

DAVID JOHN LEIGH

Report of committee convened to make a disciplinary decision about David John Leigh, a registered liquidator

Members of committee

Graeme Plath, a delegate of ASIC¹
Kelly Trenfield, a registered liquidator chosen by ARITA²
Stewart Maiden QC, an appointee of the Minister³

Decision

Under s40-55(1)(c)⁴ the registration of David John Leigh (**Mr Leigh**) as a liquidator should be cancelled.

Under s40-55(1)(g) a condition should be imposed on all other registered liquidators that they must not allow Mr Leigh to carry out any of the functions or duties, or exercise any of the powers, of a registered liquidator on their behalf (whether as employee, agent, consultant or otherwise) for a period of 8 years commencing on the date that this decision is made.

Under s40-55(1)(h) ASIC should publish this report.

Reasons for decision

Issues

1. Mr Leigh is a registered liquidator. On 2 February 1996 Mr Leigh was registered as a liquidator. Mr Leigh requested that the registration be suspended. On 2 March 2018 his registration was suspended.
2. Mr Leigh was the liquidator of Neolido Holdings Pty Ltd ACN 102 472 015 (**Neolido**). On 25 November 2005 Neolido was wound up. From 14 October 2010 to 26 February 2018 Mr Leigh, while a partner of PPB Advisory, was one of two liquidators of Neolido, together with one of his partners in PPB Advisory. During that period Neolido had no other liquidators.
3. Neolido, while being wound up, had a Commonwealth Bank of Australia account (**Neolido Account**). The account was maintained by PPB Advisory.
4. CAA Financial Services Pty Ltd (CAA) was a secured creditor of Neolido.
5. CAA had a Commonwealth Bank of Australia account (**CAA Account**).
6. Mr Leigh is a director and member of Leighfam Investments Pty Ltd ACN 100 969 300 (**Leighfam**). On 19 June 2002 Leighfam was registered and Mr Leigh and his wife Mrs Kim Leigh were appointed its directors. According to Mr Leigh, Mrs Leigh resigned as

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² Australian Restructuring Insolvency and Turnaround Association ACN 002 472 362

³ Minister for Revenue and Financial Services – see s19 of the *Acts Interpretation Act 1901*

⁴ Unless otherwise specified, references to sections are references to sections of the *Insolvency Practice Schedule (Corporations) (Schedule)* which is Schedule 2 of the *Corporations Act 2001 (Cth) (Act)* (Schedule 2 has effect because of s600K of the Act).

a director of Leighfam in June 2017. Leighfam has had no other directors. All of its shares are held by Mr Leigh and members of his family.

7. Leighfam had a Bank of Queensland account (**Leighfam Account**).
8. Between 25 July 2017 and 9 November 2017, a total of \$800,000 was transferred from the Neolido Account to the Leighfam Account, in the following instalments (**Transfers**):
 - (a) \$250,000 on 25 July 2017;
 - (b) \$450,000 on 11 September 2017;⁵ and
 - (c) \$100,000 on 9 November 2017.
9. On 21 February 2018, PPB Advisory's legal representative contacted ASIC and advised ASIC that the transfers were a "*defalcation from the PPB liquidation account for Neolido Holdings to an unauthorised account*", that PPB had investigated the transfers, and that "[t]hose investigations revealed that electronic transfers authorised and approved by Mr Leigh were made to an unauthorised bank account with the Bank of Queensland". The unauthorised account was identified as the Leighfam Account.
10. ASIC conducted an investigation into Mr Leigh's affairs. On 13 November 2018 ASIC sent Mr Leigh, care of his solicitor, a '*Notice to explain why liquidator registration should continue*', issued under s 40-40(1) (**Show-cause Notice**). In summary, the Show-cause Notice stated that ASIC believed that Mr Leigh:
 - (a) had contravened s 184(2)(a) of the Act because as liquidator of Neolido he had dishonestly arranged for the Transfers in circumstances where he had no entitlement to the funds transferred;
 - (b) had contravened ss 1307(1) and 1308(2) of the Act because, to facilitate the Transfers, he had amended an email that he had received from CAA to give the appearance that CAA had given certain payment instructions which it had not given; and had created internal payment instructions to PPB Advisory staff to give the appearance that, by following those instructions, payments would be made to CAA when in fact they would be made to the Leighfam Account; and
 - (c) was not a fit and proper person.
11. Mr Leigh did not respond to the Show-cause Notice.
12. On 2 January 2019, ASIC convened this Committee under s 40-45 for the purpose of making a decision of a kind mentioned in s 40-55 in relation to Mr Leigh.
13. The issues that arise for the Committee's consideration are:
 - (a) What are the facts concerning the Transfers?

⁵ The evidence before the Committee is unclear as to the precise date of the transaction; some correspondence suggests that the transfer may have occurred on 5 September 2017. That uncertainty does not affect the Committee's decision.

- (b) Do those facts establish that any of the Transfers was such that Mr Leigh committed the contraventions identified by ASIC in the Show-cause Notice?
- (c) If so, is it the case that Mr Leigh is not a fit and proper person?
- (d) Has the Committee's jurisdiction been enlivened?
- (e) If so, what decision should the Committee make under s 40-55?

What are the facts concerning the Transfers?

14. On or about 25 July 2017, Mr Leigh contacted CAA and informed it that \$250,000 was available for distribution to CAA from the Neolido liquidation. In fact, more than \$500,000 was then available. At 11.38 am that day, a representative of CAA sent an email (**Email**) to Mr Leigh which read:

"Can you please transfer the \$250,000 into the account below. We are in discussions with the other directors in relation to the proposed exit.

*CAA Financial Services Pty Ltd
Commonwealth Bank
[Details of the CAA Account were then set out.]
Thankyou and Regards".*

15. Mr Leigh altered the Email. This caused the Email to represent that CAA required two transfers of \$250,000:
- (a) a transfer of \$250,000 from the Neolido Account to the CAA Account; and
 - (b) a transfer of \$250,000 from the Neolido Account to the Leighfam Account.

16. The altered email stated (**Altered Email**):

"Can you please transfer the \$250,000 into each of the accounts below. We are in discussions with the other directors in relation to the proposed exit.

*CAA Financial Services Pty L [sic]
[Details of the CAA Account were then set out.]
-and-*

*CAA Financial Services Pty Ltd
[Details of the Leighfam Account were then set out.]
Thankyou and Regards".*

17. By an email dated 25 July 2017 and timed 11.53am Mr Leigh forwarded the Altered Email to a graduate working at PPB Advisory and copied it to two other persons, one of whom was a director of PPB Advisory. The Altered Email stated:

"Can you action the below please. I understand that the split is due to there being different investors in different funds therefore keep separate.

*Cheers
David Leigh
Partner"*

18. In an interview with ASIC officers on 16 March 2018, Mr Leigh stated that:
 - (a) he altered the Email to produce the Altered Email;
 - (b) nobody else had a role in changing the Email; and
 - (c) he produced the Altered Email and provided it to the graduate so that transfers would be made including a transfer to the Leighfam Account.
19. On 25 July 2017 \$250,000 was transferred from the Neolido Account to the CAA Account and \$250,000 was transferred from the Neolido Account to the Leighfam Account.
20. On or about 11 September 2017, Mr Leigh signed a 'Commbiz' document authorising the payment of:
 - (a) \$450,000 from the Neolido Account to the CAA Account; and
 - (b) \$450,000 from the Neolido Account to the Leighfam Account.
21. While the evidence available to the Committee suggests that the two payments of \$450,000 were made, it is uncertain as to whether they were made on 5 September 2017 or 11 September 2017 or some other date. The Committee has reached the view that it is most likely that they were made on 11 September 2017.
22. On or about 9 November 2017, Mr Leigh signed an internal PPB document and a 'Commbiz' document authorising the payment of:
 - (a) \$100,000 from the Neolido Account to the CAA Account; and
 - (b) \$100,000 from the Neolido Account to the Leighfam Account.
23. In his interview with ASIC officers on 16 March 2018:
 - (a) Mr Leigh admitted that he caused the Transfers to be made, and that he had done so without any authority or entitlement;
 - (b) he stated that the funds the subject of the Transfers were used in part to satisfy his personal debts;
 - (c) he stated that he knew at the time of making the Transfers that what he was doing was wrong; and
 - (d) when asked to explain the reasons for the Transfers, he referred to financial pressures, personal issues and business issues.

Did Mr Leigh contravene the Act?

Section 184(2)(a) of the Act

24. Under s184(2)(a) of the Act:

"A director, other officer or employee of a corporation commits an offence if they use their position dishonestly ... with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation".

25. Under s9 of the Act "*officer of a corporation means [among other things] ... a liquidator of the corporation*". Mr Leigh, when a liquidator of Neolido, was an officer of Neolido.
26. Conduct is dishonest for the purposes of s 184(2) if it would be regarded as dishonest by the standards of "*ordinary, decent people*."⁶ The test is an objective one.
27. The effect of the Transfers was to enrich Mr Leigh's family company at the expense of CAA. To cause the Transfers to occur, Mr Leigh:
- (a) lied to the representative of CAA;
 - (b) lied to staff of PPB; and
 - (c) signed documents which gave a false impression of the transactions that they recorded.
28. Those acts would be regarded as dishonest by the standards of ordinary, decent people, and so the Committee finds that by causing the Transfers, Mr Leigh used his position as the liquidator of Neolido dishonestly.
29. Mr Leigh acted deliberately in causing the Transfers and must have known what their effect would be. The Committee infers that he did so with the intention of gaining an advantage for Leighfam and, through that company, for himself.
30. The Committee concludes that Mr Leigh's acts in causing the Transfers were contraventions of s 184(2) of the Act.

Section 1307(1) of the Act

31. Under s1307(1) of the Act:

"An officer, former officer, employee, former employee, member or former member of a company who engages in conduct that results in the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company is guilty of an offence".

32. The word 'books' is widely defined in s 9 of the Act as including "a register", "any other record of information" and "financial records". The latter expression is defined in the same section as including "orders for the payment of money". The Committee's view is that each of the Email, the 'Commbiz' documents described at paragraphs 20 and 22 above, and the internal PPB document described at paragraph 22 above is a "book".

⁶ *SAJ v R* (2012) 36 VR 435 (VSCA).

33. 'Falsification', for the purposes of s 1307, is apt not only to describe the alteration of a document but also the making of a false document.⁷ Thus in *R v Webber* (1988) 15 NSWLR 49, a clerk was held to have 'falsified' cheques by drawing cheques for an improper purpose and having them signed by his managing director.
34. Applying those principles, the Committee finds that:
- (a) Mr Leigh altered, and thereby falsified, the Email such that it became the Altered Email.
 - (b) By signing each of the internal PPB document and the 'Commbiz' documents which authorised the transfers to the Leighfam Account, Mr Leigh falsified those documents, because the documents as signed gave effect to payments including payments that were unnecessary for the ostensible and legitimate purpose of those documents (that being to make payments to CAA).
 - (c) Mr Leigh's conduct comprised a contravention of a provision of the Act, namely s1307(1).

Section 1308(2) of the Act

35. Under s286(1) of the Act:

"A company, registered scheme or disclosing entity must keep written financial records that:

- (a) correctly record and explain its transactions and financial position and performance; and*
- (b) would enable true and fair financial statements to be prepared and audited.*

The obligation to keep financial records of transactions extends to transactions undertaken as trustee".

36. Under s1308(2) of the Act:

"A person who, in a document required by or for the purposes of this Act or lodged with or submitted to ASIC, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence".

37. Under s286 of the Act Neolido, while being wound up, was required to keep documents that showed the giving by an appropriate person of authorisations for proper transfers from the Neolido Account. The Email, the 'Commbiz' documents described at paragraphs 20 and 22 above, and the internal PPB document described at paragraph 22 above were such documents.

⁷ *R v Webber* (1988) 15 NSWLR 49 (NSWCCA); *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215 (SCWAFC); *Dutton v O'Shane* [2002] NSWSC 1086, [240] (James J).

38. Each of those documents:
- (a) was misleading in a material particular, in that it purported to show the giving of an authorisation for a proper transfer to a creditor of Neolido when the transfer was to Mr Leigh's company and was not proper; and
 - (b) the Committee infers, caused the recipient to bring about the relevant transfer because of the recipient's misapprehension that the transfer was proper.
39. Mr Leigh's conduct in signing those documents was a contravention of s1308(2) of the Act.

Is Mr Leigh a fit and proper person?

40. In considering whether Mr Leigh is a fit and proper person, the Committee has had regard to the statement of the plurality in *Hughes and Vale Pty Ltd v The State of New South Wales (No 2)* (1955) 93 CLR 127 at 156:
- "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.*
41. Mr Leigh's conduct as the liquidator of Neolido regarding each of the Transfers demonstrates:
- (a) deliberate dishonesty, engaged in on several occasions over a significant period of time and involving aggregating factors including:
 - (i) personal gain;
 - (ii) the causation of loss;
 - (iii) lying to his employees, to whom he owed legal and ethical duties; and
 - (iv) involving others in the conduct of his fraud;
 - (b) a lack of respect for the law;
 - (c) a lack of awareness of, or respect for, his legal obligations as a fiduciary;
 - (d) a lack of awareness of, or respect for, his professional obligations as a liquidator;
 - (e) prioritising his personal needs above the rights of others; and
 - (f) an inability to separate his personal problems from his professional decision-making.
42. The Committee concludes that Mr Leigh is not a fit and proper person.
43. In so finding, the Committee took in to account the fact that Mr Leigh repaid \$100,000 of the \$800,000 that he misappropriated, and the contrition expressed by Mr Leigh during his ASIC interview on 16 March 2018.

Has the Committee's jurisdiction been enlivened?

The reference to the Committee

44. Under s40-50:

"ASIC may refer a registered liquidator to a committee convened under section 40-45 if ASIC:

(a) gives the liquidator a notice under section 40-40 (a show-cause notice) and

(b) either:

(i) does not receive an explanation within 20 business days after the notice is given; or

(ii) is not satisfied by the explanation".

45. The Show-cause Notice was attached to an email dated 13 November 2018 addressed to Mr Leigh's legal representative. By an email dated 15 November 2018 Mr Leigh's legal representative confirmed receipt of that notice. The Committee concludes that the Show-cause Notice was given to Mr Leigh.
46. The Show-cause Notice asked Mr Leigh to give ASIC a written explanation as to why he should continue to be registered as a liquidator. The Show-cause Notice advised that it had been issued because of ASIC's review of Mr Leigh's conduct as a liquidator of Neolido and his conduct regarding the transfers, the Email and the document titled "*PPB Advisory Internal Payment Request*". The Show-cause Notice contained an attachment setting out (among other things) the conduct referred to in this report under the heading "*What are the facts concerning the Transfers*".
47. Mr Leigh did not provide an explanation in response to the show-cause notice.
48. The Committee concludes that the requirements of s40-50 have been satisfied.

The Committee's decision-making process

49. ASIC, by an email dated 2 January 2019, convened the Committee under s40-45(1) "*to make a decision of the kind mentioned in section 40-55*" regarding Mr Leigh. The members of the Committee, as required by s40-45(2), comprised ASIC (represented by Mr Plath, a delegate of ASIC), Ms Trenfield (a registered liquidator chosen by ARITA⁸) and Mr Maiden (a person appointed by the Minister). Under r50-20, Mr Plath was the Chair of the Committee.
50. Under r50-55, the "*committee must observe the rules of natural justice*". Under r50-85, a committee, if it proposes to decide that a liquidator's registration should be cancelled, "*must interview the liquidator as soon as practicable*".
51. By an email sent by Mr Plath to Mr Leigh's lawyer on 9 January 2019, the Committee attempted to arrange to interview Mr Leigh and gave him the opportunity to be heard.

⁸ Rules 5-5 and 50-10 of the *Insolvency Practice Rules (Corporations) 2016* (the **Rules**). Unless otherwise specified, a reference to a rule is a reference to the Rules.


That email contained a reference to the range of decisions available to the Committee under s40-55.

52. On 18 January 2019, Mr Leigh's lawyer informed Mr Plath that Mr Leigh had advised that he would not be in a position to attend a meeting with the Committee, and was "*content to submit to the committee's decision based on the information it has and does not wish to be heard*".
53. The Committee has determined that it has the power to make a decision notwithstanding that Mr Leigh declined to attend an interview. While r50-85 requires that the Committee interview a liquidator if it proposes to decide that his or her registration should be cancelled, neither the Rules or the Schedule makes such an interview a pre-requisite to such a decision. In contrast, s20-20 has the effect that an interview is a pre-requisite to a decision as to whether an applicant should be registered as a liquidator. While the Committee must observe the rules of natural justice, those rules require only that the liquidator be given the opportunity to be heard. Further, the fact that Mr Leigh declined an interview, together with the absence of any power to in the Committee to compel his attendance at an interview, means that there is no 'practicable' time to interview him under r80-85. Finally, as the Committee lacks the power of compulsion, it would be anomalous to conclude that a liquidator declining to attend an interview would deprive the Committee of the power to make the decision which it is compelled to make under s40-55.
54. For those reasons, the Committee is satisfied that the pre-requisites to it making a decision have been satisfied.

What decision should be made?

55. Mr Leigh contravened provisions of the Act and is not a fit and proper person.
56. The Committee has decided that:
 - (a) under 40-55(1)(c) the registration of Mr Leigh as a liquidator should be cancelled;
 - (b) under s40-55(1)(g) a condition should be imposed on all other registered liquidators that they must not allow Mr Leigh to carry out any of the functions or duties, or exercise any of the powers, of a registered liquidator on their behalf (whether as employee, agent, consultant or otherwise) for a period of 8 years commencing on the date that this decision is made; and
 - (c) under s40-55(1)(h) ASIC should publish this report.
57. In arriving at this decision, the committee found that:
 - (a) It is not appropriate for Mr Leigh to participate in any capacity in the insolvency industry. His demonstrated dishonesty, lack of respect for the law, lack of awareness of or respect for his fundamental fiduciary and professional obligations, prioritisation of his own interests over others' rights and inability to separate his personal problems from his professional decision-making would create a danger to others were he to be engaged in the industry.
 - (b) The regulatory purpose of cancellation would not be achieved if Mr Leigh could still work in the insolvency industry under a registered liquidator.

- (c) A period of exclusion of 8 years rather than the maximum of 10 years is appropriate, given that Mr Leigh's misconduct concerned only one company and was driven by Mr Leigh's personal financial problems which do not appear connected to other improper activity. Should Mr Leigh wish to return to the industry, the exclusion of 8 years would allow him to seek suitable employment in the industry for a period of 2 years prior to seeking re-registration: see s20-20(4), (5).

Signed: 

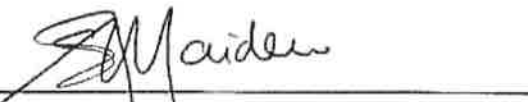
Graeme Plath, a delegate of ASIC

Date Signed: 22 February 2019

Signed: 

Kelly Trenfield, a registered liquidator chosen by ARITA

Date Signed: 21 February 2019

Signed: 

Stewart Maiden QC, an appointee of the Minister

Date Signed: 21 February 2019

This decision of the committee is taken to be made on date the last member of the committee signs the Report of the decision