration of indemnities disclosing:*

- *the identity of each indemnifier and the extent and nature of each indemnity,(other than statutory indemnities); and*

- *any payment made by or for the insolvent on account of the practitioners remuneration and disbursements.*"

133. There are no provisions in the Act that are directly relevant to a consideration of the nature of the registered liquidator's obligation to disclose an indemnity in the DIRRI in the context of a CVL.

134. The facts giving rise to each of the alleged indemnities can be summarised as follows:

WOT

(a) The indemnity was alleged to arise from an arrangement between Mr Joubert and Mr Cassaniti made before Mr Joubert's appointment as liquidator of WOT on 6 November 2009 whereby Mr Cassaniti and/or CAP Accounting promised to pay Mr Joubert's fees at least to an amount of $6,000 as liquidator of WOT ("*the WOT Indemnity*"). To the extent it was an enforceable arrangement with Mr Cassaniti or CAP Accounting Mr Joubert denied there was an indemnity. The relevant facts were not in issue namely:

(i) that there had been at least some discussion between Mr Cassaniti and Mr Attia of CAP Accounting prior to compiling the appointment documents for WOT on or before 1 October 2009 (although Mr Joubert could not recall the date);

(ii) on 1 October 2009 Mr Joubert sent a letter addressed to the directors and secretary of WOT which enclosed draft documentation to place WOT into liquidation by way of CVL and *inter alia* requiring the payment of $15,000 together with the cost of statutory advertising estimated at $1,500 to Joubert Insolvency's trust account to cover the costs of preparing the company for placement into liquidation. The letter advised that the liquidation process would not be initiated until payment was received;

(iii) Mr Joubert indicated in the WOT DIRRI that he had not been indemnified, with the exception of indemnities available under statute;

(iv) on 17 November 2009, Mr Joubert chaired a meeting of WOT creditors during which he advised the creditors that the remuneration of the liquidator had not been indemnified by the company's directors; and

(v) on 17 January 2010, Mr Joubert invoiced CAP Accounting for the sum of $6,000 for professional services in the WOT liquidation and on 21 January 2010, CAP Accounting paid the invoice.

AH

(b) The AH indemnity was also alleged to arise from an arrangement between Mr Joubert and Mr Cassaniti, made before Mr Joubert's appointment as liquidator of AH on 17 December 2009 whereby Mr Cassaniti and/or CAP Accounting promised to pay Mr Joubert's fees at least to an amount of $5,000 as liquidator of AH ("*the AH Indemnity*"). To the extent it was an enforceable arrangement with Mr Cassaniti or CAP Accounting Mr Joubert denied there was an indemnity. The relevant facts were not in issue namely:

(i) in December 2009, Mr Joubert met with Mr Cassaniti of CAP Accounting to discuss the AH appointment;

(ii) on 10 December 2009, Mr Joubert sent a letter to the directors and secretary of AH enclosing draft documentation to place AH into liquidation by way of CVL and *inter alia* requiring $15,000 together with the cost of statutory advertising estimated at $1,500 to be paid into Joubert Insolvency's trust account to cover the costs of preparing the company for placement into liquidation. The letter advised that the liquidation process would not be initiated until payment was received;

(iii) Mr Joubert indicated in the AH DIRRI that he had not been indemnified, with the exception of indemnities available under statute;

(iv) on 29 December 2009, Mr Joubert chaired a meeting of AH creditors during which he advised the creditors that the remuneration of the liquidator had not been indemnified by the company's directors;

(v) on 10 June 2011, $5,000 was deposited to the AH Bank account number 30-0562, with the reference "*payment transfer from Joubert IN 10-June*". According to Mr Joubert's internal documents the sum of $5,000 was received on 10 June 2011 and transferred from an account entitled "*pre-appointment bank account*"; and

(vi) on 1 September 2011 Mr Joubert issued tax invoice no. 198 in the sum of $4,980 for "*our professional costs rendered in relation to the voluntary administration of AH as approved by creditors*" and Mr Joubert deducted and paid to himself $4,980.80 for liquidation fees

PMG

(c) The PMG indemnity was also alleged to arise from an arrangement between Mr Joubert and Mr Cassaniti and/or CAP Accounting whereby Mr Cassaniti and/or CAP Accounting promised to pay Mr Joubert's fees at least to an amount of $5,000 as liquidator of PMG ("*the PMG Indemnity*"). To the extent there was an enforceable arrangement with Mr Cassaniti or CAP Accounting Mr Joubert denied there was an indemnity. The relevant facts were not in issue namely:

(i) On 26 May 2010 Mr Joubert received an email from Ms Laura Gentilini, a CAP Accounting staff member, requesting that Mr Joubert provide them with appointment documents for PMG.

(ii) Mr Joubert sent a letter to the directors and secretary of PMG on 28 May 2010 enclosing draft documentation to place PMG into liquidation by way of CVL and *inter alia* requiring $15,000 together with the cost of statutory advertising estimated at $1,500 to be paid into Joubert Insolvency trust account to cover the costs of preparing the company for placement into liquidation. The letter advised that the liquidation process would not be initiated until payment was received.

(iii) On 28 June 2010 Mr Joubert sent out a circular to creditors advising of his appointment enclosing a DIRRI in which Mr Joubert declared he had not been indemnified in relation to the PMG administration.

(iv) On 9 July 2010, Mr Joubert chaired a meeting of PMG creditors during which he advised the creditors that the remuneration of the liquidator had not been indemnified by the company's directors.

(v) On 2 November 2010 Mr Joubert's internal document records that $5,000 was received into the PMG bank account.

ZAG

(d) The indemnity in ZAG was alleged to arise from an arrangement between Mr Joubert and Mr Cassaniti and/or BANQ Accountants ("BANQ") and/or Mr Mohamad Irshad Rosunally ("Mr Rosunally") (a director of ZAG) whereby Mr Cassaniti and/or BANQ and /or Mr Rosunally promised to pay Mr Joubert's fees at least to an amount of $6,000 as liquidator of ZAG ("the ZAG Indemnity") As in respect of WOT, AH and PMG, Mr Joubert denied he had an enforceable relationship with any party to pay his fees. The relevant facts were not in issue namely:

(i) On 5 January 2010 Mr Joubert had sent a letter to the directors and secretary of ZAG enclosing draft documentation to place ZAG into liquidation by way of CVL and *inter alia* requiring $10,000 (excluding GST) together with the cost of statutory advertising estimated at $1,500 (excluding GST) to be paid into Joubert Insolvency's trust account to cover the costs of preparing the company for placement into liquidation. The letter advised that the liquidation process would not be initiated until payment was received.

(ii) On 6 January 2010 Mr Joubert under cover of a circular to creditors enclosed a DIRRI signed by Mr Joubert in which he declared that he had not been indemnified in relation to the ZAG administration, other than indemnities he may be entitled to under statute.

(iii) On 16 June 2010 $6,000 was deposited into ZAG's cash account for Mr Joubert's liquidation fees and $600 was deposited into ZAG's flexi account for Mr Joubert's liquidation fees.

(iv) On 6 July 2010 Mr Joubert, or a member of his staff transferred $3,600 from ZAG's cash account into ZAG's flexi account and withdrew $3,997.40 for payment of liquidation fees.

The parties' submissions

135. ASIC submitted that in each of the four liquidations referred to in Contentions 3-6 an arrangement whereby payments were promised could be inferred. In support of that inference ASIC submitted that there are no notes or working papers on any of the relevant files that would indicate that Mr Joubert was assuming responsibility as liquidator of the companies without an expectation of payment and the available evidence was consistent with Mr Joubert looking to secure payment of his fees. ASIC further submitted that the distinction drawn by Mr Joubert between an enforceable and an unenforceable arrangement to pay his fees is not a relevant distinction having regard to the wording of the 2008 Code but nevertheless showed that Mr Joubert had turned his mind to the question of whether there was an arrangement for payment of fees in place at the time he prepared each of the relevant DIRRIs.

136. Mr Joubert submitted that there was no obligation under the 2008 Code to include a declaration concerning the existence of an indemnity or any "arrangement" with CAP Accounting in the DIRRIs the subject of Contentions 3-6 inclusive and further submitted that:

(a) There was no direct evidence of any promise by CAP Accounting or Mr Cassaniti and/or BANQ Accounting or Mr Rosunally to pay his fees and although the facts could lead to an inference that there was an arrangement[36] to do so would ignore the evidence of Mr Joubert and to consider the specific facts out of their proper context which is not appropriate because as McDougall J held in *Douglas Aerospace*[37], after referring to *Associated Midland*, the inference must be considered in light of other evidence as to the existence or otherwise of a contract.

(b) Mr Joubert's evidence was that he accepted the appointments and did the work in the expectation that CAP Accounting, as a firm of professionals referring work to him as a professional, would prevail upon their clients, the directors of the relevant companies, past or present or both, to pay him. His evidence was that he had no belief that he had any enforceable agreement with CAP Accounting whereby he could demand payment from them of his fees;

(c) the objective evidence bears out Mr Joubert's evidence as there was no evidence of any demand being made by Mr Joubert to CAP Accounting for payment of fees even though he had done work months before payment was received; he only received payments in round amounts many months later; he was notified by CAP Accounting as to when they received money, at which time only then did he create an invoice (i.e.: the news that payment was coming generated the issue of an invoice); Mr Joubert stopped accepting referrals from CAP Accounting because he was not being paid his fees;

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[36] *Associated Midland Corporation Ltd v Bank of New South Wales* (1984) 51 ALR 642 *("Associated Midland")*
[37] *Douglas Aerospace Pty Ltd v Indistri Engineering Albury Pty Ltd* [2014] NSWSC 1445 " *Douglas Aerospace")*

(d) ASIC's submissions as to the proper construction of the 2008 Code were flawed. In support of this submission the Panel was referred to *Kelly*[38] where McHugh J said that the proper course is to read words of a statutory definition into the substantive enactment and then construe the substantive enactment in its context and bearing in mind its purpose. Mr Joubert's counsel argued that if this were done then it was not clear whether the definition was intended to be exclusive or inclusive; and

(e) finally that the meaning of promise as defined by the Merriam Webster dictionary is a statement telling someone you will definitely do something or that something will definitely happen in the future and as such gives rise to legally enforceable obligations when supported by consideration as in this case.

Mr Joubert's evidence

137. Mr Joubert's relevant evidence in cross-examination may be summarised as follows:

(a) He did not understand that there was a disclosable indemnity because he thought that would amount to him having an enforceable right which at the time he did not think he had;

(b) however, he said he did expect to be paid by Ms Foster and had an expectation that CAP Accounting would make arrangements with their clients, to pay him the fees that he either quoted or was offered at the time of consenting to the appointment;

(c) his expectation rose no higher than a belief that a firm of accountants who referred work to another professional would do so on the basis that the other professional would be paid for their work in due course. However, his understanding at all times was that if for whatever reason the client of CAP Accounting did not pay fees or provide CAP Accounting with any money to pay fees he had no recourse against CAP Accounting for those fees;

(d) he said that he would make inquiries of CAP Accounting from time to time as to when he might expect payment;

(e) he confirmed that he had never directly contacted a director regarding payment of his fees;

(f) his practice now is to disclose these types of arrangements in DIRRIs as an indemnity;

(g) following questioning as to his knowledge regarding Ms Foster's capacity to pay fees, Mr Joubert said that he was assured by CAP Accounting that his remuneration would be paid by the directors;

(h) he acknowledged that he did not know anything about the capacity of Mr Rosunally, the director of ZAG, to pay his fees, but that at all times he was concerned to ensure that his fees would be paid;

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[38] *Kelly v R* [2004] HCA 12 at [103] ("*Kelly*")

(i) he confirmed that at the time in relation to each liquidation he had been told there were no assets of the company against which his fees could be paid and even though he did not hear back from the directors regarding the request made for payment of fees he nevertheless took the jobs and commenced the liquidation upon the request of CAP Accounting or BANQ;

(j) the invoice issued for services rendered in the WOT matter was issued to CAP Accounting and in the other matters they were addressed to the company in liquidation but there was no instance of an invoice being addressed to a director of the company. Mr Joubert said that his understanding was that the Accountants were a conduit for the moneys to be paid and he did not have an enforceable right against either BANQ or CAP Accounting. Mr Joubert did not concede that he ever had either an agreement or other arrangement with CAP Accounting to pay his fees;

(k) he did not know whether he put his mind to whether or not he had any relevant payment arrangement to disclose when he made the relevant DIRRIs but he said that he did turn his mind to a distinction between an enforceable and unenforceable right to payment at the time because he did not believe that he had an enforceable right against CAP Accounting, or against the directors for that matter; and

(l) he did not accept that his failure to declare these matters was a failure of due care and diligence.

Was there an indemnity arrangement within the meaning of the 2008 Code?

138. The threshold question for the Panel in relation to Contentions 3-6 is whether, within the meaning of the 2008 Code there was an indemnity which required disclosure in the DIRRIs. If there was an arrangement which amounted to an indemnity within the meaning of the 2008 Code, then based on the evidence adduced it is clear that there had been no disclosure in the DIRRIs of WOT, AH, PMG and ZAG and the question for this Panel will be whether those omissions amount to a failure by Mr Joubert to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

139. As recognised by the parties' submissions, there is no direct or documentary evidence of the existence of an indemnity. Nor is it in issue that the facts at least demonstrate in each of Contentions 3-6 that Mr Joubert's understanding was that he would be paid for the liquidations, that the relevant accounting firms would be the conduit for payment and that in each case he ultimately received payment via one or other of the accounting firms.

140. The Panel is asked to infer the existence of an indemnity in each case from the objective facts and circumstances. Mr Cook's submission that we are prevented from drawing those inferences because to do so would be to ignore the evidence of Mr Joubert is not in our view well founded. Mr Joubert's evidence would only be inconsistent with such inferences, were they to be drawn, if the relevance of the distinction between the arrangement being unenforceable rather than enforceable is valid thereby sustaining an argument that there was no obligation to disclose.

141. The initial question for consideration therefore is whether there is any language in the 2008 Code that implies a legally enforceable arrangement must exist before disclosure was required in a DIRRI.

142. In order to form our view on this question it is relevant not only to consider the specific wording of the relevant section of the 2008 Code requiring disclosure of indemnities but also to bear in mind the overarching purpose of the 2008 Code; that a practitioner must not only be independent but be seen to be independent and must communicate honestly, openly clearly and succinctly with affected parties[39].

143. As already noted, Clause 6.14(d) of the 2008 Code requires a declaration of indemnities disclosing the identity of each indemnifier and the extent and nature of each indemnity (other than statutory indemnities) and Clause 4.2 of the 2008 Code defined indemnity as referring to any payment made as well as to an arrangement whereby payments are promised. We understood Mr Cook's submissions to proceed on the basis that the use of the word "*promise*" in that definition must be translated to require a legally enforceable arrangement both because in the context of professional work being carried out there was consideration for the promise and because the definition of promise in the Merriam Webster dictionary involved telling someone something will definitely happen in the future.

144. In our view the requirement to disclose arrangements whereby payments are promised is neither constricted by the definition of "*promise*" in the way contended for by Mr Cook, nor confined only to legally enforceable arrangements based on the words used in the Code.

145. We note that the Merriam Webster dictionary is an American publication. If a relevant starting point is the consideration of the definition of "*promise*" then the Macquarie Dictionary definition of Australian usage is a more appropriate reference point for considering how the word "*promise*" should reasonably be understood by a practitioner such as Mr Joubert within the context of the 2008 Code.

146. The Macquarie Dictionary definition of promise is as follows[40]

"*promise*

(a) /ˈprɒməs/ (say 'promuhs)

–Noun

1. *a declaration made, as to another person, with respect to the future, giving assurance that one will do, not do, give, not give, etc., something.*
2. *an express assurance on which expectation is to be based.*
3. *something that has the effect of an express assurance; indication of what may be expected.*
4. *indication of future excellence or achievement: a writer that shows promise.*
5. *that which is promised.*

(b) –verb (*promised, promising*)

[39] 2008 Code Page 13

[40] The Macquarie Dictionary, Sixth Edition October 2013

–verb (t)

6. to engage or undertake by promise (with an infinitive or clause): to promise not to interfere.

7. to make a promise of: to promise help.

8. to make a promise of something to.

*9. to afford ground for expecting: *Hughie looked all around with a beaming smile, promising all the entertainment of their lives.–RUTH PARK, 1948.*

10. to engage to join in marriage.

11. to assure (used in emphatic declarations).

–verb (i)

12. to make a promise.

–phrase

*13. **be on a promise**, Colloquial (of a man) to have been led to believe by a woman that they will have sexual intercourse.*

*14. **I promise you**, Colloquial (an intensifier.)*"

147. The scope of this definition supports the view that the word promise is capable of being used both formally and in a less formal more colloquial way and depending on the context may carry a greater or lesser connotation of commitment and the concomitant expectation of fulfilment. The proposition then that in all cases a promise creates a legally enforceable right, as contended by Mr Joubert's counsel, does not, in our view therefore follow. Indeed, the use of the word "*promise*" in the 2008 Code definition, rather than more technical and legal language such as contract or even agreement, supports the view that the scope of "*arrangements whereby payments are promised*" was intended to be broad to capture disclosure of both formal and less formal arrangements. This interpretation is also consistent with the overarching purpose of the 2008 Code referred to in paragraph 142 hereof.

148. For the above reasons we have formed the view that the use of the word promise is no impediment to, nor inconsistent with, the inference we are asked to draw regarding the existence of an indemnity within the relevant definition in the 2008 Code based on the payments falling within the words of the definition "*arrangements whereby payments are promised*".

149. The evidence before us in each of the matters the subject of Contentions 3-6, supports the view that Mr Joubert believed from the outset that he had an arrangement in place with the accountants who referred the work to him that would result in the payment of his professional fees either by the accountants or, if from the directors or the company, via the accountants. There is no direct evidence that the accountants made an assurance or promise that Mr Joubert would be paid although Mr Joubert's evidence is that he expected payment for his services but had no direct knowledge of the directors' capacity to pay while at the same time knowing that there were unlikely to be company assets from which his fees could be paid. In all cases the payments ultimately received by Mr Joubert were made by the accountants and although in all cases he sought but did not receive an upfront payment of his fees from the directors prior to commencing work, he nevertheless proceeded with the liquidations. In our view these facts, which are common to each of Contentions 3-6, support an

inference that the accountants had made an assurance to Mr Joubert that he would be paid for the work he undertook, as does Mr Joubert's own evidence that he had an arrangement in place with the accountants, just not an arrangement that he regarded as legally enforceable. Our view is that arrangements such as those evidenced by the facts in Contentions 3-6 fall within the scope of "*arrangements whereby payments are promised*" in the 2008 Code and the DIRRIs made for WOT, AH, PMG and ZAG should therefore have included a disclosure of the relevant payment arrangements.

150. In our view it is reasonable to expect that a reasonably competent liquidator would have had a clear understanding of the disclosure requirements for DIRRIs under the 2008 Code as this knowledge would be necessary to enable him to carry out or perform his duties adequately and properly and in accordance with the high standards expected of liquidators. If there was uncertainty as to the interpretation to be placed on a provision or definition in the 2008 Code, then those high standards would at least demand a written record of the thought process undertaken or the enquiry made to conclude the most appropriate course. In this matter that would at least have shown that Mr Joubert had turned his mind to the issue and may have provided a basis for a different view on the sufficiency of the relevant conduct depending upon what it recorded. We recognise that whether a disclosure is necessary will not always be black and white although given the overriding objective of DIRRI disclosures, being to provide transparency to creditors, a policy of disclosing more rather than less would seem desirable. In the circumstances of these Contentions we have formed the view that Mr Joubert's failure to disclose the existence of an indemnity in the relevant DIRRIs was a failure to act with due care and diligence and demonstrates a failure to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act. The alternative bases alleged in Contentions 3-6 to a failure to disclose were the allegations that the DIRRIs were false. It follows that the DIRRIs were "false" in the sense of being incorrect because they failed to make full and proper disclosure according to the relevant requirements of the 2008 Code and we find that these allegations are also established.

Findings on Contentions 3-6

151. We find that Contentions 3, 4, 5 and 6 are established.

Contentions 7-9

152. Contentions 7-9 contend that within the meaning of ss1292(2)(d)(i) of the Act, Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in failing to disclose indemnities in the amended DIRRIs and/or made false declarations in relation to WOT, AH and PMG.

Contention 7

153. The Amended WOT DIRRI, as already discussed in the context of Contention 1 was apparently prepared on 25 November 2009. ASIC alleges the Amended WOT DIRRI was not sent to creditors. Mr Joubert does not admit this

allegation. There is no evidence that establishes that the Amended WOT DIRRI was sent to creditors.

154. On the basis of the reasoning set out in relation to Contentions 3-6 our view is that any Amended WOT DIRRI sent to creditors should have included details of the indemnity arrangement with CAP Accounting. ASIC's case, however, is that the Amended WOT DIRRI was not sent and circumstances evidencing the contrary were not established even though Mr Joubert did not admit those allegations. Deficiencies in a file copy are not sufficient to establish that the amended DIRRI was either false or incorrect in any relevant sense because the allegation does not ground a relevant representation having been made.

Finding on Contention 7

155. We find that Contention 7 is not established.

Contentions 8 and 9

156. The facts in relation to AH and PMG differ from Contention 7 insofar as Mr Joubert did, on 8 September 2011 and 6 September 2011 respectively, send amended DIRRIs to the creditors of AH and PMG in which he stated that he had not been indemnified in relation to the AH and PMG liquidations other than indemnities he may be entitled to under statute. He did however, in the amended DIRRIs, disclose a payment which he identified as payments received from a director of $5,000 being a voluntary contribution for the fees and expenses associated with the liquidations of AH and PMG respectively.

157. The Amended SOFAC alleged in respect of AH and PMG that Mr Joubert had failed to disclose indemnities received in the Amended DIRRIs. The relevant particulars with respect to the Amended AH DIRRI alleged that Mr Joubert:

    (a) Did not disclose the AH indemnity;

    (b) falsely declared that he had not been indemnified in relation to the AH liquidation;

    (c) falsely declared that the deposit of $5,000 was from an AH director and was a voluntary contribution when in fact;

        (i) it had been deposited by CAP Accounting; and

        (ii) it had been paid pursuant to the AH indemnity and/or in anticipation of Mr Joubert's invoice.

158. The relevant particulars alleged with respect to PMG were that Mr Joubert:

    (a) Ought to have disclosed, but did not, the PMG Indemnity in the Amended PMG DIRRI in accordance with Clause 6.14(d) of the 2008 Code and Clause 6.8 and 6.15.1 of the 2011 Code. ("Failure to disclose allegation").

    (b) falsely declared that he had not been indemnified in relation to the PMG liquidation ("false declaration allegation").

(c) falsely declared that the deposit was from PMG's director and was a voluntary contribution when in fact it had been deposited by CAP Accounting and it had been paid pursuant to the PMG Indemnity.

Mr Joubert's Response to Contentions 8 and 9

159. Mr Joubert's response to Contentions 8 and 9 was similar:

(a) At the time he received the $5,000 payments, Mr Joubert had been told they were being made with funds provided by one of the directors of AH and PMG and as such it was appropriate to disclose them in the Amended AH DIRRI and the Amended PMG DIRRI as payments from a director;

(b) the Amended AH DIRRI and the Amended PMG DIRRI were issued at the instigation of Mr Tsakalos of ASIC who at that time was conducting a review of Mr Joubert's files as part of a regulatory audit/investigation;

(c) on 14 September 2011 and 8 September 2011 respectively Mr Joubert had notified ASIC that the Amended AH DIRRI and the Amended PMG DIRRI had been issued; and

(d) at no time since those communications took place did ASIC raise an objection to the Amended PMG DIRRI in response to that notification.

ASIC's role in the Amended AH and PMG DIRRIs

160. It was not in issue between the parties that there had been some discussion between an ASIC representative and Mr Joubert regarding the issue of amended DIRRIs Mr Joubert submitted that ASIC's involvement insofar as it went, particularly the fact that there was no response from ASIC when he sent copies of the Amended AH DIRRI and the Amended PMG DIRRI to ASIC, was its imprimatur of the contents of those amended DIRRIs.

161. In our view the extent to which there was interaction between ASIC and Mr Joubert regarding the issue of the amended DIRRIs is not a consideration relevant to our determination of these contentions. ASIC and the public are entitled to expect that a registered liquidator such as Mr Joubert will carry out his duties in accordance with the high professional standards demanded of liquidators and to assume that a registered liquidator such as Mr Joubert has a detailed knowledge and understanding of the duties and requirements of his role. The standard we must apply under ss1292(2)(d)(i) involves an objective assessment. Naturally Mr Joubert was concerned to manage his relationship with ASIC in an optimal manner and no doubt sending copies of the amended DIRRIs was a means of demonstrating to ASIC his commitment to addressing issues that had been raised with him. However, to suggest that such conduct on ASIC's part somehow abrogated his professional duty to ensure that the amended DIRRIs made proper disclosures or cured any deficiency that may have existed in the amended DIRRIs, is in our view misconceived. We note that when Mr Joubert sent the amended DIRRIs to ASIC they had already been circulated to AH and PMG creditors. That conduct on his part is consistent with the view that sending the DIRRIs to ASIC was not for the purpose of seeking "approval", especially as ASIC had no capacity or powers in that regard.

The documentary evidence on Contention 8

162. It was not in issue that on 10 June 2011, $5,000 had been deposited by way of electronic transfer, into an account with respect to AH opened by Mr Joubert on 9 May 2011. On 1 September 2011, Mr Joubert issued a tax invoice addressed to AH for $4,980.00 for *professional services rendered in relation to the voluntary administration of AH as approved by creditors* and he deducted and paid to himself fees of $4,980.80. It was also not in issue that at the time the Amended AH DIRRI was circulated AH had for some time been deregistered (see paragraphs 372-377 hereof which fully set out this evidence). On 8 September 2011, Mr Joubert signed and sent to creditors a further amended DIRRI in which he represented to creditors that AH was still in existence and that he was still the liquidator and which, under the heading "*indemnities*" referred to a voluntary contribution of $5,000 received from an AH director.

The documentary evidence on Contention 9

163. In terms of the facts that were established in relation to Contention 9 it was not in issue that there was an internal Joubert Insolvency document that recorded the receipt on 2 November 2010 of $5,000 into the PMG account with the reference "*Asset Capture, cash at bank*" and that this document evidenced the payment in question.

164. There is a covering letter addressed to the creditors of PMG dated 6 September 2011 enclosing a document headed DIRRI. The covering letter states, relevantly:

"*Further to my previous DIRRI on 28 June 2010…please find attached herewith a revised DIRRI for your information.*

I have issued a revised DIRRI due to a change in circumstances surrounding the liquidation which affected the 'Indemnities' section of my previous DIRRI."

Under the heading *"Indemnities"* in the DIRRI that was enclosed it said:

"*I have not been indemnified in relation to this administration other than any indemnities that I may be entitled to under statute.*

However on or about 2 November 2010, the director of the Company caused the amount of $5000 to be deposited into the Company's bank account as a voluntary contribution for the fees and expenses associated with the liquidation of the Company."

Mr Joubert's evidence

165. In his evidence in cross-examination Mr Joubert said:

(a) That in his opinion it was not necessary to amend a DIRRI for receipt of fees if creditors had approved remuneration at a Creditors meeting. It is still his practice today not to send out DIRRIs every time he takes fees. He went on to say that his practice was to amend a DIRRI when something new occurs in relation to fees; for example if his fees were to be a certain amount of money and that had been disclosed in the initial DIRRI, then he may issue an amendment to inform creditors of a change

to that position. However he did not do so every time he received fees as in his view it was not necessary; and

(b) in relation to the $5,000 PMG payment Mr Joubert explained that the description contained in the account of "*asset capture, cash at bank*" recording the $5000 payment was an MYOB item and in this case the money had been received from CAP Accounting but was payment from a director of PMG.

166. Relevant to these contentions is Mr Joubert's evidence in relation to the initial AH and PMG DIRRIs set out in Contentions 4 and 5 as well as our findings in respect of Contentions 4 and 5 that the AH and PMG DIRRIs should have disclosed the existence of the AH and PMG Indemnities respectively.

167. There was no contemporaneous documentary or other evidence besides the evidence of Mr Joubert that the payments were received from a director of AH and/or of PMG or that supported a view that the payment was a "*voluntary payment*" as described in the Amended AH DIRRI and the Amended PMG DIRRI respectively.

Contentions 8 and 9 - issues for determination

168. The relevant questions are:

(a) Whether Mr Joubert ought to have disclosed the AH and PMG indemnities in the Amended AH DIRRI and the Amended PMG DIRRI respectively;

(b) whether Mr Joubert falsely declared that he had not been indemnified in the Amended AH DIRRI and the Amended PMG DIRRI; and

(c) whether Mr Joubert falsely declared that the deposit of $5000 was from a director of AH and PMG respectively and a voluntary contribution when in fact it was deposited by CAP Accounting and paid pursuant to the AH Indemnity and the PMG Indemnity respectively.

169. With respect to the first issue we have made a finding in the context of Contentions 4 and 5 that Mr Joubert ought to have disclosed the relevant indemnities in the initial AH and PMG DIRRIs. The provisions of the 2008 Code were applicable at the time the initial AH and PMG DIRRIs were issued. By the time the relevant amended DIRRIs were prepared in September 2011, the 2011 Code had taken effect and a broader definition of indemnity was introduced by Clause 4.2 as follows:

> "***Indemnity refers to any payment made to the practitioner as well as arrangements whereby payments are promised either directly or indirectly***". (emphasis added)

The addition to the 2011 definition was the phrase "*either directly or indirectly*". The words that were added to the definition do not impact our conclusion as to the existence of an indemnity made in Contentions 4 and 5 and it therefore follows from that finding that Mr Joubert ought to have disclosed the AH and PMG Indemnities in the Amended AH DIRRI and the Amended PMG DIRRI respectively.

170. As to the second question identified in paragraph 168 hereof, it also follows from our finding in Contentions 4 and 5 that the arrangement between Mr Joubert and CAP Accounting amounted to an indemnity within the relevant definition and the statements in the Amended AH DIRRI and the Amended PMG DIRRI were false in the sense that they were incorrect in not disclosing that arrangement. We note that the Amended AH DIRRI contained other quite fundamental false declarations given AH had already been deregistered but we have confined ourselves to the specific allegations made in Contention 8 and note that Mr Joubert's conduct with respect to AH is also the subject of Contention 47.

171. Finally there was the third and final factual allegation made in Contentions 8 and 9 that Mr Joubert falsely declared that the deposits of $5,000 were from a director of AH and PMG and a voluntary contribution when in fact those sums were deposited by CAP Accounting and paid pursuant to the AH and PMG Indemnities. There is no contemporaneous evidence that is inconsistent with the statements in the amended DIRRIs that the deposits of $5,000 were made by a director of AH and PMG as relevant. Neither was there any evidence supporting those statements nor that supported the payments being characterised as voluntary payments. However, it was established that the payments were made by CAP Accounting, at least insofar as they were made via CAP Accounting and in our view this matter was a relevant fact that should have been disclosed to the creditors of AH and PMG in order to ensure transparency which was one of the stated objects of Clause 6.15C of the 2011 Code. With regard to Mr Joubert's characterisation of the $5,000 in the amended DIRRIs as a "voluntary payment" we further note that the payment itself, regardless of the existence of the AH and PMG Indemnities, also constituted an indemnity and in accordance with the requirements of Clause 6.15C of the 2011 Code Mr Joubert should have clearly identified them as such. To the extent the payments were not so characterised and did not refer to the involvement of CAP Accounting as a conduit for payment, we have concluded that the disclosures in the Amended AH DIRRI and the Amended PMG DIRRI were false in the sense that they were incorrect.

172. For the reasons outlined we have concluded that the evidence establishes the matters alleged in Contentions 8 and 9. It is reasonable to conclude that the catalyst for the Amended AH DIRRI and the Amended PMG DIRRI was Mr Joubert's discussion with ASIC following an audit of his files which took place in July 2011. Yet, despite that context, the disclosures made by Mr Joubert in the Amended AH DIRRI and the Amended PMG DIRRI were inconsistent, incomplete and inaccurate in the respects identified. The disclosures made, evidence no critical thought or evaluation regarding the nature and extent of disclosure required by the 2011 Code having been exercised by Mr Joubert. In our view, a reasonably competent liquidator who was aware of and paid regard to the requirements of Clause 6.15 of the 2011 Code would not have represented to creditors that he was not indemnified and would have characterised the payments disclosed as an indemnity in the circumstances of Contentions 8 and 9. To the extent that Mr Joubert failed in this regard we have formed the view that he did not act with due care and diligence amounting to a failure to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Findings on Contentions 8 and 9

173. We find that Contentions 8 and 9 are established.

Contentions 10 -13

174. ASIC alleges in these contentions that within the meaning of ss1292(2)(d)(i) of the Act, Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he failed to amend DIRRIs to disclose payment of his fees for:

    (a) WOT (Contention 10);

    (b) PMG (Contention 12); and

    (c) ZAG (Contention 13).

    For completeness, we note that the like contention in relation to AH (Contention 11) was withdrawn by ASIC as noted in paragraph 17 hereof.

175. A preliminary observation in respect of these contentions is that the conduct that is alleged as the failure to carry out or perform adequately and properly the duties of a liquidator is the failure to amend DIRRIs to disclose payment of fees. We note some of the particulars refer to conduct with respect to alleged omissions in respect of disclosures regarding indemnities. In order to make a determination on these contentions we have confined our consideration to matters relevant to the conduct relating to the disclosure of fees in accordance with the contentions as drafted.

Particulars

176. The relevant factual particulars set out in respect of each of these contentions were not in issue and were as follows:

    (a) WOT: On 17 January 2010 Mr Joubert issued an invoice addressed to CAP Accounting for an amount of $6,000 for professional services in relation to the WOT liquidation and on 21 January 2010 CAP Accounting paid that invoice.

    (b) PMG: On 2 November 2010 Mr Joubert received a payment of $5,000 into the PMG Bank Account.

    (c) ZAG: On 16 June 2010, $6,000 was deposited into ZAG's cash account for Mr Joubert's liquidation fees and $600 was deposited into Mr Joubert's flexi account for Mr Joubert's liquidation fees. On 1 July 2010 Joubert Insolvency issued a tax invoice to ZAG for $3,997.40 for professional services in relation to the liquidation of ZAG. On 06 July 2010 Mr Joubert or a member of his staff transferred $3,600 from ZAG's cash account into ZAG's flexi account and withdrew $3,997.40 from ZAG's flexi account for payment of liquidation fees.

177. It was not in issue that in neither the WOT nor ZAG liquidations had an amended DIRRI disclosing payment of fees ever been prepared or sent. ASIC alleged that an amended DIRRI ought to have been sent to disclose the payment of fees made to Mr Joubert. In PMG, in the circumstances set out in Contention

9 above, an amended DIRRI had been sent in September 2011 with respect to a payment of fees received in September 2010.

178. Mr Joubert denied Contentions 10-13 on the basis that the IPA Code did not apply.

179. We shall deal firstly with Contentions 10 and 13 together as in both these liquidations an amended DIRRI notifying payment of fees was neither prepared nor sent and in both matters the relevant IPA Code, in operation at the time that Mr Joubert issued the invoices in respect of his fees, was the 2008 Code.

180. Mr Joubert's counsel submitted that the argument put by ASIC that Mr Joubert should have updated his DIRRIs when he received a payment in respect of his fees, based on Clause 6.14(d) of the 2008 Code which required the DIRRI to disclose payments received on account of the practitioner's remuneration, was flawed for at least three reasons:

    (a) first Clause 6.14(d) required disclosure of "*any payment made by or for the insolvent **on account of** the Practitioner's remuneration…*" The phrase *on account of*, must refer to a payment made in advance of the Practitioner's remuneration and disbursements being due; it does not mean *because of*. Had the clause intended to catch payments made for fees generally it would have read "*any payment made by or for the insolvent for (or in respect of) the Practitioner's remuneration and disbursements*". This, it was said, is consistent with the fact that a DIRRI is given before the Practitioner has done any work.

    (b) second, none of the payments were made (on ASIC's case) by or *for the insolvent* (on ASIC's case, the payments were made by CAP Accounting which was not the insolvent, and on Mr Joubert's case, he only had a hope that the directors would pay him, and they were not the insolvent).

    (c) third, it does not follow that the receipt of payment of fees renders a DIRRI "*out of date*". A DIRRI may become "*out of date*" if there is a change in relevant relationships. That this is so is strengthened by the opening words of clause 6.14.3 "*If a Practitioner becomes aware that the DIRRI has become out of date….*" how would a Practitioner not be aware that he had received payment of his fees rendering his DIRRI "*out of date*"*?* A practitioner might only become aware of a disclosable relationship at a later time that the relationship in fact arose, which made his DIRRI out of date.

181. Finally, Mr Joubert's counsel submitted that ASIC's contention, if correct, would require liquidators to prepare amended DIRRIs every month (or even more frequently) if they received ongoing regular monthly payments in large liquidations spanning years. It would also require a liquidator to send an amended DIRRI in every administration where he received final payment, even at the end of an administration before de-registering the company. It was submitted that would result in substantial and unnecessary expense and is not a practice that liquidators follow.

182. We have considered the submissions above and comment on them in paragraphs 183-186 hereof.

183. We do not accept that the phrase "*on account of*" in Clause 6.14(d) of the 2008 Code would be limited in the way contended for by Mr Joubert having regard to the first part of the definition of indemnity in the 2008 Code i.e. "*any payment made*" and the appropriate meaning to be reasonably attributed to the phrase "*on account of*" as it is used in Clause 6.14(d) of the 2008 Code given the context provided by that definition. While we accept that "*on account of*" can, in an accounting context, mean a payment received in advance, that phrase is also commonly used to mean "*with reference to*", an interpretation that renders the definition of indemnity and the words of Clause 6.14(d) compatible. The distinction sought to be drawn between a payment received in advance of remuneration and a payment received in payment of services rendered (as would be the effect of interpreting Clause 6.14(d) of the 2008 Code in accordance with Mr Cook's submission) is not so compatible however as the definition of indemnity encompasses, quite simply, "*any payment made*". Even were the meaning of Clause 6.14(d) to be properly limited in the manner so contended, with respect to ZAG (Contention 13) the evidence was that Mr Joubert had not raised an invoice by the time the moneys were received and so the payment made would still have been captured within the narrower interpretation of Clause 6.14(d) argued for by Mr Cook.

184. As to the second submission made on behalf of Mr Joubert, Clause 6.14(d) of the 2008 Code mandates a declaration of indemnities disclosing, inter alia, "*any payment made by or for the insolvent on account of the Practitioner's remuneration and disbursements*". These words are straightforward and we do not agree that in the circumstances pleaded in the SOFAC regarding the relationship between CAP Accounting and the relevant companies, a payment made by CAP Accounting would not be captured by the phrase "*by or **for** the insolvent*." (emphasis added)

185. As to Mr Cook's third submission there is nothing in the language of Clause 6.14.3 of the 2008 Code that in our view supports the argument that a DIRRI only becomes out of date if there is a change in relevant relationships. Clause 6.14.3 of the DIRRI provisions in the 2008 Code is headed "*New Information*". In the initial DIRRIs circulated to creditors in the WOT and ZAG liquidations, Mr Joubert had informed creditors that he had **not** been indemnified for his fees. The subsequent payments pleaded in Contentions 10 and 13 rendered those disclosures in the initial DIRRIs inaccurate. In the absence of an amended DIRRI creditors of WOT and ZAG had no transparency as to how Mr Joubert was to be paid as the only information available to them was that disclosed in the initial DIRRIs sent which both stated that there was no indemnity for fees. The means by which and from whom a liquidator is to be paid was clearly contemplated by the DIRRI disclosure provisions in the 2008 Code. When the payments were made to Mr Joubert in the circumstances of Contentions 10 and 13 there was "*new information*" that required an amended DIRRI so as to keep creditors fully and accurately informed in accordance with the 2008 Code requirements.

186. Clause 6.14.3 of the 2008 Code required any amended DIRRI disclosures to be sent with the next communication to creditors. In respect of WOT (Contention 10) the next communication to creditors occurred on 9 August 2010 and in respect of ZAG (Contention 13) it occurred on 5 August 2010. In our view Mr Joubert ought to have included an amended DIRRI disclosing the payment of

fees to him with the communications to creditors of WOT and ZAG respectively, that occurred on those dates.

187. For the reasons set out we are satisfied that by not recognising his obligations under the 2008 Code (which clearly applied) to issue an amended DIRRI when he was paid fees in the circumstances of Contentions 10 and 13, Mr Joubert failed to act with due care and diligence amounting to a failure by Mr Joubert to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Findings on Contentions 10 and 13

188. We find that Contentions 10 and 13 are established.

Contention 12

189. The relevant question in respect of this contention is whether Mr Joubert ought to have updated the Amended PMG DIRRI before 6 September 2011.

190. The circumstances in which Mr Joubert circulated the Amended PMG DIRRI are set out in paragraphs 156, 159 and 163-164 hereof. Mr Joubert made it clear in his evidence in cross-examination that it was not his practice to update a DIRRI when fees were paid, however, in the PMG liquidation he did so following ASIC's review of his files some 10 months after the payment had been received. As already discussed the definition of "*indemnity*" in the 2008 Code was "*Indemnity - refers to any payment made as well as arrangements whereby payments are promised*." As was the case in respect of ZAG (Contention 13) no invoice had been issued at the time Mr Joubert received the deposit of $5,000 into the PMG bank account on 2 November 2010 (although this fact is not in our view relevant given our reasons set out in paragraph 183 hereof). For the reasons we have discussed in the context of Contentions 10-13 as set out in paragraphs 183-186 hereof our view is that the moneys received fell within the definition of indemnity and the words of Clause 6.14(d) of the 2008 Code. The obligation under the 2008 Code to issue an amended DIRRI arose when the payment was made and Clauses 6.14.3 of the 2008 Code and 6.15.7 of the 2011 Code provided that it should be provided to creditors with the next communication to them and also tabled at the next meeting of creditors. The evidence was that Mr Joubert sent a circular to creditors regarding his PMG investigations on 21 January 2011. In our view Mr Joubert ought to have included with that circular, an amended DIRRI disclosing the $5,000 received for his fees.

191. For the above reasons we find that Mr Joubert ought to have disclosed payment of his fees in the PMG liquidation as part of the circular to creditors that he sent on 21 January 2011.

192. We are satisfied that by not recognising his obligations under the Code to issue an amended DIRRI to the creditors of PMG at the time he sent a circular to creditors on 21 January 2011 to disclose payment of fees he had received, Mr Joubert failed to act with due care and diligence amounting to a failure to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Finding on Contention 12

193. We find that Contention 12 is established.

Contentions 14-16

194. These contentions allege that with respect to ECG, WOT and ZAG, Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he lodged Forms 524 that were deficient and/or contained false or misleading statements.

Contention 14

195. The SOFAC particularised the allegations as follows:

    (a) On 7 May 2010 Mr Joubert signed and lodged a Form 524 Presentation of Accounts and Statement with ASIC for the period 15 October 2009 to 14 April 2010 in which he declared falsely that there were three unsecured creditors of WOT with an estimated value of $220,500, when in fact he held proofs of debt in respect of four unsecured creditors totalling $50,812.86;

    (b) on 9 November 2010, Mr Joubert signed and lodged a Form 524 Presentation of Accounts and Statement with ASIC for the period 15 October 2009 to 14 October 2010 which was identical to that signed on the 7 May 2010 and was false in the same respects; and

    (c) on 24 January 2011 Mr Joubert signed and lodged a Form 524 Presentation of Accounts and Statement with ASIC for the period 15 October 2009 to 24 January 2011 which was identical to that signed on the 7 May 2010 and 9 November 2011 respectively and was also false in the same respects. By this time there was a fifth proof of debt on the ECG file from GIO Workers Compensation for the sum of $5,958.14.

196. Mr Joubert admitted these allegations. His Amended Response said that:

    (a) He overlooked including a proof of debt that had been lodged by Haihong Huang ("Ms Huang") for $4,212.86 in his estimate because it had not been entered on the firm's computer system; and

    (b) the reason for the difference between the total of the proofs of debt he held amounting to $50,812.86 and the estimate of $220,500 owed by ECG to creditors arose because although the proof of debt from the ATO was only for an amount of $1,110, consisting solely of the late payment of fees in respect of unassessed tax, in circumstances where ECG's director had stated ECG had a tax liability of $175,000 in ECG's Report as to Affairs, it was reasonable for him to consider that the higher figure was a better estimate of ECG's tax liability, if that liability were assessed.

197. On the basis of the above conduct the Amended SOFAC alleged that Mr Joubert made the Forms 524 without due care and diligence resulting in the Forms being false when submitted to ASIC (allegations that the conduct was dishonest had been withdrawn by ASIC). Mr Joubert contended that the inaccuracies were immaterial and incapable of causing any material prejudice to any person. On

this point ASIC submitted that Mr Joubert's response should not be accepted and we agree with ASIC that even if the errors were immaterial it is not a sufficient answer to the contention because whether conduct meets an appropriate professional standard under ss1292(2)(d)(i) involves a consideration of how and why the inaccuracies occurred. The facts available with respect to Contention 14 demonstrate that there was not just one but three Forms 524 submitted with the same information that, on its face, was inaccurate even if in the case of the ATO proof of debt there was a logical explanation for the inaccuracy. The omission of Ms Huang's proof of debt was clearly an oversight that remained unidentified. By the time the third Form 524 was lodged in the ECG liquidation, a further proof of debt was also overlooked and not included in the return.

198. To the extent the Form 524 overstated the amount owed by ECG, we accept Mr Joubert's explanation, set out in paragraph 196(b) hereof as it is both logical and corroborated by the documentary evidence. It would nevertheless have been desirable, when an apparent inconsistency was evident between the documentation held and the figure disclosed, for Mr Joubert to have maintained a file record of how the figure disclosed in the Form 524 had been calculated, especially having regard to the provisions of the 2008 Code which required effective compliance and risk management within insolvency practices[41]. Neither does the conduct reflect the expectation set out in ASIC Regulatory Guide 16 ("Regulatory Guide 16")[42] for accurate reporting by external administrators including liquidators to ASIC.

199. What it is in our view reasonable to conclude based on the facts above, is that to the extent there were systems and management processes in place at Mr Joubert's insolvency practice, those systems and processes failed to identify the initial error that had been made and the error remained unidentified for the duration of the period in which these three Forms 524 were prepared and submitted in respect of the ECG liquidation. Likewise, the process for recording proofs of debt when they were received by Mr Joubert's office also failed on at least two occasions within the timeframe of this contention and in respect of Ms Huang's proof of debt was not identified and recorded at all during the relevant timeframe. While on their face the individual errors the subject of this contention may be argued to be inconsequential, the failure to identify those errors at any stage over the timespan of this contention is indicative of systemic flaws in the governance of Mr Joubert's practice and demonstrates that Mr Joubert's practice management did not meet the standard required by the 2008 Code. In our view this adds to the seriousness of our finding on this contention in terms of ss1292(2)(d)(i) of the Act.

200. For the above reasons we have concluded that Mr Joubert did not exercise a level of care and diligence that should be expected of a reasonably competent liquidator when preparing the Forms 524 the subject of this contention and which resulted in the three Forms 524 being false in the sense that they were inaccurate and potentially misleading. This conduct in our view amounts to failure to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

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[41] 2008 Code page 13
[42] ASIC Regulatory Guide 16 – External Administrators: Reporting and lodging – July 2008 ("Regulatory Guide 16")

Finding on Contention 14

201. We find that Contention 14 is established.

Contentions 15 and 16

202. Contentions 15 and 16 make the same allegation that the Forms 524 were deficient and/or contained false or misleading statements in respect of WOT and ZAG. The particulars of these two contentions allege that Mr Joubert prepared the relevant Forms 524 with reckless disregard as to their truth (an allegation of dishonesty) or alternatively, without due care and diligence. For the reasons set out in paragraphs 29-44 hereof we have formed the view that the dishonesty allegations in Contentions 15 and 16 have not been pleaded sufficiently and in accordance with our comments in paragraph 45 hereof we have limited our consideration of Contentions 15 and 16 to the question of whether Mr Joubert made the relevant statements without due care and diligence as also alleged.

203. In respect of Contention 15, the particulars in the Amended SOFAC allege that Mr Joubert falsely declared in the Form 524 that he had not received or paid any monies from WOT during the period 6 November 2009 to 5 May 2010 insofar as the Form 524 did not disclose the receipt of $6,000 on 21 January 2010. The particulars set out in the Amended SOFAC further allege that Mr Joubert ought to have known of the necessity or requirement to disclose the receipt of the $6,000 on the following basis:

    (a) Mr Joubert had the benefit of the WOT Indemnity;

    (b) on 17 January 2010 Mr Joubert had invoiced CAP Accounting for his professional services in WOT;

    (c) on 21 January 2010 CAP Accounting paid the invoice;

    (d) on 27 May 2010 Mr Joubert signed and lodged the Form 524; and

    (e) according to the activity slip for WOT Mr Terence Bowers ("Mr Bowers") was the only person who was involved in the preparation of the Form 524.

204. In respect of Contention 16 it was not in issue that Mr Joubert did not declare either the ZAG flexi account or the ZAG cash account, the receipt of monies into these accounts or the payment of his liquidation fees in the relevant Form 524. The particulars in support of the allegation were as follows:

    (a) Mr Joubert had the benefit of the ZAG Indemnity;

    (b) on 16 June 2010 Mr Joubert opened the ZAG flexi account and the ZAG cash account and paid $6,600 into those accounts;

    (c) on 1 July 2010 Mr Joubert or a member of his staff transferred $3,600 from ZAG's cash account to ZAG's flexi account and withdrew $3,997.40 from ZAG's flexi account;

    (d) the named user and administrator of the accounts and the security token access holder for the accounts was Mr Joubert; and

(e) according to the activity slip only Mr Bowers spent time on the Form 524 on 12 and 14 July 2010.

205. Turning first to Contention 15, on the basis of the factual particulars set out in paragraph 203 hereof, it was alleged Mr Joubert acted without due care and diligence. In his Amended Response Mr Joubert admitted that he incorrectly failed to disclose on the Form 524 the receipt of $6,000 fees as alleged and that this was a failure to act with due care and diligence. In Mr Joubert's statement he said that he did not have a specific recollection of signing or lodging the Form 524. Mr Joubert also said that the usual practice in place at his firm at the time was sufficient in his view to ensure the receipts in respect of administrations would be recorded in the Form 524 when prepared, and he did not know why this did not occur in this matter. He did not think that he would have had a recollection at the time the Form 524 was prepared of the receipt of a payment some months earlier. Mr Joubert surmised that it was likely that he would have accepted that Mr Bowers had properly prepared the Form 524 and that the receipts and payments printout attached to it was correct. We note that in cross-examination Mr Joubert accepted that, in the case of WOT, as there had been no bank account opened – there would not have been a receipts and payments printout attached to the Form 524 when he checked it.

206. There was significant cross-examination regarding this contention and the Forms 524 generally. Mr Joubert confirmed that the lodging of the Form 524 was an important step in a liquidation and he agreed that it is one of the few ways in which interested persons or members of the public and the regulator are informed as to the true state of the conduct of the liquidation and the winding up of the affairs of the company. He confirmed that he was familiar with the form and the verification it requires as to who has completed the form. He confirmed that in respect of all of the Forms 524 he had signed the relevant verification. He accepted that by doing that on each occasion he was giving an assurance that he was either the author of, or had validated the contents of, the relevant Form 524. He said that in respect of each of the Forms 524, he had no recollection of the events that surrounded their preparation and was doing his best to reconstruct what he thinks may have happened from the documents. Mr Joubert agreed that the failure to record the receipt of the $6,000 fees in the WOT liquidation meant that no interested party or indeed ASIC would, from the information in the Form 524 lodged, become aware that he had been remunerated in the WOT liquidation, nor indeed that he had received the funds from CAP Accounting.

207. Turning to Contention 16, on the basis of the factual particulars, set out in paragraph 204 hereof, it was alleged Mr Joubert acted without due care and diligence. In his Amended Response Mr Joubert admitted the errors alleged in the Amended SOFAC, namely the omissions to declare the receipt of fees in ZAG and the ZAG Flexi and cash accounts and says that the reason for the errors was that the first monthly statements from ZAG's bank accounts had not been issued and so had not been brought into his computerised records. In relation to the allegation that Mr Joubert failed to declare the payment of his fees in the relevant Form 524, it was denied as the payment did not occur until 6 July 2010 which was outside the stated period of the Form 524 (5 January 2010 – 4 July 2010) ("*ZAG Form 524*"). Mr Joubert said that while the relevant receipts and payments were not disclosed in the ZAG Form 524 they were

disclosed in later ZAG Forms 524 and the error was not reasonably capable of causing prejudice to any person.

208. In cross-examination Mr Joubert confirmed that he accepted that the ZAG Flexi account and the ZAG cash account and the transactions in respect of those accounts ought to have been disclosed in the ZAG Form 524. On the point regarding whether the information that was not included on the ZAG Form 524 was included on the next ZAG Form 524 which was lodged in January 2011, the cross-examination revealed that the subsequent ZAG Form 524 lodged on 18 January 2011 did include details of the receipt of the fees on 6 July 2010 but not the identity of the payor. It was also revealed in cross-examination that there was no record of any working papers in relation to the Form 524 on the file. In general Mr Joubert's evidence as to what process was in place at the time for capturing receipts and payments in order to report on the Form 524 was confused. On the point regarding whether the receipt of the payment of $6,000 should have been included in the ZAG Form 524, ASIC took the position that it should have been, as Mr Joubert would have been aware through the operation of the relevant bank accounts, that it had been paid and therefore it should have been included.

209. Section 539(1) of the Act provides that every six months from the date of his/her appointment and within one month of ceasing the appointment, a liquidator must lodge:

> *(a) an account in the prescribed form and verified by a statement in writing showing:*
>
> > *(i) his or her receipts and/or payments during the period or where they have ceased to act as liquidator, during the period from the end of the period to which the last preceding account related, or from the date of his or her appointment, as the case requires, up to the date of his or her so ceasing to act;…*
>
> *(b) …a statement in the prescribed form relating to the position in the winding up, verified by a statement in writing.*

210. The relevant form is the Form 524 that requires the following information to be included:

> "*Section 4* ***Summary of professional fees and completion dates***
>
> *This section required disclosure of:*
>
> - *remuneration paid to the liquidator during the period for which the account is made up (inclusive of GST);*
> - *remuneration paid to the liquidator from the date of his/her appointment to the date to which the account is made up (inclusive of GST);*
> - *the amount received by the liquidator in respect of expenses during the period for which the account is made up (inclusive of GST); and*

- *the amount received by the liquidator in respect of expenses from the date of his/her appointment to the date to which his account is made up (inclusive of GST).*

Section 5 Account of receipts and payments

This section required disclosure of all amounts received by the liquidator before and during the relevant period; a disclosure of all payments made by the liquidator before and during the period; and a reconciliation of money held;

Section 7 The liquidator's verification of the account and statement

This section required includes a declaration that statements which the liquidator ticks are correct, those statements being:

- ***Statement**- the information given in the statement is true to the best of my/our knowledge and belief at the date of signing*

- ***If there are receipts and payments** - the account of receipts and payments set out in the annexure….contains a full and true account of my/our receipts and payments in the period and I/we have not, nor has any other person by my/our order or for my/our use during that period, received or paid any money on account of the company other than and except the items mentioned and specified in that account; and*

- ***If no receipts and payments** - I/we have not nor has any other person by my/our order or for my/our use during that period, received or paid any money on account of the company.*

  (a) The name of the person who has authenticated and submitted the form."

211. ASIC's submissions referred to Regulatory Guide 16. As we have said this provides guidance to external administrators including liquidators on their reporting obligations to ASIC under the Act. Regulatory Guide 16 underscores the importance of timely and accurate reporting and the potential consequences for the failure to lodge reports or the failure to lodge reports of a sufficient standard. Regulatory Guide 16 also makes clear that the information in the reports is placed on a public register and is available for public inspection and that the electronic lodgement system is linked to and automatically updates ASIC's public registers.

212. Mr Joubert acknowledged, and it is quite clearly the case, that the preparation and lodgement of the Form 524 by a liquidator is a serious and formal responsibility placed on liquidators by the Act and is one of the few ways in which interested persons, members of the public and ASIC can remain regularly informed as to the true state of the conduct of the liquidation and the winding up of the affairs of the company.

213. The evidence shows, as for ECG, that in respect of both the WOT and ZAG Forms 524 there were significant and material omissions from the forms lodged. Mr Joubert had no independent recollection of the events pertaining to the preparation of the relevant forms. The nature of the omissions in each of these contentions as well as in Contention 14 resulted in there being no transparency

of Mr Joubert's remuneration in the matters at the time the forms were submitted which in our view is a serious matter. A reasonably competent liquidator in Mr Joubert's position would in our view understand the importance of full transparency and accurate and timely reporting to discharge the obligations under s539 of the Act as well as to meet the standards of conduct set out in the 2008 Code, the 2011 Code and Regulatory Guide 16. Mr Joubert was prepared to attest to the completeness and accuracy of the Forms 524 by signing them in circumstances where he could have done no more than give them a cursory check. Such an approach belies the degree of care and professionalism that the law requires of a reasonably competent liquidator and in our view is a serious matter. We do not accept that the omissions were minor in nature. The fact of their occurrence evidences a serious failure to exercise due care and diligence as well as systemic issues within the firm's processes. Further, the conduct demonstrates a concerning lack of regard on Mr Joubert's part for the importance of discharging his professional responsibilities carefully and methodically with respect to dealings with the regulator.

214. We are satisfied on the evidence and for the reasons set out that Mr Joubert did not exercise due care and diligence when preparing the Forms 524 the subject of Contentions 15 and 16 and failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Findings on Contentions 15 and 16

215. We find that Contentions 15 and 16 are established.

Contentions 17–21

216. Contentions 17-21 allege that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he lodged Forms 533 that were deficient and/or contained false or misleading statements in respect of ECG, WOT, AH, PMG and ZAG.

217. The allegations in each of Contentions 17-21 include allegations of dishonesty. For the reasons set out in paragraphs 29-44 hereof we have formed the view that the dishonesty allegations have not been pleaded sufficiently and in accordance with our comments in paragraph 45 hereof we have limited our consideration of Contentions 17-21 to the question of whether Mr Joubert acted without due care and diligence in filing s533 reports in respect of each of the relevant companies that were deficient and/or contained false or misleading statements in so far as Mr Joubert had no reasonable basis to hold or give the opinion he did as to the causes of the companies' failures, and in respect of Contention 17 (ECG), Contention 19 (AH) and Contention 20 (PMG) that he should have reported a possible contravention of s344/s286 of the Act by the relevant directors.

Evidence on first allegation that Mr Joubert had no reasonable basis to hold or give the opinion stated in the Forms 533 as to the causes of the companies' failures

218. A copy of the form of s533 Report in effect during the period 17 January 2011 – 17 December 2014 and relevant to the allegations in respect of ECG and PMG was Annexure 11 to the Statement of Angeliki Mantas ("Ms Mantas") dated 15 May 2015 and Annexure 12 of her statement was a copy of the Form 533 in

effect between 1 July 2008 and 16 January 2011 and relevant in respect of AH, WOT and ZAG.

219. ASIC alleged in each of Contentions 17-21 that Mr Joubert had no reasonable basis to hold or give an opinion as to the causes of failure of each of the companies. Mr Joubert denied these allegations and said that in each case the electronic form for the s533 Report required him to tick boxes from an offered list of causes of failure.

220. Under the heading of "*Item 3 Causes of Failure*" on both versions of the Form 533 the instructions state "*Please select all causes which apply to this company*". There follow 13 boxes with various descriptions beside them including a final box designated "*Other, please specify*". In respect of ECG, WOT, AH, PMG and ZAG Mr Joubert had ticked various of the first six boxes on the Forms 533 that were filed for each of those companies, those boxes were designated as follows:

- Under capitalisation;
- Poor financial control, including lack of records;
- Poor management of accounts receivable;
- Poor strategic management of business;
- Inadequate cash-flow or high cash use;
- Poor economic conditions.

221. Mr Joubert's statement dated 17 August 2015 in the proceedings dealt with his recollection regarding the s533 Reports. He said that he did not recollect the circumstances in which any of the Forms 533 were completed and signed, although he speculated that he would have been told about the causes of failure by the referring accountants when he was instructed in each of the matters. In relation to ECG the Form 533 also omitted a reference to Ms Huang's unpaid wages and entitlements. Mr Joubert speculated that this was a consequence of the initial omission from the relevant creditors' spreadsheet of details of the debt owed to her and this error was carried over to the s533 Report for ECG because information in that spreadsheet would have been relied upon to prepare the s533 Report. Mr Joubert accepted responsibility for that omission although he did not accept it was a failure to act with due care and diligence.

222. In cross-examination Mr Joubert reiterated that he had no independent recollection of preparing the Forms 533 for ECG, WOT, AH, PMG and ZAG and was trying his best to reconstruct what would have happened according to his usual practice. His evidence was that when he completed the relevant Forms 533 he believed he would have relied on what the referring accountant had told him and that, in his opinion, this would have been a reasonable and sufficient basis for his view. He could not remember whether there was anything contrary to the view of the relevant accountant of which he had become aware before completing any of the Forms. There was further questioning in cross-examination of Mr Joubert regarding his knowledge of the nature of the work that was performed by the referring accountants on behalf of the relevant

companies. Mr Joubert could not recall whether he had ever seen any work produced by the accountants on behalf of the companies and assumed that he had not seen any work that would indicate the causes of failure of the companies. There was no record of such work on any of the files. Neither could Mr Joubert recall whether he had ever tried to contact any of the directors or creditors of any of the companies to inquire about the reasons for failure. In answer to the question whether he agreed that he was in fact providing someone else's view when responding to the causes for failure question in the relevant Forms 533, Mr Joubert said that all he could go on was the accountant's view.

Further Allegation

223. In relation to the further allegation in respect of ECG, AH and PMG that the Forms 533 were deficient because Mr Joubert should have ticked the box under 4.1 of the Form 533 that is headed ***s344(2)/s286-Obligation to keep financial records***, Mr Joubert's Amended Response was:

    (a) that the statement in each of the relevant Forms 533 that he was not reporting misconduct was true and did not therefore make the reports misleading or deficient;

    (b) that the allegation that the Respondent should have reported a possible contravention of s344 is not supportive of a contention that the report was deficient and raises a different issue; however,

    (c) nonetheless admitted that it would have been appropriate to report possible misconduct but that the SOFAC does not provide a proper basis for concluding that the Respondent should have adopted such a course of action in circumstances that included an absence of books and records and the date of Ms Foster's appointment as a Director.

224. In his statement dated 28 August 2015 Mr Joubert said that he could not recollect his state of mind when signing any of the three relevant Forms 533 although he accepted that there had been no substantial books or records produced in response to his requests for records in respect of those companies and speculated that he would have formed the view that it would not have been necessary to report a possible contravention based firstly on an assumption he would have made that the involvement of CAP Accounting meant that the companies had retained accountancy services and so had adequate financial records and second because he held the belief at the relevant times that there was little utility in making such a report in any event as no action was ever likely to be taken by ASIC.

225. In each of the Forms 533 Mr Joubert had ticked "*no*", in answer to the question "*Have you obtained or inspected the company's books and records*" under the heading ***Books and Records.*** He said in cross-examination that his view was that in order to form an opinion about whether to tick the box next to the heading ***s344(2)/s286-Obligation to keep financial records*** on the Forms 533 he believed he needed sufficient books and records "*to make the call to say that*".

226. The commentary under the box and the heading ***s344(2)/s286-Obligation to keep financial records*** on both of the relevant versions of Forms 533 is in the same form and reads as follows:

> "***this offence should only be selected if s344(2) applies***.
>
> *A Director has failed to take all reasonable steps to ensure that the company has kept written financial records that correctly record and explain its transactions and financial position and performance and would enable true and fair financial statements to be prepared and audited* ***(s344(2) applies if the director's failure is dishonest)*****".**

227. In respect of each of ECG, PMG and WOT Mr Joubert had, before completing the Form 533, issued an Annual Report to the creditors of those companies. Each of those Annual Reports informed the creditors that Mr Joubert was not in receipt of sufficient books and records and reported that he had consequently made written demands for records on the Director and external accountants. Each of those Annual Reports also contained a statement as follows:

> "*Accordingly at this stage of the liquidation, we are of the view that the company has not maintained adequate books and records in accordance with Section 286 of the Act*".

228. Mr Joubert's evidence as to the inconsistency between the Annual Reports and the Forms 533 was that he could not recall his state of mind nor why he had formed his views at the relevant times, nor whether anything relevant had occurred between the time of writing the Annual Reports and completing the Forms 533. Mr Joubert also could not recall why he did not report a possible contravention in the Form 533 when he had expressed the view to creditors that the companies had not maintained adequate books and records.

Were the first and further allegations in Contention 17-21 established?

229. Mr Joubert had no independent recollection of the matters the subject of Contentions 17-21. In his statement dated 18 August 2015 Mr Joubert acknowledged this fact and offered an explanation as to what may have occurred based on the documents and his knowledge of the way in which such matters were generally conducted by his firm. We are not confident of the reliability of this evidence both because Mr Joubert had no recollection and because there are no documents such as contemporaneous file notes, against which his evidence can be corroborated and we have therefore not placed weight on his evidence in this respect in accordance with the approach outlined in paragraph 87 hereof.

230. In relation to the first allegation, the only matter posited by Mr Joubert as the likely basis for the reasons he attributed to the causes of insolvency of ECG, WOT PMG, AH and ZAG was the information he thought would have been provided by the relevant accountant when the matters were initially referred to him. Even were we to have placed weight on Mr Joubert's evidence that such information would have been provided to him, we do not accept that it would have provided a reasonable basis for Mr Joubert to form a professional opinion on which others are to be expected to trust and rely, when he had made no independent inquiry or analysis against which the information provided could be

tested or substantiated. Mr Joubert understood that his role as liquidator was one of gatekeeper and that it was only through his office that ASIC and creditors or interested parties could gain knowledge of the winding up. It was in our view reasonable to expect that he would therefore have understood that the duties of his role involved independent inquiry and analysis to be performed by him before providing information and his opinion on substantive matters to the regulator and, indirectly, to creditors or other interested parties.

231. In our view the available evidence supports the first allegation in Contentions 17-21 that the Forms 533 for ECG, WOT, AH, PMG and ZAG are deficient because that evidence does not support a conclusion that Mr Joubert had a proper and adequate basis for the information he included in each of the Forms 533 regarding the companies' causes of failure. There is no evidence that Mr Joubert undertook any independent analysis or enquiry and he accepted in cross-examination that the opinion he expressed would not have been based on any independent enquiry or analysis on his part of the likely causes of failure of each of the companies and each of the Forms 533 must therefore have been completed either on that basis or on the basis of information he may have received from the referring accountants (a matter we do not find established for the reasons noted). We find that the evidence establishes the first allegation made in Contentions 17-21.

232. The further allegation relevant to Contentions 17, 20 and 21 was that, in the circumstances of the opinion expressed by Mr Joubert in each of the Annual Reports that the companies had not maintained adequate books and records in accordance with s286 of the Act, Mr Joubert should have made a report in the Form 533 under ***s344(2)/s286-Obligation to keep financial records*** ("*the relevant reports*")**.** We are satisfied that the evidence establishes that he made this statement to creditors in each of the Annual Reports and did not report a potential offence in the Form 533. Mr Joubert confirmed in cross-examination that he was familiar with the Form 533 in use at the relevant times.

233. The matter that triggers a reporting obligation under the relevant heading in the Form 533 is the potential application of ss344(2) of the Act which applies if the Director's failure is ***dishonest.*** The information in the relevant annual reports evidencing Mr Joubert's view that the companies had "*not maintained adequate books and records in accordance with Section 286 of the Act*" does not therefore provide a basis for alleging that Mr Joubert should have made the reports in the Form 533, as that matter by itself does not demonstrate that Mr Joubert was aware of any possible dishonesty having occurred on the part of the directors. Nor was any other evidence adduced that suggested that the apparent lack of company records was attributable to dishonesty on the part of the directors that would thereby have triggered the reporting obligation.

234. The Substantiation guide (Schedule D to ***Regulatory Guide 16***) sets out in Table 7 the elements of the offence reportable under the ***s344(2)/s286 obligation to keep financial records*** heading in the Form 533. The Substantiation guide refers to the three elements of a reportable offence under this heading as (i) attempts to recover the records, (ii) the records not correctly recording or explaining the entity's transactions and (iii) the directors' failure to secure compliance with s286 as being dishonest**.** In respect of the third element of the offence, Regulatory Guide 16 refers to the need for material to exist that shows

the failure by the director to secure compliance with s286 was dishonest, such as evidence of destruction of records or evidence of a deliberate decision not to keep records so as to avoid the detection of an offence. There was no evidence that there was any such material in this matter and as already noted the fact that Mr Joubert reported to creditors regarding an apparent failure to keep records under s286 is not relevant to the question of whether there was possible dishonesty on the part of the directors of the relevant companies.

235. Having regard to the provisions of Regulatory Guide 16 we have therefore formed the view that the evidence does not establish the second allegation in Contentions 17, 19 and 20.

Was the conduct established in relation to the first allegation a failure to act with due care and diligence?

236. Regulatory Guide 16 makes it very clear that the reporting obligations placed on administrators and liquidators are serious and important obligations. We refer to the dicta in *Pace v Antlers Pty Ltd (in liq)*[43] where, in the context of discussing the propositions that have appeared to gain acceptance in Australia with respect to the liquidator's duty to exercise reasonable care and skill, it was said that: "*a high standard of care and diligence is to be expected of a liquidator as a professional person who is being paid for his or her services."* And (liquidators) … *"must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. "All the circumstances" will include the facts that a liquidator is a person practising a profession, that a liquidator holds himself or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work*[44]."

237. Having regard both to the high standards expected of liquidators in the exercise of their professional skill in performance of their duties and the importance of the requirement to ensure that information provided to ASIC was provided in accordance with the guidelines in Regulatory Guide 16 we have formed the view that a reasonably competent liquidator in the circumstances of these contentions would have ensured that the information included was accurate and, if it involved the provision of an opinion, that the liquidator could substantiate that the opinion expressed had a reasonable basis.

Finding on Contentions 17-21

238. On the basis of our findings in respect of the first allegation in Contentions 17-21 and our finding that Mr Joubert did not include the debt owed to Ms Huang in the ECG Form 533 in Contention 17, we are satisfied that Contentions 17-21 have been established. We are satisfied that those findings demonstrate that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

239. We find that Contentions 17-21 are established.

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[43] *Pace v Antlers Pty Ltd (in Liq)* (1998) 26 ACSR 490 ("*Pace*")
[44] *Pace* Ibid footnote 43 at [501]

Contention 22

240. ASIC contends that within the meaning of ss1292(2)(d)(i) of the Act that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he did not report to ASIC pursuant to s533 of the Act, a possible contravention of s344 of the Act by the director and/or previous directors of ZAG in failing to take all reasonable steps to comply with, or secure compliance with s286 of the Act as set out in the Amended SOFAC.

241. The particulars in the Amended SOFAC are in the same terms as the *further allegation* in Contentions 17-21 (see paragraph 223 hereof). On 4 January 2011, (after he had made an initial Form 533 Report to ASIC with respect to ZAG which he had done on 3 September 2010), Mr Joubert issued an Annual Report to the creditors informing them that he was not in receipt of sufficient books and records and had consequently made written demands for records on the Director and external accountants and that at that stage of the liquidation his view was that ZAG had not maintained adequate books and records in accordance with s286 of the Act. The allegation was that Mr Joubert should have made a further Form 533 report to ASIC regarding a possible contravention of s344 of the Act by Mr Rosunally and/or previous directors of ZAG in failing to take all reasonable steps to secure compliance with s286 of the Act.

242. The evidence ASIC submitted in support of this contention was as follows:

    (a) on 5 January 2010, according to the WIP activity sheet of ZAG, Mr Joubert had a meeting with the accountant and sent a s530B notice to deliver books of the company to Mr Rosunally;

    (b) on 17 June 2010 Ms Davis sent an email to Mr Gino Cassaniti requesting a list of the company's assets and enclosing a further notice pursuant to s530B addressed to BANQ Accountants and requesting delivery of ZAG's books and records;

    (c) at no time did Mr Joubert receive any books and records from anyone, nor any response to the s530B notices he had despatched;

    (d) on 3 September 2010, Mr Joubert lodged his s533 report in which he stated he had not obtained or inspected ZAG's books and records;

    (e) on 6 September 2010, Mr Gino Cassaniti informed Ms Davis that he would post the books and records to them and

    (f) on 4 January 2011 the Annual Report to Creditors was despatched in which he expressed the view that ZAG had not maintained adequate books and records in accordance with s286 of the Act.

243. ASIC submitted that the above evidence, namely the issuing of demands to Mr Rosunally and BANQ Accountants and their lack of response was sufficient to require the reporting of a possible contravention of s344/s286 by Mr Rosunally and/or other previous directors of ZAG.

244. For the reasons set out in paragraphs 232-233 hereof regarding the elements necessary for a ***s344(2)/s286 obligation to keep financial records*** report set out

in the substantiation guide incorporated in ASIC Regulatory Guide 16, we have formed the view that the facts relied on by ASIC do not establish that Mr Joubert had an obligation to make a s533 report as alleged.

245. We note that the terms of ss1292(2)(d) require the Board to form its own view as to whether the relevant conduct did not meet the standard required under the section. The fact that Mr Joubert conceded in his Amended Response that it would have been appropriate to report possible misconduct in relation to ZAG is a matter that is independent of and not relevant to the Board's obligation.

Finding on Contention 22

246. We find that Contention 22 is not established.

Contentions 23–25

Annual reports to Creditors ECG, PMG, ZAG

247. Contentions 23-25 contend that with respect to ECG, PMG and ZAG, Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act in that he lodged Annual Reports to creditors that were deficient and/or contained false or misleading statements.

248. Each of Contentions 23-25 included allegations of dishonesty. In respect of ECG the dishonesty allegation related to the stated causes of failure in the annual report; PMG for alleged failure to report investigations on a disposal of the company's motor vehicles in the annual report; and ZAG for the stated causes of the company's failure set out in the annual report. For the reasons set out in paragraphs 29-44 hereof we have formed the view that the dishonesty allegations have not been pleaded sufficiently and in accordance with our comments in paragraph 45 hereof we have limited our consideration of Contentions 23-25 to the question of whether Mr Joubert failed to act with due care and diligence.

Contention 23

ECG

249. The Amended SOFAC annexed a copy of the Annual Report to Creditors dated 8 October 2010 with respect to ECG ("ECG Annual Report"). ASIC alleged that the ECG Annual Report was deficient and/or false and misleading:

    (a) in that Mr Joubert had no reasonable basis to hold or express the opinion that the reasons for ECG's failure were poor strategic management, economic conditions and particularly the economic downturn, inadequate cash-flow and capital injection and poor performance;

    (b) insofar as the ECG Annual Report falsely stated:

        (i) That Mr Joubert had liaised with Ms Foster, the ECG Director and staff of ECG;

        (ii) that collection and storage of books and records of ECG had been attended to; and

(iii) that books and records of ECG had been provided to the Department of Fair Trading to assist in their investigations.

250. In his Amended Response, Mr Joubert:

(a) Denied that he had not liaised with Ms Foster as he had written to her regarding ECG's Books and Records;

(b) denied that he had not liaised with staff of ECG as his employee Mr Bowers had communicated with Ms Huang regarding her claim;

(c) did not admit that he had not collected or stored any books and records of ECG;

(d) admitted that he had not provided any books and records to the Department of Fair Trading (in cross-examination Mr Joubert said that he had used a template document and the reference to provision of documents to the office of Fair Trading should have been removed); and

(e) admitted that he did not have sufficient books and records of ECG to form a determination as to the reasons for ECG's failure based on his own investigation, but says that he was told in general terms the reasons for failure of ECG at the pre-appointment meeting with CAP Accounting and that in the absence of evidence to the contrary it was reasonable for him to consider those reasons to be true.

251. In his statement dated 17 August 2015 Mr Joubert stated that the opinion he held as to the circumstances of failure was genuine and that at the time he considered he had a proper basis for holding it. He accepted that the reference to the Department of Fair Trading in the report was wrong and that the only explanation for the reference seemed to be that a precedent document was used and the reference was not removed.

252. In cross-examination Mr Joubert said that he had not received any books and records in respect of ECG as at 8 October 2010.

253. As to the allegation in Contention 23 that Mr Joubert did not have a reasonable basis to hold or give an opinion as to the causes of failure of ECG, we refer to and repeat our reasoning in paragraphs 230-231 hereof which applies equally to the allegation in this contention and forms the basis of our view that the evidence establishes this allegation.

254. As to the other allegations in Contention 23 we find on the evidence that it is established that Mr Joubert had not provided any books and records to the Department of Fair Trading and that he had not collected any books and records of ECG as stated in the ECG Annual Report, although we do not regard the evidence as sufficient to establish that Mr Joubert did not liaise with the Directors and staff of ECG.

Was the conduct established a failure to act with due care and diligence by reference to the standard of a reasonably competent liquidator?

255. Having regard both to the high standards expected of liquidators in the exercise of their professional skill in the performance of their duties and the importance

of providing accurate information to creditors in accordance with the 2008 Code we have formed the view that a reasonably competent liquidator in the circumstances of Contention 23 would have ensured that the details included in the Annual Report were correct in all material respects. Further, to the extent a professional opinion was expressed, that that opinion was based on independent analysis by the liquidator and could be shown to have a reasonable basis.

256. While errors do of course occur and every minor error would not necessarily amount to a failure to exercise due care and diligence on the part of a reasonably competent liquidator, we have formed the view that the extent and nature of the errors established by the evidence in Contention 23 do demonstrate a failure to act with due care and diligence. The law is clear that a liquidator owes fiduciary obligations to creditors. The serious and exacting nature of that obligation informs the attendant level of care and skill necessary on the part of a liquidator when communicating with creditors.

Finding on Contention 23

257. For these reasons we have formed the view that our findings in respect of Contention 23 demonstrate a failure by Mr Joubert to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

258. We find that Contention 23 is established.

Contention 24

259. On 24 June 2011, Mr Joubert prepared and sent the Annual Report to Creditors for PMG pursuant to ss508(1)(b)(ii) of the Act. The report included the following statements:

    (a) He had attended to the collection and storage of all available books and records of PMG;

    (b) he had provided books and records to the Department of Fair Trading regarding their investigations and liaised with PMG's directors and staff;

    (c) that at this stage of the liquidation he was of the view that PMG had not maintained adequate books and records in accordance with s286 of the Act; and

    (d) that he had found no registered charges against PMG.

260. ASIC alleged that Mr Joubert acted without due care and diligence because the report was deficient and/or contained false or misleading statements insofar as Mr Joubert:

    (a) Had not liaised with the director and staff of PMG;

    (b) did not refer to the disposal of the company's motor vehicles and assets or refer to the correspondence and enquiries in that regard;

    (c) had not attended to the storage and collection of PMG's books and records nor provided any to the Department of Fair Trading; and

(d) did not refer to registered charges to National Australia Bank ("NAB") and Suncorp.

261. In his Amended Response Mr Joubert admitted that the Annual Report did not refer to either the disposal of PMG's motor vehicles and plant and equipment or the registered charges to NAB and Suncorp and that the report erroneously referred to having collected PMG's books and records and having provided documents to the Department of Fair Trading.

262. On the basis of the evidence we are satisfied that the relevant factual allegations with respect to the PMG Annual Report have been established.

Was the conduct established a failure to act with due care and diligence by reference to the relevant standard of a reasonably competent liquidator?

263. We note that the evidence in relation to PMG demonstrates that the Annual Report did not refer to a number of significant matters that had occurred in the PMG liquidation but did not include an opinion from Mr Joubert as to the causes of failure of PMG.

264. Having regard both to the high standards expected of liquidators in the exercise of their professional skill in the performance of their duties and the importance of providing full and accurate information to creditors in accordance with the 2008 Code, we have formed the view that the omissions particularised in paragraph 260 hereof are material and that a reasonably competent liquidator would have included them in the Annual Report to PMG creditors.

Finding on Contention 24

265. For these reasons we have formed the view that our findings in respect of Contention 24 demonstrate a failure by Mr Joubert to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

266. We find that Contention 24 is established.

Contention 25

267. On 4 January 2011, Mr Joubert prepared and sent an Annual Report to creditors for ZAG pursuant to ss508(1)(b)(ii) of the Act in which the following statements were made:

(a) There were no registered charges against the company;

(b) ZAG's failure was caused by poor strategic management, economic conditions and particularly the economic downturn, inadequate cash-flow and capital injections and poor trading performance;

(c) there were no receipts and payments in the ZAG liquidation as evidenced in the annexure to the annual report;

(d) that at this stage of the liquidation Mr Joubert's view was that ZAG had not maintained adequate books and records in accordance with s286 of the Act and;

(e) there would be no AGM convened for ZAG as the Annual Report had been prepared instead.

268. ASIC alleged that Mr Joubert acted without due care and diligence because the Report was deficient and/or contained false or misleading statements insofar as Mr Joubert:

(a) Failed to report that there were two registered charges in favour of Suncorp Metway Advances Corporation Pty Ltd and Capital Finance Australia Ltd; and

(b) did not have a reasonable basis for the opinion expressed in the report as to the reasons for ZAG's failure.

269. In his Amended Response Mr Joubert admitted that he failed to report on the registered charges and we are satisfied that this factual allegation has been established. He denied that he did not have a reasonable basis for the views he expressed as to the causes of ZAG's failure. As to this matter, we refer to and repeat our comments and findings with respect to ZAG in the context of Contentions 17-21 in paragraphs 219-222 and 229-231 hereof which apply equally to the allegation in this contention and on which basis we find that this allegation has been established.

Was the conduct established a failure to act with due care and diligence by reference to the relevant standard of a reasonably competent liquidator?

270. We refer to and repeat as also relevant to this contention our comments in paragraphs 230-231 and 236-237 hereof.

Finding on Contention 25

271. We have concluded in respect of Contention 25 based on the matters set out above, that Mr Joubert did not carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

272. We find that Contention 25 is established.

Contentions 26-30

273. Contentions 26-30 allege that Mr Joubert failed to properly investigate the affairs of ECG, WOT, AH, PMG, and ZAG.

274. In respect of ECG (Contention 26), the particulars allege Mr Joubert did not but should have investigated the affairs of ECG in any or all of the following ways:

(a) Enquiries of the director Ms Foster as to the affairs of ECG and follow up regarding the whereabouts of books and records of the company and/or her failure to respond to a notice to deliver books and records to the liquidator;

(b) enquiries of CAP Accounting as to the affairs of ECG and follow up regarding the whereabouts of books and records of the company and/or their failure to respond to a notice to deliver books and records to the liquidator;

(c) making enquiries of Ms Huang as to the affairs of the company; and

(d) locating and/or making enquiries of previous directors of ECG as to its affairs and/or the whereabouts of its records.

275. ASIC further alleged that Mr Joubert should have undertaken sufficient investigation to enable him to express a view as to the reasons for ECG's failure in the Annual Report and the s533 Report.

276. In his Amended Response Mr Joubert denied that in the circumstances known to him at the relevant time a competent liquidator in his position would have or had an obligation to conduct the investigations particularised where he had called for funding but received none and said that he did make enquiries of CAP Accounting and otherwise admitted the allegation.

277. In respect of WOT (Contention 27) the particulars allege Mr Joubert did not but should have investigated the affairs of WOT in any or all of the following ways:

(a) Enquiries of the director Ms Foster as to the affairs of WOT and follow up regarding the whereabouts of books and records of the company and/or her failure to respond to a notice to deliver books and records to the liquidator;

(b) enquiries of CAP Accounting as to the affairs of ECG and follow up regarding the whereabouts of books and records of the company and/or their failure to respond to a notice to deliver books and records to the liquidator;

(c) attending WOT's principal place of business;

(d) locating and/or making enquiries of the directors of World of Timber Pty Ltd ACN 138 924 697 regarding its relationship with WOT; and

(e) locating and/or making enquiries of previous directors of WOT as to its affairs and/or the whereabouts of its records.

278. It was further alleged that Mr Joubert should have undertaken sufficient investigation to enable him to express a view as to the reasons for WOT's failure in the Annual Report and the s533 Report.

279. Mr Joubert's Response to Contention 27 was in similar terms to his response to Contention 26. That is to say he denied that in the circumstances known to him at the relevant time a competent liquidator in his position would have or had an obligation to conduct the investigations particularised where he had called for funding but received none and said that he did make enquiries of CAP Accounting and otherwise admitted the allegations.

280. In respect of AH (Contention 28), the factual particulars alleged were similar to those set out in relation to Contentions 26 and 27 as was Mr Joubert's response.

281. In respect of PMG (Contention 29) as well as the factual particulars alleged in respect of ECG, WOT and AH, there were additional matters set out including:

(a) Making enquiries of Salvatore Provenzano in his capacity as secretary as to the affairs of PMG; and

(b) making enquiries of the directors of LGM NSW Pty Ltd and the landlord regarding the affairs with PMG.

282. Mr Joubert's response to the allegations in respect of PMG was similar to that of ECG, WOT and AH except that:

(a) he denied that he did not make follow up enquiries of Ms Foster asserting that following her failure to comply with the notice sent to her on 8 December 2010 requiring production of PMG's books and records, he sent a notice to her on 20 December 2010 requiring her to attend his office for an interview, with which she did not comply; and

(b) he denied that not making enquiries of any previous directors of PMG including Mr Piero Provenzano (" Mr Provenzano") and said that on 8 December 2010 he sent Mr Provenzano a notice requiring the production of PMG's books and records, and on 20 December 2010 he sent Mr Provenzano a notice requiring Mr Provenzano's attendance for an interview and a notice to Mr Salvatore Provenzano requiring the production of PMG's books and records to which he received no response.

283. In respect of ZAG (Contention 30) the investigative steps it was alleged that Mr Joubert should have undertaken included:

(a) Making enquiries and follow up enquiries of Mr Rosunally and relevant persons from BANQ Accountants as to the affairs and the whereabouts of books and records of ZAG;

(b) providing details requested to Commonwealth Bank of Australia to enable them to properly identify any accounts held by ZAG; and

(c) locating or making enquiries of any previous directors of ZAG, including Messrs Cosimo and Frank Criniti as to the affairs and whereabouts of the books and records of ZAG.

284. Mr Joubert denied that he failed to take all or necessary steps of a reasonably competent liquidator in investigating the affairs of ZAG. He submitted that pursuant to s545 of the Act he was not liable to incur any further expense in relation to the winding up of ZAG unless ZAG had sufficient available property to fund those expenses and ZAG had no available property to fund any expenses. He asserts that he sent a notice to Mr Rosunally on 5 January 2010 requiring the production of the books and records of ZAG and said that he did make enquiries of relevant persons from BANQ Accountants and received no books or records in response.

285. In addition to the matters set out above the particulars of each of contentions 26-30 all included an allegation that a reasonably competent liquidator in Mr Joubert's position would have given consideration to applying to ASIC under its assetless administration funding programme. There was nothing in Mr Joubert's files to indicate (other than in the case of ECG) that he gave consideration to so applying. Contentions 26-30 each alleged that Mr Joubert "*failed to take all or necessary steps of a reasonably competent liquidator to investigate the affairs*" of each of the companies and the particulars set out the steps he should have taken. In our view whether Mr Joubert gave consideration to applying to ASIC

for funding is not a matter that is relevant to the contentions being made that Mr Joubert "*failed to take all or necessary steps of a reasonably competent liquidator to investigate the affairs*" of each of the companies. We refer to our earlier comments regarding the requirement for the case being made against Mr Joubert to be clearly articulated and in our view this requires the primary allegations being made to appear clearly and succinctly in the contentions in the SOFAC with particulars specifically relating to the contention being made. For these reasons we have formed the view that the allegation that Mr Joubert failed to give consideration to applying to ASIC under the assetless administration funding scheme is not a matter that is relevant for us to consider in the context of making our findings on Contentions 26-30 regarding whether Mr Joubert "*failed to take all or necessary steps of a reasonably competent liquidator to investigate the affairs*" of each of the companies.

286. The Board, in its decision in the matter of *Fiorentino*[45] considered the nature and extent of the duty of a liquidator to investigate the affairs of a company in liquidation. That decision contains a useful summary of relevant legal authority as follows:

"*[525] The investigation of the affairs of the company in liquidation is one of the fundamental obligations of a liquidator, whether the liquidation be voluntary or court-ordered.*

[526] In Re Fermoyle Pty Ltd (In Vol Liq) (1982) 6 ACLR 640 at 648, (a case of a voluntary winding up) Crockett J quoted McPherson: The Law of Company Liquidation 2nd ed at 225 where it was said:

> *"One of the primary functions of the liquidator is to investigate the affairs of the company, including its promotion and formation, and the conduct of its business in the past. This must be done not only for the reason that it is necessary in order to enable him to discharge his duty of locating and collecting the assets of the company, but also because it may lead to a public examination or prosecution of delinquent officers of the company which it is part of the liquidator's duty to set in motion."*

[527] In Commonwealth of Australia v O'Reilly [1984] VR 931 at 943, again a case involving a voluntary winding up, Fullagar J confirmed that the duties of a liquidator included "to investigate the affairs of the company from its foundation onwards" and continued:

> *"He should be alert to ascertain any misfeasance by officers or former officers or promoters and, so far as the assets allow, proceed to recover any preferences or any damages for which any such persons may be liable. Where the history of the company shows a likelihood of some misfeasance, he should investigate, so far as the assets allow, to see whether officers or former officers have infringed the requirements of the law, at least where the liquidation will otherwise result in no payment at all to external creditors, and where the external creditors would have been paid in full if transactions which raise or assist to raise the likelihood had not been entered into."*

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[45] *Fiorentino* Ibid footnote 1 at [525 to 529]

[528] In Re HIH Insurance Limited (2001) 39 ACSR 645 at [17], Santow J referred to the duties and functions of liquidators and said:

> *"In recent times, the functions and duties of liquidators are seen as more extensive: for example, the duty of a liquidator to deliver a report under s533, Corporations Act 2001 (Cth). It is recognised in cases such as Douglas-Brown (official liquidator of Woomera Holdings Pty Ltd) (rec and mgr apptd) v Furzer (1994) 13 ACSR 184 and Re New Cap Reinsurance Corp Holdings Ltd [2001] NSWSC 835; BC200106778 (per Santow J) that there is a public interest in the proper investigation of possible civil or criminal proceedings arising out of the insolvency of corporations as well as the creditors' and the public interest in a beneficial winding up of the corporation."*

[529] However, the liquidator's obligation to carry out investigations is subject to a number of considerations:

> *(a) In the first place, no liquidator is obliged to spend his own money to further a winding up if the company has no funds immediately available to him for this purpose. Re Goonal Pty Limited (1977) 3 ACLR 408. However, in Commonwealth of Australia v O'Reilly at 943, Fullagar J said:*
>
> > *"If the assets available (pending any recovery for misfeasance etc) do not allow of full compliance with the relevant duties, the liquidator should report the circumstances, with his opinion of the likelihood, and the reasons for his opinions, to the interested creditors and to the Corporate Affairs Commissioner."*
>
> *(b) Secondly, the need for investigation depends upon the circumstances, and may require judgement on the part of the liquidator. In Re St Gregory's Armenian School (In Liq) (2012) 92 ACSR 588 at [33], Brereton J said:*
>
> > *"[33] In evaluating the conduct of a liquidator, it is important to remember that a liquidator is required to make practical commercial judgments. Much of a liquidator's decision-making involves the application of business acumen. That a decision is not fully reasoned or supported by the fullest investigation does not mean that it should be second-guessed by the court.*
> >
> > *[34] Moreover, in an environment in which there are usually insufficient funds fully to pay claims, it is desirable that liquidators be frugal in incurring expenditure. It is usually preferable that scarce resources be preserved for the benefit of creditors and contributories, rather than expended in chasing all hares down every burrow. It is not unusual for liquidators to be criticised for incurring excessive expenditure or remuneration; SingTel is an obvious illustration. It is undesirable that the court adopt a policy that is calculated to encourage further expenditure by liquidators on investigations out of more abundant caution, rather than a practical commercial judgment that further exploration is 'not worth the candle'."*

287. In relation to Contentions 26-30 it is uncontroversial and not in issue between the parties that beyond taking some initial steps to obtain the books and records of each of the companies, Mr Joubert did not undertake the investigative steps alleged in the Amended SOFAC. Mr Joubert's answer to the allegation was that in circumstances where he had called for funding but received none, there was no available company property to fund such expenses and in light of s545 of the Act, he was not obliged to incur any further expense. While the authorities above confirm the fundamental nature of a liquidator's duty to investigate the affairs of a company, they also recognise that a liquidator is not obliged to spend his own money if the company has no funds immediately available to him for the purpose, but that if the assets available do not allow full compliance with the relevant duties, the liquidator should "*report the circumstances with his opinion of the likelihood, and the reasons for his opinions to the interested creditors and the Corporate Affairs Commissioner*" *("O'Reilly")*[46].

288. In respect of each of the companies the subject of Contentions 26-30, Mr Joubert admitted to not taking steps to investigate that in our view would have provided him with no more than basic information about the companies to which he had been appointed as liquidator. When that is considered in the context of the legal principles regarding the importance and fundamental nature of the liquidator's duty to investigate it seems self-evident that a reasonably competent liquidator when discharging that duty would at the least take some basic steps to inform himself about the company in order to form a view as to the matters on which he would be required to report to the creditors and to ASIC. While available company funds would be relevant to the extent of any investigation which would reasonably be required, it is the case that in respect of each of the companies the subject of these proceedings Mr Joubert had an expectation of being remunerated for undertaking the liquidations by either the relevant directors or accounting firm and in taking on the matters on that basis it was reasonable to expect that he would undertake all aspects of the liquidation to a sufficient degree. The fact that Mr Joubert did not make attempts to liaise with former directors or visit the premises of the business, especially in circumstances where he had either none or limited books and records to which to refer meant that he placed himself in a position where any independent analysis, such as is expected and required of a liquidator in his role as gatekeeper, was simply not possible and does not in our view reflect an approach consistent with the high professional standards expected of a registered liquidator.

289. Mr Joubert relied on ss545(1) of the Act. That section provides:

> "*Subject to this section, a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property*".

We note that the sub-section refers to expenses as distinct from remuneration and in any event ss545(3) states:

> "*Nothing in this section shall be taken to relieve a liquidator of any obligation to lodge a document (including a report) with ASIC under any*

[46] *Commonwealth of Australia v O'Reilly* [1984] VR 931 ("*O'Reilly*") at [943], Fullagar J

provision of this Act by reason only that he or she would be required to incur expense in order to perform that obligation".

290. In our view it is self-evident that in order to sufficiently discharge the reporting obligations referred to in ss545(3) a degree of investigation would be required in order to form views on matters which are reportable such as the reasons for a company's failure in the Form 533 reports. If initial steps are taken, and in the face of limited availability of funds, a liquidator decides that further investigation is not justified, then the legal authorities support the view that that decision should be communicated to creditors and ASIC. By contrast what occurred in these liquidations was that Mr Joubert made his reports and as we have already found, included views therein as to, for example the causes of corporate failure, that were not based on facts known to him, because he had prosecuted little if any substantive investigation of the companies' affairs in order to inform himself regarding those relevant matters.

291. For these reasons we have formed the view that the evidence with respect to Contentions 26-30 demonstrates that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act, in that he failed to adequately investigate the affairs of ECG, WOT PMG, AH and ZAG as alleged in Contentions 26-30 of the Amended SOFAC.

Findings on Contentions 26-30

292. We find that Contentions 26-30 are established.

Contentions 31-35

293. Contentions 31-35 allege that within the meaning of ss1292(2)(d)(i) of the Act, Mr Joubert failed to take all or any necessary steps of a reasonably competent liquidator in that he did not have proper or adequate systems or practices in place to ensure that information sent to creditors was up to date, accurate and cogent, and forms lodged with ASIC in respect of ECG, WOT, AH, PMG and ZAG were accurate and did not contain misleading statements or information.

294. In relation to ECG (Contention 31), the factual particulars alleged were:

    (a) The Form 524 statements dated 7 May 2010, 9 November 2010, and 24 January 2011 that falsely declared there were three unsecured creditors with an estimated value of $220,500, when in fact there were four unsecured creditors totaling $50,812.86;

    (b) the circular to ECG creditors sent on 12 July 2010 noting Mr Joubert had received limited books and records when in fact he had received none;

    (c) the Annual Report to ECG creditors dated 8 October 2010 and the s533 report dated 18 January 2011 in which Mr Joubert set out a statement of opinion as to the causes of failure of ECG that he did not have a reasonable basis for making; and

    (d) the remuneration report with respect to ECG which referred to matters that were not relevant to the liquidation of ECG, including preparation of a s439A report, correspondence with "*Willis*" regarding initial and ongoing

workers compensation requirements, preparing a deficiency statement and preparation of affidavits seeking non-lodgements assistance.

295. In relation to WOT (Contention 32), the factual particulars alleged were:

(a) That the Form 529 dated 6 November 2009 did not identify WOT as the former name of ACN 121 404 073;

(b) that Mr Joubert sent letters to banking institutions utilities and telecommunications providers referring only to ACN 121 404 073 (and not to "WOT") and not within 2 business days of his appointment on 6 November 2009 as liquidator of WOT;

(c) the circular to creditors dated 6 November 2009 enclosed a DIRRI that did not appropriately disclose an indemnity or relevant relationship and was not updated when Mr Joubert was paid fees on 21 January 2010;

(d) on 27 May 2010 Mr Joubert signed and lodged a Form 524 that did not disclose a receipt of $6,000 in respect of his fees and declared that he had not received and/or paid any moneys from WOT during the period.

(e) a further circular to creditors of WOT sent on 9 August 2010 noted that he had received limited books and records when in fact he had not received any;

(f) the s533 report dated 21 September 2010 included Mr Joubert's opinion as to the causes of WOT's failure for which he had no reasonable basis; and

(g) the remuneration report dated 6 November 2009 referred to matters that were not relevant to the liquidation of WOT, including preparation of a s439A report, correspondence with "*Willis*" regarding initial and ongoing workers compensation requirements, preparing a deficiency statement and preparation of affidavits seeking non-lodgements assistance.

296. In relation to AH (Contention 33), the factual particulars alleged were:

(a) The circular to creditors dated 17 December 2009 enclosed a DIRRI that did not appropriately disclose an indemnity or relevant relationship and, was not updated when he was paid fees on 21 January 2010;

(b) "*Day One*" correspondence to banking institutions, utilities, telecommunications providers and the like was sent on 11 January 2010 and not within 2 days of Mr Joubert's appointment as liquidator of AH which had been made on 17 December 2009;

(c) the s533 report dated 18 October 2010 included Mr Joubert's opinion as to the causes of AH's failure for which he had no reasonable basis;

(d) a circular to AH creditors sent on 22 October 2010 noted that he had received limited books and records when in fact he had not received any;

(e) a further Amended AH DIRRI dated 8 September 2011 failed to disclose the AH indemnity and declared a voluntary contribution of $5,000 had been made by an AH director when in fact it had been made by CAP Accounting and paid pursuant to the AH indemnity; and

(f) the remuneration report dated 17 December 2009 referred to matters that were not relevant to the liquidation of WOT, including preparation of a s439A report, correspondence with "*Willis*" regarding initial and ongoing workers compensation requirements, preparing a deficiency statement and preparation of affidavits seeking non-lodgements assistance.

297. In relation to PMG (Contention 34), the particulars alleged were:

(a) "*Day One*" correspondence to banking institutions, utilities, telecommunications providers and the like was sent on 9 July 2010 following Mr Joubert's appointment on 28 June 2010 and not within 2 days of his appointment;

(b) in the circular to creditors dated 21 January 2011 Mr Joubert noted that he had received limited books and records when he had in fact received none. The circular was also deficient insofar as it made no reference to the disposal of the company's assets just prior to his appointment as the liquidator of PMG nor reference to the ATO's audit of the disposal of one of the assets or to his receipt of $5,000 on 2 November 2010;

(c) the s533 report that he lodged on 29 June 2011 included Mr Joubert's opinion as to the causes of PMG's failure for which he had no reasonable basis;

(d) the remuneration report for the period 28 July 2010 to completion referred to matters that were not relevant to the liquidation of PMG, including preparation of a s439A report, correspondence with "*PRM*" regarding initial and ongoing workers compensation requirements, preparing a deficiency statement and preparation of affidavits seeking non-lodgements assistance; and

(e) the circular to creditors dated 6 September 2011 enclosed a DIRRI that did not appropriately disclose an indemnity or relevant relationship, and was not updated in a timely fashion following the receipt of fees on 2 November 2010.

298. In relation to ZAG (Contention 35), the factual particulars alleged were as follows:

(a) "*Day One*" correspondence to banking institutions, utilities, telecommunications providers and the like was sent on 8 January 2010 following Mr Joubert's appointment on 5 January 2010 and not within 2 days of his appointment;

(b) on 28 January 2010 Mr Joubert lodged a Form 5011 incorrectly attaching a copy of minutes signed by Mr Joubert for Bakers Choice Trading Company Ltd;

(c) the circular sent to creditors on 6 January 2010 enclosed a DIRRI that did not appropriately disclose an indemnity or relevant relationship.

(d) the Form 524 lodged on 14 July 2010 and Mr Joubert's letter to creditors dated 5 August 2010 were deficient insofar as they did not declare receipt of monies into the ZAG accounts and payment of his liquidation fees;

(e) the s533 report lodged on 3 September 2010 included Mr Joubert's opinion as to the causes of ZAG's failure for which he had no reasonable basis;

(f) the Annual Report to creditors failed to include information regarding the registered charges to Suncorp Metway Advances Corporation Ltd and Capital Finance Ltd and included Mr Joubert's opinion as to the causes of ZAG's failure for which he had no reasonable basis; and

(g) the remuneration report for the period 5 January 2010 to completion referred to matters that were not relevant to the liquidation of ZAG, including preparation of a s439A report, correspondence with "*Willis*" regarding initial and ongoing workers compensation requirements, preparing a deficiency statement and preparation of affidavits seeking non-lodgements assistance.

299. In respect of Contentions 31-35 Mr Joubert denied the allegation that he did not have proper systems in place and said that to the extent there were some errors they did not justify the conclusion that his systems were inappropriate or that he failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i).

300. The submissions made on Mr Joubert's behalf acknowledged that with the benefit of hindsight Mr Joubert's systems were not sufficient to prevent the mistakes that have been shown to have been made in the documents before the Panel.

301. ASIC submitted that the particulars set out in support of Contentions 31-35 sustained the allegation that Mr Joubert did not have proper and adequate systems in place to ensure information sent to creditors was up to date, accurate and cogent and that forms lodged with ASIC were accurate and did not contain false and misleading statements or information.

302. It was not in issue that the errors identified by the particulars in Contentions 31-35 had occurred and certainly the fact that they occurred and were frequently repetitive errors is circumstantial evidence supporting the allegation that Mr Joubert's systems and processes were not adequate to enable him to perform his duties as a liquidator adequately and properly (although the particulars as established do not constitute direct evidence as to the ways in which Mr. Joubert's systems and processes were lacking).

303. Mr Joubert was cross-examined in some detail on aspects of his systems and practices, including the seniority and training of his employees and his approach to supervision. He had a number of employees with varying levels of experience between 2008 and 2012. Mr Joubert's evidence was that he instructed his employees as to the tasks they were to perform and closely supervised their discharge of those tasks. In 2012 he employed Ridda Abdel Malik ("Mr Malik") as an insolvency manager. Mr Malik was a former colleague with whom Mr Joubert worked while at his former employer.

304. Mr Joubert gave evidence as to the systems and practices he applied when undertaking a creditors' voluntary liquidation. As well as an independence check and company search this essentially involved utilising "*glossary 15*",

which was essentially a database containing pro-forma documentation including appointment documentation, and pro-forma correspondence to third parties and creditors relevant to implementing a creditors' voluntary liquidation. The specific company information would be input to create the relevant documentation. Relevant ASIC forms were separate to the *glossary 15* documentation and were kept in either hard or soft copy within his office.

305. There was also a checklist that Mr Joubert agreed to a large extent set out the system and practice followed by his firm in 2008/9. Mr Joubert's evidence was that when a matter commenced a copy of this checklist was printed and placed on the file and it was completed by the employee who conducted a file review by inserting the initials of the officer who had completed the task next to the relevant item in the checklist as well as the date the task was completed. We note that this evidence is inconsistent with the evidence of Ms Davis as to the use to which the checklists were put and for the reasons we have referred to in paragraph 80 hereof we have preferred Ms Davis' evidence.

306. Mr Joubert confirmed that until perhaps halfway through 2011 when he installed the MYOB Insolvency program with another program called Accountant's Enterprise that set calendar reminders for tasks required within certain timeframes, the process by which he would ensure steps required in a creditors' voluntary liquidation were carried out on time would be to diarise them in an electronic diary to which he and his employees had access. His evidence was that there was no effective check in place as to the completeness or accuracy of the diary entries made but that he would convene regular weekly meetings with the staff about upcoming tasks on specific matters as well as ad-hoc meetings that occurred when daily mail was distributed. All mail received was vetted by Mr Joubert and when he distributed it he would often provide instructions at the same time. At the weekly meetings not all files were reviewed each week. Mr Joubert's evidence was that the files to be the subject of a given weekly meeting were identified by matters that were diarised. Mr Joubert did not provide staff with any specific instruction about the keeping of diary notes or working papers. Mr Joubert said that the practice he personally adopted was not necessarily to keep file notes. He confirmed that he was aware that he was required under the Act to keep an audit trail of the liquidations he conducted. He could not recall whether he gave staff specific instructions to keep working papers and books.

307. Mr Joubert was cross-examined regarding the circumstances in which Joubert Insolvency staff were permitted to use Mr Joubert's electronic signature. This was permitted he said on what was termed "*bulk correspondence*" that was in accordance with his instructions i.e. notices to banks and utility companies and on an ad-hoc basis in instances where it was necessary to dispatch correspondence in his absence.

308. Mr Joubert provided evidence regarding the process for electronic lodgement of forms with ASIC. He confirmed that members of his staff were able to log in and lodge forms on his behalf. He also confirmed that he had signed an agreement with ASIC to comply with its "*electronic lodgement protocol*" and that in all cases where his signature appeared either electronically or physically, his practice was to have reviewed those documents before they were lodged or despatched.

309. There was further evidence adduced in cross-examination regarding Mr Joubert's processes. For example:

(a) he said that there was no process for entering information on his electronic file system that would show necessarily that a file had been closed although it could be gleaned from a deregistration request being on file for example; and

(b) as to correspondence sent in specific matters, the record of dispatch would not be found on the file but in the daily record that was kept of what was posted from the firm.

310. With the exception of the file checklists there was no documentary evidence adduced regarding the office systems about which Mr Joubert gave evidence and therefore no evidence that corroborated Mr Joubert's evidence.

311. Even were we to place weight on Mr Joubert's evidence and in the circumstances of his general lack of recall and no corroborating evidence we have decided that the most appropriate course is not to, that evidence would not demonstrate the completeness nor efficacy of the office systems and practices in place at the relevant times in any event. The fact that the errors particularised occurred is consistent with the view that to the extent there were systems and processes in place at the firm they were either not always followed or were not sufficiently efficacious to enable Mr Joubert to ensure that his duties as a liquidator were carried out to an adequate standard.

312. It appears to us from the evidence of those errors and oversights that a significant and relevant gap in Mr Joubert's systems must have been that he had not put in place effective back up or safety net procedures that would capture or identify errors or oversights once they occurred. In addition, to the extent he may have undertaken supervision it was not apparently reliable as an effective means of identifying errors if they were initially overlooked, as the errors which occurred were often repeated. For example, Mr Joubert's evidence was that not all matters were systematically checked at the weekly meetings but, rather, diary entries for tasks in a given week were the trigger for identifying the matters to be discussed at the weekly meeting. Were that evidence to be given weight, a reasonable conclusion would be that if a matter had not been diarised for any reason then the weekly meeting would not serve to identify that oversight and the matter would in all likelihood slip through the supervision net of the weekly meeting. Similarly, Mr Joubert said that there was no audit procedure for ensuring diary entries were correct and if that were the case there was an obvious gap in the process in place in his office at the time.

313. When these issues are considered in light of further evidence, such as;

(a) that it is unlikely his staff, given their relative inexperience, would have used file notes as a management tool when he did not at all times and he did not recall instructing them to; and

(b) that the matter files were kept partly electronically and partly in hard copy and records such as when correspondence had been sent out was kept in a record separate to the matter file;

the potential for oversight to occur, as the evidence demonstrates it did, was in our view obvious, particularly in the absence of any regular and rigorous checking process as appeared to be the case.

314. Both the 2008 Code and the 2011 Code which were in force at the relevant period of these contentions contained provisions regarding the need for policies and procedures.

The 2008 Code included as a principle:

"*Practice Management*

*Members **must** implement policies, procedures and systems to ensure effective:*

- *Quality Assurance;*
- *Compliance Management;*
- *Risk Management; and*
- *Complaints Management*.[47]"

There were further relevant clauses in the 2008 Code including Clause 9.7 which provided:

"*Policies, Processes and Education*

Practitioners should implement policies and processes, and educate staff, to minimise the risk of failing to meet deadlines. The process should include:

- *checklists or other systems;*
- *training; and*
- *auto-reminder schedules (software)*".

Clause 15 provided that practitioners should apply APES standard 320 and in addition to those requirements should develop and implement policies, systems and processes that enable adherence to the 2008 Code and Clause 16 required members to implement systems policies and procedures to ensure effective compliance management.

315. By the time the 2011 Code was introduced it was a requirement to use and maintain checklists or other systems to alert the practitioner to critical dates such as statutory obligations and notifications, meetings and reporting whereas in the earlier code it had been recommended practice.

316. There is no doubt that the relevant practice requirements in place over the period required Mr Joubert to have effective policies, procedures and systems to achieve compliance with legislative requirements and appropriate quality assurance and risk management. These requirements included ensuring information to creditors was accurate and up to date and forms lodged with ASIC were accurate. The evidence in respect of Contentions 31-35

[47] 2008 Code Part A Page 13

demonstrated numerous examples of non-compliance with these requirements and we are satisfied that these matters demonstrate that Mr Joubert's systems and processes were not sufficiently adequate to satisfy the requirements of the 2008 and 2011 Codes that required, amongst other things, effective quality assurance and compliance management.

317. We are satisfied that our findings in relation to Contentions 31-35 demonstrate that Mr Joubert did not carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Findings on Contention 31-35

318. We find that Contentions 31-35 are established.

Contention 36

319. Contention 36 alleges that Mr Joubert failed to carry out or perform adequately and properly, the duties of a liquidator in relation to a letter he sent to the Australian Taxation Office ("ATO") in the ZAG liquidation which was deficient and/or contained false or misleading statements in so far as it stated that Joubert Insolvency did not have any books and records of ZAG in circumstances where Joubert Insolvency had not been informed this was the case and Ms Davis, an employee of Joubert Insolvency, had been informed by Mr Gino Cassaniti, Accountant, that ZAG's books and records would be posted to them

320. Contention 36 included allegations of dishonesty. For the reasons set out in paragraphs 29-44 hereof we have formed the view that the dishonesty allegations have not been pleaded sufficiently and in accordance with our comments in paragraph 45 hereof we have limited our consideration of Contention 36 to the question of whether Mr Joubert failed to act with due care and diligence.

321. By way of background, Mr Joubert's reason for writing to the ATO on 29 September 2010 was to obtain a tax clearance in order to finalise the ZAG administration. On 6 September 2010 Ms Davis had been told by Mr Gino Cassaniti that he would post the books and records. On 9 September 2010 she called the Office of State Revenue ("OSR") and informed "*Ankur*" that she had not received the books and records but expected to and that Joubert Insolvency was in the process of finalising the matter. On 23 September 2010, Joubert Insolvency received a letter from the ATO advising that the ATO could not give tax clearance as the company's liability had not been fully determined. On 29 September 2010 Ms Davis drafted a letter to the ATO which stated that there were no books and records of ZAG. According to Ms Davis' statement she had no independent recollection of the documents or events the subject of Contention 36 but stated that the contents of all the documents she drafted were in accordance with instructions given to her by Mr Joubert and heavily based on templates.

322. Mr Joubert's response to Contention 36 was that the letter to the ATO was drafted by Ms Davis. He was unaware of whether Ms Davis had had a further conversation with the accountants before writing the letter to the ATO and did not know or recall whether he saw the letter before it was sent. He asserted that

if the letter to the ATO was incorrect it was reasonable for him to have relied upon his employee in respect of drafting a letter of that type.

323. ASIC's submissions on this contention relied upon the evidence before the Panel on what Mr Joubert's practice was in relation to supervision of his employees eg: that he said he would not give permission for his electronic signature to be used and his practice of instructing employees on the contents of correspondence in their matters. Notably, there is no evidence of any subsequent discussion with the accountants in which they informed Joubert Insolvency that there were no books and records and the factual basis of the allegation relies on the absence of this evidence to establish the falsity of what was said to the ATO.

324. In his evidence on cross-examination, Mr Joubert was largely unable to recall the circumstances leading to the dispatch of the letter to the ATO which he said he did not write and could not recall if he had reviewed.

325. In our view the available evidence fails to establish the factual basis of the allegation in Contention 36 that the letter to the ATO dated 29 September 2010 contained a false and misleading statement. While we accept the evidence that there is no file note that supports the statement made in the letter to the ATO that there are no books and records of ZAG (and while such a record would have been desirable had a discussion occurred), the making of file notes was not a practice regularly employed by Mr Joubert nor a practice he required of his staff. The Panel is being asked to draw a factual inference based on the absence of a file record that there was no further communication with the accountants between 9 September 2010 and 29 September 2010 when Ms Davis subsequently wrote to the ATO on behalf of Joubert Insolvency stating that there were no books and records. We are not persuaded that such an inference is justified on the basis of the other facts established.

Finding on Contention 36

326. We find that Contention 36 is not established.

Contentions 37-41

327. Contentions 37-41 each allege that Mr Joubert is not a fit and proper person to remain registered as forms lodged with ASIC and information sent to creditors contained false and misleading statements. Contentions 37-41 deal with ECG, WOT, AH, PMG and ZAG respectively and each of those contentions refer to paragraphs of the Amended SOFAC that particularise the allegations. We note that the particularised allegations to which Contentions 37-41 refer are allegations the subject of other contentions in the Amended SOFAC alleging Mr Joubert failed to carry out or perform his duties adequately and properly within the meaning of ss1292(2)(d)(i) of the Act and in respect of which we have made findings, as follows:

(a) ECG Contentions 17 and 23 (both established);

(b) WOT Contentions 1, 15 and 18 (all established);

(c) AH Contentions 2, 8, 19 and 47 (all established);

(d) PMG Contentions 9, 20 and 24 (all established); and

(e) ZAG Contentions 16, 21, 25 (all established), 36 (not established).

328. Contentions 37- 41 allege the specified conduct as the basis for a further finding that Mr Joubert is also not fit and proper to remain registered as a liquidator under ss1292(2)(d). We have already formed our view as to the extent the relevant conduct as particularised has occurred in the context of the contentions as set out above and made findings (to the extent set out in paragraph 327 hereof) that such conduct was a failure by Mr Joubert to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

329. In order to form a conclusion as to whether Contentions 37-41 have been established it therefore remains for us to form our view, based on the relevant legal principles, as to whether that conduct is also a proper and sufficient basis to make a further finding that Mr Joubert is not a fit and proper person to remain registered within the meaning of ss1292(2)of the Act.

330. In the Board's decision in *Fernandez*[48] the question of whether a finding of "*not fit and proper*" is a separate finding[49] was considered. The approach applied by the Board in *Fernandez*[50] was based on the view expressed by Hill J in *Davies*[51] that, to the extent that the phrase "*or is otherwise*" in s1292 of the Act has any significance at all, it is to express a legislative view that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paragraphs (i) and (ii) of ss1292(1) of the Act (and which we note are equally applicable to ss1292(2) of the Act) will ordinarily *not* be a fit and proper person to remain registered. But circumstances may well occur where a person has failed to carry out or perform adequately and properly the duties or functions of a registered auditor without that failure demonstrating that he or she is not a fit and proper person. In such a case, the Board may in the exercise of its discretion, decide not to exercise its powers - it "*may*" cancel or suspend if it is satisfied of the requisite matters (ss1292(1) and ss1292(2)). Alternatively, if the Board considers that the failure does not warrant cancellation or suspension, the Board may impose a lesser disciplinary sanction contained in ss1292(9). The Board in its decision in *Fernandez*[52] considered that the High Court in *Albarran*[53] applied the same approach in stating that the words "*otherwise not a fit and proper person*" in ss1292(2)(d) "*expanded or added to*" sub-paragraphs (i) and (ii) of ss1292(2)(d)[54].

331. Based on these authorities it is clear that a finding of "*not fit and proper to remain registered*" is a separate finding under ss1292(2) and the approach we have taken when considering whether that finding should be made will be to start from the premise that a person who does not carry out the duties or functions referred to in ss1292(2)(d)(i) or (ii) will ordinarily not be a fit and proper person to remain registered although there may be circumstances where that is not demonstrated.

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[48] *ASIC v Avitus Thomas Fernandez– Decision of the Board dated 29 October 2013 Matter Number 02/VIC13 ("Fernandez")*
[49] *Fernandez* Ibid footnote 48 [pages 17-19]
[50] *Fernandez* Ibid footnote 48 [pages 17-19]
[51] *Davies v Australian Securities Commission* (1995) 59 FCR 221 ("*Davies*")at [233]
[52] *Fernandez* Ibid footnote 48
[53] *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23 ("*Albarran*") at [24]
[54] *Albarran* Ibid footnote 53 at [24]

"Fit and proper"

332. The pre-eminent authority on the meaning of "*fit and proper person*" is the High Court's decision in *Hughes and Vale*[55], particularly the following passage in the judgment of Dixon CJ, McTiernan and Webb JJ:

> "*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]*". (emphasis added)

333. 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 of fitness with respect to an office - "*honesty, knowledge and ability*" - these are flexible concepts. The "*honesty, knowledge and ability*" required will be informed by the nature of the office concerned, in this case the nature and obligations of the role of a registered liquidator. There is no doubt that the law places onerous and important responsibilities on liquidators to which we have already referred in paragraphs 109-113 and 118 hereof, and these include duties of a public nature. The public is entitled to expect that liquidators maintain very high professional standards.

334. The conduct which is the subject of each of the contentions alleging Mr Joubert is not a fit and proper person to remain registered concerns the failure to lodge accurate Forms 533 and 524 with ASIC and the provision of inaccurate Annual Reports to creditors. With the exception of two of the allegations particularised we have found the factual basis of the allegations with respect to Contentions 37-41 to have been established having made findings that Mr Joubert failed to act with due care and diligence that enlivened the criteria in ss1292(2)(d)(i) of the Act.

335. On the basis of the evidence established with respect to Contentions 37-41, in respect of which Mr Joubert's conduct has been found not to meet the standard of adequacy and propriety under ss1292(2)(d)(i) of the Act, the relevant question in this matter is whether it also demonstrates that his actions demonstrated a lack of proper knowledge and ability to satisfy the test for fitness under *Hughes and Vale*[56].

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[55] *Hughes and Vale Pty Ltd v The State of New South Wales (No. 2)* (1955) 93 CLR 127 ("*Hughes and Vale*") at [156- 157]
[56] *Hughes and Vale* Ibid footnote 55

336. In our view the findings we have made regarding Mr Joubert's conduct, that are the subject of Contentions 37-41, amount to serious failures on Mr Joubert's part.

337. Registration as a company liquidator under the Act brings with it a consequent set of obligations, responsibilities and privileges. A person, before being registered must demonstrate competence, fitness and propriety. ASIC's Regulatory Guide 186[57] states that ASIC will only be satisfied that a person is a fit and proper person to be registered as a company liquidator if they are 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.

338. In assuming the responsibility of becoming a registered liquidator Mr Joubert committed to upholding high professional standards and unequivocally that involves dealing with creditors in accordance with the legislative requirements, professional standards and the general law, and the important responsibility as a regulated person to diligently observe the reporting obligations of a registered liquidator under the Act. As the Board said in its decision in *Hill*[58]:

"*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.*"

339. Although it is not determinative of fitness and propriety overall, none of the matters established suggest that Mr Joubert did not satisfy the first concept of "fitness" under the test in *Hughes and Vale*[59] being honesty. Honesty is, in any event, an essential requirement for the proper performance by liquidators of their professional duties at all times.

340. As to the second concept under the test in *Hughes and Vale*[60], knowledge, it is of course implicit that to perform the role of a liquidator adequately one must have the knowledge to properly deal with and account for the corporation's property and the capacity to be trusted and retain the trust of those whose interests are affected. The third and related concept under the test is ability.

341. The conduct established in Contentions 23, 24 and 25 (the inaccuracies and omissions in the ECG, WOT and ZAG Annual Reports), Contentions 17-21 regarding deficient Forms 533 and Contentions 15 and 16 regarding the deficient Forms 524 demonstrates, in our view, that Mr Joubert did not have a proper level of capacity and ability within those concepts as described in the test in *Hughes and Vale*[61] to properly discharge his role as a registered liquidator. The fact of the omissions and inaccuracies in the reports to creditors undermined the reliance that creditors should and must be able to place on a liquidator's communications and belied the existence of sufficient competence

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[57] Regulatory Guide 186[57] External Administration: Liquidator Registration Issued 30 September 2005 ("Regulatory Guide 186")
[58] *Hill* Ibid footnote 5 at [181]
[59] *Hughes and Vale* Ibid footnote 55
[60] *Hughes and Vale* Ibid footnote 55
[61] *Hughes and Vale* Ibid footnote 55

and resources within Mr Joubert's practice to ensure these important duties would be undertaken fully and reliably.

342. Likewise the conduct established in Contentions 17-21 regarding deficient Forms 533 and Contentions 15 and 16 regarding the deficient Forms 524 filed with ASIC also indicates a lack of ability and capacity on Mr Joubert's part. His duty as a regulated person to diligently observe the reporting obligations of a registered liquidator under the Act are a key responsibility of his role. The fact that these forms contained errors that, in some cases, were repetitive and recorded opinions which Mr Joubert had not formed on an appropriate basis demonstrates a lack of capacity and ability on the part of Mr Joubert to competently and reliably perform those duties as well as a lack of ability to understand or appreciate the serious nature of his obligation to report fully and accurately in order to properly discharge his duty and uphold the integrity of the regulatory processes in place.

343. Guided by the principle in *Davies*[62] that a person who does not carry out or perform their duties adequately and properly will not ordinarily be a fit and proper person to remain registered, the evidence and the matters that have been established as enlivening ss1292(2)(d)(i) are matters that we are persuaded also demonstrate that Mr Joubert is not a fit and proper person to remain registered. A key tenet of the role of a liquidator is the position of trust that he/she occupies *vis a vis* the creditors of a company and the regulator. The continued credibility of the profession as a whole relies on the maintenance by all practitioners large and small, of consistently high standards when dealing with these important stakeholders. That credibility is severely undermined unless careful and accurate reporting of the matters for which a liquidator is responsible can be consistently relied upon.

344. A further matter that was relevant to our findings on Contentions 37-41 was Mr Joubert's ad-hoc practice with respect to keeping file notes. This has been weighed by the Panel as an aspect of his approach to professional practice that increased the likelihood of misinformation and error in the conduct of his matters particularly when different employees in his practice would work on matters during their course.

345. In our view these matters demonstrate that Mr Joubert's conduct, while serious when considered within the context of its occurrence, also had the potential for much broader ramifications and was indicative of systems and practices in his firm that were sub-optimal and belied the serious nature of his obligations to creditors and ASIC. For these reasons we have formed the view that within the meaning of ss1292(2)(d), Mr Joubert is also not fit and proper to remain registered as a liquidator.

Findings on Contentions 37-41

346. We find that contentions 37-41 are established.

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[62] *Davies* Ibid footnote 51

Contentions 42-45

347. Contentions 42-45 allege that Mr Joubert did not send certain correspondence on, or no later than 2 business days after, his appointment as a liquidator of WOT, AH, PMG and ZAG as follows:

    (a) WOT appointment 6 November 2009, correspondence sent 16 November 2009;

    (b) AH appointment 17 December 2009, correspondence sent 11 January 2010;

    (c) PMG appointment 28 June 2010, correspondence sent 9 July 2010; and

    (d) ZAG appointment 5 January 2010, correspondence sent 8 January 2010.

348. Mr Joubert's response to each of these contentions was similar. He admitted that the correspondence was sent on the dates alleged by ASIC but said that there is no statutory or other basis for the alleged requirement that the correspondence be sent within 2 days of a liquidator's appointment. Further, he contended, in circumstances where he had been told the companies were not trading, and were each the subject of a CVL and so the directors were necessarily aware of the liquidation before it occurred, there was no reasonable basis for him to contemplate that there would be a dissipation of assets or post appointment activity upon any accounts the subject of the said correspondence. Having regard to the totality of these circumstances, Mr Joubert submitted, his conduct was not inconsistent with that of a reasonably competent liquidator.

349. The fact that the correspondence was not sent within two days of his appointment was not in issue. The question for the Panel is whether in not sending the correspondence within a two day timeframe Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

350. The correspondence referred to in ASIC's contentions comprised letters from Mr Joubert to banking institutions, utilities, telecommunication providers, WorkCover, the Office of State Revenue, the Australian Tax Office and the Roads and Traffic Authority to inform those bodies of his appointment and to instruct them and/or seek information accordingly. ASIC submitted that such correspondence is well known in the insolvency profession as "*Day One*" correspondence and that this is so because it is important to ensure that assets are preserved for the benefit of all creditors once a liquidator is appointed.

351. Mr Joubert's counsel submitted that the subject matter of these contentions was not a matter that should have been raised with the Panel.

352. As a matter of practice it is generally the case that the suite of documents to which ASIC refers in these contentions are sent out at the same time and generally within one or two days of a liquidator's appointment. Some of the correspondence, such as letters to the banks and the utilities companies are more important in terms of ensuring that assets are not dissipated or liabilities incurred unnecessarily while other correspondence such as to WorkCover and the ATO are generally enquiry letters that commence the process of information gathering necessary to enable timely reporting to creditors. While it is

important to recognise that there are distinctions between the purposes of various correspondence customarily sent and arguably particular correspondence such as letters to banks are more important to send quickly than other "*Day One*" correspondence, we agree that the concept of "*Day One*" correspondence exists as a customary practice within the insolvency profession. While there is no specific legislative or other mandate for this obligation it quite clearly follows, in our view, from the legislative mandate in s474 of the Act. Section 474 of the Act provides that if a company is being wound up in insolvency and a liquidator has been appointed – the liquidator must take into his or her custody, or under his or her control, all the property which is or which appears to be, property of the company. While there is no specific further requirement that the correspondence the subject of these contentions be sent within 2 days of appointment, the rationale for sending such correspondence within 2 days is self-evident as doing so is a means of ensuring that the liquidator has taken appropriate steps to comply with s474 of the Act which is a mandatory legislative requirement. Having regard to this context we think that the subject matter of these contentions relates to an important liquidator's duty and we do not agree that (with the exception of contention 45 discussed further below) the circumstances alleged relate to matters in respect of which a liquidator's duty to act adequately and properly within the meaning of ss1292(2) is not relevant.

353. As is evident from the dates set out in paragraph 347 hereof Mr Joubert did not in any matter, send the "*Day One*" correspondence within 2 days of being appointed as liquidator to the relevant companies although in respect of Contention 45 Mr Joubert sent the correspondence within 3 days of his appointment. No explanation or evidence as to why the delays occurred was provided with respect to any of the contentions.

354. Whether or not Mr Joubert had been told by the instructing accountants that the companies to which he was appointed as liquidator had ceased trading does not in our view bear on whether, by not sending the correspondence within 2 days of appointment, he did not act properly within the meaning of ss1292(2)(d). That aspect of Mr Joubert's response to these contentions suggests that he does not appreciate the independent nature of the role of the liquidator nor the importance of securing the assets of the company as soon as possible after appointment, nor his obligation as a registered liquidator to ensure control of a company's property.

355. We have formed the view having regard to the purpose of the "*Day One*" correspondence and s474 of the Act, that Mr Joubert's failure to send out the "*Day One*" correspondence in the circumstances of Contentions 42-44 is a failure to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Findings on Contentions 42-44

356. We find that Contentions 42-44 are established.

Contention 45

357. In respect of Contention 45 Mr Joubert sent the correspondence one day after the customary period. We have formed the view that this oversight, while it no

doubt occurred, is *de minimus* especially having regard to the fact it occurred in the holiday period of early January and in our view this conduct in those circumstances is not sufficiently significant to base a finding under ss1292(2)(d) of the Act.

Finding on Contention 45

358. We find that Contention 45 is not established.

Contention 46

359. Contention 46 alleges that within the meaning of ss1292(2)(d)(i) Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator in that he failed to set out that WOT was the former name of ACN 121 404 673 on the Form 529 – Notice of Meeting lodged with ASIC and advertised in the Sydney Morning Herald and in the "*Day One*" Correspondence.

360. The particulars of this allegation were that on 6 November 2009 and 16 November 2009 respectively Mr Joubert lodged with ASIC a Form 529 Notice of Meeting advising of a proposed creditors' meeting on 17 November 2009 and sent out letters to various banking institutions, utilities, telecommunications providers, WorkCover, the Office of State Revenue and the Roads and Traffic Authority, ("the correspondence") that did not identify WOT as ACN 121 404 673's former name. It was alleged that this conduct was deficient because a reasonably competent liquidator in Mr Joubert's position would have referred to or identified WOT as ACN 121 404 673's previous name.

361. The company search showed that WOT changed its name to ACN 121 404 673 on 17 August 2009.

362. Mr Joubert, in his Amended Response, noted that although the former name of ACN 121 404 673 was not referred to on the covering page of the electronic lodgement to ASIC of the Form 529, it did appear in the attached circular to creditors. He admitted that the "*Day One*" correspondence ought to have included WOT's former name but did not due to an unintentional oversight.

363. Section 497 of the Act sets out the requirements for a meeting of creditors in a creditors' voluntary winding up. A liquidator has an obligation to advise all interested parties of an upcoming creditor's meeting (ss497(d)). In addition to known creditors (information that is usually provided by a director of the company being wound up) a circular to creditors calling the initial meeting must also be sent to other creditors identified by the liquidator's own enquiries. Prior to July 2012 this was typically done by placing an advertisement in a daily circulating newspaper in the area where the business operated. In this matter such an advertisement was placed in the Sydney Morning Herald on 9 November 2009 ("the advertisement").

364. There are three documents the subject of this contention. Dealing first with the advertisement it is in our view clear in the context of the purpose of placing an advertisement, that is to say, to attempt to notify creditors that may not already have been identified that a creditors' meeting is to take place, that the failure to identify and include ACN 121 404 673's former name (WOT) substantially diminished the prospect of the advertisement identifying any additional

creditors. When considered in the context of the liquidator's fiduciary duty to act in the interests of all of the creditors of a company being wound up the need to be careful and diligent in taking these initial steps to identify all possible creditors in order to satisfy that duty is, in our view, self-evident and the fact that the former trading name of ACN 121 404 673 had not been included in the advertisement placed for that purpose made it substantially less likely that such creditors, to the extent they existed, would be identified.

365. The second set of documents on which ACN 121 404 673's former name did not appear was the "*Day One*" correspondence discussed in Contentions 42-45 above. As we have already commented the despatch of some of the correspondence comprising what is customarily known as "*Day One*" correspondence is very important in terms of ensuring that a liquidator's duty to secure the assets of a company is carried out appropriately. In our view not identifying a recent corporate name change that has occurred (particularly when the new name is an ACN reference) creates a greater likelihood that the company will not be recognised under its new name by the recipients of the "*Day One*" correspondence. This would potentially affect the efficacy of such correspondence.

366. The third document the subject of the Contention was the Form 529 circular to creditors and Mr Joubert pointed out that while the former name did not appear on the Form 529 it did appear on the attached circular to creditors. We agree that in those circumstances the former trading name of WOT had been sufficiently identified to known creditors, even though best practice would in our view have been to include it also in the covering Form 529.

367. Based on our views on the first two sets of documents, we have concluded that this conduct represents a failure by Mr Joubert to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

Finding on Contention 46

368. We find that Contention 46 has been established.

Contention 47

369. Contention 47 alleges that Mr Joubert is neither a fit and proper person to remain registered and failed to carry out or perform adequately and properly the duties of a liquidator in relation to his conduct after the deregistration of AH.

370. ASIC alleges that Mr Joubert made false representations to creditors in the amended AH DIRRI that he was still the liquidator of AH when it had been deregistered and false representations to Westpac Bank that he was the liquidator of AH in order to open two bank accounts so as to enable him to deposit monies he had received in payment of his fees after the company was deregistered.

371. Contention 47 includes allegations of dishonesty. For the reasons set out in paragraphs 29-44 hereof we have formed the view that the dishonesty allegations have not been pleaded sufficiently and in accordance with our comments in paragraph 45 hereof we have limited our consideration of

Contention 47 to the question of whether Mr Joubert failed to act with due care and diligence.

372. It was not in issue that AH had been deregistered. On 17 November 2010 Mr Joubert had lodged with ASIC a Form 578 Deregistration Request and a Form 505 cessation of appointment as AH's liquidator. On 23 January 2011, AH was deregistered by ASIC. On 9 May 2011 Mr Joubert opened two bank accounts with Westpac bank in the name of AH. In order to open these two bank accounts Mr Joubert made a false representation to the bank that AH was still in existence and that he was the liquidator when he had ceased as liquidator and the company had been deregistered.

373. On 10 June 2011 $5,000 was deposited by way of electronic transfer, into one of those AH Bank accounts. On 1 September 2011, Mr Joubert issued a tax invoice addressed to AH for $4,980.00 for *professional services rendered in relation to the Voluntary Administration of [AH] as approved by creditors* and he deducted and paid to himself fees of $4,980.80. On 8 September 2011, Mr Joubert signed and sent to creditors a further amended DIRRI in which he represented to creditors that AH was still in existence and that he was still the liquidator.

374. Mr Joubert's evidence was that he was not aware that AH had been deregistered and that standing instructions in his office were that if money was received for a particular company to the fees account, a bank account in the name of the company should be opened so the fees can be transferred into that account. The evidence in this instance was unclear however and did not establish that the money was received before the bank account had been opened. In accordance with the approach to assessing Mr Joubert's evidence set out in paragraph 87 hereof we have not placed weight on his evidence on this matter.

375. During his cross-examination Mr Joubert was shown the relevant bank account opening forms and he confirmed that his signature and the title "Liquidator" appeared in his handwriting on both of the account opening forms. He accepted that he had represented to the Bank that the company was still in existence and that he was the liquidator although he did not have a specific recollection of opening the account. He accepted that with the benefit of hindsight the way in which he had dealt with the $5,000 received was not appropriate.

376. ASIC confirmed that once it had received a company deregistration request, the process was that the company was automatically deregistered after 3 months and no further notice would have been issued. ASIC then informed the Panel at the hearing that the actual date of deregistration in the case of AH was 23 January 2011 which was less than three months after Mr Joubert had submitted the deregistration request to ASIC. In any event, it was not in issue that AH had been deregistered some months before the fees were received or the account had been opened. As to from whom the payment of $5,000 had been received, Mr Joubert could not recall.

377. On the basis of the evidence we find that it is established that Mr Joubert received a payment of $5,000 on 10 June 2011 which he deposited in an account which had been opened by him in the name of AH as its appointed liquidator after AH had been deregistered in January 2011. On 8 September 2011, Mr Joubert signed and sent to AH creditors a further amended DIRRI in which he

represented to creditors that AH was still in existence and that he was still the liquidator.

378. In the Amended Response Mr Joubert said that the Amended AH DIRRI was sent at the instigation of ASIC following a file review they had conducted. We refer to and repeat our comments in paragraphs 160-161 hereof regarding the relevance of ASIC's role with respect to the Amended AH DIRRI.

379. In our view this conduct evidences a serious lack of due care and diligence. It would have taken very little action by Mr Joubert to realise, having not independently recollected that fact when the monies were received or at any time thereafter when he took steps in relation to AH, that AH had already been deregistered. The steps of opening the accounts and preparing and sending the Amended AH DIRRI were apparently taken without making any reference to the existing record of what had occurred in the winding up of AH.

380. In our view this raises serious questions about the efficacy of Mr Joubert's work practices as well as his capacity and ability to perform his duties as a liquidator, as does the fact that an amended DIRRI could be prepared and sent by his office some months later still without the fact that AH had been deregistered being revealed or recalled by Mr Joubert.

381. This contention alleges on the basis of the conduct that Mr Joubert has failed to perform his duties adequately and properly and is not a fit and proper person to remain registered.

382. We have formed the view that a reasonably competent liquidator would have been aware that AH was already deregistered and would not have taken the subsequent actions. The fact that it was possible that Mr Joubert was able to execute matters such as opening bank accounts and circulating amended DIRRIs containing information that was so fundamentally incorrect in our view evidences serious flaws in the governance of his insolvency practice as well as a basic incapacity to ensure the proper and effective execution of his duties. We are satisfied that the conduct alleged demonstrates that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act.

383. As to the further allegation that Mr Joubert is not a fit and proper person to remain registered we refer to and repeat our discussion of "*fit and proper*" as a separate finding available under s1292 and the elements of the test in *Hughes and Vale*[63] in the context of Contentions 37-41 set out in paragraphs 330-343 hereof.

384. Guided by the principle in *Davies*[64] that a person who does not carry out or perform their duties adequately and properly will not ordinarily be a fit and proper person to remain registered, the evidence in respect of this contention and which we have found enlivens ss1292(2)(d)(i) of the Act are matters that we are persuaded also demonstrate that Mr Joubert is not a fit and proper person to remain registered as they evidence an unacceptable lack of capacity and ability on Mr Joubert's part in carrying out his duties as a liquidator.

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[63] *Hughes and Vale* Ibid footnote 55
[64] *Davies* Ibid footnote 51

385. A key tenet of the role of a liquidator is the position of trust that he/she occupies *vis a vis* the creditors of a company and also the public. The continued credibility of the profession as a whole relies on the maintenance by all practitioners large and small, of consistently high standards when dealing with the public as well as stakeholders in a winding up. Hence the requirement for registered liquidators to be fit and proper. That credibility is severely undermined when fundamental misrepresentations are made such as occurred in this matter regardless of the reason for their occurrence. Another feature of the conduct the subject of Contention 47, is that even after the AH file had been reviewed by ASIC and further action taken in the form of sending the Amended AH DIRRI to the former creditors of AH (regardless of whether that was done at the behest of ASIC) the fact that AH had been deregistered was still not appreciated by Mr Joubert either because his record keeping was inadequate, or because the file and records were never checked. Whatever the reason may have been, the fact remains that fundamental errors occurred which evidence conduct that demonstrates neither capacity nor ability to perform the duties required of a registered liquidator.

386. In our view these matters also demonstrate that Mr Joubert's conduct, while serious when considered within the context of its occurrence, also had the potential for much broader ramifications and was indicative of systems and practices in his firm that were sub-optimal and simply not sufficient to ensure the discharge of his duties to a standard which would uphold the requirements of his professional responsibility to creditors and ASIC and the public all of whom were entitled to expect a high standard of competence and integrity by reason of his professional status as a registered liquidator.

387. In our view these circumstances demonstrate that within the meaning of ss1292(2)(d), Mr Joubert is also not fit and proper to remain registered as a liquidator.

Finding on Contention 47

388. We find that Contention 47 is established.

Contentions 48-53

389. These contentions were withdrawn by ASIC in the Amended SOFAC.

The Board's findings under section 1292(2)

390. In light of the contraventions established, we have determined that we are satisfied that Mr Randall Clinton Joubert has failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of ss1292(2)(d)(i) of the Act and is not a fit and proper person to remain registered as a liquidator within the meaning of ss1292(2)(d) of the Act.

Sanctions Hearing

391. On 31 March 2016, the Panel held a hearing in relation to what orders, if any, should be made under ss1292(2) of the Act with respect to Mr Joubert, having regard to our determination that Mr Joubert has failed within the meaning of ss1292(2)(d)(i) of the Act to carry out or perform adequately and properly the duties of a liquidator and is not a fit and proper person to remain registered as a

liquidator under ss1292(2)(d) ("the Sanctions Hearing"). Mr Joubert was represented by counsel, Mr Doran Cook. ASIC was represented by counsel, Mr Peter Russell. There were detailed written and oral submissions on sanction made by each of the parties which have assisted us in evaluating factors relevant to the decision we must make under ss1292(2). We have summarised those submissions below and provided commentary on our views where we have thought it relevant.

Summary of Mr Joubert's evidence and submissions on sanction

392. Mr Joubert's counsel argued that a six month suspension of registration together with appropriate undertakings designed to provide the Panel with confidence that Mr Joubert's office system and process issues had been sufficiently improved, would achieve the relevant objectives of the Board in exercising its sanction power in s1292 of the Act. It was submitted that the Panel should be guided by the dual objectives of achieving deterrence and public protection while ensuring that the impact of the sanction on Mr Joubert would not be punitive. Mr Cook's oral submissions focussed on responding to ASIC's written submissions. In that context he sought to adduce additional oral evidence from Mr Joubert, to which request the Panel acceded. Those submissions and the additional evidence may be summarised as follows:

(a) The suspension sanction of six months proposed on behalf of Mr Joubert would have serious consequences for him, not only in terms of its reputational and professional impact, but also including the loss of income for the period while being liable for the expenses of conducting his business. Such consequences would clearly be a deterrent both to him and the wider insolvency community. A longer period of suspension would however amount to a punitive order. In considering the impact of a sanction we have been cognisant of the principal purpose of our order being the protection of the public. We are guided in this exercise by the principles summarised in *Fiorentino* and therein endorsed by the Board[65]. Relevantly, that the personal circumstances of the practitioner are to be given limited consideration in deciding an appropriate sanction, the objective of which is to protect the public and the need to have objective regard to the seriousness of the conduct established and the suitability of the sanction to address the concerns raised by the conduct and the circumstances giving rise to it.

(b) Mr Joubert accepted the proposition that where the Board has made a finding under ss1292(2)(d) that a registered liquidator is not a fit and proper person to remain registered, there needs to be a reason why suspension, rather than cancellation would be an appropriate order. Reference was made to the dictum of Reynolds JA in *McNamara*[66]:

"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

[65] *Fiorentino* Ibid footnote 1 at [paragraph 997 and paragraph 1005]
[66] *Law Society of NSW v McNamara* (1980) 47 NSWLR 72 at [76] *("McNamara")*

a practising certificate, his name will then be on the roll of solicitors and he may resume his practice".

(c) Events since 2011 should be relevant to the Panel in determining the appropriate sanction. There was evidence showing that Mr Joubert:

(i) is willing to concede his mistakes and try to do better;

(ii) has taken remedial steps directed at improving his skills as a liquidator;

(iii) has engaged consultancy services on behalf of Joubert Insolvency including Mr Stephen Barnett who conducted a review of his liquidation files and advised on shortcomings and from 2014 Mr Neville Ralph Rubinstein ("Mr Rubinstein"), an experienced registered liquidator, has been retained by his practice; and

(iv) has changed his procedures, including moving to the use of *"MYOB Insolvency"* software, updating DIRRI procedures and updating relevant templates.

In addition;

(v) There was a document tendered at the Sanctions Hearing that was a printout detailing hours spent by Mr Joubert on professional development activities in support of the submission that he has continually developed his professional skills since the time these contraventions arose.

(vi) There was also, it was submitted, the natural expectation that the passage of some six years since Mr Joubert first commenced as a registered liquidator might have resulted in an increased capacity to discharge his functions as a liquidator.

In our view, the central questions raised for us by the evidence on the matters set out in sub-paragraphs (i) to (vi) above are;

A. The extent of that evidence and the weight it should be given;

B. Assuming there is persuasive evidence before us with respect to each of the above matters, how far do these matters go to addressing the concerns raised by the conduct established as a whole; and

C. Do the matters raised provide a basis or reason for concluding that suspension is appropriate in circumstances where cancellation is the logical consequence of our finding that Mr Joubert is not a fit and proper person to remain registered as a liquidator?

(d) Mr Joubert gave evidence at the Sanctions Hearing regarding his remorse for his past conduct as well as to steps he had implemented to improve his office systems. Relevant excerpts of the transcript of his evidence are as follows:

Q. Mr Joubert, have you read the panel's determination?

A. Yes, I have.
Q. And you see that there have been various findings made against you?
A. Yes.
Q. Do you agree with those findings?
A. Yes, I do.
Q. Do you accept that your conduct as revealed in the matters the subject of these proceedings demonstrates that your professionalism fell short of the standard expected of a liquidator?
A. Yes.
Q. Do you accept that your conduct the subject of these proceedings demonstrates conduct of a person who is not a fit and proper person --
A. Yes.
Q. -- to hold the office of a registered liquidator?
A. Yes.

And:

Q. Mr Joubert, explain how this came about.
A. Well, I've had a chance now to have a long think about what happened in my practice in 2009 and I've had five years to reflect on that and, yes, I agree with the findings that it was not what it should have been. I was inexperienced at the time, starting off in a practice on my own. I may have underestimated what was required with respect to resources of having - of just commencing a practice. I may have put too much trust in the referring accountants, naively, so it was my own inexperience in not monitoring what my staff were doing effectively. I had perhaps the thought or the understanding that whatever systems I had in place at the time were enough to highlight any mistakes or issues that were made. Obviously that wasn't the case, but at the time, I may have had this naive notion that perhaps those systems were in place…."

And:

Q. Have you always accepted that your conduct fell short of the standard?
A. Yes.
Q. Have you always held the view that it was appropriate that you be suspended for a period of time as a liquidator or certainly - let me ask you this question - at the time these proceedings commenced, did you hold the view that you should be suspended for a period of time?
A. Yes.
Q. And were you prepared to accept a suspension?
A. Yes, I was; I was prepared to accept a period of suspension.

And:

Q. In light of the fact of the very serious findings that the panel has made against you, how can the Panel be assured that you will be a better liquidator?

A. I've grown in the last five years. It is my commitment that these mistakes do not occur again in my practice. That is my commitment. I have always sought to change or get everyone to change so that my practice improves and, maybe to my detriment, so much so that even when ASIC had the audits and the exit interview and asked me to change DIRRIs, I did that. There was always the - I never buried my head in the sand. I always took responsibility for whatever mistakes I made and I always tried to improve on those mistakes. I've grown and become a little more savvy, as I've obviously grown as a liquidator, and more experienced. I have sought to improve my own knowledge by going on courses. In 2013, I did the first of my courses, being the professional standards courses, which are the independent remuneration, section 349A report writing courses. I have just done them recently again, as of about three weeks ago.

Q. Have you made any changes to your systems and the way you conduct your practice?

A. Absolutely. It's a totally different practice from what it was in 2009. In 2009, I did not have the - I never had the robust systems in place that I have at the moment. I've purchased the "MYOB Insolvency" software in 2011 or 2012. I pay $1,200 a month to maintain that system, so $13,000 a year to maintain that system with them. That is in conjunction with another software system that records all my time and WIP, called Accountants Enterprise. That is now an improvement. I have engaged consultants, outside consultants, to come into my practice and have a look at my procedures and my files and criticise my system and my report writing. Mr Steven Barnett is one person - ex-ASIC. I engaged a very senior liquidator more than a year ago to come into my practice. He's there every day working beside me, and that's Mr Neville Rubinstein. My staff have gone on courses and have improved and they are more experienced. So, yes, my practice is vastly different to what my practice was in 2009.

Q. And do you believe that you can now perform the functions that you clearly were unable to do back in 2009?

Q. Are you able to give an assurance to the panel that you will do this?

A. Absolutely. I can give that assurance. I am committed that my practice does not make these mistakes or any mistakes again. They were important. I'm the gatekeeper and I take responsibility for that. Ever since the audit in 2011 started, I have committed to make my practice better and that's so that these things don't happen ever again".

(g) Oral evidence was also provided by Mr Neville Rubinstein, to whom Mr Joubert had referred in his evidence as a current consultant assisting him in his insolvency practice. Mr Rubinstein summarised his experience as a liquidator. It is relevantly noted that he became a registered liquidator in Australia in 1990 following moving here from South Africa in 1987

where he had had 15 years' experience as a liquidator overseeing the insolvency offices of a trust company there. Mr Rubinstein said that he has been retained by Joubert Insolvency since November 2014. He said his work involves spending approximately 3 hours per day three days per week at Mr Joubert's practice (initially he had spent 3 hours per day 5 days a week at the practice). He said that he is involved in the education of the staff and looking at systems. He said the practice is making constant improvements and the aim is to be in a position of best practice and he is proud of what has so far been achieved.

393. The Panel asked Mr Cook to clarify what evidence before us addressed why, if we were minded to order a period of suspension, we could now be confident of Mr Joubert's capacity or ability (within the meaning of the fit and proper test discussed in *Hughes and Vale*[67]*).* Mr Cook submitted that because the undertakings proposed as part of the suspension sanction would involve oversight of Mr Joubert's professional activity for a period by a fellow practitioner who would independently report to ASIC, we could be so satisfied. If that fellow practitioner formed the view that Mr Joubert was unable still to perform the requisite duties adequately, it would then be open to ASIC to apply for a permanent cancellation of Mr Joubert's registration. The Panel indicated its view that the need for an interim step in order to satisfy ourselves regarding Mr Joubert's fitness and propriety of itself appeared to demonstrate that the confidence required of us at the time of making an order for suspension did not have a clear basis.

394. As to the possibility of cancellation as the sanction, Mr Cook submitted that if that sanction were to be imposed it would be extremely difficult for ASIC to agree to re-registration in the future. There was a reasonable expectation that Mr Joubert may not be treated fairly in any process for re-registration as a liquidator because, even though the dishonesty allegations were not ultimately considered, ASIC holds that view of Mr Joubert. In our view this submission lacks a valid basis. To expect that Australia's corporate regulator will deal with a person unfairly is not reasonable. In any event, such a consideration would not be relevant to how we decide to exercise our discretion under ss1292(2) in relation to sanction. In light of our finding that Mr Joubert is not a fit and proper person to remain registered, cancellation is a logical consequence unless we have a sound basis for being confident that at the end of a period of suspension, Mr Joubert would be fit and proper to be registered.

395. Mr Joubert's final submission was that the strongest reason in support of ordering a period of suspension rather than cancellation is that the failings demonstrated by these proceedings had a common cause, namely a lack of systems in place at Mr Joubert's firm at the time. The Panel was asked to infer from the fact that there was no evidence of any further complaints against Mr Joubert since ASIC's investigations some five years ago, that these systems issues have been addressed by the changes Mr Joubert says he has made. We do not think it would be appropriate for the Panel to draw that inference simply on the basis that there was no evidence before us to the contrary. Nor is it the case that all the findings made can be sheeted home to a lack of office systems.

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[67] *Hughes and Vale* Ibid footnote 55

396. Finally, Mr Joubert's submissions in response to ASIC's submissions regarding cancellation of Mr Joubert's registration may be summarised as follows:

(a) Where there has been a systemic failure repeated instances of the offending conduct across a number of matters is to be expected. Of itself, a systemic failure is no reason why the Panel should disregard a period of suspension as an appropriate order under s1292 of the Act.

(b) It was put against Mr Joubert that the matters the subject of these contentions were not complex but simple matters that he should have been able to complete adequately and properly. Mr Cook submitted that the fact that these were simple matters, while not exculpatory, explains these mistakes - Mr Joubert simply did not appreciate that because these were small matters for which he would receive payment of $5,000.00, his obligation was to deal with them in the same way he would deal with complex and far larger liquidations. He treated them with a lack of care and diligence because of their small size. Mr Cook said that the Panel might well draw the inference that these were small liquidations not worth the trouble of investigating. In our view this submission is troubling to the extent that it suggests the view that the professional standard required varies according to the remuneration to be received. There is no legal basis for suggesting this is the case and it follows that we would not be prepared to draw the inference invited.

(c) Mr Cook disagreed with ASIC's characterisation of the conduct in relation to the Amended DIRRI's sent following ASIC's review (Contentions 8 and 9) as reprehensible. Rather, he said that while Mr Joubert may still not have appreciated what was required to be disclosed in the Amended DIRRI's, it was open to the Panel to draw the inference on the evidence that Mr Joubert is the type of person who, when criticised, seeks to address the issue identified. In our view the evidence supports a view that Mr Joubert was responsive to carrying out a direction or recommendation made by ASIC. However the evidence does not support an inference that Mr Joubert carried out such directions or recommendations diligently or properly. We refer to our findings with respect to Contentions 8 and 9[68]. In our view, Mr Joubert's conduct in respect of preparing and despatching these Amended DIRRI's, while we would not go so far as to characterise it as reprehensible, is nevertheless a serious matter. It raises significant questions regarding his technical knowledge as well as his diligence, professional judgement, ability and overall capacity to uphold standards sufficient to maintain public confidence in the reputation of the profession as a whole. This is especially so having regard to the fact that the conduct occurred when he was being audited by ASIC and it would be reasonable to assume that he would have been paying extra attention to executing such tasks. These matters are central to the question of fitness and propriety.

(d) The finding that Mr Joubert was not a fit and proper person to remain registered does not, as was submitted by ASIC, detract from the case for suspension as the most appropriate sanction because the Panel can, by

[68] Paragraph 173

imposing appropriate undertakings under ss1292(9) to be performed during a period of suspension, achieve the requisite confidence that Mr Joubert will be fit and proper to be registered at the end of that period. Our comments in paragraph 393 are also relevant to this submission.

(e) Mr Cook submitted that these proceedings highlighted extensively to Mr Joubert the inadequacy of his systems. The fact that five years on there are no further complaints before the Board supported the submission that Mr Joubert's systems have changed. The further points were made that there is no evidence of Mr Joubert having inflicted damage on the public over the last five years and there is evidence that an experienced liquidator has been consulting to his practice and providing guidance which can provide the Panel with a basis to be confident of Mr Joubert's fitness and propriety at the end of a six month suspension. Unless the Panel believes that Mr Joubert is irredeemable, then suspension must be considered as the appropriate sanction in all of the circumstances. Dixon J's dictum in *Ziems*[69] is relevant with respect to this submission.

"But even so, it is probably a better course in most cases where room exists for the belief that time may give the barrister a title to resume his place at the Bar, to allow him to re-apply at a subsequent time and offer positive evidence of the ground upon which he then claims to be re-admitted."

His Honour's comments are not consistent with us needing to form the view that Mr Joubert is irredeemable before cancellation would be an appropriate sanction and indeed the relevant principles direct our analysis to an assessment of the most appropriate order in the context of the purpose of the sanction order we are empowered to make. An important aspect of this assessment will be whether there would be a proper basis for us to be confident of Mr Joubert's fitness and propriety at the end of a period of suspension, should that order be made.

Summary of ASIC's submissions on sanction

397. In summary, ASIC submitted that cancellation was the appropriate sanction based on what had been established in the proceedings. ASIC's submissions focussed on the seriousness of the Panel's findings in Contentions 37-41 and Contention 47 that Mr Joubert was not fit and proper to remain registered. The conduct found to be established with respect to those contentions was, in ASIC's submission, conduct which demonstrated that Mr Joubert did not recognise, appreciate or understand the independent functions, duties and responsibilities of a liquidator and the professional standards required of him. Moreover, it was conduct which had the effect of obscuring the details of the companies he was liquidating which potentially impacted ASIC, the creditors of the companies, and other interested persons.

398. ASIC also submitted that the lack of remorse on Mr Joubert's part as evidenced by his manner of conduct of these proceedings including his failure to make any concessions, weighed against suspension as the appropriate sanction because evidence of genuine remorse is a pre-requisite. In the Panel's view, Mr Joubert

[69] *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at [286] ("*Ziems*")

has expressed remorse in respect of his conduct insofar as he has made genuine attempts to improve his office systems, staff training and the like. We accept that this demonstrates that he appreciates the seriousness of the findings that have been made.

399. ASIC emphasised that its submission that cancellation was the appropriate sanction was based on what had been found established in these proceedings and not the dishonesty allegations that were alleged but not ultimately considered. The finding that Mr Joubert is not a fit and proper person to remain registered as a liquidator prima facie demands cancellation unless the Panel is satisfied that at the end of a period of suspension it can be satisfied and confident that Mr Joubert would be fit and proper to remain registered. ASIC submitted that the evidence before the Panel would not justify such confidence. The fact that the undertakings proposed on behalf of Mr Joubert would require a review at a future point itself demonstrates that point.

400. Further, and in any event, the Panel did not have before it evidence that could satisfy it in relation to the matters of knowledge and ability that are critical components of fitness and propriety and would not be addressed by satisfactory performance of the undertakings proposed even were such undertakings appropriate in the circumstances. In support of this submission the following points were made:

(a) First, there is no documentary or other evidence, for example about the specific terms of Mr Rubinstein's retainer, the nature of the issues he has identified or addressed and how they relate to the Panel's findings. Mr Rubinstein gave no evidence of having read the determination or having understood its ramifications;

(b) Second, no referees were proffered to the Panel regarding the matters the subject of the determination and whether, for example, they were out of character, nor were there references expressing a positive view regarding professional dealings with Mr Joubert. The point was made that the Panel is being asked to infer that the intervening years have increased Mr Joubert's knowledge when there is simply insufficient evidence to form a view particularly in relation to knowledge and ability. The Panel's findings go well beyond the systemic issues upon which Mr Cook focussed. The fact that the liquidations were not complex is an aggravating factor as it demonstrates that even with respect to straightforward and simple matters he failed to meet the standards expected of him and there is no evidence of mitigating circumstances. It is no answer to suggest that the relevant professional standard depends on the amount of remuneration to be paid - that must be irrelevant - professional standards must be consistently attained across the spectrum of work of a registered liquidator;

(c) The fact that dishonesty was not found is not a determining factor in relation to the appropriate sanction; and

(d) It is irrelevant whether anyone was detrimentally affected by the conduct. Relevant professional standards are not measured by whether someone was affected by the conduct. The Panel notes in any event that there was

no positive evidence relied on for this submission but rather the negative proposition that there was no evidence to that effect.

401. In support of an order for cancellation of Mr Joubert's registration, Mr Russell referred us to the words of Sir Owen Dixon in the *Ziems* case[70] that we have quoted in paragraph 396(e).

He submitted that this statement is apposite in these circumstances. Based on the matters identified, Mr Joubert's registration as a liquidator would be most appropriately dealt with by the regulator at a future time when Mr Joubert can offer positive evidence as to why he should be re-admitted as a registered liquidator. The fact of these proceedings is no basis to suggest that ASIC would not deal with Mr Joubert fairly and in accordance with its legislative mandate if he sought re-registration as a liquidator in the future.

Decision on sanction

402. ASIC's submissions as summarised above, generally accord with our views regarding the points made.

403. A summary of principles applicable to our consideration of an appropriate sanction under s1292 of the Act, as endorsed by the Board in its decision in *Fiorentino*[71], is as follows:

(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 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.

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[70] *Ziems* Ibid footnote 69
[71] *Fiorentino* Ibid footnote 1 at [1005] and [997]

404. The function being performed by the Board in exercising its powers under s1292 was described by the Full Court of the Federal Court in *Albarran v Companies Auditors and Liquidators Disciplinary Board*[72] 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*".

405. In this matter the Panel has found that Mr Joubert failed to carry out or perform adequately and properly the duties of a liquidator under ss1292(2)(d)(i). Any finding that a liquidator has failed to carry out or perform adequately and properly the duties of a liquidator will often if not usually suggest that the person is not fit and proper to remain registered[73]. In this matter we have also made a separate finding that Mr Joubert is not a fit and proper person to remain registered under ss1292(2)(d). Evidence before us pertaining to Mr Joubert's current fitness and propriety including evidence of his rehabilitation with respect to the failings identified by the matters the subject of our findings, is therefore relevant to consider in making our decision on the appropriate sanction.

Not Fit and Proper Finding

406. Once a person is found not to be a fit and proper person to remain registered as a liquidator, cancellation may be seen as a logical consequence. While that is the case the discretion under s1292 is not constrained in its terms and suspension for a period may be ordered if there is evidence to support it as an appropriate sanction.

407. A further matter relevant to our consideration of sanction is the seriousness of the matters found to be established[74]. Mr Joubert's conduct did not involve the highest level of seriousness as there was no finding that he had engaged in dishonest conduct. Nevertheless we regard the extent of the findings made against Mr Joubert as serious because of the extent to which they:

    (a) Demonstrate the breadth of inadequacies of the systems and processes that were in place in his practice;

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[72] *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 233 ALR 37 at [page 47] ("*Albarran Full Court of Federal Court*")
[73] *Fiorentino* Ibid footnote 1 at [1007]
[74] *Davies* Ibid footnote 51 at [233]

(b) Demonstrate either ignorance of, or a troubling disregard for some basic precepts of insolvency law and practice;

(c) Suggest that Mr Joubert lacks the necessary insight, ability and professional judgement required of a registered liquidator; and

(d) Demonstrate his failure to uphold the standards necessary in order to maintain public confidence in the reputation of the profession as a whole.

408. In *Law Society of New South Wales v McNamara*[75] Reynolds JA stated:

"*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.*"

By analogy with this reasoning, the seriousness of our findings means we should not consider suspension in this matter unless our view is that at the termination of a particular period of suspension, Mr Joubert will be fit to resume practice. In *Fernandez*[76] it was noted that in making a difficult judgement 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[77] it was the Board's view, consistent with the authority cited above, that it should not contemplate a respondent continuing to practise unless it could be confident that he would be fit and proper at the time.

409. As we have noted, Mr Joubert's counsel submitted that a suspension period of six months together with undertakings to be performed within the period of suspension would be an appropriate sanction. Mr Joubert's counsel accepted that the point at which the Panel would be satisfied that Mr Joubert would be fit and proper to resume practice would be when the satisfactory performance of the proposed undertakings had occurred. His submissions proceeded on the basis that there was a possibility that this would not eventuate, at which time it would then be appropriate to cancel Mr Joubert's registration. The Panel expressed its reservation at the Sanctions Hearing that the scenario contemplated would not be capable of providing the Panel with the requisite confidence regarding Mr Joubert's fitness and propriety when making our orders, because it involved a review of the processes and procedures introduced to Mr Joubert's practice first taking place with the attendant possibility of a range of outcomes including one that would not justify the confidence necessary. Having now heard and considered all of the submissions, this remains, in our view, an obstacle to a sanction order in the terms proposed by the Respondent, that is to say, a period of suspension coupled with undertakings that would include a review of Mr Joubert's practice, the outcome of which would not be known until after the Board's orders were made. In our view, the sanction proposed by the Respondent suffers from the further impediment that the undertakings proposed did not address all the aspects of Mr Joubert's fitness and proprietary raised by the conduct found to have occurred; directed as they

[75] *McNamara* Ibid footnote 66 at [76]
[76] *Fernandez* Ibid footnote 48 at [369]
[77] *Fernandez* Ibid footnote 48 at [369]

were to systems improvements and professional education. Assuming as we do that Mr Joubert acted honestly, our findings give rise to serious concerns not only about his technical knowledge and office management skills but about his capacity for making appropriate professional judgements and his overall skill and ability to meet the demands of the role of a registered liquidator in its many and varied respects.

410. In circumstances where we were considering whether we could be confident that Mr Joubert would be fit and proper at the end of any period of suspension, evidence as to whether he embodies the range of attributes encompassed within the concept of "*fitness and propriety"* would be relevant, as we have already noted. This follows from the purpose of our orders being to ensure protection of the public, which includes ensuring that those found unfit to practise do not continue to hold themselves out as fit to practise, and the importance of demonstrating publicly that there is a regulatory regime applicable to liquidators which is effective in maintaining high standards of professional conduct and therefore the reputation of the profession as a whole.

411. In *Bond*[78] Toohey and Gaudron JJ stated that:

"The question whether a person is fit and proper is one of a value judgement. In that process the seriousness or otherwise of the particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring the person whose fitness and propriety are under consideration.

Toohey and Gaudron JJ also made it clear in their judgement in *Bond*[79] that character (because it provides an indication of likely future conduct) or reputation (because it provides an indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the role in question.

412. The dicta in the *Bond* decision, confirms the role of evidence relevant to character in any evaluation of Mr Joubert's potential fitness and propriety. Character references could possibly assist by attesting to relevant character attributes such as reliability, a change in approach, or increased diligence or professionalism for example. They might provide the basis for forming the view for example, that a respondent would be fit and proper at the end of a period of suspension, or reliable in properly carrying out any undertakings ordered or that matters giving rise to our findings had been addressed appropriately and would not recur.

413. In the Board's decision in *Hill*[80] the professionalism and trustworthiness of Mr Hill as attested to by each of his referees was an important factor in leading the Board to be confident that Mr Hill would be a fit and proper person to be registered as an auditor at the end of the twelve month suspension period ordered by the Board. Had character and/or professional references been provided by Mr Joubert, we may have been able to form the view that despite the level of seriousness of the findings made with respect to Mr Joubert's past

[78] Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) Toohey and GaudronJJ at [63] ("*Bond*")
[79] *Bond* Ibid footnote 78 at[36]
[80] *Hill* Ibid footnote 5 at [215]

conduct, there was a clear and sound basis for forming a view that Mr Joubert's increased experience had improved his professional insight and judgement and/or that if undertakings were to be ordered as part of a sanction he could be depended upon to carry them out fully and reliably.

414. The extent of the evidence that was before us that could possibly have assisted us in the task of assessing character in the context of Mr Joubert's overall fitness and propriety, was the evidence of Mr Rubinstein and Mr Joubert's own evidence as to his commitment to improve his practice and the steps he has taken in that regard. Mr Rubinstein's evidence complemented the evidence of Mr Joubert by confirming that he had taken on Mr Rubinstein as a consultant and that together they were working towards implementing best practice procedures within the firm. Mr Rubinstein's evidence did not provide us with any insight into the matters that would be relevant to consider in evaluating Mr Joubert's character in the context of his likely future conduct (or indeed the extent of improvement of Mr Joubert's ability and knowledge, on which we have commented further in the next paragraph). As to Mr Joubert's evidence, while we accept that he has been committed to making improvements to his practice and increasing his knowledge, the matters to be addressed by our findings extend, as we have said in paragraph 409, well beyond this focus. In any event it would not in our view be sufficient to rely on a respondent's own evidence regarding matters of character. There is therefore little, if no, relevant character evidence and none in our view that provides us with a proper or sufficient basis to consider suspension would be an appropriate sanction. In the context of having made findings that Mr Joubert is not a fit and proper person to remain registered and a logical consequence of such a finding being cancellation of registration, there is insufficient evidence before us that provides us with a reason or basis to consider that suspension would be an appropriate alternative.

415. We have considered what other evidence there was before us relevant to the extent of the rehabilitation or potential rehabilitation of Mr Joubert's fitness and propriety.

416. There is evidence that Mr Joubert has attended many hours of professional training and the undertakings proposed by Mr Joubert included one that would have required him to attend at least 20 hours of additional professional training covering the areas of independence and conflicts, investigation, reporting and office procedures and systems. While additional learning and professional development particularly when targeted to the gaps in knowledge highlighted by the findings made, did and would have gone some way to addressing Mr Joubert's overall fitness, there is more than knowledge encompassed within the concept of "fitness". Our findings identified not only a lack of knowledge that had led to the matters that occurred, but also the matters identified in paragraph 409. These attributes are difficult to assess and there was no evidence before us which assisted in this regard. There would certainly have been a role for positive character evidence to play, if it had been available.

417. We have also had regard to the fact that Mr Joubert has had the benefit of exposure to Mr Rubinstein, an experienced registered liquidator through the consultation arrangement he put in place in November 2014. Such a relationship might well contribute to the process of developing professional skill and judgement and overall ability. However the evidence of Mr Rubinstein's

involvement with Mr Joubert's practice did not provide us with an insight into the terms of his retainer and nor were we made aware of whether Mr Rubinstein had read the Panel's determination with respect to Mr Joubert or was aware of and understood the scope of its ramifications. To the extent Mr Rubinstein referred to the work he was doing, it was systems related and directed to staff training. Such evidence does not provide a basis for concluding that Mr Joubert's association with Mr Rubinstein is a matter we could give weight to as relevant in forming a view about whether Mr Joubert's ability and professional skill and judgement could be fully rehabilitated within a period of suspension.

418. Finally, we have had regard to the undoubted circumstance that Mr Joubert is now significantly more experienced as a liquidator than he was when these events occurred. That circumstance is likely to have improved his ability and professional skill and judgement particularly having regard to the additional professional development he has undertaken. However, in the absence of any corroborating evidence that this is the case, we would not be prepared to infer that this extra experience has conferred sufficient improvement especially having regard to the serious contraventions found to have occurred.

419. Although we have concluded that the evidence before us does not provide a basis for considering suspension would be the appropriate sanction in the circumstances of this matter, we have nevertheless considered whether there could have been undertakings formulated that did not suffer from the impediment identified in those proposed by Mr Joubert's counsel. We have concluded that both the scope and level of detail that would have been required in any such undertakings weigh heavily against the view that the Panel could have had the requisite confidence that Mr Joubert would have been fit and proper to be registered at the end of a period of suspension. This is even the moreso in the absence of any evidence going to character which may have provided us with a basis for conviction that Mr Joubert would carry out undertakings diligently and completely and be fully rehabilitated as a result.

420. For the above reasons we have formed the view in the circumstances of this matter, and in particular the absence of sufficient evidence providing us with the basis to be confident that Mr Joubert would be fit and proper to resume practice at the end of a period of suspension, that cancellation of Mr Joubert's registration is the most appropriate course. The decision in *Ziems*[81] supports the view that, in most cases, where there is the potential for the affected party to re-apply at a subsequent time, the better course is for that affected party to lose the statutory privilege afforded and offer positive evidence of the grounds upon which they then claim to be re-admitted. We note that it would be open to Mr Joubert in the future to seek re-registration and at that time offer ASIC the positive evidence, in accordance with Regulatory Guide 186[82], of the range of competencies required to practise as a registered liquidator in Australia including his fitness and propriety.

Orders

421. We order as follows:

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[81] *Ziems* Ibid footnote 69
[82] Regulatory Guide 186 Ibid footnote 57

(a) The registration of Randall Clinton Joubert as a liquidator be cancelled. This order takes effect 14 days from the date hereof.

Notice

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

Maria McCrossin
Panel Chairperson

11 May 2016

Counsel for the Applicant	Mr Peter Russell
Solicitor for the Applicant	Mr George Boland of ASIC
Counsel for the Respondent	Mr Doran Cook
Solicitor for the Respondent	Mr David Edney of Polczynski Lawyers