FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Bettles [2023] FCA 975

File number:	QUD 693 of 2019
Judgment of:	**MARKOVIC J**
Date of judgment:	18 August 2023
Catchwords:	**CORPORATIONS** – application under s 45-1 of the *Insolvency Practice Schedule (Corporations)* (**IPS**), Sch 2 to the ***Corporations Act*** *2001* (Cth) – application for cancellation of defendant's registration as a registered liquidator – whether defendant breached duties in ss 180(1), 181(1) and 182(1) of the Corporations Act – whether defendant breached common law duties – accessorial liability – whether a person involved in a contravention of s 180 of the Corporations Act contravenes that Act – whether defendant was involved in contraventions of s 181(1) and s 182(1) of the Corporations Act – where primary contravenor is not a party to the proceeding – where the defendant relies on s 545(1) of the Corporations Act in relation to alleged breaches of duties as liquidator – whether defendant breached provisions of the Australian Restructuring Insolvency & Turnaround Association Code of Professional Practice– whether plaintiff has established matters to be taken into account for the purposes of s 45-1 of the IPS – whether defendant failed to discharge obligations as liquidator to obtain relevant books and records in relation to reports filed under s 533 of the Corporations Act – application dismissed
Legislation:	*Australian Consumer Law*, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) s 18 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA(1), 12DB(1)(i) and 13 *Corporations Act 2001* (Cth) ss 79, 180, 181, 182, 422, 438, 533, 536 (repealed) 1041H, 1308(2), 1317E *Freedom of Information Act 1982* (Cth) *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the *Corporations Act 2001* (Cth) s 1 and s 45-1 subs (4)(a), (b), (d) and (e) *National Consumer Credit Protection Act 2009* (Cth) s 29 and s 30

Personal Property Securities Act 2009 (Cth)

Taxation Administration Act 1953 (Cth) Sch 1 s 449-89(1D)

Trade Practices Act 1974 (Cth)

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth) s 116

Estate Agents Act 1980 (Vic) s 12(1)

Land Acquisition (Just Terms Compensation) Act 1991 (NSW) s 55

Cases cited:

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (2015) 235 FCR 181

Australian Securities and Investments Commission v Big Star Energy Ltd (No 3) (2020) 389 ALR 17; [2020] FCA 1442

Australian Securities and Investments Commission v Cassimatis (No 8) (2016) 336 ALR 209; [2016] FCA 1023

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 2) (2019) 140 ACSR 635; [2019] FCA 2151

Australian Securities and Investments Commission v Drake (No 2) (2016) 340 ALR 75; [2016] FCA 1552

Australian Securities and Investments Commission v Flugge (2016) 342 ALR 1; [2016] VSC 779

Australian Securities and Investments Commission v Maxwell (2006) 59 ACSR 373; [2006] NSWSC 1052

Australian Securities and Investments Commission v Mitchell (No 2) (2020) 382 ALR 425; [2020] FCA 1098

Australian Securities and Investments Commission v Rich (2009) 236 FLR 1; [2009] NSWSC 1229

Australian Securities and Investments Commission v Wily (2019) 137 ACSR 1; [2019] NSWSC 521

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304

Capricornia Credit Union Ltd v Australian Securities and Investments Commission (2007) 159 FCR 69

Chew v R (1991) 4 WAR 21

Commissioner of Taxation v Iannuzzi (No 2) (2019) 140 ACSR 497; [2019] FCA 1818

Coshott v Prentice (2014) 221 FCR 450

Doyle v Australian Securities and Investments Commission (2005) 227 CLR 18

DTM Constructions Pty Ltd (t/as QA Developments) v Poole (2017) 123 ACSR 171; [2017] QSC 210

English v Vantage Holdings Group Pty Ltd [2021]

WASCA 47

Giorgianni v The Queen (1985) 156 CLR 473

Hakea Holdings Pty Ltd v Neon Underwriting Limited for and on behalf of the Underwriting Members of Lloyds Syndicate 2468 (2023) 408 ALR 28; [2023] FCAFC 34

Hanwood Pastoral Co Pty Limited v Kelly (No 2) [2022] FCA 850

Hausmann v Smith (2006) 24 ACLC 688; [2006] NSWSC 682

In the matter of Vault Market Pty Ltd [2014] NSWSC 1641

Ireland v WG Riverview Pty Ltd (2019) 101 NSWLR 658

Jahani, in the matter of Ralan Group Pty Ltd (in liq) (2022) 159 ACSR 222; [2022] FCA 107

Macks v Viscariello (2017) 130 SASR 1

Matheson Engineers Pty Ltd v El Raghy (1992) 37 FCR 6

McMillan v Coolah Home Base (No 3) [2020] NSWSC 1325

Murdaca v Australian Securities and Investments Commission (2009) 178 FCR 119

Pace v Antlers Pty Ltd (in Liquidation) (1998) 80 FCR 485

Re Colorado Products Pty Ltd (in prov liq) (2014) 101 ACSR 233; [2014] NSWSC 789

Seaman v Silvia [2018] FCA 97

Termite Resources NL (in liq) v Meadows, Re Termite Resources NL (in liq) (No 2) (2019) 370 ALR 191; [2019] FCA 354

United Petroleum Australia Pty Ltd v Herbert Smith Freehills (2018) 128 ACSR 324; [2018] VSC 347

Vrisakis v Australian Securities Commission (1993) 9 WAR 395

Wyong Shire Council v Shirt (1980) 146 CLR 40

Yorke v Lucas (1985) 158 CLR 661

Australian Restructuring Insolvency & Turnaround Association Code of Professional Practice

Keay's Insolvency (11th ed, Thomson Reuters, 2022)

Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency

Number of paragraphs:	888
Date of hearing:	6 – 9 June 2022; 13 – 16 June 2022; 4 – 5 August 2022
Counsel for the Plaintiff:	Ms C Heyworth-Smith KC, Mr S Seefeld and Ms K Slack
Solicitor for the Plaintiff:	Colin Biggers & Paisley Pty Ltd
Counsel for the Defendant:	Mr PP McQuade KC, Mr AJH O'Brien and Ms J Marr
Solicitor for the Defendant:	Norton Rose Fulbright Australia

ORDERS

QUD 693 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**JASON WALTER BETTLES** Defendant

ORDER MADE BY: **MARKOVIC J**

DATE OF ORDER: **18 AUGUST 2023**

THE COURT ORDERS THAT:

1. The proceeding be dismissed.
2. The plaintiff pay the defendant's costs of the proceeding.
3. If either party wishes to apply to vary Order 2 above, on or before 1 September 2023 that party should file and serve submissions, not exceeding five pages in length, setting out the orders sought and the reasons for seeking those orders.
4. If submissions are filed by a party pursuant to Order 3 above then the other party may file submissions in response, not exceeding five pages in length, such submissions to be filed on or before 15 September 2023.
5. Unless a party requests an oral hearing, any application made to vary Order 2 above will be dealt with on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

MARKOVIC J:

1 Liquidators perform a unique and important public function. They act as protectors of the insolvent company, as asset recovery agents and protectors, as investigators, as inquisitors and as problem solvers: see Murray M and Harris J, *Keay's Insolvency* (11th ed, Thomson Reuters, 2022) at [1.180]. When a liquidator falls short of the standards expected of them both the public's trust in the office of liquidator and the effective administration of the body of insolvency law are eroded. In turn this affects the administration of justice: see *Commissioner of Taxation v* ***Iannuzzi*** *(No 2)* (2019) 140 ACSR 497; [2019] FCA 1818 at [204].

2 This proceeding brings into sharp focus the conduct of a liquidator. In particular, the Australian Securities and Investments Commission (**ASIC**) seeks orders pursuant to s 45-1 of the *Insolvency Practice Schedule (Corporations)* (**IPS**) being Sch 2 to the ***Corporations Act*** *2001* (Cth) that Jason Walter Bettles' registration as a liquidator be cancelled and that Mr Bettles be prohibited from reapplying for registration for a period to be fixed and as considered appropriate by the Court.

3 The conduct on which ASIC relies arises out of Mr Bettles' appointment as administrator and/or liquidator to companies in the Members Alliance Group (**MA Group**), a group of more than 50 companies which operated principally from the Gold Coast, Queensland as well as his conduct as a liquidator of an unrelated company, **Bradford Marine** Pty Ltd (in liquidation).

4 On 7 April 2022 orders were made for the question of remedies and sanction to be determined separately from the question of liability. Accordingly, these reasons address only the latter. However, given the conclusions I have reached it will not be necessary for me to consider questions of remedies and sanctions. That is because, for the reasons that follow ASIC's claim should be dismissed.

5 The events that led to this proceeding and to ASIC seeking the relief it did are set out below.

1. ASIC's pleaded case

6 ASIC relies on a further amended statement of claim filed on 10 June 2022 (**FASOC**). Leave to amend was granted in the course of the trial in the circumstances described below.

7 The FASOC pleads a detailed case against Mr Bettles, a high level summary of which appears below.

8 As set out above, ASIC's case relies on Mr Bettles' conduct as a liquidator or voluntary administrator of companies in the MA Group as well as his conduct as a liquidator of Bradford Marine. In summary ASIC contends that:

(1) Mr Bettles knew of, enabled and facilitated the diversion of income producing assets and funds from certain companies in the MA Group, referred to as the MA Trading Companies (see [39] below), to the detriment of **Iridium Holdings** Pty Ltd (in liquidation), the sole shareholder of the MA Trading Companies (see [35] below) and other companies in the MA Group, and of creditors of those companies;

(2) the alleged diversion of funds occurred through a strategy of which Mr Bettles was aware prior to his appointment as liquidator of Iridium Holdings and which was implemented after that appointment; and

(3) Mr Bettles breached his duty in his capacity as liquidator of Bradford Marine by accepting an offer for the purchase of a chose in action and opposing a subsequent application for his removal as liquidator.

9 More particularly ASIC puts its case in the following way.

10 In its pleaded case, ASIC alleges that:

(1) as at certain points in time leading up to his appointment Mr Bettles knew, or ought to have known, certain things about the MA Group;

(2) more particularly as at 8 July 2016, after a meeting (see [52]-[60] below), Mr Bettles knew or ought to have known that Richard Marlborough, one of the directors of Iridium Holdings, was developing a strategy with the assistance of his professional advisors, **WMS** Accountants and Ramsden Lawyers, referred to as **the strategy** in the FASOC;

(3) the strategy was as follows:

(i) Marlborough would register at least one new company which would be under his effective control (via his son, Braiden, and his employed general counsel, Young);

(ii) Marlborough would arrange for the staged winding up of the companies so as to be able to transfer the income producing assets of certain companies to such a new company;

(iii) the new company would then be able to receive the income that would otherwise have gone to the existing companies;

(iv) Marlborough required $500,000 in order to do this, and intended to obtain that from one or more of the entities that conducted the financial planning business or from the WIP of MM Prime Pty Ltd (20);

(v) the professional advisors (WMS Accountants and Ramsden Lawyers) intended to enter into arrangements which would enable them to take security for past and future fees over the assets of companies in the MA Group and with the effect that their professional fees should rank ahead of non-secured creditors; and

(vi) Marlborough wanted to limit the amounts available in MA Group companies that could be used to pay creditors, including the ATO.

(4) the strategy was implemented through a number of steps and transactions including:

(a) the incorporation of four new companies including: Benchmark Private Wealth Pty Ltd (**BPW**), Benchmark Wealth Property Services Pty Ltd (**BWP Services**) and Benchmark Private Wealth Holdings Pty Ltd (**BPW Holdings**) (collectively, **Benchmark Group**);

(b) the registration of security interests in the period 13 to 19 July 2016 against one or more of the companies in the MA Group in favour of Mr Domingo, Domingo Superannuation Fund/**Mellow Brae** Pty Ltd, Ramsden Law Pty Ltd, WMS Solutions Pty Ltd, **Crest Accountants** Pty Ltd and Members Winding Up Pty Ltd;

(c) the transfer of staff from the MA Group to BPW;

(d) appointing Mr Bettles as voluntary administrator and/or liquidator of companies in the MA Group;

(e) the entry into of the deed of settlement dated 19 July 2016 by **SS Residential** NSW Pty Ltd with Colin MacVicar (**MacVicar Deed**) pursuant to which Mr MacVicar was to receive, and did receive, $250,000 in return for his agreement to resign as a director of companies in the MA Group (**MacVicar Payment**);

(f) in October 2016 the entry into the following management deeds:

(i) management deed dated 11 October 2016 between BPW and **MM Prime** Investment Pty Ltd (**MM Prime Management Deed**);

(ii) management deed dated 13 October 2016 between BPW and **Capricorn Securities** Pty Ltd (**Capricorn Securities Management Deed**);

(iii) management deed dated 13 October 2016 between BPW and **Iridium Financial Planning** Pty Ltd (**Iridium Financial Planning Management Deed**); and

(iv) management deed dated 20 October 2016 between BWP Services and **Airlie Beach** (MA) Pty Ltd (**Airlie Beach Management Deed**), (collectively, **Management Deeds**),

in respect of each of which ASIC alleges that BPW or BWP Services did not provide any of the services which it agreed to provide as set out in each of the deeds;

(g) payments of commissions in 2016, by **Elderton** Holdings Pty Ltd, a member of the **RILOW Group**, to **Members Alliance Incorporated** Pty Ltd when those payments should have been made to MM Prime pursuant to an agreement dated on or about 25 February 2015 between Elderton and MM Prime (**Elderton Transaction**);

(h) the sale of the Client Book (see [395] below) to Crest Accountants; and

(i) the ultimate disclaimer of **Provincial Property** Investments (Aust) Pty Ltd's rental roll by Mr Bettles.

11 In part, ASIC's case against Mr Bettles arises from his role in a number of the transactions that it alleges were entered into to implement the strategy. ASIC contends:

(1) in relation to the MacVicar Deed and the MacVicar Payment that:

(a) by failing to investigate whether Mr MacVicar was entitled to the MacVicar Payment and by failing to take steps to prevent the MacVicar Payment Mr Bettles:

(i) breached s 180 of the Corporations Act as an officer of Iridium Holdings; and

(ii) breached Liquidator's Duty No. 1 and Liquidator's Duty No. 2 as set out in Sch C to the FASOC, which is reproduced in **Annexure A** to these reasons;

(b) the failure to investigate and prevent the MacVicar Payment, the breach of s 180 of the Corporations Act and the breach of Liquidator's Duty No. 1 and

Liquidator's Duty No. 2 are matters that can be taken into account under subss 45-1(4)(a), (b), (d) and (e) of the IPS;

(c) having provided earlier advice to Mr MacVicar and his wife Jennifer MacVicar, referred to as the **MacVicar Advice** (see [44] below), Mr Bettles acted inconsistently with the spirit of cl 6.1 and cl 6.8 and Principle 2 of the Australian Restructuring Insolvency & Turnaround Association (**ARITA**) Code of Professional Practice (**ARITA Code**) by accepting appointments to act as liquidator of companies in the MA Group. That is also a matter which the Court can take into account under subss 45-1(4)(a) and (e) of the IPS;

(d) having accepted the appointment as liquidator of Iridium Holdings and other companies in the MA Group, the failure by Mr Bettles to investigate whether Mr MacVicar was entitled to the MacVicar Payment and to prevent the payment in circumstances where the MacVicar Advice gave rise to a relationship between Mr Bettles and Mr and Mrs MacVicar are matters that can be taken into account in considering the seriousness of the consequences of any action or failure to act by Mr Bettles, including the effect of that action or failure to act on public confidence in registered liquidators as a group under subs 45-1(4)(e) of the IPS; and

(e) Mr Bettles was "involved", as that word is defined in s 79 of the Corporations Act, in Mr Marlborough's breaches of duties owed to SS Residential under s 180 of the Corporations Act. To that end ASIC alleges that Mr Marlborough breached his duty owed to SS Residential by executing, and causing SS Residential's entry into, the MacVicar Deed and by authorising the MacVicar Payment. As to the former, ASIC alleges that Mr Bettles' involvement arises from his knowledge of each of Mr Marlborough's relevant acts. As to the latter, ASIC alleges that Mr Bettles aided the MacVicar Payment within the meaning of s 79(a) of the Corporations Act or, alternatively, was knowingly concerned in that payment within the meaning of s 79(c) of the Corporations Act. These are also matters which may be taken into account under subss 45-1(4)(a), (b), (d) and (e) of the IPS;

(2) in relation to the Management Deeds that:

(a) because of his state of knowledge of and involvement in the preparation of the various management deeds, Mr Bettles was involved in Mr Marlborough's

contraventions of each of ss 180, 181(1) and 182(1) of the Corporations Act in relation to the entry into each of those deeds and the payment made by companies in the MA Group pursuant to those deeds;

(b) the matters pleaded in connection with the allegations at (a) above are matters which the Court may take into account under subss 45-1(4)(a), (b), (d) and (e) of the IPS;

(c) by agreeing to, and/or allowing or failing to prevent, entry into of the management deeds and/or failing to prevent payments pursuant to those deeds by using the powers he held as liquidator of Iridium Holdings, Mr Bettles breached s 180 of the Corporations Act as an officer of Iridium Holdings and was in breach of Liquidator's Duty No. 1 and Liquidator's Duty No. 2 as listed in Sch C to the FASOC; and

(d) the matters pleaded in connection with the allegations at (c) above are matters which the Court may take into account under subss 45-1(4)(a), (b), (d) and (e) of the IPS;

(3) in relation to the Elderton Transaction that:

(a) by failing to investigate whether MM Prime was entitled to payments pursuant to the First Tranche MM Prime Commission invoices and Second Tranche MM Prime Commission Invoices and by permitting those payments to be made to Members Alliance Incorporated rather than to MM Prime, Mr Bettles, in his capacity as an officer of Iridium Holdings, was in breach of s 180 of the Corporations Act;

(b) Mr Bettles was in breach of Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 4 as set out in Sch C to the FASOC; and

(c) the matters pleaded in connection with the allegations set out at (a) and (b) above are matters which the Court may take into account under subss 45-1(4)(a), (d) and (e) of the IPS;

(4) in relation to the sale of the Client Book:

(a) by failing to prevent the entry into of the agreement for sale of the Client Book using the powers at his disposal Mr Bettles:

(i) in his capacity as an officer of Iridium Holdings, was in breach of s 180 of the Corporations Act; and

(ii) was in breach of Liquidator's Duty No. 1 and Liquidator's Duty No. 2 as set out in Sch C to the FASOC; and

(b) the matters pleaded in support of the allegations at (a) above are matters which the Court may take into account under subss 45-1(4)(a), (b), (d) and (e) of the IPS; and

(5) in relation to the disclaimer of Provincial Property's rent roll that:

(a) Mr Bettles, in his capacity as an officer of Provincial Property and Iridium Holdings, breached s 180 of the Corporations Act in failing to investigate the value of Provincial Property's rent roll, in failing to properly market Provincial Property's rent roll and in disclaiming Provincial Property's rent roll;

(b) Mr Bettles was in breach of Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 4 as defined in Sch C to the FASOC; and

(c) the matters pleaded in support of the allegations in (a) and (b) above are matters which the Court may take into account under subss 45-1(4)(a), (b), (d) and (e) of the IPS.

12 As additional matters, ASIC contends:

(1) in relation to the members' voluntary winding up of each of SS Residential, Iridium Financial Planning and Capricorn Securities, that Mr Bettles' knowledge of the status of those companies at the time and of other matters which he was, or ought to have been aware, are matters which the Court may take into account under s 45-1 of IPS. ASIC further contends that by accepting the appointments of those companies, Mr Bettles breached Principle 1 and Principle 2 of the ARITA Code and Liquidator's Duty No. 6, as set out in Sch C to the FASOC, and that these are matters which the Court may take into account under subss 45-1(4)(a) and (e) of the IPS;

(2) in relation to the declarations of independence, relevant relationships and indemnities (**DIRRI**) pursuant to s 506(2) of the Corporations Act signed by Mr Bettles for ten of the companies in the MA Group, Mr Bettles failed to adequately disclose the nature of his relationship with Mr MacVicar and the nature of the MacVicar Advice which was contrary to cl 6.10.3 of the ARITA Code, contrary to the spirit of cl 6.8.1 of the ARITA Code and are matters which the Court may take into account under subss 45-1(4)(a) and (e) of the IPS; and

(3) in relation to reports lodged with ASIC pursuant to s 533 of the Corporations Act, Mr Bettles, in making declarations as to the adequacy of the relevant MA Group company's books and records, made a statement that he knew was false or misleading contrary to s 1308(2) of the Corporations Act, made declarations that were false and failed to discharge his obligations as a registered liquidator to obtain relevant books and records of the companies. Mr Bettles' failure is a matter which the Court may take into account under subss 45-1(4)(a), (b) and (e) of the IPS.

13 The relief sought by ASIC as a result of Mr Bettles' conduct in his role as liquidator of companies in the MA Group is set out at [294]-[301] of the FASOC.

14 At [294] ASIC defines "the conduct of the Defendant" and "the assets and income streams" respectively by reference to particular aspects of Mr Bettles' alleged conduct and the amounts allegedly either paid out or not received by MA Group companies.

15 ASIC contends that:

(1) Mr Bettles' conduct had the effect of avoiding or reducing scrutiny being given to elements of the strategy and its implementation and sets out why that is so;

(2) Mr Bettles consented to act as liquidator of MA Group companies, including Iridium Holdings, when he knew or ought to have known of the strategy (as defined in [58(c)] of the FASOC) and in the circumstances pleaded at [296]; and

(3) notwithstanding the circumstances pleaded at [296], Mr Bettles consented to act as liquidator of companies in the MA Group, took no steps to prevent the implementation of the strategy or to ameliorate its effects and engaged in conduct designed to avoid or reduce scrutiny of the strategy.

16 At [298]-[301] of the FASOC ASIC pleads that:

> 298. The Court may take into account the cumulative nature and effect of the conduct of the Defendant under div. 45-1(4) of the Act.
>
> 299. The conduct of the Defendant pleaded in paragraph 294(a) above, together with the matters pleaded in paragraphs 295, 296 and 297 above, viewed cumulatively, constituted so gross a departure from, and abrogation of, the duties of a registered liquidator, as to warrant:
>
> (a) the cancellation of the Defendant's registration as a Registered Liquidator;
>
> (b) a lifetime prohibition on the Defendant from reapplying for registration as a Registered Liquidator;

(c) a lifetime prohibition on the Defendant from consenting to any appointment and acting as a liquidator; and

(d) an order that the Defendant pay ASIC's costs.

14.2 Individual Items of the Defendant's Conduct

300. Each individual item of the Defendant's Conduct pleaded herein (being that conduct listed in paragraph 294(a) above) and the matters pleaded in paragraphs 295, 296 and 297 above, or any one of more item of the same taken in combination, is conduct which may be taken into account by the Court pursuant to div 45-1(4) of the *Insolvency Practice Schedule*.

301. The conduct of the Defendant pleaded herein, viewed as individual items of conduct or one or more item taken in combination, constituted so gross a departure from, and abrogation of, the duties of a registered liquidator, as to warrant:

(a) the cancellation of the Defendant's registration as a Registered Liquidator;

(b) a lifetime prohibition on the Defendant from reapplying for registration as a Registered Liquidator;

(c) a lifetime prohibition on the Defendant from consenting to any appointment and acting as a liquidator; and

(d) an order that the Defendant pay ASIC's costs.

17 ASIC also contends that Mr Bettles breached his duties in relation to the liquidation of Bradford Marine by engaging in conduct which occurred after commencement of this proceeding. The relevant events are set out in Sch D to the FASOC and are more fully described below commencing at [750].

18 As is apparent from the summary set out above, ASIC contends that by his conduct Mr Bettles breached what it refers to as "Liquidators' Duties" as set out in Sch C to the FASOC (see Annexure A to these reasons).

2. Facts

2.1 Witnesses

19 Although there was a significant volume of documentary evidence relied on, there were only four witnesses.

20 ASIC led evidence from the following witnesses:

(1) Paul Dunn who is employed as an investigator by ASIC. Mr Dunn conducts investigations into suspected contraventions of the laws regulated by ASIC and was in ASIC's investigation into the MA Group, Mr Dunn was cross-examined;

(2) Benjamin de Waard, who is employed as a computer forensic analyst by ASIC. Mr de Ward gave evidence about the nature of metadata and his review of the metadata of two documents. Mr de Waard was not cross-examined; and

(3) Oliver Jones. Mr Jones is a solicitor. He was admitted to practice on 2 February 2009. Mr Jones practises primarily in commercial and corporate law including advising companies from time to time about insolvency issues. He has also undertaken some immigration and employment law. From early 2009 to mid-February 2017 Mr Jones worked as a solicitor at Ramsden Lawyers on the Gold Coast, Queensland, principally under the direction of the firm's managing partner, John Ramsden. Mr Jones was involved in advising the MA Group in relation to transactions the subject of this proceeding. He was cross-examined.

21 Mr Bettles gave evidence in support of his defence. His qualifications and background are set out below. Mr Bettles was cross-examined.

22 It is convenient at this point to make some observations about his evidence. It was apparent that Mr Bettles did his best to assist the Court. In addition to his detailed affidavits he provided frank answers in cross-examination and was prepared to make concessions where appropriate. Overall Mr Bettles struck me as someone who endeavoured to do his best both professionally and in assisting the Court.

23 As is clear from Mr Bettles' evidence he has many years' experience as an insolvency practitioner and registered liquidator. That said, my impression was that he had not had significant experience in large group insolvencies. A review of his evidence and the way in which he interacted with the director of, and advisors to, MA Group companies suggested a level of naivety on Mr Bettles' part and a complete lack of scepticism. Mr Bettles was too trusting. While it is not my role to speculate, it was perhaps these qualities that ultimately caused Mr Bettles to manage the liquidations as he did. In short Mr Bettles did not strike me as someone who would act in disregard of his duties or statutory obligations. On the contrary, he struck me as someone who is earnest and attempted to "do the right thing" when it came to understanding his role as liquidator.

2.2 ASIC commences an investigation

24 On 29 September 2016 ASIC commenced an investigation under s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) in relation to potential

breaches of ss 184, 911A and 1041F of the Corporations Act and s 29 and s 30 of the *National Consumer Credit Protection Act 2009* (Cth) by Capricorn Securities and BPW. ASIC's investigations subsequently expanded to include, among other matters, the conduct of the liquidators, Mr Bettles and Rajendra Khatri, appointed to companies in the MA Group.

2.3 Mr Bettles – background

25 Mr Bettles is a chartered accountant. He graduated in 1996 with a bachelor of accounting. He is a professional member of ARITA and is also a justice of the peace for the state of Queensland.

26 Mr Bettles has specialised in the field of insolvency since 1995 and has been a registered liquidator under the Corporations Act since 28 August 2002.

27 Since September 2004 Mr Bettles has been a partner of **Worrells** Solvency & Forensic Accountants, although strictly the "partner" of the firm is Bettles Holdings Pty Ltd as trustee for the Bettles Holding Trust and Mr Bettles is its nominee. Worrells is principally an insolvency practice, but also runs a small forensic accounting service. It does not provide general accounting services. Worrells has offices in Queensland, New South Wales, the Australian Capital Territory, Victoria and Western Australia. Mr Bettles is usually based at Worrells' office situated in Robina, Queensland which is referred to as the Worrells Gold Coast office.

2.4 Worrells' file management system

28 Worrells' offices are paperless. All correspondence in relation to an external administration is stored electronically in files related to the relevant client. Any paper correspondence received at the offices is scanned and saved into the relevant electronic file. The originals are then destroyed in accordance with Worrells' document protocol.

29 Worrells uses a proprietary file management system known as "Workbench" which comprises two parts:

(1) a potential system (**Potential System**) which includes all notes and correspondence relating to discussions prior to taking an appointment; and

(2) a general system which provides a complete record of the steps undertaken on every liquidation or administration to which members of the firm are appointed.

30 Each appointment to a particular company or entity is treated as a separate administration or liquidation. For each appointment, a separate file is opened in Worrells' file management system and a separate client number is allocated, even where entities belong to a group of companies.

31 Worrells' internal system has detailed notes and procedures setting out the steps required in each administration undertaken by the firm and all enquiries conducted during an administration or liquidation are recorded electronically in this system.

32 At the commencement of each appointment, a number of generic file enquiry documents, referred to as "file notes", are set up which are specific to different elements of an external administration. Each file note sets out:

(1) a date and time of entry and the initials of the author which are automatically generated when an entry is made. The system recognises the user by his or her login details. Each author has unique initials assigned to them;

(2) a general narration of the particulars in relation to that part of the external administration;

(3) a list of the relevant legislative sections for reference;

(4) any ASIC flowchart links and required reporting;

(5) details of any actions that need to be undertaken in relation to that aspect of the external administration; and

(6) a general text area where all enquiries are recorded with the date, time and initials of the person who made or who is to make the enquiry.

33 Worrells also maintains a "webnote" system which provides periodic updates, together with relevant information, reports and statutory forms for an external administration. The "webnotes" are specific to each matter and access is password protected and available through the internet. The password is provided to all relevant stakeholders for an external administration, such as directors and creditors. Access to "webnotes" is available for a period of approximately six months following the finalisation of an external administration.

34 A new bank account is opened for each external administration to record receipts into and payments out of that administration.

2.5 The MA Group

35 The ultimate holding company of most of the companies in the MA Group and more particularly of those companies relevant to this proceeding was Iridium Holdings (now ACN 161 598 938 Pty Ltd (in liquidation)). The shareholders in Iridium Holdings were **Astro Holdings** Pty Ltd (in liquidation), a company controlled by Richard Marlborough, as to 50% and **J.T. Prestige** Pty Ltd (in liquidation), a company controlled by Mr MacVicar, as to 50%. Messrs Marlborough and MacVicar were also directors of Iridium Holdings.

36 The companies in the MA Group which are relevant to this proceeding include:

(1) 2585 **Gracemere** Pty Ltd (in liquidation);

(2) ACN 117 674 236 Pty Ltd (in liquidation), formerly **Syree Enterprises** Pty Ltd;

(3) ACN 129 388 969 Pty Ltd (in liquidation), formerly **Silverback Constructions** Pty Ltd;

(4) ACN 144 889 270 Pty Ltd (in liquidation), formerly **Iridium Home Loans** Pty Ltd;

(5) ACN 147 346 192 Pty Ltd (in liquidation), formerly **Iridium Mortgage Fund** Pty Ltd;

(6) ACN 159 641 371 Pty Ltd (in liquidation), formerly **Laver Resources** Pty Ltd;

(7) ACN 161 904 776 Pty Ltd (in liquidation), formerly **Members Alliance Rocket** Pty Ltd;

(8) **MAIC Human Resources** Pty Ltd (in liquidation);

(9) **All My Best Wishes** Pty Ltd (in liquidation);

(10) **RJM Property** Developments Pty Ltd (in liquidation);

(11) **Silverback Investments** Pty Ltd (in liquidation);

(12) **HSINIF** Pty Ltd (in liquidation);

(13) Provincial Property;

(14) ACN 151 259 675 Pty Ltd (in liquidation), formerly **Image Building Group** QLD Pty Ltd;

(15) **Trats** Pty Ltd (in liquidation);

(16) SS Residential;

(17) Iridium Financial Planning; and

(18) ACN 143 933 644 Pty Ltd (in liquidation), formerly Capricorn Securities;

(19) ACN 133 019 093 Pty Ltd (in liquidation), formerly MM Prime;

(20) **MA Human Resources** Pty Ltd (in liquidation); and

(21) Airlie Beach.

37 Iridium Holdings:

(1) was the sole shareholder of:

(a) Iridium Mortgage Fund;

(b) Iridium Home Loans;

(c) Laver Resources;

(d) Members Alliance Rocket;

(e) MAIC Human Resources;

(f) Provincial Property;

(g) Silverback Investments;

(h) SS Residential;

(i) Iridium Financial Planning;

(j) Capricorn Securities;

(k) MM Prime;

(l) Airlie Beach; and

(m) MA Human Resources;

(2) was the ultimate holding company of Silverback Constructions; and

(3) held 98% of the shares in Syree Enterprises.

38 The companies in the MA Group conducted a number of businesses, primarily in Queensland, New South Wales and Victoria including:

(1) project marketing;

(2) finance broking;

(3) financial planning and risk services;

(4) property management;

(5) construction;

(6) lease holding;

(7) staff and labour hire; and

(8) investment activities on behalf of the directors of companies in the MA Group.

39 By letter dated 28 November 2014 the Australian Taxation Office (**ATO**) informed Iridium Holdings that it had processed its notification to register a goods and services tax (**GST**) group, the group was registered from 1 July 2014 and the representative member of the group was Iridium Holdings. There were 20 other companies named as members of the group including SS Residential, Iridium Financial Planning, Capricorn Securities, MM Prime and Airlie Beach (together, the **MA Trading Companies**).

40 By letter dated 2 March 2015 the ATO informed Iridium Holdings that it had registered its income tax consolidated group for income tax purposes with an effective date of 1 July 2013. The letter listed 21 companies as members of the consolidated group including four of the MA Trading Companies: SS Residential, MM Prime, Airlie Beach and Capricorn Securities.

2.6 Mr MacVicar

41 As set out at [10(4)(e)] above Mr MacVicar was a director of Iridium Holdings. He was also a director of a number of other companies in the MA Group.

42 Mr Bettles was first introduced to Mr MacVicar by Aaron Lavell of **WMS** Chartered Accountants, a firm of accountants operating on the Gold Coast, Queensland. Mr Bettles understood that WMS was one of the largest firms of accountants operating on the Gold Coast. Mr Bettles had known Mr Lavell for some time, having first met him in the mid-1990s through a mutual friend. His relationship with Mr Lavell was professional with WMS referring potential clients to him.

43 In about February 2015 Mr Lavell introduced Mr Bettles to Mr MacVicar, who was one of Mr Lavell's clients.

44 On 11 March 2015 Mr Bettles provided the MacVicar Advice to Mr and Mrs MacVicar. The MacVicar Advice was addressed to Mr Lavell of WMS. As stated at its commencement the purpose of the MacVicar Advice was to provide advice "on the adverse financial consequences to Mr Colin and Mrs Jenny MacVicar personally should the [MA Group] cease to trade in a short timeframe because of an inability to pay outstanding debts to the Australian Taxation Office".

45 The MacVicar Advice was detailed, spanning some eight pages and addressed the following topics:

(1) the factual background on which the advice was based including the ownership of Iridium Holdings, the holding company of the MA Group, and J.T. Prestige which as trustee for the Denominator Trust held 50% of the shares in Iridium Holdings;

(2) the "Areas of Exposure". Here Mr Bettles noted that:

> It is obviously impossible for me to advise you of every adverse financial consequence without reviewing every transaction that Mr & Mrs MacVicar and their associated entities have entered into for at least the last five years. Consequently this advice is designed to broadly identify the areas that may have a material effect on Mr & Mrs MacVicar and their associated entities, and therefore should be considered as part of a review of their affairs.

(3) he the considered the following topics;

(a) inter entity loans. Mr Bettles advised that there was a need "to carefully review the balance sheets for all entities to confirm who owes what to whom" and stated:

> Some particular areas you may wish to consider are:
>
> • MA Human Resources Pty Ltd has a significant liability to the ATO. I note that MM Prime Investments Pty Ltd acts as treasury for the [MA Group] and that MM Prime Investments Pty Ltd owes MA Human Resources Pty Ltd $4,160,087.
>
> Should MA Human Resources Pty Ltd be wound up then the liquidator would be looking to seek recovery of the $4,160,087 owed by MM Prime Investments Pty Ltd. If this resulted in MM Prime Investments Pty Ltd being wound up then this could have a significant impact on the [MA Group] because the liquidator may seek recoveries of all of the loans owing to MM Prime Investments Pty Ltd.
>
> • Denominator Trust owes the ATO $321,249. Should the ATO take legal action seeking recovery of this debt then it would need to take action against the trustee, as a trust is not a legal entity and therefore cannot be sued. The trustee is obviously J.T. Prestige Pty Ltd.
>
> The winding up of J.T. Prestige Pty Ltd would give control of the Denominator Trust to the liquidator by virtue of the indemnity contained within the trust deed. The liquidator could then seek recovery of the debts owed to both J.T. Prestige Pty Ltd and Denominator Trust, which includes:
>
> …
>
> The winding up of J.T. Prestige Pty Ltd would also result in the liquidator controlling the 50% shareholding in [Iridium Holdings], which the liquidator would sell to any interested party.

(b) voidable transactions. Mr Bettles set out a summary of the type of transactions that can be set aside by a trustee in bankruptcy. After doing so he noted:

> Some particular areas you may wish to consider are:

- [Iridium Holdings] has not paid for the purchase of Provincial Property Investments (Aust) Pty Ltd. Rather it is intended to show a loan in the accounts of J.T. Prestige Pty Ltd, which will be offset by any amounts owing by other entities to the [MA Group].

  Should a liquidator be appointed to J.T. Prestige Pty Ltd the liquidator could argue that because J.T. Prestige Pty Ltd did not physically receive the purchase price then the transaction is a voidable transaction and the liquidator would seek the return of the shareholding in Provincial Property Investments (Aust) Pty Ltd or the amount of the purchase price.

- I note your advice that Mr MacVicar's remuneration, which is directed to Denominator Trust, is derived from a fee of $4,500 for each successful property settlement achieved by the [MA Group]. I also note that you are comfortable that this fee is reasonable. Given the total quantum of monies paid in this area it is likely to be a matter thoroughly investigated by a liquidator and consequently, if you have not documented how you arrived at the figure of $4,500, I suggest you do so.

(c) director penalty regime;

(d) directors' duties;

(e) dividends to shareholders;

(f) shareholding;

(g) beneficially held shares;

(h) director disqualification; and

(i) association membership and practising certificates.

2.7 The ATO serves statutory demands

46 Between 5 January 2016 and 21 April 2017 the ATO issued the following statutory demands to companies in the MA Group:

Date Of Demand	Debtor Company	Amount Of Demand
5 January 2016	Syree Enterprises	$954,098.10
5 January 2016	Gracemere	$996,615.97
5 January 2016	Astro Holdings	$681,501.63
6 January 2016	RJM Property	$549,745.62
6 January 2016	Trats	$722,837.78
23 June 2016	Iridium Holdings	$2,178,490.16
23 June 2016	Silverback Constructions	$636,148.38

23 June 2016	Iridium Mortgage Fund	$69,039.21
23 June 2016	Iridium Home Loans	$74,102.63
23 June 2016	MAIC Human Resources	$599,395.64
24 June 2016	HSINIF	$592,540.87
24 June 2016	Members Alliance Rocket	$80,790.55
24 June 2016	All My Best Wishes	$687,282.36
27 June 2016	Provincial Property	$173,282.42
7 July 2016	Image Building Group	$1,385,287.71
8 July 2016	Laver	$6,766,842.94
21 April 2017	Airlie Beach	$2,193,769.07

47 By letter dated 8 April 2016 WMS wrote to the ATO's "Significant Debt Management" area on behalf of the "Iridium Holdings Group of Companies" (i.e. the MA Group) setting out "the taxpayer's proposal to enter into a Deed of Compromise and meet ongoing compliance commitments". By letter dated 15 June 2016 the ATO refused the proposed compromise, providing its reasons for doing so and noting at the conclusion of the letter that:

> If the outstanding taxation liabilities for all entities within the Group are not paid in full immediately we will initiate action to wind up the companies by using a Creditor's Statutory Demand for Payment.

2.8 Ramsden Lawyers

48 Ramsden Lawyers acted for the MA Group from about June 2016. John Ramsden was the managing partner of Ramsden Lawyers and, as set out above, Mr Jones principally worked under his supervision.

49 A new matter for the MA Group was referred to Ramsden Lawyers by WMS. Mr Jones first became involved in the matter in about June 2016 at a meeting with Mr Ramsden. Mr Jones recalls that during the meeting Mr Ramsden informed him that:

(1) this would be the biggest matter of this type that the firm had ever done. It was a corporate group insolvency and restructure of more than 20 companies;

(2) the intention was to realise certain assets before the companies went into liquidation because, if the companies went into liquidation, they would lose their Australian

Financial Services Licence (**AFSL**) and, as a result, certain assets, such as the insurance roll, would have a markedly decreased value or may even be worthless;

(3) one of the possible strategies for the restructure was to create a new corporate entity which would purchase some of the assets remaining in the MA Group;

(4) the MA Group had significant debts owing to the ATO and the Office of State Revenue for payroll tax. Mr Jones recalls that the MA Group was consolidated for tax purposes and had a tax liability of around $21 million; and

(5) Ramsden Lawyers would need to secure its fees by registration of a security interest so that they would not be considered a preference if the companies went into liquidation, the companies in the MA Group were solvent and they could therefore enter into transactions with them and register a security interest for their fees but moving forward the companies would eventually most likely become insolvent.

50 At this initial meeting Mr Ramsden instructed Mr Jones to contact Mr Lavell to get the matter started. Mr Jones did so by email sent on 1 July 2016 in which, among other things, he:

(1) sought specified "additional material" following his review of the file; and

(2) referred to a "new entity controlled by Braiden Marlborough", Mr Marlborough's son who, for ease and without intending any disrespect, I will refer to as **Braiden**. Mr Jones recalled that one of the strategies being considered at the time was for a new entity (**NewCo**) to be set up by Braiden to purchase certain assets of the MA Group.

51 On 5 July 2016 Mr Jones drafted a retainer letter and a security agreement to allow for registration of a security interest under the *Personal Property Securities Act 2009* (Cth) (**PPSA**) and to ensure that both Ramsden Lawyers and WMS had documentation in place to give rise to a valid security interest under the PPSA.

2.9 Pre-appointment meetings

2.9.1 8 July 2016 Meeting

52 On 8 July 2016 Mr Bettles attended a meeting with Mr Lavell of WMS and Messrs Ramsden and Jones of Ramsden Lawyers (**8 July 2016 Meeting**). Mr Bettles recalls that Mr Lavell invited him to the meeting to discuss the financial position and structure of the MA Group and the nature and general consequences of an insolvency appointment.

53 Mr Bettles, who did not attend the entirety of the meeting, recalls that Mr Lavell did most of the talking during the meeting addressing each of the companies in the MA Group and that Mr Ramsden was also involved in the discussions. While he cannot recall the precise words spoken, Mr Bettles recalls that the following matters were discussed:

(1) Mr Lavell identified various companies in the MA Group and their operations and, to the best of Mr Bettles' recollection, he went through a spreadsheet or spreadsheets;

(2) there was a discussion about placing companies in the MA Group into insolvency administration; and

(3) Mr Bettles was informed that there was a need to realise the assets of the MA Trading Companies before liquidating those companies, otherwise the value in those assets would be lost.

54 Upon returning to his office, Mr Bettles made a file note which is date and time stamped 8 July 2016 at 12.38 pm. The file note records:

> JB 08/07/16 12:38 PM: Meeting with Aaron Lavell from WMS Accountants, and John Ramsden and Oliver Jones from Ramsden Law to discuss the financial position of the group. It seems a number of the companies have received statutory demands from the ATO, some other companies are insolvent, and some companies are solvent but their sole shareholders are insolvent.
>
> Aaron ran through the operations of each entity. John indicated that he was doing a review of all of the companies to provide advice to each of them on their solvency position. It seems likely that the whole group will ultimately fail and Richard (director) will end up bankrupt, but the liquidations of each company will need to be staged because in some cases assets need to be realised prior to liquidation otherwise the value in the asset will be lost.
>
> Aaron is to email me his spreadsheets on what each company does and which companies have received statutory demands.

55 According to Mr Bettles, given the generality and high level of the discussion, at the conclusion of the meeting he had no specific knowledge of the financial affairs of the MA Group.

56 Mr Bettles was cross-examined about the 8 July 2016 Meeting. He maintained that he did not believe that there was any discussion to the effect that Messrs Lavell and Ramsden would put a proposal to him as to the order in which companies in the MA Group were to be placed into liquidation. Rather, he recalled that Mr Ramsden was still undertaking a review of the solvency of each of the companies in the MA Group at the time, although there was discussion about issues that arose in relation to some of the companies in the group.

57 However, Mr Bettles accepted that by the end of the 8 July 2016 Meeting, he was aware:

(1) there was a special purpose human resources company in the MA Group which was indebted to the ATO; and

(2) of Airlie Beach and probably aware that it held management rights for a building known as "the Summit".

58 Mr Jones also gave evidence about the 8 July 2016 Meeting. Based on the work in progress report for the matter maintained by Ramsden Lawyers (**WIP Report**), the meeting went for five hours although, as Mr Jones accepted in cross-examination, that timing included travel time from Ramsden Lawyers' offices to WMS' offices at Robina, Queensland, where the meeting took place. Having regard to travel time Mr Jones accepted that the meeting time was closer to four hours in length and he recalled that it ended near the end of the working day. Mr Jones could not recall when Mr Bettles left the meeting. However, it is clear that by 12.38 pm, when he recorded his file note, Mr Bettles was back in his office and, given Mr Jones' evidence as to when the meeting ended, that Mr Bettles was not present for its entirety.

59 Mr Jones did very little talking during the meeting. His role was to take notes, which he did on his iPad. Mr Jones' notes comprise six pages. Although he cannot now recall who said what at the meeting, by reference to his notes he recalls that:

(1) as reflected on the first page of the notes, there was discussion about:

(a) the assets which remained within various companies in the MA Group, which in many cases were trail commissions being received under various agreements;

(b) checking with Liam Young, the general legal counsel of the MA Group and the sole director of BPW, BPW Holdings and **Young Corporation** (NSW) Pty Ltd, about whether any companies on which a statutory demand had been served were complying with payment arrangements, including checking those companies with "Image" in their names;

(c) a company called "Iridium Home Loans" and determining if the trail agreements would cease upon certain events occurring, such as liquidation;

(d) financial reports in relation to various of the MA Group companies which were reviewed during the meeting;

(e) various trail commissions being received by companies in the MA Group;

(f) Capricorn Securities, which held an AFSL, and Iridium Financial Planning, which was an authorised corporate representative under that AFSL, that a statutory demand for about $70,000 had been issued to Capricorn Securities, concern that the trailing commissions received by Capricorn Securities would cease if it went into liquidation based on that demand and whether the statutory demand should be paid in order to avoid that consequence;

(g) JP Downey of Downey and Co and MA Human Resources, which was in receivership;

(h) Iridium Home Loans paying the statutory demand, selling off its assets and putting that company into administration to effect the sale of assets or perhaps entering into a deed of company arrangement (**DOCA**);

(i) Airlie Beach, including that it had management rights to certain properties located at Airlie Beach which David Domingo, a director of various companies in the MA Group, wanted, that Mr Marlborough had not allowed Mr Domingo to take these management rights because he had already taken an asset worth $3 million, which concerned the Prime Securities Income Trust, and that Mr Domingo was aware that Mr Bettles would likely try to recover the $3 million asset once he was appointed liquidator;

(j) the taxation liability of the MA Group, that the MA Group was a consolidated group for tax purposes under a tax sharing arrangement which meant that there was joint and several liability for tax debts and whether the ATO would make a decision to treat the MA Group as a group for taxation purposes. In cross-examination Mr Jones accepted that the effect of the discussion was that payroll tax would likely be consolidated but that it was not known at that time whether other taxation liabilities would be consolidated by the ATO;

(k) the trail book of Capricorn Securities and Iridium Financial Planning and, if it was not sold before those companies went into liquidation, the book would not have any value if sold by liquidators because liquidation would mean loss of the AFSL and would result in the trail providers no longer paying the trail commission;

(l) the NewCo arrangement. The notes state "Richard's son will create new entity with Liam as sole director and shareholder. Ownership of the trustee co, will

also be Liam". This was a reference to Braiden, Mr Young and the NewCo arrangement as referred to at [50(2)] above;

(m) Provincial Property and that it had rental property management rights to a large number of properties in certain regional cities; and

(n) Mellow Brae, a company associated with Mr Domingo, and a second mortgage book relating to the Prime Securities Income Trust;

(2) as reflected on the second page of the notes, there was discussion about:

(a) the transaction with Mr Domingo concerning the Prime Securities Income Trust;

(b) a $4 million asset which was the same asset as referred to at [59(1)(i)] above. During the discussion that asset was variously referred to as being worth between $3 and $4 million;

(c) MM Prime which had an asset in relation to certain work in progress from property development and that Mr Marlborough wanted to buy this business in order to collect the work in progress. I note that in his notes Mr Jones recorded that:

> Richard will want to buy this business and carry on but Richard needs $500K to get them to continue business so can collect WIP. Only way to pull out is the below $400K from the planning business but that will take 90 days. Every day there is settlements that said.

(d) various options for the liquidation of the companies in the MA Group; and

(3) as reflected on the third page of the notes, there was discussion about:

(a) the current employees of the MA Group and that Mr Marlborough would employ some of them in NewCo;

(b) Mr Lavell being prepared to accept $130,000 or $140,000 in satisfaction of the outstanding amount of $165,000 owing to WMS for fees;

(c) what Mr Bettles could do once appointed as liquidator of Iridium Holdings, the sole shareholder of companies in the MA Group. Mr Ramsden noted that Mr Bettles could wind up each of the subsidiary companies;

(d) whether the liquidator could access funds held in trust. There was $450,000 available which could be used to pay WMS' outstanding fees with the balance, of $350,000, available for use by Mr Bettles in the liquidation;

(e) a deed with the NSW government concerning a payment to SS Residential;

(f) ensuring that Capricorn Securities kept its AFSL by paying its debts and avoiding going into liquidation, the need to keep the responsible manager in order to maintain the AFSL and that he may need to be paid;

(g) tax liability, as to which Mr Bettles made a comment about the tax liability for the consolidated group;

(h) WMS' and Ramsden Lawyers' fees. This included a detailed discussion about how WMS' past fees could be secured and Mr Ramsden's suggestion, in relation to Ramsden Lawyers' fees, that a security interest provision be inserted into its fee agreement which would make all of the MA Group companies liable for the fees and allow Ramsden Lawyers to register a security interest. The reference in Mr Jones' notes to "Getting $450 once deed is signed" was a reference to an amount of about $450,000 which SS Residential expected to receive once the deed with the NSW government was signed; and

(i) the obligation of other MA Group members to pay Ramsden Lawyers' fees. Mr Jones explained that his file note refers to issuing a demand to SS Residential or Airlie Beach because those companies had an asset upon which demand could be made.

60 At the end of the third page of his notes Mr Jones recorded "Telephone attendance with Richard following meetings". Based on his review of the subsequent pages of his notes, Mr Jones believes that he and Mr Ramsden had a telephone discussion with Mr Marlborough following their meeting with Messrs Lavell and Bettles.

2.9.2 14 July 2016 Email

61 On 14 July 2016 at 11.36 am Mr Young sent an email to Messrs Ramsden and Jones, copied to Mr Marlborough and Genevieve White of Ramsden Lawyers, setting out NewCo's requirements in relation to "its management of current business of the [MA Group] of companies for an appointed liquidator" (**14 July 2016 Email**). The 14 July 2016 Email referred to the "operations of NewCo" and NewCo's requirements as follows:

> 1. Payment of all property management fees paid to Provincial Property Investments Pty Ltd (PPI) and Airlie Beach (MA) Pty Ltd until such time as a Deed of Company Arrangement (DOCA) has been entered into and the Airlie Beach management rights are sold;
>
> 2. NewCo will offer to pay the existing ATO debt of PPI at 100c in the dollar as

part of a DOCA in order to continue the operations of the company;

3. Payment of all trail income received by Capricorn Securities Pty Ltd and Iridium Financial Planning Pty Ltd in order to manage existing WIP while a sale to market is arranged;

4. Payment of 25% of any up-front commissions received in order for NewCo to pay relevant incentives to retained staff to complete existing WIP;

5. Any costs to maintain Capricorn or Iridium Financial Planning are to be paid from the remainder of up-front commissions received. This includes (but is not limited to) payment of the existing statutory demand, any required professional indemnity insurance and financial planning software;

6. The full sale price achieved for financial planning asset will be made available to the liquidator, once such sale is finalised;

7. In relation to MM Prime Investments Pty Ltd, NewCo to split WIP on a 50/50 basis for all settled sales;

8. In order to ensure NewCo has cash flow at the front end it will require 100% of sales for the first 10 settlements;

9. NewCo will split settled WIP on a 50/50 basis for the next 20 settled deals;

10. Thereafter, NewCo will split settled WIP on a 50/50 basis with adjustments to be made in order for the liquidator to recover the 50 share of commissions retained by NewCo on the initial 10 settlements;

11. Any costs required to manage existing WIP are to be met by the portion of funds retained by the liquidator. This would include, though is not limited to, maintaining the existing CRM and cloud access to allow NewCo access to client data; and

12. Payment of Sydney rent to be met until payment of funds from Transport NSW is received, NewCo to be given access to the Sydney premises in this time.

2.9.3 14 July 2016 Meeting

62 Mr Bettles next met with Mr Ramsden on 14 July 2016 to discuss the operations of each of the companies in the MA Group and the nature and consequences of an insolvency appointment (**14 July 2016 Meeting**). Mr Bettles could not recall the detail of what was discussed at that meeting and his file note of the meeting lacks detail. He could not recall discussing the 14 July 2016 Email at the 14 July 2016 Meeting and his evidence, which I accept, is that he did not receive the 14 July 2016 Email until after the 14 July 2016 Meeting (see [102] below).

63 Mr Jones, who also attended the meeting, recalls that the purpose of the meeting was to discuss the strategy of how they would proceed with NewCo including the management of funds, the management of assets by NewCo and realisation of those assets. In his evidence in chief, Mr Jones said that he recalled that Mr Bettles approved "the strategy for the NewCo". He understood from Mr Ramsden that he was not prepared to proceed with the strategy without

Mr Bettles' approval because he did not want the liquidator to undo, at a later stage, what had been done. Mr Jones said he recalled this because it gave him comfort to know that Mr Bettles was on board with the "strategy".

64 However, in cross-examination Mr Jones' recollection was undermined. He accepted two things: first, that he does not identify in his evidence the content of the "strategy"; and secondly, his understanding that the "strategy" was approved by Mr Bettles was based on information he received from Mr Ramsden and not Mr Bettles directly. In addition, Mr Jones could not recall that the 14 July 2016 Email was discussed at the 14 July 2016 Meeting.

2.9.4 16 July 2016 Meeting

65 On 16 July 2016 Mr Bettles attended a meeting with Mr Lavell and Justin Wowk from WMS, Messrs Marlborough and Young and Braiden (**16 July 2016 Meeting**). Mr Bettles does not have a specific recollection of what was discussed at that meeting but his file note of the meeting records:

> Meeting with Aaron Lavell and Justin from WMS Accountants, Richard (director), Braydon (Richard's son), Liam (former legal counsel) to go over the operations of each of the companies. The operations are set out in a powerpoint presentation that Aaron will email me. Just need to remember that:
>
> 1. there are 21 cars leased from SGI Fleet. They will arrange for the vehicles to be dropped at SGI depots around the country
>
> 2. the records are saved on a server in the cloud. Maintaining that server is necessary to complete the wip and sell the books and trails. Cost is $11,000 per month.

66 Following the 16 July 2016 Meeting Mr Bettles thought that the records "stored in the Cloud" were the books and records of the whole of the MA Group.

2.9.5 Mr Bettles' general recollections of discussions at the pre-appointment meetings

67 Mr Bettles recalls a number of matters that were discussed at the pre-appointment meetings described above but, other than those matters raised by Mr Marlborough which must have occurred at the 16 July 2016 Meeting, he cannot recall at which particular meeting they were discussed. The matters which Mr Bettles recalls were discussed were:

(1) a conversion of assets belonging to the MA Trading Companies was to occur within a short time. Mr Bettles was told that if those companies went into administration immediately, the assets would not be realised for their proper value and therefore they should be wound up at a later date so that asset values were not lost;

(2) in the interim, the MA Trading Companies did not have any staff. Thus the assets would need to be managed by someone other than the directors of the MA Trading Companies;

(3) Mr Young, who previously worked for the MA Group, was the appropriate person to do so. He was already operating a similar but smaller business to that conducted by the MA Group. Mr Bettles does not recall whether the name "Benchmark" was used during the discussions;

(4) statutory demands had been issued by the ATO and he would be sent further information in relation to which companies had received those demands;

(5) he was asked what a liquidator would do in certain circumstances but can no longer recall the circumstances put to him;

(6) Messrs Lavell and Ramsden informed him that each of the MA Trading Companies were solvent;

(7) there would be no employees left in the MA Group companies;

(8) Mr Young's companies would be assisting the MA Trading Companies to continue to trade or to service their clients so that the value of their assets could be preserved and then realised. Mr Bettles understood that this would mean that more funds would then flow to Iridium Holdings, as the sole shareholder of those companies;

(9) the entire MA Group started within MM Prime, which conducted a project and property marketing business, that he would not be appointed to MM Prime yet as it was one of the MA Trading Companies that was to continue to trade to recover work in progress and that MM Prime was not to be placed into liquidation so that referral fees could be collected from developers and builders. The house and land packages gave purchasers opportunities to terminate their contracts. For the property marketer to receive its referral fees, it worked as a liaison between the purchasers and developers/builders to ensure that the contract settled and that they thus received those fees. Mr Bettles recalls that he was told that all employees in the MA Group would be terminated prior to the commencement of the insolvency administration and thus it would not be possible for an insolvency practitioner to service the clients which would likely see the contracts terminated and no referral fees paid;

(10) in relation to SS Residential, that if it was placed into administration the moneys to be paid by the landlord for the surrender of the lease of a building in Sydney would not be

paid and, upon the moneys being paid by the landlord for the surrender of the lease to SS Residential, that company would be placed into a members' voluntary liquidation to enable the distribution of the funds to Iridium Holdings as its sole shareholder;

(11) in relation to Capricorn Securities and Iridium Financial Planning:

(a) that both of these companies were solvent;

(b) Capricorn Securities was the holder of an AFSL and Iridium Financial Planning was its corporate authorised representative;

(c) as the AFSL authorised representative, Iridium Financial Planning's business included financial planning, insurance sales and investment services and it received commissions and was entitled to trailing commissions with respect to the insurance business if clients took up investments;

(d) Capricorn Securities would lose its AFSL upon the appointment of an external administrator and the business would lose value once the companies entered into administration because the agreements with the providers included clauses that entitled them not to continue to pay commissions upon the AFSL being lost or the holder of the AFSL being placed in external insolvency administration. Mr Bettles explained that, as an insolvency practitioner, he had experience in administrations of holders of AFSLs or, alternatively, authorised representatives losing the entitlement to commissions upon an administration and the providers refusing to continue to pay the commissions;

(e) Mr Young, through his company or companies, would be engaged to service the existing clients and to provide the services required to retain these clients so that the entitlement to trailing commissions was preserved; and

(f) subsequent to the realisation of the assets of Capricorn Securities and Iridium Financial Planning, those companies would be placed into a members' voluntary liquidation and those funds would be available to be distributed to their shareholder, Iridium Holdings; and

(12) there was discussion about Airlie Beach to the following effect:

(a) that Airlie Beach provided real estate and management rights services as a caretaker and operator of a leasing business for apartments located in Airlie Beach, Queensland;

(b) there was a concern that a sale by an insolvency administrator would negatively affect the ability to realise the management and letting rights for proper value; and

(c) subsequent to the realisation of its assets, Airlie Beach would be placed into a members' voluntary liquidation and those funds would be available to be distributed to the shareholder, Iridium Holdings.

68 In cross-examination Mr Bettles accepted that prior to his appointment to Iridium Holdings he was aware that:

(1) staffing would be an issue for the MA Trading Companies and that they would not be able to trade because they did not have any employees. Mr Bettles understood that the staff had been terminated, he assumed by Mr Marlborough or the directors of MAIC Human Resources, one of the main labour hire companies within the MA Group. He did not really consider what became of those employees;

(2) the NewCo group was going to be controlled by Mr Young, the former general counsel for the MA Group, and that Mr Marlborough was also going to be involved. Mr Bettles said that he was informed at the pre-appointment meetings that Mr Young had a business that was similar to the business carried on by the MA Group, albeit smaller; and

(3) MAIC Human Resources continued to employ staff and, on his appointment to Iridium Holdings on 22 July 2016, the remaining time of those employees with the MA Group was to be short as they were to be employed by NewCo. Mr Bettles accepted that he knew, at the very latest by 20 July 2016, that BPW was going to employ staff that worked for the MA Group.

2.10 The WMS PowerPoint

69 Mr Jones recalls that he, Messrs Ramsden and Bettles were first shown a PowerPoint presentation by Mr Lavell (**WMS PowerPoint**) during the 8 July 2016 Meeting. Despite that, in cross-examination Mr Jones accepted that he did not make specific reference to the WMS PowerPoint in his notes of the 8 July 2016 Meeting. Insofar as his notes of the 8 July 2016 Meeting recorded the words "saw financials", Mr Jones maintained that he saw the financials for the group entities at the meeting as well as the WMS PowerPoint showing all of the assets and liabilities of each member of the MA Group. Mr Jones' evidence was that the WMS

PowerPoint was a WMS document and, as far as he is aware, no one at Ramsden Lawyers made any amendment to it once it was provided to the firm.

70 Mr Bettles recalls that Mr Lavell referred to a PowerPoint presentation at the 16 July 2016 Meeting, as referred to in his file note of that meeting (see [65] above), and that the WMS PowerPoint was not referred to at the 8 July 2016 Meeting.

71 Ultimately in the evidence before me there were five versions of the WMS PowerPoint. They were:

(1) the version which ASIC contends was discussed at the 8 July 2016 Meeting (**WMS PowerPoint V1**);

(2) the version updated on or about 11 July 2016 (**WMS PowerPoint V2**);

(3) the version updated on or about 12 July 2016 (**WMS PowerPoint V3**);

(4) the version updated on or about 13 July 2016 (**WMS PowerPoint V4**); and

(5) the version updated on or about 20 July 2016 (**WMS PowerPoint V5**).

72 ASIC contends that WMS PowerPoint V1 was shown at the 8 July 2016 Meeting. As set out above, Mr Jones' and Mr Bettles' evidence are at odds as to whether there was a PowerPoint presentation at that meeting. Mr Jones' notes, which are relied on by ASIC and which are comprehensive, do not record that a PowerPoint presentation was shown at the meeting.

73 At first Mr Jones gave evidence that WMS PowerPoint V5 was shown at the 8 July 2016 Meeting but when it was pointed out to him in cross-examination that WMS PowerPoint V5 included dates that post-dated the 8 July 2016 Meeting Mr Jones accepted that that version could not have been shown at that meeting. That revelation caused ASIC to undertake a further search in the course of the trial of the documents it held relating to its investigation and led to production of the five versions of the WMS PowerPoint set out above.

74 It also became apparent that on 7 July 2016 Loren McFarlane, executive assistant to Mr Lavell, forwarded a package of material which included WMS PowerPoint V1 to, among others, Messrs Jones and Ramsden with a message:

> Please see attached documents as per Aaron's email below. Richard will check for factual accuracy and may have further changes tomorrow.

75 Based on Ms McFarlane's email Mr Jones gave evidence that WMS PowerPoint V1 was shown electronically at the 8 July 2016 Meeting. However, in cross-examination Mr Jones conceded

that he could not be sure that it was WMS PowerPoint V1 that was shown at the 8 July 2016 Meeting and that it could have been another version of the same document.

76 The state of the evidence in relation to whether a PowerPoint presentation was shown at the 8 July 2016 Meeting and, if so, what version is unsatisfactory. The highest it goes is that it is possible that a version of the WMS PowerPoint was shown at the meeting and, taking Mr Jones' evidence as a whole, it is likely that it was WMS PowerPoint V1 but he cannot be sure.

77 Turning to WMS PowerPoint V5, in an email dated 20 July 2016 Mr Bettles requested Mr Lavell to:

> … please forward to me that powerpoint presentation we keep looking at. The one that sets out your notes on each company's operations.

78 Later that day Mr Lavell emailed Mr Bettles the requested PowerPoint presentation, which was WMS PowerPoint V5. Mr Bettles saved a copy of Mr Lavell's email and WMS PowerPoint V5 to Worrells' Potential System.

79 Mr Bettles was cross-examined about this evidence and, in particular, his email dated 20 July 2016 (see [77] above). He disagreed that he had seen versions of the WMS PowerPoint at the pre-appointment meetings prior to the 16 July 2016 Meeting. He suggested that his reference to the "PowerPoint presentation we keep looking at" was infelicity of expression and that, while he had seen a PowerPoint presentation at the 16 July 2016 Meeting, he had only been shown spreadsheets at earlier meetings.

80 As Mr Bettles requested that the PowerPoint presentation that he had seen be sent to him, his usual practice would have been to review it on receipt.

81 Mr Bettles does not recall amending WMS PowerPoint V5 (**Amended WMS PowerPoint**) although he accepts that he did so. That must be the case given that the evidence relied on by ASIC confirms that it was Mr Bettles who made the modifications which resulted in the Amended WMS PowerPoint and it is the Amended WMS PowerPoint which is linked to each of the "100 Overview" file notes for the companies in the MA Group to which Mr Bettles was appointed as external administrator.

82 On 23 July 2016, at the time of linking the Amended WMS PowerPoint, Mr Bettles added the following entry under the heading "initial conversation with director":

> Here is a handy PowerPoint presentation prepared by WMS Chartered Accountants

that sets out all the companies in the Members Alliance business and what each does.

Mr Bettles said that both WMS PowerPoint V5 and the Amended WMS PowerPoint are referred to in those file notes and were available to all partners and staff who worked on the external administrations of the companies in the MA Group to which he and Mr Khatri of Worrells' Brisbane office were appointed.

83 Mr Bettles said that as best he can determine, the difference between WMS PowerPoint V5 and the Amended WMS PowerPoint is the deletion of slides 2 and 3 appearing in the former so that they did not appear in the latter. Slides 2 and 3 in WMS PowerPoint V5 were as follows:

Slide 2

Timeline

Action	Who	When	Comments
Prepare forms to formally appoint Worrells	Ramsden	By Friday 15 July	Colin MacVicar to sign
Prepare forms to resign Colin MacVicar	Ramsden	By Friday 15 July	Not essential if Colin decides to stay on. More admin convenience.
Newco establishment. Trustee co, Discretionary Trust, Holding Co, SPV Project Marketing Co, SPV HR Co, SPV Property Management Co	Liam / RM	Wednesday 13 July	To immediately establish bank accounts, apply for OFT licence etc
Consider DOCA PPI	Ramsden	By Friday 15 July	
Liaise MacVicar, Chesterton and Downey	Ramsden	Tuesday 12 July	In progress. Specific requests provided and relayed to RM

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WMS SPEND YOUR TIME WISELY

Slide 3

Proposed Staff – New Co

Staff	Section	Role	State	Pay
Penelope Duke	Telemarketing payroll	2IC: Data Operations	QLD	80,000
Bryson Cox	Telemarketing payroll		QLD	70,000
Cathy Harding	Telemarketing payroll	Podium / Admin	QLD	55,328
Telemarketers - Casual	Telemarketing payroll	EOI	QLD	561,600
Lucas Brine	Administration payroll	Contracts Manager	QLD	52,500
Heidi Phillips	Administration payroll	National Travel Co-Ordinator	QLD	60,000
Melanie Jade	Administration payroll	National In-Home Administrator	QLD	52,500
Victoria Read - casual	Administration payroll	Finance Manager	QLD	26,624
Paul Stafford	Administration payroll	Marketing Manager	QLD	100,000
Liam Young	Administration payroll	Corporate Lawyer	QLD	150,000
Steven Peters	Administration payroll	I.T. Support Analyst	QLD	75,000
Richard Marlborough	Administration payroll	Director	QLD	-
Braiden Marlborough	Administration payroll	Land Acquisitions	QLD	-
Natasha Leonard	Administration payroll	Executive Assistant	QLD	70,000
Carliene Zweers	Administration payroll	Executive Assistant	QLD	70,000
Maighan Brown	PPI Payroll	National Property Manager	QLD	100,000
Margaret Jackson	PPI Payroll	Accounts/Property Manager	QLD	48,000
Edward Douglas	BDC payroll	Investment Analysis Co-ordinator	QLD	55,000
Glenn Wright	BDC payroll	Investment Analysis Co-ordinator	QLD	75,000
Arzu Altanhan	BDC payroll	Customer Service/Confirmer	QLD	55,000
Daniel Willis	Sales Manager payroll	National General - Sales Manger	QLD	200,000
Daniel Irvine	Office consultant payroll	In-Office Sales Consultant	QLD	50,000
Nicholas Stephens	Office consultant payroll	In-Office Property Consultant	QLD	70,000
Kym Davidson	Office consultant payroll	In-Office Sales Consultant	QLD	70,000
Michael Kearney	Office consultant payroll	In-Office Sales Consultant	QLD	50,000
James Molloy	In Home consultant payroll	In-Home Consultant	QLD	90,000
Darryl Bright	In Home consultant payroll	In-Home Consultant	QLD	59,360
Warren Mann	In Home consultant payroll	In-Home Consultant	SA	50,000
Bernardo Francese	Sales Manager payroll	VIC State Manager	VIC	100,000
Jim Afendakis	Property consultant payroll	Property Consultant	VIC	50,000
Troy Dyer	Financial Planning payroll	Financial Planner	QLD	57,500
Matthew Le	Financial Planning payroll	Financial Planner	QLD	50,000
Group accountant	Finance	Group Accountant	QLD	150,000

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84 Mr Bettles said that those slides were irrelevant to his appointment and would be irrelevant to tasks to be undertaken by him and his staff in the insolvency administrations of MA Group companies because:

(1) the timeline in slide 2 was of no relevance. Mr Bettles had not been appointed as liquidator or administrator to any company in the MA Group at either of the dates referred to in that slide. In Mr Bettles' experience timelines are elastic and the dates shown are imprecise; and

(2) the proposed staff in slide 3 were of no relevance to Mr Bettles as they were to be employed by a company owned and operated by Mr Young, Mr Bettles was not to have any role in that company and he had been told that the companies to which he was to be appointed had no staff.

85 Mr Bettles disagreed that he removed slide 2 and 3 from WMS PowerPoint V5 to create the Amended WMS PowerPoint because those slides would have alerted other Worrells staff working on the administrations to the fact that there was a timeline for the creation of the NewCos, that there was a proposed list of staff to be transferred from the MA Group to the

NewCos and that there was a plan to move staff to the NewCos and to set up a mirror image of companies and which would have caused his staff to make enquiries about exactly what was going to happen.

2.11 Mr Bettles' knowledge

2.11.1 Mr Bettles' knowledge as at 8 July 2016 including the strategy

86 It is convenient at this point to consider whether as alleged by ASIC, Mr Bettles knew or ought to have known by the conclusion of the 8 July 2016 Meeting that Mr Marlborough was developing the strategy as defined at [58(c)] of the FASOC (see [10] above).

87 Based on the evidence, at the conclusion of the 8 July 2016 Meeting Mr Bettles knew or ought to have known that:

(1) Mr Marlborough would register a new company to be controlled by Braiden and Mr Young. The evidence does not establish that Mr Bettles knew at that time that the new company was to be under Mr Marlborough's effective control. That element of the strategy is not referred to in Mr Bettles' or Mr Jones' notes of the 8 July 2016 Meeting; and

(2) there would be a staged winding up of the companies in the MA Group. Mr Bettles did not know and ought not to have known that this was to enable the transfer of the income producing assets to the new company. Rather, Mr Bettles was told this was to enable the sale of assets held by certain companies prior to liquidation of those companies so that the value in those assets was not lost.

88 I am not satisfied that by the conclusion of the 8 July 2016 Meeting Mr Bettles knew or ought to have known that:

(1) the new company, once established, would be able to receive income that would otherwise have gone to existing companies in the MA Group. This element of the strategy is not referred in Mr Bettles' or Mr Jones' notes of the meeting;

(2) Mr Marlborough required $500,000 in order "to do this", and intended to obtain that from one or more of the entities that conducted the financial planning business or from the work in progress of MM Prime. It is not clear what "this" is in that context, it could be the establishment of the new company and/or the ability for that company to receive the income that would otherwise have gone to existing companies. In any event Mr Bettles' notes do not reflect that this was discussed and to the extent that Mr Jones'

notes refer to Mr Marlborough requiring $500,000, this seemed to be in connection with his intention to acquire the business of MM Prime;

(3) the professional advisors (WMS and Ramsden Lawyers) intended to enter into arrangements which would enable them to take security for past and future fees over the assets of companies in the MA Group with the effect that their professional fees should rank ahead of non-secured creditors. While Mr Bettles became aware of this, it has not been established that he knew about the intention as at 8 July 2016. Mr Bettles was not present for the whole of the 8 July 2016 Meeting and it is apparent from Mr Jones' notes of this meeting that the topic of WMS' and Ramsden Lawyers' fees was discussed towards the end of the meeting; and

(4) Mr Marlborough wanted to limit the amounts available in MA Group companies that could be used to pay creditors, including the ATO. There is no evidence that this was discussed at the 8 July 2016 Meeting or that Mr Bettles could have otherwise known of this fact.

89 ASIC also contends that by the conclusion of the 8 July 2016 Meeting Mr Bettles knew or ought to have known that:

(1) the MA Group owed a significant amount to the ATO and, if he did not know the exact amount, it was at least $17 million. Mr Bettles accepts that at that time he knew that a number of companies in the MA Group had received statutory demands from the ATO but there is no evidence that he knew the total amount claimed by the ATO. Mr Jones' notes of the 8 July 2016 Meeting do not disclose a total amount and, assuming WMS PowerPoint V1 was shown at that meeting, the total said to be owing pursuant to statutory demands is far less than $17 million; and

(2) as well as the statutory demands issued to companies individually by the ATO, Iridium Holdings and the members of the income tax and GST consolidated groups were jointly and severally liable for moneys owed to the ATO in respect of the GST consolidated group and the income tax consolidated group. It is not clear what Mr Bettles knew about the income tax and GST consolidated groups other than that there were such groups. But Mr Bettles was unsure about the effect of a tax consolidated group and as at the 8 July 2016 Meeting he did not know which companies were part of each group.

90 Based on the available evidence I am not satisfied that by the conclusion of the 8 July 2016 Meeting Mr Bettles knew or ought to have known the matters which comprised the strategy and accordingly am not satisfied that ASIC has made out this element of its case.

2.11.2 Mr Bettles' knowledge as at 14 July 2016

91 ASIC contends that by conclusion of the 14 July 2016 Meeting Mr Bettles knew or ought to have known that:

(1) the strategy to transfer assets and income streams to one or more new companies or NewCo had developed to the point that terms were being identified as to its practical implementation, including the extent to which income would be diverted from MA Group companies to a new company or companies, and the extent to which it would be available to pay MA Group creditors;

(2) as to Provincial Property, the whole of its income stream was to be diverted to a new company until a deed of company arrangement was entered into and that the new company would pay the ATO debt owed by Provincial Property as part of a deed of company arrangement;

(3) as to Airlie Beach, the whole of its income stream was to be diverted to a new company until a deed of company arrangement was entered into and Airlie Beach's management rights had been sold;

(4) as to the Client Book, the new company would require all trail income until the Client Book was sold and 25% of all upfront commissions, with the balance of those upfront commissions being used to pay the existing statutory demand, professional indemnity insurance and required software;

(5) as to MM Prime's income from commissions, the new company would receive: 50% of the work in progress (i.e. commissions already due to MM Prime on settled sales); 100% of the commissions on the first ten settlements in order to fund the new company's start-up costs; 50% of the commissions on the next 20 settlements; and 50% of commissions on subsequent settlements until "the liquidator" was able to recover 50% of the amount of the commissions diverted to the new company on the first ten settlements. In addition, the costs required to manage the work in progress, including maintaining the "existing CRM and cloud access" to allow NewCo access to client data would be met by the portion of funds retained by "the liquidator";

(6) the new company's rental expense in Sydney would be met by an existing MA Group company, which ASIC contends was possibly SS Residential having regard to the reference to "Transport NSW funds"; and

(7) the arrangements referred to above would be the subject of written agreements between the relevant existing company and the new company.

I pause to observe that these are all matters which are derived from the 14 July 2016 Email.

92 ASIC's contentions are not made out.

93 The evidence before me does not establish that there was discussion of the 14 July 2016 Email at the 14 July 2016 Meeting. Neither Mr Bettles nor Mr Jones recall discussing the 14 July 2016 Email at that meeting. There is no evidence of the discussions that occurred at that meeting and the only contemporaneous evidence of the 14 July 2016 Meeting was Messrs Ramsden's and Jones' entries in the WIP Report and Mr Bettles' file note which each describe the purpose of the meeting differently.

94 Mr Bettles' evidence, which I accept and which is supported by the contemporaneous documents, is that he only received the 14 July 2016 Email on 25 July 2016 (see [102] below). It is not clear from the evidence whether Mr Bettles approved a "strategy" at that meeting and, if so, the content of that strategy.

2.11.3 Mr Bettles' knowledge as at 16 July 2016

95 ASIC contends that at the 16 July 2016 Meeting, those present discussed:

(1) the structure of the MA Group;

(2) the structure of the MA Group and the assets and liabilities of the group's companies by reference to WMS PowerPoint V4;

(3) the contents of WMS PowerPoint V4;

(4) the structure of the NewCos and the fact that the Benchmark Group of companies had been registered on 15 July 2016;

(5) that there were 21 cars leased from SGI Fleet and that they would "arrange for the vehicles to be dropped at SGI depots around the country"; and

(6) that the records were saved on a server in "the cloud" and maintaining that server was "necessary to complete the wip and sell the books and trails. Cost is $11,000 per month".

96 ASIC further contends that by 16 July 2016, by reason of the matters conveyed to him during the 16 July 2016 Meeting, Mr Bettles knew or ought to have known that:

(1) the implementation of the strategy had commenced with the registration of the new companies; and

(2) the cost of that part of the strategy referred to in [95(6)] above, whereby the "liquidator" of the relevant MA Group company would bear the cost ($11,000 per month) to "manage the WIP", including maintaining the "existing CRM and cloud access" to allow NewCo to access the client data.

97 The threshold question is whether WMS PowerPoint V4 was discussed during the 16 July 2016 Meeting. ASIC says that it ought to be inferred that it was based on the metadata showing the date that WMS PowerPoint V4 was created. However:

(1) the only witness who gave evidence about the 16 July 2016 Meeting was Mr Bettles. As set out at [65] above, Mr Bettles has no specific recollection of what was discussed at the meeting but his file note refers to a PowerPoint presentation which Mr Lavell was to email to Mr Bettles. Mr Bettles accepted that there was a PowerPoint presentation at the meeting but he could not recall what version of the WMS PowerPoint was presented;

(2) ASIC did not call any other witnesses in relation to the 16 July 2016 Meeting;

(3) Mr Dunn's evidence is that the metadata identifies that WMS PowerPoint V3 and WMS PowerPoint V4 were modified by Gemma Sullivan, an employee of Ramsden Lawyers, but no one from Ramsden Lawyers was present at the 16 July 2016 Meeting;

(4) WMS PowerPoint V4 is saved by a different name from the earlier versions; and

(5) the evidence does not establish that WMS PowerPoint V4 was provided to anyone who attended the 16 July 2016 Meeting including, in particular, Mr Lavell. Mr Dunn's evidence is that, unlike the earlier versions of the WMS PowerPoint which were obtained from WMS, WMS PowerPoint V3 and WMS PowerPoint V4 were obtained by ASIC from Mr McCann of Grant Thornton in response to notices to produce.

98 For those reasons I am not prepared to draw the inference that WMS PowerPoint V4 was presented at the 16 July 2016 Meeting. It follows that ASIC has not established that the items set out at [95(2), (3) and (4)] above were discussed at the 16 July 2016 Meeting and therefore I am unable to find that Mr Bettles knew or ought to have known the matters set out at [96]

above. In particular as to the second of those matters, Mr Bettles' file note of the 16 July 2016 Meeting (see [65] above) records the cost of maintaining the server but it does not record that the liquidator of the relevant MA Group company would bear that cost nor does it record that the "existing CRM and cloud access" was to be maintained to allow NewCo to access the client data.

2.12 The Benchmark Group of companies

99 On 15 July 2016 BPW, BPW Holdings and BWP Services were incorporated. Relevantly:

(1) Mr Young was the sole director of BPW and BPW Holdings was its sole shareholder;

(2) Mr Young was the sole director of BPW Holdings. Young Corporation as trustee for the Structured Finance Trust held 95 shares and Young Corporation as trustee for the Young Family Trust held five shares in BPW Holdings; and

(3) Mr Young was initially the sole director of BPW Services and from 16 November 2016 Ms Brown was also appointed a director. BPW Holdings was its sole shareholder.

100 The Structured Family Trust was settled on 15 July 2016, the appointors were Braiden and Deborah Marlborough (who for ease and without intending any disrespect I will refer to as **Deborah**) and the "Primary" beneficiary was Braiden.

101 Mr Bettles gave no advice in relation to, and was not involved in, the incorporation of the companies in the Benchmark Group. As far as he was aware, Mr Young controlled those companies.

102 On 25 July 2016 Mr Young forwarded the 14 July 2016 Email to Mr Bettles. In his covering email Mr Young noted that the 14 July 2016 Email set out "the management proposal for the WIP of Iridium Capital that was discussed" and stated that he believed that Ramsden Lawyers was currently working on documenting the arrangement.

103 This was the first time that Mr Bettles became aware of NewCo. He was not involved in negotiating the terms set out in the 14 July 2016 Email. Mr Bettles noted that, in any event, insofar as the 14 July 2016 Email referred to Provincial Property, it would be necessary for Mr Young to discuss any terms with him as its voluntary administrator given his recent appointment (see [104] below) if NewCo was to be involved in its leasing business. As there had been no arrangement between Mr Bettles as voluntary administrator of Provincial Property

and Mr Young's companies, Ramsden Lawyers could not have been documenting any arrangement concerning that company.

2.13 Mr Bettles' appointment as external administrator of companies in the MA Group

104 Mr Bettles, together with Mr Khatri, was appointed:

(1) on 22 July 2016:

(a) as liquidator of Iridium Holdings, Astro Holdings, J.T. Prestige and the companies in the MA Group listed at [36(1)-(11)] above; and

(b) as voluntary administrator of Provincial Property, Image Building Group, HSINIF and Trats (being companies listed at [36(12)-(15)] above);

(2) on 22 August 2016 as liquidator of each of HSINIF and Trats;

(3) on 25 August 2016 as liquidator of Provincial Property and Image Building Group;

(4) on 11 January 2017 as liquidator of SS Residential by way of a members' voluntary liquidation; and

(5) on 10 February 2017 as liquidator of Iridium Financial Planning and Capricorn Securities by way of a members' voluntary liquidation.

105 On 22 July 2016, at the time of taking the appointments as liquidator and voluntary administrator of the companies referred to at [104(1)] above, Mr Bettles understood that the MA Trading Companies were also to be put into liquidation at a later date and that he would not be paid until their assets were sold, the companies were wound up and a distribution was made to Iridium Holdings. Mr Bettles said it was common for him to take speculative appointments such as this.

106 The Worrells staff who assisted in the external administrations of companies in the MA Group (and their initials) were:

(1) Brian Carey (BNC) – senior manager;

(2) Erin Phipps (EP) – senior file accountant;

(3) Jacob Grosser (JG) – file accountant;

(4) Lee Moore née Bragg (LB) – supervisor;

(5) Michael Thomas (MT) – file accountant;

(6) Tasha Blake (TB) – office administrator; and

(7) Victoria Hine (HN) – supervisor.

107 Before accepting the appointments as liquidator of companies in the MA Group:

(1) a Worrells "Independence Checklist (Corporate)"; and

(2) a declaration of independence, relevant relationships and indemnities (**DIRRI**),

was prepared for each company to which Messrs Bettles and Mr Khatri were to be appointed.

108 In addition, Mr Bettles considered whether the provision of the MacVicar Advice would impair his independence or give rise to a perception of a lack of independence. Relevantly, each of the DIRRIs referred to the MacVicar Advice as follows:

> On 11 March 2015 we provided a written advice to WMS Chartered Accountants in respect of the affairs of Mr Colin MacVicar, one of the directors and/or shareholders of a number of the above listed companies. The advice provided a general overview of.
>
> • The voidable disposition provisions of the Corporations Act
>
> • The Australian Taxation Office director penalty regime
>
> • A director's duty to prevent companies from trading whilst insolvent
>
> • Court decisions in respect of the payment of dividends to shareholders
>
> In some cases we related the above mentioned to the companies' affairs, however at no time did we provide advice on how to restructure Mr MacVicar's affairs, how Mr MacVicar should deal with his affairs in light of the above provision, or instruct WMS Chartered Accountants on how to record any transactions that Mr MacVicar or the companies had undertaken.
>
> We do not believe that providing this advice to Mr MacVicar results in a conflict of interest in us taking the appointment as liquidators/voluntary administrators of the companies because we have been informed that Mr MacVicar has not been involved in the operations of the Members Alliance trading companies for some time, Mr MacVicar is not a current director of the Members Alliance trading companies, and the advice we provided was general in nature.

109 Mr Bettles considered that the MacVicar Advice did not impair his independence to act as a liquidator or administrator of companies in the MA Group or give rise to a perception of a lack of independence. He explained that was because his role as liquidator or administrator did not require him to undertake an investigation of any of the matters referred to in the MacVicar Advice or into the conduct of Mr MacVicar personally in respect of those matters. He considered the MacVicar Advice to be a one-off advice which was general in nature and which related to a different time period.

110 At no time during his appointments to the companies in the MA Group did Mr Bettles have any concerns about his independence, or that there was a perception of a lack of independence, in relation to the tasks that he undertook in the administrations. Further, at no time did he receive any communications from a creditor, or a person expected to become a creditor, of any of the companies in the MA Group or any other person expressing concern or any issues about his conduct. If during the currency of his appointments Mr Bettles had become aware that he was not independent, or that there was a perception of a lack of independence, he would have either sought the views of the creditors on how the issue was to be managed, sought directions or approval for the continuation of his appointment from the Court or sought the appointment of another liquidator or voluntary administrator.

111 On 3 May 2017 Messrs Bettles and Khatri converted the administrations of SS Residential, Iridium Financial Planning and Capricorn Securities from members' voluntary liquidations to creditors' voluntary liquidations in the circumstances described at [286]-[288] and [399]-[401] below.

112 On 5 May 2017 MM Prime and Airlie Beach were each wound up by a creditors' voluntary liquidation instigated by Messrs Bettles and Khatri as liquidators of their shareholder, Iridium Holdings. Michael McCann and Shaun McKinnon of Grant Thornton were appointed as liquidators of those companies.

113 On 13 July 2017 Mr Bettles applied to have himself and Mr Khatri replaced as liquidators of the 18 companies to which they were appointed in July and August 2016 (see [104(1) and (3)] above) by Messrs McCann and McKinnon.

2.14 Security interests granted to Ramsden Lawyers, WMS, entities associated with Mr Domingo and Crest Accounting

114 On 13 July 2016 Mr Jones attended to registering security interests to secure professional fees on the Personal Property Securities Register (**PPSR**) in favour of Ramsden Lawyers over the property of:

(1) Airlie Beach;

(2) Iridium Financial Planning;

(3) Provincial Property; and

(4) SS Residential.

115 On 13 July 2016 Mr Jones was also directed by Mr Ramsden to prepare template letters for the registration of security interests and to provide them to Mr Lavell and to Graeme Downie of Johnston Business Sales and Peter Chesterton of Crest Accountants.

116 On 15 July 2016 security interests to secure professional fees were registered on the PPSR in favour of WMS over the property of:

(1) Airlie Beach;

(2) Iridium Financial Planning;

(3) Provincial Property; and

(4) SS Residential.

117 On 18 July 2016, security interests were registered on the PPSR in favour of Mr Domingo, the Domingo Superannuation Fund and Mellow Brae over the property of:

(1) Iridium Holdings;

(2) Iridium Financial Planning;

(3) Iridium Mortgage Fund;

(4) Image Building Group;

(5) Airlie Beach;

(6) Provincial Property;

(7) Iridium Home Loans; and

(8) Syree Enterprises,

(together, the **Domingo Parties' Security Interests**).

118 On 21 July 2016 security interests were registered on the PPSR in favour of Crest Accounting and Members Windings Up over the property of Iridium Financial Planning.

119 Mr Bettles was not involved in the decision making in relation to the PPSR registrations of the securities granted in favour of Ramsden Lawyers or WMS, their execution or their preparation. Nor was his advice or consent sought in relation to them. Mr Bettles does not recall if he was told that Ramsden Lawyers and WMS were intending to take security for the payment of their respective fees at the pre-appointment meetings. However, he was informed of this fact prior to his appointment as liquidator of Iridium Holdings and other companies in the MA Group on 22 July 2016. At the time, he had no basis to query the steps taken. In particular the

"questionnaire for directors and officers" completed for Provincial Property disclosed that "All PAP" (i.e. all present and after acquired property) securities had been issued in favour of Ramsden Lawyers, WMS, Crest Accounting and **Members Windings Up** Pty Ltd.

120 Mr Bettles only became aware of the Domingo Parties' Security Interests upon his appointment as liquidator of companies in the MA Group on 22 July 2016 when PPSR searches were undertaken.

121 Mr Bettles instructed his staff to write to Mr Domingo about the Domingo Parties' Security Interests. Among other things, those letters notified Mr Domingo of the liquidators' appointment; requested copies of the security documents and details of the amount currently owing; and asked whether any realisation action had been taken or was intended to be taken under the securities.

122 By letter dated 11 November 2016. Mr Bettles sought advice from Grants Law in relation to, among other things, the security interests registered against some of the companies in the MA Group. That letter included (as written):

> Upon it becoming apparant that the Members Alliance business could no longer continue, the directors, on the advice of their lawyers and accountants, elected rather than to immediately place all the companies into external administration, that certain of the companies should be kept on foot with the idea being that such a stategy would better enable the remaining company's assets to be realised.
>
> Whilst there is certainly merit to this approach given that the remaining companies hold an AFSL, own trailing commission books, etc; of concern to the liqudators is that a number of security interests have been registered against certian of the companies in the mid to later part of July 2016. Relevantly, those registrations are in favour of:
>
> - Ramsden Law Pty Ltd,
> - WMS Solutions Pty Ltd,
> - Crest Accountants Pty Ltd,
> - Members Windings Up Pty Ltd,
> - The trustee for The Ramsden Law Trust,
>
> And in certain instances:
>
> - David Bruce Domingo,
> - Domingo Superannuation Fund, and
> - Mellow Brae Pty Ltd.

And:

> Would you please provide your advice as to the following:

1. In relation to the securities registered against the companies which are currently in liquidation,

- Would you please provide your advice as to:
    - Whether the security interests are supported by an instrument pursuant to which the respective company has granted a charge in favour of the respective party,
    - In circumstances where such an instrument has been created, the effect upon the grantee if at the time the charge is granted the grantee is owed a debt for work done prior to the charge being granted, and conversely, what is the effect in respect to work done subsequent to the granting of the charge.
    - In circumstances where such an instrument has been created, was the security interest created by the instrument registered within the time provided by the PPSA, and if not, what is the effect of it not being so registered.

2. In relation to the securities registered against the companies which are not currently in liquidation,

- Would you please provide your advice as to:
    - What action (if any) should be taken by the liquidators in their capacity as the sole shareholder of the four companies which are not currently subject to any form of external administration and in circumstances where those companies are able to realise assets and the resultant funds are (at the direction of the incumbent directors), directed in payment of the parties noted above who have registered security interests against the respective companies.

3. In relation to the security interest registered by Ramsden Law,

- Would you please provide your advice as to:
    - the ability of that security interest and / or the underlying charge to secure fees rendered for work done in relation to one entity against assets recovered in an alternate entity.

123 It is not apparent on the evidence before me whether Grants Law provided the advice sought by Mr Bettles.

124 In February 2017 upon Mr Bettles' appointment as liquidator of Iridium Financial Planning, Worrells linked PPSR searches conducted in August 2016, together with a new company search dated 3 February 2017, to the Iridium Financial Planning file note. On 9 February 2017 Mr Bettles recorded the following entry in that file note:

> There are currently no PPS registrations, but there were a number that were paid out recently on the sale of the trail book. Once we have Ramsden Lawyers' file (who I understand handled the settlement of the sale) we can determine if there is any work to be done on the secured creditors. Until that time I am completing the filenote.

2.15 Iridium Holdings

125 As set out at [37] above Iridium Holdings was the sole shareholder of each of the MA Trading Companies and of Provincial Property. As at the date of Mr Bettles' appointment as liquidator of Iridium Holdings, Mr Marlborough was its sole director.

126 At the time of his appointment as a liquidator of Iridium Holdings, Mr Bettles was provided with a "Form 507 – Report as to affairs" dated 22 July 2016 certified by Mr Marlborough (**Iridium Holdings RATA**) which recorded that Iridium Holdings had:

(1) total assets of $2,907,255 made up of a debt of the same amount owing to it by MM Prime with a realisable value of "$Nil"; and

(2) total unsecured creditors of $2,265,648.51 of which the largest creditor was the ATO who was said to be owed $2,178,490.16 with the balance of $87,158.35 made up of sundry creditors listed in the report.

127 The Iridium Holdings RATA did not list the shares held by Iridium Holdings in companies in the MA Group, notably the MA Trading Companies.

128 While Mr Bettles was a liquidator of Iridium Holdings its asset and liability position was investigated, only $1,489.04 was received and the administration was otherwise without funds. In the "Form 524 – Presentation of accounts and statement" for Iridium Holdings for the period 22 July 2016 to 21 January 2017 signed by Mr Bettles, total unsecured creditors were valued at $3,212,919.34.

2.16 The MA Group as a tax consolidated group

129 As set out at [39]-[40] above, companies in the MA Group were registered as a GST group and as an income tax consolidated group.

130 Mr Bettles said that he could not recall when he first became aware that there was a GST group registration or consolidated group for income tax for the MA Group but noted that:

(1) a file note entry he made on 9 August 2016 records that on that day he and Mr Carey had a conversation with Sharon Campbell of the ATO. His file note provides (emphasis added):

> Telephone discussion with Sharon Campbell from ATO and Brian Carey regarding the background to the negotiations the ATO had with the Members Alliance business. Sharon has a bunch of documentation and is happy to send it to us. **She said that because there was a tax sharing arrangement all of**

> **the information is linked to Iridium Holdings and consequently we can just write to her once under that company.** Sharon had been asked by her supervisor about grouping the tax debt because the ATO wanted to try and have any dividend paid to the SGC. I explained that I had been investigating pooling the companies pursuant to the provisions of the Corps Act because I was concerned that we could end up with money in some companies but liabilities in others. I said my investigations were in there early stages and I would keep her informed. I explained that Prime Securities Pty Ltd, Iridium Financial Planning Pty Ltd and MM Prime Investments Pty Ltd were earmarked to be placed into external administration but had not been because the external administration could impact on the value of their assets. Consequently I was working with the director to ensure the realisation of those assets and then placing the companies into administration. Sharon thought that was a good idea. We discussed that a lot of money was missing and that there had to be claims against the directors. I noted that I had been advised by WMS that Richard Marlborough accepted that he was going to end up bankrupt and possibly be banned from being a director.

(2) file note entries were made by members of his staff on 14 August 2016, 2 September 2016 and 7 September 2016 in the Iridium Holdings file which refer to tax consolidated groups as follows:

> EJP 24/08/16 04:08 PM: Correspondence in - ATO - confirmation of consolidated group for income taxation
>
> …
>
> EJP 02/09/16 09:34 AM: Correspondence in - ATO - cancellation of members of GST Group
>
> …
>
> MT 07/09/16 02:16 PM: Correspondence in - ATO - confirmation of consolidated group for income taxation.

The correspondence referred to notified that two companies, Iridium Mergers & Acquisitions Pty Ltd and Iridium Accounting & Financial Services Pty Ltd, were no longer part of the tax consolidated groups.

131 Mr Bettles did not know which MA Group companies formed part of the tax consolidated groups for any periods to which the groups' liability related and did not know whether any tax sharing agreement existed for the groups. Prior to his appointment to companies in the MA Group he had been told by Messrs Lavell, Ramsden and Marlborough that the MA Trading Companies were solvent.

132 In order to determine the correct position Mr Bettles said that he made enquiries of WMS, Mr Marlborough and the ATO including requesting copies of any tax sharing agreement and indirect tax sharing agreement. Those enquiries are set out below.

133 On 29 August 2016 Mr Bettles sent a letter to the ATO in his capacity as liquidator of Iridium Holdings which included:

> In order to assist our investigations into the affairs of this, and the related companies, we ask that you provide copies of documents relating to the Members Alliance business affairs under the tax sharing arrangement.
>
> In particular, we request copies of any documentation received from the group in support of their applications for repayment arrangements.

In his letter Mr Bettles went on to request particular categories of documents for the 12 month period prior to the liquidators' appointment.

134 By letter dated 1 September 2016 addressed to Iridium Holdings care of Worrells, the ATO confirmed the group members' details for the MA Group for the purpose of the registered GST group and the income tax consolidated group.

135 By letter dated 22 September 2016 the ATO responded to Worrells' request referred to at [133] above. In doing so it provided copies of the following for Iridium Holdings:

- Running Balance Account
- Statement of Account for Income Tax
- Business Activity Statements
- Correspondence
- Case Notes

136 On 9 November 2016 Mr Carey sent an email to Ms Campbell which included:

> To assist with our on-going investigations into the affairs of the business group it would be greatly appreciated if you would advise whether the following entities, which we consider are also part of the Members Alliance business group, owe amounts to the ATO, and if so, the amounts owed:
>
> - Airlie Beach (MA) Pty Ltd ACN 168 345 113,
> - ACN 143 933 644 Pty Ltd ACN 143 933 644 (formerly Capricorn Securities Pty Ltd and also Indian Pacific Capital Pty Ltd),
> - Iridium Financial Planning Pty Ltd ACN 601 124 341,
> - ACN 133 019 093 Pty Ltd ACN 133 019 093 (formerly MM Prime Investment Pty Ltd and also SS Residential Pty Ltd), and
> - SS Residential NSW Pty Ltd ACN 152 401 851.

137 By email dated 10 November 2016 Ms Campbell informed Mr Carey that she had found no outstanding trading debts for the companies for which Mr Carey had sought the information i.e. the MA Trading Companies.

138 On 13 February 2017 Mr Bettles had a telephone conversation with Mr Lavell. His file note records:

> I spoke earlier today to Aaron Lavell from WMS about the tax position, noting that we have previously spoken to Sharon Campbell from the ATO and she said that according to the ATO's records this company doesn't owe the ATO any money. Aaron said that as the company was grouped for tax purposes the liability for tax depends upon what the tax sharing agreement says. A tax sharing agreement is an agreement between the members of the group setting out who is liable for what tax. Aaron said that he has never seen the tax sharing agreement.

Following that entry Mr Bettles recorded the following instruction:

> > Please:
>
> 1. send a letter to Richard Marlborough asking for the tax sharing agreement.
>
> 2. send a FOI request to the ATO asking for the tax sharing agreement. I'm assuming that to be grouped you need to give a copy to the ATO.

139 On 17 February 2017 Mr Bettles sent an email to Mr Lavell requesting that he email him "a list of the companies that formed part of the tax group". Mr Lavell responded later that day. His email included:

> I have attached two self-explanatory emails from Justin Wowk who managed the compliance on that file. You will note that the former CFO had indicated he was preparing a tax sharing agreement. This would remove the joint & several nature of an ATO claim for unpaid income tax and each company would only be up for its share.
>
> There would be no amount owing from SS Residential NSW Pty Ltd in my opinion as it had not traded at a profit. Justin also didn't believe there was any income tax outstanding (although we haven't gone back to check) at a group level because they had a token amount payable in FY14 and large losses in subsequent years. Maybe you can ask the ATO for further particulars on the Proof of Debt they have lodged.

140 A file note entry made by Mr Thompson on 28 February 2017 records:

> MT 28/ 02/ 17 09:59 AM: PC in from Sharon Campbell from the ATO.
>
> Sharon advised that there are two types of Tax Sharing Agreements:
>
> 1. GST Group Tax Sharing Agreement
>
> 2. Income Tax Consolidated Group Tax Sharing Agreement
>
> Sharon advised she did not have an up to date copy of the Tax Sharing Agreement on file, as it was not a requirement to provide one to the ATO.

> Sharon suggested asking WMS.
>
> Sharon advised she would be sending us a letter today by email asking for a copy of the Tax Sharing Agreement, we will have 14 days to provide a response, and if we do not provide one, all of the companies in the GST Group will be deemed jointly and severally liable for the debts of Iridium Holdings Pty Ltd.

141 On 28 February 2017 Worrells sent a letter in the Iridium Financial Planning liquidation to the ATO seeking a number of categories of documents including "[a] copy of the company's tax sharing agreement as a member of a consolidated group" with head company Iridium Holdings.

142 On the same day Worrells sent a letter to Mr Marlborough in the Iridium Financial Planning liquidation noting their understanding that Iridium Financial Planning is a member of a consolidated group for income tax purposes and requesting a copy of the company's tax sharing agreement as a member of a consolidated group with Iridium Holdings as its head company.

143 By email dated 1 March 2017 Mr Finch of Ramsden Lawyers wrote to Mr Thompson. In that email Mr Finch referred to Worrells' letter dated 28 February 2017 to Mr Marlborough seeking a copy of the tax sharing agreement, asked that all further communications be directed to Ramsden Lawyers and noted that they had sought their client's instructions and that WMS did not hold a copy of any tax sharing agreement.

144 By emailed dated 1 March 2017 Ms Campbell served a notice to produce on Iridium Holdings under s 449-90(1D) of Sch 1 to the *Taxation Administration Act 1953* (Cth) requiring production of a copy of an indirect tax sharing agreement. Later that day, Mr Bettles had a telephone conversation with Ms Campbell. His file note of that conversation records:

> JB 01/03/17 02:35 PM: Telephone in-Sharon Campbell from ATO regarding:
>
> 1. confirmation that we received her email requesting a copy of the tax sharing agreement. I said we had. She asked that we reply confirming that. She will also send the request to the registered office.
>
> 2. she is only now just finding out what happens with the tax sharing.
>
> 3. you can only group for income tax and GST. The liability for the income tax and GST depends upon the tax sharing agreement.
>
> If there is no agreement, or the ATO requests a copy of the agreement and you don't provide it within the relevant timeframe, then the ATO can deem that all members are jointly and severally liable for the tax. I asked about the POD lodged in the liquidation of SS Residential; Sharon said that the ATO shouldn't have lodged the POD because at this time it is not confirmed that SS Residential is liable for the amount on the POD because it relates to the grouping.
>
> 4. you can't group super & PAYG, so the individual companies will be liable for those debts but not any of the grouped companies.

> 5. I noted that WMS said they didn't have the tax sharing agreement and so we had asked the director for it. At this time all we have received is a letter from the director's lawyers advising that they will get back to us.

145 On 2 March 2017 in the Capricorn Securities liquidation Worrells: sent a letter to Mr Marlborough care of Ramsden Lawyers requesting a copy of the income tax sharing agreement for the consolidated group; and sent a letter to the ATO requesting that it provide a number of categories of documents including a copy of the tax sharing agreement.

146 On 3 March 2017, in response to Mr Bettles' letter sent on 2 March 2017 seeking a list of the entities within the GST group, Ms Campbell provided a further copy of the ATO's letters dated 1 September 2016 with the full listings of the GST group and the income tax consolidated group (see [134] above).

147 On 5 and 6 March 2017 Mr Bettles and Ms Campbell had an email exchange. Mr Bettles sent an email to Ms Campbell in which he wrote:

> I notice that the ATO has sent a request for the tax sharing agreement as part of enquiries in respect of the GST group, and there is certain implications if that agreement is not produced within 14 days. Does the ATO intend sending a notice in respect of the income tax consolidated group?

In response Ms Campbell wrote:

> Yes we have requested the GST Group Tax Sharing Agreement without a request for the IT Consolidated Group Tax Sharing Agreement. Initially, we did want both agreements but after consideration, and as the head company ACN 161 598 938 Pty Ltd (In Liquidation) does not (at this stage) have an outstanding income tax debt, determined it not necessary.
>
> If a tax debt is the result of the head group member lodging their outstanding 2016 income tax return then this may need to be reviewed and requested at a later date.

148 On 6 March 2017 Mr Bettles had a telephone conversation with Mr Lavell. His file note of that conversation records:

> JB 06/03/17 03:21 PM: I was just speaking to Aaron Lavell from WMS on another matter and he asked if I had heard anything about the tax sharing agreement. I said I hadn't. He said that Ramsden had asked him and since WMS didn't do one he called Michael Jeffreys who worked for MA, who said that he had started drafting one but had never finished it. Aaron suggested that we would shortly get a letter from Ramsden advising that they couldn't find a tax sharing agreement.

149 On 15 March 2017 the ATO responded to Mr Bettles' request for documents in relation to Capricorn Securities (see [145] above). The ATO agreed to provide some of the documents

sought by the liquidators but it did not provide a copy of the tax sharing agreement for the consolidated group which he had requested.

150 On 20 March 2017 Mr Bettles recorded the following on the Iridium Holdings liquidation file:

> JB 20/03/17 03:18 PM: I notice that we have not received a tax sharing agreement for the GST consolidated group, or the income tax consolidated group. So that there are no claims later on that they had been given to us, please draft a letter to Ramsden (cc. the director) in response to their email dated 3 March noting that they have not provided tax sharing agreements for the GST consolidated group, or the income tax consolidated group and consequently we are operating on the basis that they do not exist.

151 On 24 March 2017 Mr Bettles had a telephone conversation with Ms Campbell. His file note of that conversation records:

> Telephone in-Sharon Campbell from the ATO returning my call. She advised:
>
> 1. she has an income tax sharing agreement from 2 years ago. She will send me a copy.
>
> 2. 14 days have expired since issuing the notice requiring the production of the GST sharing agreement and as no agreement has been produced all members are now liable for GST just like a partnership
>
> 3. Airlie Beach is a member so liable. ATO will raise debt on to the company's accounts, so you will be able to see it on portal. Sharon will then issue a demand. If they don't pay then issue stat demand, etc.
>
> 4. it will take a while to raise debt because she has to check when each company came on to the group, because a company is only liable for debts after date joined.
>
> 5. proofs of debt lodged in SS Residential, Iridium FP, and Capricorn Securities appear to be dated before the 14 days expires so are not technically correct, but now the companies are now liable so probably a moot point
>
> 6. pretty rare that tax sharing agreements are prepared. She said that most are grouped to make it easier to lodge tax returns, not to spread liability.

152 Until Mr Bettles' discussion with Ms Campbell referred to in the preceding paragraph, he did not know that the consolidated group had a tax sharing agreement for income tax.

153 On 27 March 2017 Mr Bettles received an email from Ms Campbell attaching the tax sharing agreement for the consolidated group that had been provided to the ATO. That was the first time that Mr Bettles had received a copy of any tax sharing agreement for the income tax consolidated group. Ms Campbell noted that the agreement had been provided to the ATO on 4 May 2015 and that she was not sure if there was an updated version since that time. Mr Bettles still does not know whether there is an indirect tax sharing agreement for the GST group.

154 Mr Bettles was aware of the membership of the income tax and GST groups and that they included the MA Trading Companies. However as at September 2016 and February 2017, when he became liquidator of Iridium Financial Planning and Capricorn Securities, he was not aware that one of the consequences of having a tax consolidated group is that each of the companies in the group is jointly and severally liable for the tax owed. Nor could Mr Bettles recall any discussion about tax groups at the 8 July 2016 Meeting.

155 Mr Bettles explained that while he is an accountant, he has been an insolvency practitioner since graduating from university and he has no speciality in taxation. While he received the letters referred to at [134] above, and was aware of the existence of the groups for GST and income tax purposes, he did not understand their consequences, was not aware of tax sharing arrangements and, at the time, the ATO was not pursuing the MA Trading Companies for outstanding tax. In those circumstances, and given initial advice received from WMS, Mr Bettles made no further enquiries about the effect of the tax consolidated group.

156 Further, when at WMS' request Mr Bettles signed the tax return for the MA Group for financial year ended 30 June 2015, it did not occur to him to ask why there was a single return for the group. He was told there was one return and no income tax payable.

2.17 Labour hire companies in the MA Group

157 On 22 July 2016 Mr Bettles was appointed as liquidator of MAIC Human Resources, which was one of the labour hire companies in the MA Group. Despite having been informed at the pre-appointment meetings that there would be no employees left in the MA Group and that the MA Trading Companies had no staff, Mr Bettles became aware upon his appointment that not all employees of the MA Group may have been terminated.

158 MAIC Human Resources did not have the financial capacity to continue to pay employees or to meet ongoing employee entitlements.

159 Mr Bettles instructed his staff to prepare and issue notices pursuant to s 588(1) of the Corporations Act to employees. Those notices informed the employees: that as MAIC Human Resources was in liquidation their employment was terminated effective 22 July 2016; of the Fair Entitlements Guarantee scheme; and what an employee needed to do in order to make a claim under that scheme for outstanding wages and entitlements, other than superannuation.

160 It is apparent that the amount owing to employees was far in excess of that declared to be the case by Mr Marlborough in the "Form 507 – Report as to affairs" dated 22 July 2016 for MAIC Human Resources.

2.18 Progress Meetings

161 After his appointment to Iridium Holdings Mr Bettles took steps to ensure that he was kept informed about what was happening with the MA Trading Companies. Among other things, he sought updates from Mr Marlborough, WMS and Ramsden Lawyers.

162 As the realisation of the MA Trading Companies' assets was not progressing in the way in which he had been told and in accordance with his expectations, Mr Bettles instigated meetings to discuss progress (**Progress Meetings**). The Progress Meetings took place on 5 and 19 September 2016, 6 and 26 October 2016, 1 and 23 December 2016 and 12 January 2017. Their purpose was for Mr Bettles to receive updates, principally in relation to the MA Trading Companies, and to discuss progress in relation to the realisation of those companies' assets.

163 Where relevant, the matters discussed at the Progress Meetings are referred to below.

2.19 Management deeds

164 Mr Jones was involved in drafting management deeds between companies in the Benchmark Group and MM Prime, Provincial Property, Airlie Beach, Iridium Financial Planning and Capricorn Securities.

165 The management deeds were to be entered into to give effect to the arrangements proposed in the 14 July 2016 Email for companies in the Benchmark Group to provide services to permit the MA Trading Companies and Provincial Property to continue to trade.

166 Mr Jones recalls that Messrs Bettles and Carey provided comments in relation to drafts of the management deeds and he noted that, although it was finalised and submitted for signing to Mr Bettles, the management deed for Provincial Property (**Provincial Property Management Deed**) was never executed. Only the Management Deeds were executed.

2.20 Provincial Property

167 As set out at [104] above, on 22 July 2016 Messrs Bettles and Khatri were initially appointed as voluntary administrators of Provincial Property.

168 Provincial Property operated a rent roll. It managed about 237 rental properties in 29 regions across Queensland, New South Wales and Victoria (**Rent Roll**). At the time of Messrs Bettles' and Khatri's appointment as voluntary administrators, Mr Marlborough was the sole director of Provincial Property.

169 According to Mr Bettles, as at 23 July 2016 a DOCA was being considered for Provincial Property. However, by 9 August 2016 it was apparent that there was to be no DOCA proposal and on 25 August 2016 Provincial Property was, by resolution of its creditors, put into liquidation and Messrs Bettles and Khatri were appointed as its liquidators.

170 Mr Bettles encountered the following difficulties in the liquidation of Provincial Property:

(1) security interests had been registered on the PPSR in favour of a number of creditors;

(2) it was necessary to have licences in place to manage the business in Queensland, Victoria and New South Wales. As at the date Provincial Property was placed into voluntary administration it did not have the required licences to manage the rental properties that comprised the Rent Roll;

(3) Provincial Property did not have staff to operate the property management business. Its staff had been employed by the labour hire companies in the MA Group;

(4) it became apparent that the Benchmark Group also did not have the required licences to carry on the management and leasing business in Victoria and New South Wales;

(5) the properties managed by Provincial Property were spread over a number of regions across three states which created difficulties in managing and selling the Rent Roll;

(6) property owners were paid their rental entitlements every two weeks which created time pressure upon Mr Bettles' appointment as voluntary administrator. It was necessary to maintain the fortnightly payments to avoid losing property owners. This required having rental management staff in place and, to that end, it was desirable to have staff managing the Rent Roll who were familiar with the properties and the software management system operated by Provincial Property;

(7) Provincial Property was using local agents in the regions to assist in managing the properties. There was no restraint on those agents approaching or soliciting the property owners to move the property management rights directly to those agents; and

(8) there was historically a mixing of dealings and rents between Provincial Property and Airlie Beach.

2.20.1 Proposed management deed

171 As noted above, at the time of Mr Bettles' appointment as voluntary administrator, Provincial Property had no staff. Mr Bettles explained that he had been appointed to a business with a rent roll and trust account but with no staff available to operate the business. It was thus necessary to have suitably qualified people to operate the business, including a licensee/nominee who held a real estate licence to let the properties in each state in which the company operated. A decision had to be made quickly in relation to the continued management of the Rent Roll given that Provincial Property was in voluntary administration and, at the time, there was discussion about a DOCA proposal for the company.

172 Mr Bettles therefore determined that it was reasonable to enter into a management agreement with BPW to manage and sell the Rent Roll. BPW was to employ staff who previously undertook the property management work for Provincial Property and Mr Bettles had been told that it held the required licences.

173 On 25 July 2016 Mr Bettles sent an email to Mr Lavell requesting details of the properties managed by Provincial Property, the relevant management agreements and any other information or documentation that Mr Lavell believed would assist him.

174 Mr Lavell responded to Mr Bettles' email later that day as follows:

(1) in relation to Mr Bettles' request to Mr Lavell to provide details of the managed properties including the relevant management agreements, Mr Lavell wrote:

> I have loaded on the portal the list I received on 17 June from Richard. The list of properties looks accurate at that date. The cover email said that they average $320 per week and that has been adopted in this list. We need to liaise with Maighan to get the complete listing and current actual rents. Based on the understanding there is approx. $320 per week rent with management fees / commission of 7.5% then the indicative value is between $500k and $550k. I can prepare a more formal valuation if you like.

(2) in relation to Mr Bettles' request for "other information and/or documentation surrounding the transaction" that Mr Lavell believed would assist the administrators, Mr Lavell wrote:

> They are split approx. $95k in NSW, $160k in QLD and $270k in Victoria. You need to be licenced in each state to derive. Between Maighan and external agents you should be able to sell them within that price range in an orderly fashion.

175 As set out above, on 25 July 2016 Mr Young forwarded the 14 July 2016 Email to Mr Bettles. That email included a proposal for the management of Provincial Property until entry into a DOCA. Mr Bettles noted in relation to Mr Young's management proposal that the question of any arrangement with respect to Provincial Property was for him to determine, in his capacity as voluntary administrator, and not for Mr Marlborough.

176 On 26 July 2016 Mr Bettles had a telephone discussion with Mr Ramsden about Provincial Property. Mr Bettles' file note records:

> Telephone out-John Ramsden from Ramsden Lawyers regarding the administrators taking control of the practical issues (eg. trust account, collection of rent, payment of bills, notifying OFT, etc.) surrounding the company's management. John understood the issues and said that he had met with Richard Marlborough this morning and advised him of some of them. He said he had particularly told Richard that they couldn't deal with the company's bank accounts without approval of the administrators. We both agreed that we probably needed some advice on whether the administrators could sell the rent roll and would need a valuation.

177 On 26 July 2016 Mr Bettles also had a telephone discussion with Mr Marlborough and Maighan Brown, Braiden's wife, a director of BWP Services and at the time the national property manager for Provincial Property, about the operations of Provincial Property and, as described in his file note, "the practicalities of dealing with the properties and sale of the [Rent Roll]".

178 On 28 July 2016 Mr Lavell sent an email to Mr Ramsden, copied to Mr Bettles, which attached spreadsheets listing the properties managed by Provincial Property. From about that date Mr Bettles commenced discussions with Ms Brown about sale of the Rent Roll. According to Mr Bettles, he and Ms Brown reached an arrangement whereby the Benchmark Group would manage the properties on behalf of the administrators in return for a commission of 7.5%, which was equivalent to the rate fixed by the rental agreements. The Benchmark Group was also entitled, at the same time and at no cost, to negotiate the sale of the Rent Roll at a price suitable to the administrators.

179 Mr Bettles thought it was desirable to use former employees who had worked in the Provincial Property business to manage the Rent Roll as they would have knowledge of the properties and systems. He considered that if there was any prospect of maintaining the Rent Roll for sale then the property management business needed to continue to operate.

180 On 28 July 2016 Mr Bettles had a telephone conference with Messrs Ramsden and Lavell. His file note records that they discussed the following matters (as written):

1. my office meeting with the staff who previously ran the rent roll to review the operations, particularly the trust account. I noted that we were comfortable that the trust account was in order and that we didn't see any issues paying landlords as normal on the 1st and 15th of the month

2. that the liquidators were of the view that if landlords were being paid as normal all of their entitlements they were not creditors of the company and consequently we were not required to send them a notice specifically advising of the liquidation at this time

3. the liquidators were concerned that specifically notifying the landlords of the appointment could lead to landlords looking to terminate their management agreements and going to another agent which would obviously lead to a dimunission in the value of the business. I also noted that the rent roll was spread right across the country, yet managed from the Gold Coast, and as a result the company used local agents to do reletting and deal with on the ground issues. That meant that local agents had the contact details of the landlords and it was likely that once the agents heard of the liquidation directly they would start approaching tenants with a view to taking over the management of their property. Again, this was likely to devalue the rent roll because of the loss of properties being managed. I noted that I had had this same scenario of losing most of the rent roll overnight on another liquidation that had a rent roll.

4. consequently the liquidators had negotiated an arrangement with a business associated with the real estate license nominee, Maighan, whereby they would manage the properties on behalf of the liquidators, be paid the 7.5% commission the company was entitled to, and at the same time, at no cost, negotiate the sale of the rent rolls at a price suitable to the liquidators. The sale would be parcels of the rent roll (eg. all the properties in Orange to one buyer) ratther than as a whole book. I noted that Maighan had indicated that there was no approval for the company to assign the management agreements, and consequently the sale would be on the basis of part of the sale price being paid upfront and the balance held as a rentention on the basis that we would work with the purchaser to endeavour to get the landlord to sign a new management agreement and if the landlord did then the retention would be paid.

5. the liquidators would engage WMS to value the rent roll on both a parcel basis and as a whole book.

6. the liquidators needed Ramsden to prepare a managment agreement with the company associated to Maighan, to provide advice on whether they were breaching the Privacy Act by selling this way, and assuming they weren't to prepare a sale agreement.

181 Mr Bettles retained Ramsden Lawyers to act for Provincial Property during his appointment. At the time he was comfortable in doing so as Ramsden Lawyers were Provincial Property's solicitors, they were across the MA Group's affairs and the administrators did not have the time or funds available to engage new solicitors who would need to properly understand the relevant background in order to be in a position to draft an appropriate management agreement.

182 As foreshadowed in the 28 July 2016 teleconference, by letter dated 29 July 2016 Mr Bettles, in his capacity as voluntary administrator, sought advice from Ramsden Lawyers in relation to Provincial Property and the Rent Roll. Among other things, his letter provided:

> As discussed, I confirm that the company currently manages 210 properties (spreadsheets attached) across Queensland, New South Wales and Victoria. The administrators are looking to sell the rent roll of the company and seek your urgent advice as to whether the voluntary administrators can release the names and contact details of the lessees as part of the due diligence process.
>
> The nominee for the company's real estate license, Ms Maighan Brown, has suggested that the sale price will be maximized if the rent roll is sold on a parcel basis. For example, attached is an offer to purchase the Kingaroy parcel. Consequently, the administrators are concerned to comply with the *Privacy Act 1988* provisions, as highlighted in the attached article.
>
> Should your advice be that the administrators are in a position to release private information then I ask that you please prepare a draft sale agreement. Ms Brown advises that she has a proforma sale agreement that you may wish to use. Ms Brown's contact details are 0451 373 960, Maighan.Brown@maproperty.com.au.
>
> On a separate note, the voluntary administrators have struck an arrangement with an entity associated with Ms Brown, for that entity to manage the properties currently under the company's control on behalf of the voluntary administrators, and negotiate the sale of the company's rent roll, all in exchange for the commission that the company would have been entitled to receive under the management agreements with each owner (7.5% of the rent collected).
>
> The entity will be responsible for appropriate staffing, premises, etc., all rental and other collections will be deposited into the company's trust account, and the entity is not authorized to withdrawn any funds from the trust account without the administrators' specific written authority. In that regard, I ask that you please prepare the relevant agreement. You will need to contact Mr Richard Marlborough to obtain details of the entity which is entering into the agreement.

183 On 11 August 2016 Ramsden Lawyers provided its advice on the privacy issues raised by Mr Bettles in his letter dated 29 July 2016. On 12 August 2016 Mr Bettles had a discussion with Mr Jones about that advice. His file note records:

> I outlined that we had been told that the firms we are selling the rent rolls to already know the customer information because they arranged for the letting of the properties so there probably isn't an urgent need for a confidentiality agreement, but there is an urgent need for a sale agreement because we have offers. It was agreed that Oliver would ring Maighan and get a copy of her pro-forma agreement and would review it to see if any changes were required.

184 On 16 August 2016 Mr Jones emailed a draft management deed between BWP Services and Provincial Property to Mr Bettles in relation to the provision by BWP Services of management services, namely the management of the Rent Roll. On 17 August 2016 Mr Jones sent a further

email to Mr Bettles informing him that "[BWP Services] have advised that they are satisfied with the deed and do not require any amendments".

185 On 18 and 19 August 2016 Worrells' staff reviewed the draft deed between BWP Services and Provincial Property. At the time Mr Bettles recorded his own comments on the draft deed in a file note as follows:

> 1. we were never paying them commission on the sales of the rent roll, so clause 3.1(b) should be deleted. See Ramsden - advice-280716.docx …
>
> 2. they are paid fortnightly when we pay the landlords, so clause 3.2 needs to be amended and should say that the invoice is to provide a breakup of each property being managed, the rent received and consequently the commission charged
>
> 3. Benchmark needs to have an appropriately licensed real estate agent. Perhaps this is covered in clause 4.1(b)?
>
> 4. Benchmark is not entitled to disburse any funds from the trust account without the written authorisation from the administrators
>
> 5. allow us to terminate the agreement before sale of the rent roll is completed
>
> 6. I dare say we will need a final audit to be done on the trust account and will need Benchmark's help to do that; so perhaps that should be in the agreement.
>
> 7. we are joint and several administrators, so does Raj really need to be a signatory?

186 On 31 August 2016 Mr Carey sent an email to Mr Jones, copied to Mr Bettles, setting out his comments on the draft management deed. Mr Carey's comments in relation to cl 3 titled "Remuneration" included that:

> Clause 3.1(b) provides for a payment of 10% of the sale proceeds derived from the sale of PPI's assets, including its rent roll.
>
> As such a payment was never contemplated by the Administrators (and now) Liquidators, clause 3.2(b) needs to deleted. In this regard I draw your attention to Ramsden Law letter of advice dated 28 July 2016.

187 On 8 September 2016 Mr Bettles had a telephone conversation with Mr Lavell about the commission generally paid to brokers on the sale of small rent rolls. Mr Bettles' file note of the conversation records the following:

> Aaron said it really depended on the amount of work that the broker was required to do. ie.
>
> 1. if the broker just had to list the rent roll on a website and sit back and wait, then the commission wouldn't be very much
>
> 2. if the broker was selling the complete rent roll then he would probably charge

around 15%

3. if the broker was selling the rent roll in parcels then around 15% - 20%

4. his firm would charge 20% - 25%

> I note that Benchmark wants to charge 10% and we are selling the rent roll in parcels. Based upon the information provided by WMS that rate seems reasonable.

As recorded in Mr Bettles' file note, he considered that the commission rate recorded in the draft management deed of 10% was reasonable and he was content to adopt that rate. Mr Bettles said that he was also of the view that there was limited room to negotiate the commission rate as it was necessary to locate someone at short notice to manage and sell the Rent Roll very quickly. Mr Bettles was of the opinion that it was likely to prove to be difficult to do so as the properties were in a number of regions in three different states.

188 On 9 September 2016 Mr Bettles instructed Mr Carey, in turn, to instruct Ramsden Lawyers that they were happy with the 10% fee on the sale of the Rent Roll to be paid to BWP Services "providing that there is a mechanism for [BWP Services] to pay back any commission as a result of us having to pay back under the retention".

189 On 12 September 2016 Mr Carey sent an email to Mr Jones, with a copy to, among others, Messrs Bettles and Young in which he referred to his earlier comments in relation to cl 3.1(b) of the draft management deed and noted that:

> Following further negotiations between the parties the liquidators are now satisfied with a 10% fee on the sale of the rent roll being paid to [BWP Services] providing that:
>
> 1. there is a mechanism for [BWP Services] to pay back any commission amount/s as a result of moneys not collected (or needing to be refunded) under the retention provisions of the sale agreement/s, and
>
> 2. the deed clarifies at paragraph 5.1(c) that the costs of the business are only PPI's costs, and [BWP Services] is to pay its own licence fees, insurance costs, financial software, etc.

190 On 13 October 2016 Messrs Bettles and Carey, among others, received a further draft of the management deed which was the subject of further review and discussion. By email dated 21 October 2016 to Mr Jones, copied to, among others, Mr Young, Mr Carey made further comments in relation to the draft management deed to amend cl 3.1(b) such that the remuneration payable to BWP Services would exclude "any rent roll associated with the Summit Apartments located at Flame Tree Court, Airlie Beach … plus all costs incurred by [BWP Services] in marketing and advertising [Provincial Property's] asset". Later that day,

Mr Young sent an email responding to those comments stating that he did not see "any commercial reason why [BWP Services] should not be entitled to the 10% sales commission for the Summit Apartments".

191 On 24 October 2016 the question about payment of commission on the sale of the Summit Apartments at Airlie Beach was resolved. In an email from Mr Carey to Messrs Young and Jones, copied to, among others, Mr Bettles, Mr Carey informed Mr Jones that:

> I am instructed that the parties have discussed the Airlie Beach commission issue and are in agreement that [BWP Services] should be entitled to 10% commission on the Airlie Beach sale as set out by Liam below.

192 On 25 October 2016 Mr Jones provided Mr Carey with a copy of "the finalised management deed" noting that if Mr Carey was "happy with the document" it should be signed by Mr Bettles. Mr Bettles said that the decision in relation to acceptance of the terms of the management deed was a matter for the liquidators of Provincial Property. Ultimately Mr Bettles did not execute the management deed as liquidator of Provincial Property because he became aware that BWP Services did not hold a licence to manage and sell properties in the Rent Roll situated in Victoria and because they could not obtain insurance.

2.20.2 Operation of Provincial Property's bank accounts

193 On 25 and 27 July 2016 respectively Mr Bettles, as voluntary administrator of Provincial Property, sent letters to the Commonwealth Bank of Australia (**CBA**) and **Westpac** Banking Corporation in relation to bank accounts held by Provincial Property notifying the banks of the appointment of the voluntary administrators to Provincial Property and requesting that the accounts held with each of the institutions be placed on "post credits only status". This meant that moneys could be deposited into the accounts but no funds could be withdrawn from them. Worrells did not identify any other accounts held by Provincial Property with any other bank.

194 Mr Bettles noted that it was necessary to pay landlords from moneys held in trust, they were paid fortnightly and, if they were not paid on time, Provincial Property would start losing landlords quickly. In addition payments had to be made to BPW for its management fees. Relevantly on 1 August 2016 Worrells staff met with Ms Brown and Margaret Jackson of the Benchmark Group at Provincial Property's premises about payments to be made from Provincial Property's trust account that day.

195 From about 1 August 2016 to 1 March 2017 Mr Bettles required that he and/or Mr Khatri, in their capacity as liquidators, provide prior approval of any payments to be made by BPW from Provincial Property's accounts. In order to obtain approval BPW was required to provide substantiating documentation and an explanation of its calculations.

196 As part of Provincial Property's administration Worrells staff monitored payments from bank accounts that were operated in relation to rental management. On each occasion that they identified an unauthorised transaction Mr Bettles took steps to investigate the transaction and to take control of the accounts. For example on about 2 September 2016 unauthorised withdrawals totalling $20,937 from Provincial Property's bank account to BPW were identified. Those payments were investigated and the amounts paid were recovered after the liquidators sent a request to BPW for the moneys to be refunded. At the time Mr Marlborough and Ms Brown were removed from the accounts as administrators and their permission was limited to viewing the accounts and uploading transactions but not approving them.

197 Mr Bettles recorded identification of the unauthorised withdrawals, the options open to him to address them, which option he selected and why in a file note dated 14 September 2016 in which he recorded (as written):

> Between 9 August and 2 September Maighan Brown, under the instruction of Richard Marlborough, has transferred $20,937 from the company's general account to Benchmark without any authority from the liquidators. I discovered the withdrawals on 2 September and immediately telephoned Liam Young of Benchmark advising of the unauthorised withdrawals and demanded repayment of the monies. I followed that telephone call up with an email. Liam could not explain the withdrawals and noted that the money needed to be repaid. Since that phone call and email I have discussed the matter with Liam at the meeting at Ramsden Lawyers offices on 5 September and then again at a meeting with Liam in our offices on 9 September. On both occasions Liam understood the severity of the situation and promised to repay the monies. At the meeting on 5 September he advised that he did not currently have the money and was waiting on payments to him. He asked if we could set off the money owing by the liquidators to Benchmark, which I declined.
>
> …
>
> It seems clear that the liquidators have two choices:
>
> 1. work with Benchmark to recover the monies, whether by payment from Benchmark or set off of monies that will be due to Benchmark from the management and sales of the rent roll. The upside to this option is that we will be repaid. The downside is that the actions by the staff of Benchmark and the director casts doubt on our ability to trust them going forward in any future dealings.
>
> 2. cease dealing with Benchmark and seek recovery through litigation. The upside to this option is that we will cease dealing with Benchmark. The downside is that we now won't be able to manage the rent roll, which will

> likely result in landlords finding new property managers and consequently we won't have a rent roll to sell, thereby losing an asset valued at $150,000. There is an additional matter, in that Benchmark was assisting in attempting to recover the work in progress in the related entity MM Prime Investments worth around $1 million. The sole shareholder of both Provincial and MM Prime is Iridium Holdings, of which we are the liquidators. There are no creditors of MM Prime and consequently that wip will come to the shareholder to be available to creditors. As Benchmark employs staff that used to work for MM Prime and therefore know the clients that form part of the work in progress, Benchmark seems the logical party to assist us in that collection. If we cease working with Benchmark in Provincial then we need to cease working with Benchmark in MM Prime and consequently we are putting at jeopardy the $1 million of work in progress.
>
> I have considered both options, and it seems to be in the best interests of the administrations and creditors to continue to work with Benchmark. Consequently I am taking option 1. I note that the director no longer has access to Provincial's accounts, and very specific instructions have been given to Benchmark about the deposit of monies.
>
> I have spoken to my fellow appointee, Raj Khatri, about the matter, and he agrees with the decision.

198 On 14 September 2016 Mr Bettles had a telephone conversation with Mr Young about the unauthorised payments. He made a file note of that conversation which recorded that he had informed Mr Young that he was "not happy that the $20,937 had not been reimbursed" and that consequently he would not be paying the management fees due to BPW the following day and would offset moneys otherwise payable against the unauthorised deductions. The file note records that Mr Young accepted that arrangement. Mr Bettles then instructed his staff to ensure that no management fee was paid to BPW the following day and told them how to account for that in the general ledger.

199 A file note dated 19 September 2016 on Worrells' Provincial Property file prepared by Ms Bragg included that:

> Management fee from distribution on 15/09/2016 was paid to the administration account in place of Benchmark Wealth as the offset set out in JB's filenote above.
>
> Funds taken from General Account by Benchmark $20,937
>
> Less funds collected from CBA incorrect deposit ($3947.45)
>
> Less management fee from 15/09/2016 distribution ($6,764.81)
>
> BALANCE TO BE COLLECTED FROM BENCHMARK = $10,224.74

On 21 September 2016 Mr Bettles reviewed the assessment set out above and instructed Ms Bragg to proceed in the manner outlined.

200 Mr Bettles accepted that by 14 September 2016 he did not trust Messrs Young and Marlborough or Ms Brown.

2.20.3 Mr Marlborough's involvement

201 The unauthorised withdrawals referred to above were addressed in a document titled "Checklist for Offence Referrals" for Provincial Property prepared by Worrells as follows (as written):

> **Breach of directors' and officers' duties (s180-184)?**
>
> *Note from JB: In this company it seems that the day to day operations were controlled by Maighan Brown (in the very least she had unfetted access to the bank account) and therefore I would suggest she was a shadow director. After our appointment Mr Marlborough/Ms Brown took funds from the company account which is perhaps a breach of 180, 181, 182, 183, 184, 206A, 471A, 596, and 1310. The company also let its property management licences lapse in various states but continued to manage properties in those states, which is probably breaches of 180, 181, and 184. These are just my initial thoughts, you should review the above sections and consider if there are any other potential offences.*
>
> …
>
> **Section 182: Improper use of position?**
>
> …
>
> Between 9 August and 2 September 2016, Maighan Brown (reported as shadow director), under the instruction of Richard Marlborough, transferred $20,937 from the company's Westpac general account to Benchmark without any authority from the liquidators. Mr Marlborough and Ms Brown have used their position as director and former employee (shadow director) of the company to gain an advantage for Benchmark, at the direct detriment of the company. The subject funds were initially deposited to the company's account as proceeds from the sale of a portion of the company rent roll asset and were immediately transferred away from the company to Benchmark.
>
> …
>
> **Section 183: Improper use of information?**
>
> Mr Richard Marlborough and Ms Maighan Brown have used information obtained because of their positions as director and employee of the company to gain advantage for Benchmark to the detriment of the company. …

202 Despite this document and Mr Bettles' file note, dated 14 September 2016 which observed that, as at September 2016, Ms Brown acting "under the instruction of Mr Marlborough" had transferred funds from Provincial Property to BPW, Mr Bettles maintained in cross-examination that he was not aware that Mr Marlborough was involved in the Benchmark Group. That evidence is difficult to accept given the content of those documents. Even accepting a level of naivety on his part, I do not accept that Mr Bettles was not aware that Mr Marlborough was in some way involved in the Benchmark Group and its management.

203 This conclusion is reinforced by the following which were in evidence before me:

(1) on 4 August 2016 Mr Marlborough sent an email to Mr Bettles which included (as written):

> When the girls have done the Airlie beach fee transfer it has gone into PPI general account Commonwealth bank which is frozen, it should have gone into the Airlie beach general account.
>
> could you please arrange for this to be unblocked so i can transfer or arrange for the funds to be transferred back to the Airlie beach trust account where they came from .
>
> Airlie Beach Trust account details are BSB:4445 ACC: 10557981
>
> PPI general account BSB: 4445 ACC: 10543694
>
> If you need any document please let me know, there is also a variation of balane in PPI to what was deposited, this is due to PPI being overdrawn by $10.00

(2) on 8 August 2016 Mr Bettles responded as follows (as written):

> Sorry for the delay in getting back to you about this Richard.
>
> Would you please have your staff email through the following in respect of the transfer so that we can get the money released:
>
> 1. Date of transfer
>
> 2. Something to evidence that Provincial Property Investments (Aust) Pty Ltd weren't entitled to the funds. eg. management agreement and breakdown of the calculation of amount deposited.
>
> If you have any queries please feel free to contact myself or Lee Bragg in my office.

(3) on 9 August 2016 Ms Brown sent an email to Messrs Marlborough, Bettles and Carey which included (as written):

> See attached EOM EFT statement generated from Airlie Beach – The disbursement bank account details were incorrectly entered. These fund were to be disbursed direct to Bench Mark Private Wealth.

It is apparent from these emails, as Mr Bettles appeared to accept, that the response from Mr Bettles' request to Mr Marlborough to have "[his] staff" provide the necessary details was provided by an employee of the Benchmark Group, i.e. Ms Brown.

2.20.4 Valuation of the Rent Roll

204 On 11 August 2016 WMS Corporate Services Pty Ltd trading as **WMS Corporate Finance** provided an indicative valuation of the Rent Roll to Mr Bettles (**WMS Rent Roll Valuation**). It concluded that the value of the Rent Roll was:

(1) using a "sum of the parts" approach, approximately:

(a) $390,000 on a going concern basis; and

(b) $255,000 on a forced sale basis; and

(2) if sold "in one line", approximately:

(a) $273,000 on a going concern basis; and

(b) $178,000 on a forced sale basis.

205 Mr Bettles believed that Mr Hayes and WMS Corporate Finance were independent and it was appropriate for them to be retained to prepare the valuation. Mr Hayes prepared the WMS Rent Roll Valuation with input from Mr Lavell who understood the MA Group's affairs and had the necessary information about the Rent Roll which comprised a loose collection of rights, with little or no documentation, spread over several states. Mr Bettles also retained WMS Corporate Finance because, at the time, WMS was the premier accounting firm on the Gold Coast, had a good reputation and had the necessary specialists to prepare a valuation.

206 Mr Bettles undertook an assessment of the WMS Rent Roll Valuation. On 20 August 2016 he recorded his review in a file note (as written):

> Having reviewed the valuation of the rent roll prepared by WMS Corporate Finance on 11 August I note that two basis for valuations have been prepared; fair market value and forced sale. The definition of fair market value is set out in the valuation and is 'the price that a willing but not anxious buyer, acting at arm's length, with adequate information, would be prepared to pay to a willing but not anxious seller of the assets in question.' The company is in liquidation, the liquidators do not have any staff to maintain the rent roll and have had to enter into a management agreement with Benchmark Private Wealth to manage and sell the rent roll, the properties under management are in Victoria, NSW, & Qld, the company has had to enter into cojunction agreements with local agents to service on the ground issues, as a consequence the local agents have the contact details of the landlords and tenants and there are no restrictions in those local agents poaching the landlords. Based upon this information it would be fair to say that the liquidators are anxious sellers and consequently the fair market value would NOT be appropriate for us to use.

207 Mr Bettles observed that he was not appointed to Airlie Beach at any time and that the trust accounts into which rents were paid for the Summit Apartments was in Airlie Beach's name. Accordingly, he had no control over that trust account even though Provincial Property was the appointed letting agent.

2.20.5 The requirement to hold a real estate agent's licence

208 The properties under management that made up the Rent Roll were predominantly in country Victoria, New South Wales and Queensland. As set out above, as at the date of the appointment of Messrs Bettles and Khatri to Provincial Property as voluntary administrators, that company: managed about 237 rental properties in 29 regions in Queensland (95 properties in 11 regions), New South Wales (57 properties in six regions) and Victoria (85 properties in 12 regions); and operated the leasing business for Airlie Beach. However, Provincial Property only held the required real estate licences for Queensland.

209 From about 25 August 2016 Mr Bettles' staff became aware that neither Provincial Property nor BWP Services held the required real estate licences in New South Wales and Victoria and therefore could not undertake property management work in those states in compliance with the relevant legislation. Despite that knowledge, Mr Bettles and his staff continued to negotiate the terms of the proposed management deed between Provincial Property and BWP Services, as described above, although ultimately that deed was not executed. Upon becoming aware of that problem Mr Bettles took steps to resolve it and to continue the management, marketing and sale of the Rent Roll. Mr Bettles sought advice from the relevant bodies as to whether Provincial Property or the administrators could apply for a licence or mutual recognition of an interstate licence. The administrators were informed that they could not do anything without licences.

2.20.5.1 Victoria

210 On 25 August 2016 Ms Bragg had an initial discussion with Matthew Sargeant, a compliance and enforcement officer with Consumer Affairs Victoria about these issues. On 7 September 2016 Ms Bragg received an email from Mr Sargeant seeking further information in relation to the management of the properties included in the Rent Roll in Victoria.

211 On 8 September 2016 Mr Sargeant sent Mr Bettles and Ms Bragg an email which included, under the heading "Trading Unlicensed", the following:

> [Consumer Affairs Victoria] do hold serious concerns about [Provincial Property], and now Benchmark Wealth Property Services Pty Ltd may have been/currently are operating as an Estate Agent in Victoria without a Victorian licence.
>
> We understand that you, as administrators/liquidators have unfortunately inherited a part this issue and I appreciate yesterdays immediate offer to do everything in your power to assist. Unlicensed trading carries significant risk of financial detriment for a few reasons, including that rents are not being correctly placed into approved Victorian trust accounts as required, and consumers are not able to make claims to the Victorian

> Property Fund (a safety net trust fund Victorians can claim from in the case of a defalcation, but are unable to in cases of unlicensed/interstate real estate agents). There are significant penalties under the Act for trading unlicensed.
>
> There are still Victorian properties advertised by 'PPI Rentals' (now operated by Benchmark Wealth Property Services) as available for rent on-line (for example: http://www.realestate.com.au/property-house-vic-sebastopol-412318891). The Estate Agents Act 1980 defines an Estate Agent as a person who carries on the business of letting/negotiating leases/collecting rents, and if an estate agent operates in Victoria through a company, that company must be licensed in Victoria.
>
> Could you please provide me the details of an appropriate officer of Benchmark Wealth Property Services for me to conduct enquiries with them, as to whether or not they have/need a Victorian licence.

212 Consumer Affairs Victoria also attempted to contact BWP Services to discuss its relationship with Provincial Property and its role.

213 On 12 September 2016 Consumer Affairs Victoria sent a letter to Mr Bettles notifying him, among other things, that as neither Provincial Property nor BWP Services held a real estate licence in Victoria, through the ongoing management of properties in Victoria, Provincial Property and Worrells as liquidators of Provincial Property's assets may be in contravention of s 12(1) of the ***Estate Agents Act*** *1980* (Vic). The letter also informed Mr Bettles that insofar as the liquidators were taking steps to sell the management rights for the properties in issue, they should do so as soon as practicable to ensure that the offending conduct was not exacerbated. Because of the ongoing potential contraventions of the Estate Agents Act, Consumer Affairs Victoria required Provincial Property to remove all advertisements of properties for rent in Victoria.

214 On 22 September 2016 Ms Bragg contacted the Business Licensing Authority, a division of Consumer Affairs Victoria to ascertain whether Provincial Property and/or Worrells were required to apply for a real estate licence in Victoria or mutual recognition of an interstate licence.

215 By email dated 3 October 2016 the Business Licensing Authority informed Worrells that, based on the information it had provided, it seemed that the activities to be undertaken by BWP Services would come within the definition of an estate agent for the purposes of the Estate Agents Act and that BWP Services would need to be licensed in Victoria to carry on an estate agency business. The Business Licensing Authority suggested that Worrells seek independent legal advice in relation to its enquiry.

216 On 20 October 2016 Worrells staff accessed the Consumer Affairs Victoria website in order to ascertain the application process for obtaining a licence but noted that Provincial Property was ineligible to be licensed because it was under external administration.

2.20.5.2 New South Wales

217 On 9 September 2016 Mr Bettles instructed his staff to contact New South Wales Fair Trading (**NSW Fair Trading**) to enquire whether Provincial Property was required to be licensed and whether it in fact held a licence.

218 Upon contacting NSW Fair Trading Ms Bragg was told that she could obtain licensing information on the public register. Ms Bragg proceeded to undertake a search and ascertained that Provincial Property did not hold a licence but that Ms Brown held a current licence in New South Wales.

219 On 19 September 2016 Mr Bettles as liquidator of Provincial Property wrote to NSW Fair Trading noting: his and Mr Khatri's appointment as liquidators of Provincial Property that Provincial Property managed 57 rental properties in New South Wales; and that its real estate licence nominee was Ms Brown. In the letter, Mr Bettles sought confirmation as to whether Provincial Property and the liquidators were appropriately licensed to manage properties in New South Wales or if they needed to meet any further licensing requirements as a result of their appointment. The liquidators did not receive a response to their letter.

2.20.5.3 Queensland

220 On 22 September 2016 Ms Bragg conducted a search of the Queensland Office of Fair Trading website and ascertained that Provincial Property held a licence in Queensland which was due to expire on 18 December 2018.

221 On 27 September 2016 Mr Bettles sent a letter to the Queensland Office of Fair Trading advising that: he and Mr Khatri had been appointed as liquidators of Provincial Property; as at the date of their appointment Provincial Property managed 95 rental properties in Queensland which were still under management; and Provincial Property held a current real estate licence. Mr Bettles sought confirmation as to whether Provincial Property and, ultimately, the liquidators were appropriately licensed to manage properties in Queensland or if there were further licensing requirements necessary as a result of the liquidators' appointment. No response was received to that letter.

2.20.6 Marketing and sale of the Rent Roll

222 From early August to September 2016 Provincial Property, through Ms Brown, marketed and sold a number of parcels of the Rent Roll properties through BPW. Mr Bettles explained that the rights to manage the rental of the properties were sold in parcels for commercial reasons because:

(1) there was no single buyer that would buy the entire book given that the properties were located in a number of regions across three states:

(2) there was no alternative to selling in parcels;

(3) there was no national agent to deal with all of the properties (approximately 237) in different states and regions; and

(4) Provincial Property already had to enter into conjunction agreements with local agents to service on the ground issues and, as a consequence, the local agents had the contact details of the landlords and tenants and there were no restrictions on those local agents poaching the landlords.

223 When Ms Brown went on annual leave in September 2016, the sale of the Rent Roll in parcels slowed down.

224 Parcels of the Rent Roll were sold for the following areas:

(1) Albury and Wodonga;

(2) Armidale and Guyra;

(3) Dalby;

(4) Fernvale;

(5) Gympie;

(6) Kingaroy; and

(7) Wangaratta.

225 By October 2016 Mr Bettles was becoming concerned by the rate of sale of the Rent Roll parcels. He contacted Messrs Lavell and Downie to see if they could assist. His file notes of his conversations with each of Messrs Lavell and Downie record:

> JB 27/10/16 10:22 AM: Telephone out-Aaron Lavell from WMS Accountants regarding the sale of the rent roll. I advised that I was getting frustrated with the slowness of the sale of the rent roll parcels because it seemed that we were losing more than we were selling. I said that this was compounded by the company not appearing

to be a licensed real estate agent in NSW or Victoria. I said we had indicated to the licensing bodies that we were selling the parcels and the trust account was in order, but because things were not moving as fast as expected I had concerns about the liquidators' obligations. I asked Aaron if WMS could assist in selling. Aaron advised that his firm was not geared up to do sales of rent rolls in regional areas Australia wide and therefore couldn't help. He said that if the parcels were in capital cities or large regional areas he might be able to help, but we both knew that wasn't the case. He said there was a previous broker who had been trying to sell the parcels, but Aaron understands that after the sale of the big parcels the broker had lost interest.

JB 27/10/16 10:38 AM: Telephone out-Graeme Downie from Johnston Business Sales about the sale of the rent roll parcels. I explained the position and asked if he could help or knew of anybody who could. Graeme said that selling things in regional areas was going to be very difficult (if not impossible) because there were limited buyers and the market in regional areas was soft. He could not help and didn't know of anybody who could.

226 Also on 27 October 2016 Messrs Bettles and Carey met with Mr Young and Ms Brown. Mr Bettles' file note of the meeting records (as written):

JB 27/10/16 04:26 PM: Today Brian Carey and I met with Liam Young and Maighan Brown from Benchmark Property Services regarding:

1. an update from Benchmark on the sale of the rent roll parcels. Maighan advised that despite her best efforts because the remaining parcels are in rural areas (some with no tenants) she is finding it almost impossible to sell them. She has tried all the agents in the areas, and in some cases adjoining areas, with no success. There are a couple in Victoria where some interest has been expressed, but she has no offers. She gave me a list of the properties with notes next to them. Benchmark - rent roll interest 27 Oct 16.pdf (file:\\gc-fileserver\WPDATA\Clients\2514\Letters%20In\Benchmark%20-%20rent%20roll%20interest%2027%20Oct%2016.pdf)

2. that the company is not licenced as a real estate agent in NSW & Victoria. Liam advised that the company used to be licenced, but the nominees had left the employ of the company and the licences had not been renewed. I noted that we had spoken to and written to the relevant regulatory authorities and seeking assistance in getting the liquidations licenced with no success.

3. based upon the inability to sell the rent rolls and that the company is not licenced it was agreed that the liquidators would write to all of the remaining owners in NSW & Vic advising them that the company can no longer manage their properties and asking that they find new agents. As there are a couple of rent roll parcels with some interest we would try and convert those sales over the next week and write to the owners after the 1 November owner remittance.

4. the above excluded the Qld properties, because the company is licenced in Qld. However Maighan has had no success in selling the Qld rent roll parcels. Consequently it was agreed to write to those landlords (excluding the Airlie Beach owners) at the same time as the NSW & Vic owners asking them to find new agents.

5. the Airlie Beach owners were in a different category because they all had properties in one complex of which the related entity Airlie Beach MA Pty Ltd owned the management rights. It was a strange situation where Airlie Beach

MA Pty Ltd owned the management rights, but the company had the property management. It seems to have come about because Airlie Beach MA Pty Ltd does not have a real estate licence. Despite this there is a separate trust account for Airlie Beach MA Pty Ltd into which the tenants pay their rent. We have previously discussed changing where the rent is paid into, but this is a massive task and not commercial to do so. I reiterated that no money is to be paid out of the Airlie Beach MA Pty Ltd trust account without our approval.

6. why Maighan had been signing cheques on the company's trust account. Maighan produced documentation to show that all of the payments were only to remit bonds to the RTA. That she had done it because she had always done it and didn't think about it, even though she knew she wasn't supposed to because the company was in liquidation. She promised not to do it again. I did note that we were qurerying Westpac as to why they were presenting them when I was the sole signatory on the account.

7. Maighan confirmed that the $18,033.08 we received for the Fernvale rent roll was the last payment

8. Maighan advised that a retention payment of $2,252.57 was due from the sale of the Leeton rent roll parcel and would be paid into the company's general account on or about 2 November.

2.20.7 Disclaimer of the Provincial Property property management agreements

227 On 7 December 2016 Messrs Bettles and Khatri in their capacity as the liquidators of Provincial Property sought advice from Grants Law in relation to the property management agreements for the Victorian and New South Wales properties managed by Provincial Property. At the time the liquidators instructed Grants Law that all saleable properties on the Rent Roll had been disposed of, that they were seeking to terminate the remainder of the property management agreements and that they had become aware that the nominee for BPW did not hold the appropriate licences to carry out the rental management services in those states. In their advice, Grants Law advised, among other things, that:

> Whilst I appreciate that you have drafted letters which seek to terminate the Rental Agreements in accordance with their terms, which I note requires 14 days' notice for Victoria and 90 days' notice for New South Wales', I hold significant concern that by doing so, the liquidators could be construed as having acknowledged those Management Agreements and make themselves liable for the carrying out of those services. This becomes particularly concerning in circumstances where you believe that those management services may not now be carried out by a licenced agent.
>
> In light of the background above, one alternative approach may be to rely upon the provisions of Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) concerning 'Disclaimer of Onerous Property'. As you may be aware, the provisions of section 568(1A) provide that a liquidator can disclaim a contract without the leave of the court in circumstances where it is an unprofitable contract.
>
> The courts when considering the term 'unprofitable contract' have noted:
>
> …

> It would appear that in circumstances where Benchmark is taking the entirety of the management fee for the payment of the management services it provides, that the continuation of the contracts (which are unsaleable) confers no sufficient reciprocal benefit to the creditors of [Provincial Property].
>
> Furthermore, in circumstances where there is significant concern over whether the agent holds the necessary licences in Victoria and New South Wales to carry out those services, there would appear to be significant prospective liability to both the company and the liquidators. In the event that through the conduct of providing the services, there were damages suffered by a party, a relevant insurer may elect to waive any policy that was being claimed on the basis of the person providing the services not holding the appropriate licences.
>
> In these circumstances, rather than acknowledge the contracts and provide the relevant termination period, it may be far more prudent to deem the Management Agreements as unprofitable contracts for the purposes of the liquidation and as such, disclaim same as onerous property pursuant to section 568(1A).

228 Given that, despite his attempts to do so, Mr Bettles was unable to sell the management rights for all of the properties the subject of the Rent Roll, and the fact that without the required licences neither Provincial Property nor BWP Services could continue to manage the properties, Mr Bettles formed the view that the correct and reasonable action was to disclaim the remaining property management agreements.

229 Accordingly, on 13 and 14 December 2016 he formally disclaimed the management agreements for 108 properties on the Rent Roll by lodging notices of disclaimer with ASIC. Mr Bettles did not seek leave pursuant to s 568 of the Corporations Act from the Court prior to disclaiming the property management agreements because, based on the advice he received, he understood that it was possible to disclaim the property without doing so. Mr Bettles was also concerned that making an application to the Court would have added to the cost of the liquidation of Provincial Property.

2.21 Management rights held by Airlie Beach

230 As set out at [10(4)] above, on 20 October 2016 BWP Services and Airlie Beach entered into the Airlie Beach Management Deed. Mr Bettles was not present at, nor involved in, the execution of the Airlie Beach Management Deed and does not recall that he was provided with a copy of it on or about 20 October 2016 or while he was the liquidator of Iridium Holdings. Nor does Mr Bettles recall having any involvement in the drafting or review of the Airlie Beach Management Deed and he is unable to locate any record of any such involvement by him or any other member of his staff on Worrells' files.

231 Mr Bettles was cross-examined about the Airlie Beach Management Deed and accepted that, despite bearing 20 October 2016 as the date of its execution, its operation was backdated to 25 July 2016.

232 Mr Bettles was not the liquidator of Airlie Beach at any time and thus was not in control of its affairs. However, Mr Bettles knew from attendance at meetings at which Mr Young was also present that Mr Young took steps to assist in a sale of the management rights of the Summit Apartments. In particular the sale of Airlie Beach's assets was discussed at the Progress Meetings held on 5 and 19 September 2016, 6 October 2016 and 23 December 2016.

233 Mr Bettles said that Mr Young and his staff identified and provided:

(1) a list of all of the properties under management at the Summit Apartments;

(2) copies of each of the management agreements with the owners of the properties under management at the Summit Apartments;

(3) copies of the caretakers agreement, the letting agreement and the deed of assignment; and

(4) a client list in respect of the Summit Apartments:

    (a) managing the trust account and collecting the rent; and

    (b) liaising with property owners and tenants.

234 In September 2016 it was concluded that Provincial Property not Airlie Beach, was the party to the Airlie Beach owners' agreements for the properties under management at the Summit Apartments.

235 Relevantly, on 9 September 2016 Messrs Bettles and Carey and Ms Bragg met with Mr Young and Ms Jackson. Mr Bettles' file note of that meeting includes:

> 4. Separating [Airlie Beach] rent roll management from [Provincial Property] management.
>
> I explained that whilst I understood that prior to the administration there was some mixing of the dealing with the rents between [Provincial Property] and Airlie Beach, as I was only liquidator of [Provincial Property] I did not control the affairs Airlie Beach and consequently they need to keep the affairs separate now. [Ms Jackson] said that she had spoken to Console about setting up different letterhead for PPI and Airlie Beach but because the subscription is in [Provincial Property's] name that is not possible. We then started talking about the management and tenancy agreements and [Ms Jackson] noted that they were all in [Provincial Property's] name. Not only was this news to us, but also to [Mr Young]. It seems that whilst [Airlie Beach] owns the management rights, all of the management agreements were put in [Provincial Property's] name. I asked why Airlie Beach had its own trust account and there seemed

> to be no reason. [Mr Young] felt sure there was a management agreement between [Provincial Property] and Airlie Beach allowing Airlie Beach to manage the properties. He is to check the records. I suggested this meant that as liquidators of [Provincial Property] I should be controlling the management of each property and PPI was one of the sellers of the management rights. We are to start by getting copies of the management agreements to confirm who is the manager and go from there.

236 On 9 September 2016 Mr Bettles also had a telephone conversation with Mr Lavell. His file note of that conversation records:

> Telephone out-Aaron Lavell from WMS regarding the news that [Provincial Property] might be the property manager in Airlie Beach. This was news to Aaron, but he said it would explain why when he asks for management accounts he gets accounts for Airlie Beach and accounts for [Provincial Property]. Aaron said he would complete his valuation based on one line, but accepts that he will need to apportion the valuation between [Provincial Property] and Airlie Beach. We are to get the management agreements for him.

237 On 20 September 2016 Mr Young provided Worrells with 61 owners' agreements. On 27 September 2016, I infer having undertaken a review of those agreements, Ms Bragg of Worrells concluded that "the Airlie Beach owners' agreements" were with Provincial Property and not Airlie Beach and noted that Provincial Property was listed as "the agent/licensee".

238 On 29 September 2016 Ms Bragg had a telephone discussion with Ms Brown. Her file note of that discussion provides (as written):

> PC out to Maighan at Benchmark regarding the controls needed to be put in place as [Provincial Property] is the manager of the rent roll for Airlie Beach. She confirmed that funds could not easily be diverted from the Airlie Beach trust account to [Provincial Property's] trust account as you would need to provide notice to all tenants to change the account they are paying into. She noted that we could take control of the trust account like we have done with [Provincial Property], (As noted above this is not an option due to the liquidators hving no authority over the Airlie Beach MA Account), I advised that we would likely have to deal with the trust account like we did with [Provincial Property] where all disbursements need to come to the liquidators for approval before being paid out. Maighan understood this and I confirmed that [Mr Bettles] would call Richard Marlborough to confirm this course of action but practically she understands what needs to be done.

239 On 20 October 2016 Mr Marlborough sent an email to Messrs Bettles, Lavell and Ramsden which included (as written):

> Below is the letter of offer for Airlie Beach, although we have not received the valuation yet i believe in discussions with Aaron this offer would be close to the val.
>
> I believe I should sign and accept this offer today due to the market perception of the group in the area, any further delays will only diminish future value.
>
> This has been the only group who have made an offer and this was on the market for

some time prior to liquidation.

I will forward to Oliver to draw up contacts for execution.

Attached to the email was a document titled "letter of intent/heads of agreement" between **WNZ** Pty Limited as buyer and Airlie Beach as seller setting out an offer by WNZ to purchase the business of Airlie Beach, i.e. its rent roll/management rights, for $570,000.

240 On 20 October 2016 Mr Lavell responded to Mr Marlborough's email noting that he agreed that "we should accept based on my review of operations".

241 Later that day Mr Bettles sent an email to Messrs Marlborough and Lavell copied to Messrs Ramsden, Jones and Carey in which he wrote:

> Based upon Aaron's recommendation, the liquidators of [Provincial Property] are happy to accept the offer. I understand that Richard accepts the offer as the director of Airlie Beach MA Pty Ltd. On that basis it seems appropriate for Ramsden to draft a sale contract/s in the name of the two sellers.
>
> You can obtain information about the properties managed by [Provincial Property] from Maighan Brown at Benchmark Property Services, and a break up of the sale price from Aaron.

242 Accordingly the vendors of the management and letting rights for the Summit Apartments has to be both Airlie Beach and Provincial Property. On 20 October 2016 Mr Bettles was notified by Mr Marlborough about an offer he had received for the purpose of the management and letting rights for the Summit Apartments (see [239] above) and that the potential purchaser was WNZ.

243 On 17 November 2016 Mr Bettles had a telephone conversation with Mr Marlborough. Mr Bettles' file note of that conversation records that Mr Marlborough informed him that "a contract had been sent to the buyer of the Airlie Beach management rights and they expected the sell without any problems".

244 Given that Provincial Property was party to the owners' agreements for the properties under management at the Summit Apartments, both Airlie Beach and Provincial Property had to be named as vendors.

245 On 25 November 2016 Mr Bettles prepared a decision memorandum about the proposed offer and sought advice from Grants Law as to whether the decision which he set out in his decision memorandum was reasonable.

246 On 22 December 2016 Mr Bettles met with Messrs Marlborough and Young and Braiden. At that meeting an update was provided on the sale of the Airlie Beach management rights and property management. Mr Bettles' file note records that Mr Marlborough informed the meeting "that some contract amendments were with the buyer's solicitor, but the deal was going ahead and looked like it was going to settle in March 2017 with no change to the sale price".

247 As the sale progressed an issue arose as to the apportionment of the sale proceeds between Provincial Property, on the one hand, and Airlie Beach, on the other. There was exchange of correspondence between Ramsden Lawyers and Grants Law in relation to that issue.

248 Ultimately, the sale did not complete prior to May 2017 when Messrs McCann and McKinnon of Grant Thornton were appointed as liquidators of Airlie Beach.

2.22 SS Residential

249 SS Residential was one of the MA Trading Companies.

250 At the pre-appointment meetings described above Mr Bettles was informed that SS Residential was solvent and that he would not be appointed to it immediately because it was to continue to trade and realise a payment in relation to the surrender of a lease for premises located in Sydney, before it would be wound up.

251 On 24 July 2016 Mr Bettles obtained a historical search of SS Residential to confirm that Iridium Holdings was its sole shareholder because, if Iridium Holdings was the sole shareholder, he needed to decide in his capacity as liquidator whether it was appropriate for SS Residential to continue to trade.

252 On 28 July 2016 Mr Bettles had a teleconference with Messrs Ramsden and Lavell about SS Residential. Mr Bettles' file note of that conversation relevantly records:

> Aaron advised that there were no unsecured creditors of this company. John advised that its only asset was a payment from the landlord as compensation for terminating the lease early. John said his office had just received the draft deed of settlement and he was talking to the director about the matter. Apparently around $400,000 will be paid by the landlord. John says that the director is suggesting that once the monies are received he will look to pay the secured creditors, distribute the profit to shareholders and then deregister / MVL the company.

At the time Mr Bettles recorded that the liquidators saw no need to interfere with the work being done by the director of SS Residential.

253 That is, as at 28 July 2016 Mr Bettles was informed by Messrs Ramsden and Lavell that SS Residential's only asset was the amount to be paid to it by Transport for NSW pursuant to a deed of settlement to be entered into by SS Residential and Transport for NSW (**SS Residential Deed**).

2.22.1 The SS Residential Deed

254 On 11 January 2017 Messrs Bettles and Khatri were appointed as liquidators of SS Residential (see below). Upon that occurring Mr Bettles sent a letter to Ramsden Lawyers requesting that, as they acted as SS Residential's solicitors and, on his understanding that moneys were recently receipted into their trust account and distributed, they provide a copy of Ramsden Lawyers' trust account ledger setting out all transactions relating to SS Residential together with a copy of their file. On or about 16 February 2017 Ramsden Lawyers provided a copy of its file to the liquidators.

255 Ramsden Lawyers' file included a copy of a lease held by SS Residential for premises at 55 Hunter Street, Sydney, New South Wales (**Hunter Street Premises**) and a copy of the SS Residential Deed which was dated 26 September 2016. Mr Bettles could not recall whether he reviewed the lease for the Hunter Street Premises and the SS Residential Deed at the time of their receipt.

256 The SS Residential Deed provided for the surrender of the lease of the Hunter Street Premises in consideration for the "Surrender Fee" which was defined as the amount of $455,993 (exclusive of GST) and was "equivalent to compensation determined in accordance with s 55 of the [*Land Acquisition (Just Terms Compensation) Act 1991* (NSW)]". Relevantly, cl 2.1 and cl 2.2 of the SS Residential Deed provided as follows:

> **2.1 Surrender of Lease**
>
> [SS Residential] surrenders all of its right, title and interest in the Lease and in the Land free of any Encumbrances and [Transport for NSW] accepts the surrender, with effect from the Surrender Date, subject to:
>
> (a) unless otherwise waived in writing by [Transport for NSW], [SS Residential] paying all rent and other moneys payable by [SS Residential] under the Lease up to and including the Surrender Date;
>
> (b) unless otherwise waived in writing by [Transport for NSW], the performance of all other obligations by [SS Residential] under, and [SS Residential] otherwise complying with the terms and conditions of the Lease (other than, subject to clause 3, [SS Residential's] Make Good Obligations), up to and including the Surrender Date; and
>
> (c) the execution of this document by [Transport for NSW].

2.2 Payment of Surrender Fee

Subject to clause 2.1, [Transport for NSW] will pay to [SS Residential] the Surrender Fee on the day which is 15 Business Days after the later of:

(a) the date on which [SS Residential] issues a valid tax invoice to [Transport for NSW] in respect of the Surrender Fee; and

(b) the date on which [SS Residential] signs and delivers the original copies of this document (in duplicate) and the Surrender Form to [Transport for NSW] or [Transport for NSW's] solicitors.

257 As at 30 September 2016 SS Residential was in arrears of payment of rental for the Hunter Street Premises. Transport for NSW's lawyers, Ashurst, informed Mr Jones that, pursuant to cl 2.1 of the SS Residential Deed, payment of the Surrender Fee was subject to compliance by SS Residential of its financial obligations under the lease which required SS Residential to pay all outstanding rental up to the Surrender Date, namely 26 September 2016.

258 By email dated 18 October 2016 Ashurst provided Mr Jones with a statement of the outstanding rental amount for the Hunter Street Premises, being $93,660.44. SS Residential was required to pay this amount before Transport for NSW would release the Surrender Fee. Mr Bettles understands that this amount was advanced to SS Residential by either Ramsden Lawyers or, in the alternative, Mr Ramsden, and was paid to Transport for NSW in November 2016.

259 Mr Bettles' understanding is confirmed by evidence given by Mr Jones. He explained, by reference to the WIP Report, that on 19 October 2016 he settled the details of the registration of a security interest against SS Residential by Ramsden Lawyers. This was put in place because, as Transport for NSW would not pay the Surrender Fee until the rental arrears were paid, Mr Ramsden decided that Ramsden Lawyers would loan the sum of $91,000 to SS Residential for that purpose. That is, as Mr Jones confirmed, if Mr Ramsden or Ramsden Lawyers had not paid the rental arrears, Transport for NSW would not have paid the Surrender Fee which was SS Residential's only asset.

2.22.2 Payment of the Surrender Fee

260 By reference to a Ramsden Lawyers' trust account ledger in relation to SS Residential, Mr Jones gave the following evidence about receipt and disbursement of the Surrender Fee:

(1) the Surrender Fee in the sum of $500,492.30 was received on 27 October 2016. Mr Jones did not know why the final amount of the Surrender Fee was different to the anticipated amount of $450,000;

(2) on 1 November 2016 $93,660.44 was transferred from Ramsden Lawyers' trust account to its general account as repayment of the loan from Ramsden Lawyers to SS Residential;

(3) on 3 November 2016 there was a further transfer of $5,500 from Ramsden Lawyers' trust account to its general account in payment of Ramsden Lawyers' tax invoice for "fees associated with work in relation to loan agreement between Ramsden Lawyers and [SS Residential]";

(4) on 9 November 2016 a cheque for $250,000 was drawn in favour of Mr MacVicar i.e. the MacVicar Payment. Mr Jones explained that this was in relation to an earlier agreement with Mr MacVicar that he resign as a director of companies in the MA Group and his claim for unpaid directors' fees i.e. the MacVicar Deed; and

(5) on 15 November 2016 the balance of $151,331.86 was transferred to matter no. 161547. Mr Jones recalls that this amount was paid to WMS for past fees which WMS claimed were owed.

2.22.3 The MacVicar Payment

261 At the Progress Meetings on 5 September 2016, 16 September 2016 and 6 October 2016 Mr Bettles sought an update about the status of the draft SS Residential Deed.

262 The agenda for the Progress Meeting which took place on 5 September 2016 included a general update on the status of SS Residential. On 6 September 2016 following that meeting Mr Bettles sent an email to Derek Finch of Ramsden Lawyers, Braiden and Messrs Ramsden, Jones, Carey, Young and Lavell setting out his "understanding of the action plan" from the 5 September 2016 Progress Meeting. The email included, under the heading "Ramsden Lawyers", "Arrange for the signing and lodgement of the [SS Residential Deed]".

263 On 16 September 2016 Mr Bettles sent an email to Messrs Finch, Marlborough, Jones, Carey, Young, Lavell and Ramsden setting out "some items for Monday afternoon's meeting agenda", being the next Progress Meeting. One of the items identified by Mr Bettles was an "[u]pdate from Ramsden as to the status of the [SS Residential Deed]".

264 On 6 October 2016, prior to the Progress Meeting which took place on the same day, Messrs Jones, Ramsden, Marlborough and Young and Braiden attended a meeting to discuss matters that may arise at the Progress Meeting.

265 On 6 October 2016 Mr Bettles sent an email to Messrs Finch, Marlborough, Jones, Carey, Young, Lavell, Ramsden and Braiden setting out a suggested agenda for the Progress Meeting to take place that afternoon which included as item 14 an "[u]pdate from Ramsden as to the status of the [SS Residential] payment". While he had no specific recollection, in cross-examination Mr Bettles accepted that it was possible that he was aware that by 6 October 2016 the SS Residential Deed had been agreed and that it was reasonable to assume that a payment was to be made fairly soon. However, Mr Bettles did not agree that there was any discussion at the Progress Meetings about the MacVicar Payment. He had the following exchange with senior counsel for ASIC, Ms Heyworth-Smith QC:

Ms Heyworth-Smith:	And given that that was your anticipation and you had been told previously that there was some secured creditors to be paid and then a distribution to be made to Iridium Holdings, you would have been interested to know what the secured creditors were owed, wouldn't you?
Mr Bettles:	I suppose. Yes.
Ms Heyworth-Smith:	You had been told that there were no unsecured creditors for SS Residential, hadn't you?
Mr Bettles:	That's correct. Yes.
Ms Heyworth-Smith:	And that suggests that the only amount that you anticipated would be coming out would be to a secured creditor?
Mr Bettles:	Yes. That's correct.
Ms Heyworth-Smith:	You made no inquiries during these meetings, did you, with respect to the amount of any secured indebtedness, did you?
Mr Bettles:	It doesn't appear as an agenda item. That's correct.
Ms Heyworth-Smith:	Nor in any of those progress meetings did you specifically ask Mr Ramsden if he intended to pay Ramsden Lawyers any amount of the anticipated $450,000, did you?
Mr Bettles:	That's call. I don't recall a conversation. Sorry. That's correct. I don't recall a conversation.
Ms Heyworth-Smith:	At none of those meetings did you ask Mr Ramsden nor Mr Lavell, nor anyone who was present, whether there was any contingent indebtedness of SS Residential, did you?
Mr Bettles:	I don't recall asking such a question. No.
Ms Heyworth-Smith:	I would suggest to you, Mr Bettles, that each one – sorry. I withdraw that question. I suggest to you, Mr Bettles, that the idea that $250,000 was going to be paid by SS Residential to Mr MacVicar was discussed at those progress meetings?
Mr Bettles:	So I disagree.

Ms Heyworth-Smith: I would suggest to you that you well knew from those discussions that Mr MacVicar was going to be paid $250,000 from the receipt of the payment?

Mr Bettles: I disagree.

266 In cross-examination Mr Jones said that the SS Residential Deed was a standing item at the Progress Meetings, the moneys to be paid pursuant to that deed were discussed at almost all of the Progress Meetings and the payment to Mr MacVicar was discussed as at least one of those meetings. As to the latter, Mr Jones accepted that there was no reference to the MacVicar Payment in the agenda or his notes for the Progress Meetings.

267 As set out above, on or about 27 October 2016 Ramsden Lawyers received the sum of $500,492.30 from Transport for NSW. Mr Bettles does not recall how or when he was told that the payment of $500,492.30 had been made to Ramsden Lawyers. A file note made by Mr Bettles on 1 November 2016 records that:

> Yesterday afternoon I had a text discussion with John Ramsden about the disbursement of the monies received from the settlement with the landlord of the company where it was agreed that Ramsden would not disburse any of the monies (other than in repayment of their loan to the company to finalise the settlement with the landlord) until obtaining my further approval.

As set out at [258] above, Mr Bettles was aware that either Ramsden Lawyers or Mr Ramsden personally had advanced SS Residential about $93,000 to finalise the settlement with Transport for NSW and to enable payment of the Surrender Fee pursuant to the SS Residential Deed.

268 On 8 November 2016 Mr Bettles telephoned Mr Marlborough about the disbursement of the moneys received from Transport for NSW pursuant to the SS Residential Deed. Mr Bettles' file note records that Mr Marlborough "agreed not to authorise the disbursement (sic) any of the monies until obtaining [his] further approval".

269 Later that day Mr Bettles gave instructions to Mr Carey in relation to the registered securities. His file note records:

> … Brian, as discussed please:
>
> 1. conduct PPSR searches of the security claimed by Ramsden, WMS, Colin MacVicar, Crest Accountants, & PG Downie
> 2. call RHG lawyers to confirm whether they have a conflict in reviewing these securities for us
> 3. call the ATO seeking advice on whether this company owes any taxes

4. draft a brief to the lawyer seeking advice on the securities and what we can do as shareholder.

270 On 9 November 2016 Mr Ramsden provided Mr Bettles with a copy of a deed of settlement dated 19 July 2016 between Mr MacVicar and SS Residential, i.e. the MacVicar Deed. In cross-examination, Mr Bettles accepted that it was possible that he requested a copy of the MacVicar Deed during his text discussion with Mr Ramsden on 31 October 2016 (see [267] above). The MacVicar Deed provided for Mr MacVicar to resign his position as a director of "all members of the Iridium Group" (i.e. the MA Group) except SS Residential in return for payment of the Settlement Sum (as defined) "within 2 (two) business days upon receiving payment of the SS Entitlement". Payment of the Settlement Sum was said to be in satisfaction of Mr MacVicar's claim that he was owed outstanding director fees for SS Residential and companies in the MA Group since the date of SS Residential's incorporation.

271 For the purposes of the MacVicar Deed, the term "Settlement Sum" was defined to mean $250,000 (i.e. the MacVicar Payment) and the term "SS Entitlement" was defined to mean the payment by Transport for NSW of $450,000 pursuant to the SS Residential Deed.

272 As set out at [260] above, the MacVicar Payment was transferred from Ramsden Lawyers' trust account for SS Residential to Mr MacVicar. By reference to the WIP Report Mr Jones gave the following evidence about the MacVicar Payment:

(1) on 3 November 2016 at 10.24 am and 10.55 am respectively Mr Jones had a telephone conversation with Mr MacVicar concerning payment to him and a telephone conversation with Mr Ramsden about whether Mr MacVicar had a security interest over SS Residential in relation to his claim for directors' fees. According to Mr Jones, Mr Ramsden informed him that he was considering whether Mr Bettles may have to pursue Mr MacVicar for the $250,000 as a preference and, if so, whether Mr MacVicar had any security interest registered for the directors' fees he claimed were owing;

(2) on 3 November 2016 at 11.44 am Mr Ramsden asked Mr Jones to undertake ASIC and PPSR searches of SS Residential to determine whether any security interest had been registered by Mr MacVicar; and

(3) on 9 November 2016 at 9.20 am Mr Jones had a discussion with Ramsden Lawyers' accounts department about paying $250,000 from the trust account to Mr MacVicar.

273 According to Mr Bettles, he did not know that the MacVicar Payment was made at the time. He did not authorise the payment, nor inform Ramsden Lawyers that he did not oppose the payment and neither Ramsden Lawyers nor Mr Marlborough informed Mr Bettles that the payment would be made. Mr Bettles only became aware of the MacVicar Payment after it had been made. I accept that to be the case, despite Mr Jones' evidence that the MacVicar Payment was discussed at least at one Progress Meeting. The MacVicar Payment was not referred to in any of Mr Jones' notes of the Progress Meetings, or any other notes and the unchallenged evidence is that Mr Bettles only received a copy of the MacVicar Deed on 9 November 2016, the date the MacVicar Payment was made.

274 Mr Bettles gave the following further evidence about the MacVicar Payment:

(1) as a liquidator of the sole shareholder of SS Residential, he did not have the power to control SS Residential's "conduct". The management of SS Residential was in the control of its directors;

(2) as a liquidator of the sole shareholder of SS Residential, he did not consider it reasonable or prudent to remove the directors as he did not know of any person who would be prepared to be appointed as a director in their place. In Mr Bettles' view neither Mr Khatri nor he could be appointed as a director given that they were the liquidators of Iridium Holdings. Further, and in any event, Mr Bettles was not prepared to accept such an appointment;

(3) based on his experience, Mr Bettles did not know of any power the sole shareholder of SS Residential had to pass a resolution at a general meeting to control its management, which was vested in the directors, so as to protect the assets and income stream of the company, unless such a power is specifically provided for in the constitution of the company; and

(4) Mr Bettles did not know, and does not now know, of any obligation of directors to comply with a resolution of its shareholders about the management of the company in business and nor how the shareholders could direct Messrs Marlborough or MacVicar not to authorise Ramsden Lawyers to make the MacVicar Payment.

275 As liquidator of Iridium Holdings Mr Bettles did not consider it reasonable or prudent to:

(1) apply to the Court for directions under s 511 of the Corporations Act without first seeking legal advice on such a course and what direction may have been sought that

would have prevented the MacVicar Payment, particularly in the context of the assurances he had received from Messrs Ramsden and Marlborough;

(2) apply for the appointment of a provisional liquidator, particularly given the assurances received from Messrs Ramsden and Marlborough. In addition there were no funds in the liquidation of Iridium Holdings to pay for such an application, particularly if it was contested; and

(3) apply for an injunction. Mr Bettles is aware that usually on such an application an undertaking as to damages would be required and, given that Iridium Holdings was in liquidation and had no funds, he and Mr Khatri would have been required to provide such an undertaking. Mr Bettles said that he would not have been prepared to do that personally. In addition there were no funds in the liquidation of Iridium Holdings to pay for such an application and the proceeding more generally. Before commencing the proceeding and bringing an application for injunctive relief Mr Bettles would have sought legal advice on the merits of doing so. He is also aware that a respondent or defendant to such a proceeding may have sought an order for security for its costs given that Iridium Holdings was insolvent and without funds.

276 After learning of the MacVicar Payment, Mr Bettles investigated the basis upon which the payment was made, including the services provided by Mr MacVicar. Mr Bettles also investigated the securities that had been granted by SS Residential and sought legal advice about them.

277 Mr Bettles was cross-examined extensively about the steps he could have taken in relation to the MacVicar Payment as liquidator of Iridium Holdings, the sole shareholder in SS Residential. He frankly accepted that there were steps that could have been taken to investigate whether Mr MacVicar was entitled to the claimed remuneration which constituted the MacVicar Payment including calling for payroll records, convening and passing a resolution at a general meeting of SS Residential requiring production of those records and seeking and inspecting the profit and loss statements and balance sheets for SS Residential. However, as noted above, the earliest date on which Mr Bettles became aware of the MacVicar Payment was on 9 November 2016, being the date it was made.

278 Mr Bettles also accepted that he did not make any inquiry of Mr Marlborough about Mr MacVicar's entitlement to the MacVicar Payment, apart from pursuant to the MacVicar Deed, either before or after his appointment as liquidator of SS Residential.

279 Mr Bettles accepted that at no time during 2016, whether as liquidator of Iridium Holdings or MAIC Human Rescores or in relation to his roles vis à vis SS Residential, did he see any document that suggested that Mr MacVicar had any entitlement to remuneration from SS Residential, other than pursuant to the MacVicar Deed. However, he also said that in the period after he became a liquidator of Iridium Holdings and before he became a liquidator of SS Residential, there was nothing to lead him to suspect that Mr MacVicar had no entitlement to $250,000 in director's fees.

280 More generally, Mr Bettles accepted that, had he known that SS Residential was trading while insolvent then, as liquidator of its sole shareholder, he could have taken steps to prevent it from doing so: he could have contravened a meeting and put SS Residential into a members' voluntary liquidation; or sought to appoint a provisional liquidator. However, at the time he saw no reason to interfere with the work being done by the director.

281 After his appointment as liquidator of SS Residential, as the investigations into its affairs progressed, Mr Bettles identified the following matters:

(1) there was outstanding rental owed by SS Residential of $34,138 (inclusive of GST) in relation to the Hunter Street Premises;

(2) WMS claimed to be owed $62,713;

(3) in 2017 the Deputy Commissioner of Taxation lodged a proof of debt for $2,193,769 for outstanding GST; and

(4) even if the MacVicar Payment had not been made it was likely that there would be no return to Iridium Holdings, as the sole shareholder of the company, from its winding up. However, this was not determined until after SS Residential had been placed into liquidation.

2.22.4 The winding up of SS Residential

282 On 22 December 2016 during the course of a meeting with Messrs Carey, Marlborough and Young and Braiden, Mr Marlborough informed Mr Bettles that he was happy to wind up SS Residential and signed a notice calling a shareholders' meeting and a declaration of solvency. An attempt by Worrells staff to lodge the declaration of solvency online with ASIC was unsuccessful because the company had a strike off action in progress. Accordingly the declaration of solvency was posted to ASIC for lodgement. Thereafter Mr Bettles was informed that SS Residential could not go into liquidation because it was required to lend Airlie

Beach moneys to discharge a payroll tax debt and Mr Marlborough sought to withdraw his consent and to object to the winding up of SS Residential.

283 Mr Bettles subsequently sought legal advice from Grants Law as to whether as liquidator of Iridium Holdings, the sole shareholder in SS Residential, he could proceed to wind up SS Residential. Ultimately, Grants Law advised Mr Bettles that Iridium Holdings could proceed to wind up SS Residential if it chose to do so and, as set out above, on 11 January 2017 Messrs Bettles and Khatri were appointed as liquidators of SS Residential.

284 Thereafter, Mr Bettles took steps to investigate the payments from SS Residential and to make enquiries with Mr MacVicar about the MacVicar Deed, the payment made to Mr MacVicar pursuant to it and Mr MacVicar's entitlement to those moneys as "director fees". In undertaking his investigations Mr Bettles sought a copy of Ramsden Lawyers' file in relation to SS Residential and, in particular, the MacVicar Payment and sought information from Mr MacVicar in relation to the directors' fees for which the payment was made. Ramsden Lawyers provided a copy of its file and on 19 April 2017 Mr MacVicar responded to the liquidators' enquiries.

285 Messrs Khatri and Bettles were appointed as liquidators of SS Residential in a members' voluntary liquidation. Mr Bettles said that: (1) had he known, or reasonably suspected, prior to his appointment that the declaration of solvency made by Mr Marlborough for SS Residential was not reasonably made he would have refused to accept the appointment as liquidator in a members' voluntary liquidation; and (2) had he known, or reasonably suspected, after his appointment that the declaration of solvency made by Mr Marlborough for SS Residential was not reasonably made he would have taken steps to convert the administration into a creditors' voluntary liquidation, which ultimately he did but for other reasons.

286 On 16 February 2017 Mr Bettles recorded in his file note titled "510 Investigations – Insolvency of Company" that:

> I note that we have received a proof of debt from the ATO for $2 million in relation to debts of the shareholder, and that WMS claims to be a secured creditor for $62k (albeit that WMS seems to have security over other companies as well and if they pay then there will be no debt owing). Last night I called Richard Marlborough about the ATO's claim and he was very surprised. He said that all the company did was lease office space in Sydney; it didn't employ staff or otherwise trade. Richard said that he would review the DPN he received to see if the company's name appeared on it. Would you please ring the ATO and ask how SS Residential is liable for the other company's debt, and if they have any documentation to substantiate their claim (eg. tax sharing

> agreement) would they please forward it to us. If they are not sure or you can't get anyone to answer your query, please draft a further evidence letter in the proof of debt section. If we satisfy ourselves that the ATO is a creditor of this company we will need to immediately call a meeting of creditors to convert the liquidation to a CVL.

287 Mr Bettles' file note of 25 March 2017 records that:

> It seems that the company may be insolvent because the ATO has lodged a proof of debt for $2 million for GST owing by the GST tax group, Transport NSW has lodged a claim (albeit this is being questioned), and WMS claims to be a secured creditor and there are no funds in the company to pay any of these debts. As a result we need to convene a meeting and turn the MVL into a CVL. …

288 On 3 May 2017 Mr Bettles caused a meeting of creditors of SS Residential to be held and Messrs McCann and McKinnon of Grant Thornton were appointed as liquidators.

2.23 MM Prime

289 MM Prime provided real estate marketing services and other property development services. As set out at [67(9)] above, at the pre-appointment meetings Mr Bettles was informed that MM Prime was solvent and that he would not be appointed to it initially as it was continuing to trade in order to recover work in progress.

290 Mr Bettles agreed that he would have first became aware that MM Prime was not insolvent upon receipt of the Iridium Holdings RATA following his appointment as liquidator to that company. That is, at about the time of his appointments on 22 July 2016, Mr Bettles became aware that there was an intercompany loan between Iridium Holdings and MM Prime as disclosed in the Iridium Holdings RATA. Mr Bettles accepted that at that point one of the options available to him as liquidator of Iridium Holdings was to put MM Prime into liquidation because it was insolvent.

291 As set above, on 25 July 2016 Mr Young forwarded the 14 July 2016 Email addressed to Messrs Ramsden, Jones and Mr Marlborough and Ms White to Mr Bettles. The text of the 14 July 2016 Email is set out at [61] above.

292 Mr Bettles' file note of his teleconference on 28 July 2016 with Messrs Ramsden and Lavell, records the following in relation to MM Prime:

(1) Mr Ramsden explained MM Prime's business and informed Mr Bettles that MM Prime's director had been looking to find someone to assist with managing the

business to enable completion of the work in progress so that the business could then be sold;

(2) Mr Lavell estimated the business to be worth about $1 million;

(3) Mr Ramsden informed Mr Bettles that the director had secured the interest of a business associated with Mr Young who would be prepared to work to complete the work in progress on the basis that it receives half of the upfront commissions received by MM Prime for each deal that succeeds. Mr Ramsden explained the rationale for that share of the commission;

(4) Mr Bettles was informed that there was a need for a large employee base to manage each client, a management contract was being prepared and it was the director's intention to present it to the liquidators of the sole shareholder of MM Prime before signing off; and

(5) there were no independent creditors demanding payment from MM Prime and most of its creditors were related.

293 Based on the information provided to him, Mr Bettles understood that in order for referral fees to be paid to MM Prime the land sales needed to settle and houses needed to be constructed. Thus MM Prime was required to work with clients, developers, builders and financiers to ensure the relevant milestones were met. Mr Bettles said that with Mr Young's assistance, MM Prime would be able to continue trading until the referral fees were paid, resulting in a return to MM Prime while Mr Young, through his business, would be paid a percentage of the referral fees. Mr Bettles' file note goes on to record that "[t]he liquidators are comfortable that they are not in a position to provide the expertise necessary to complete the work in progress without assistance, and consequently an arrangement suggested above is appropriate to maximise the value of the business which will ultimately be sold".

294 Despite becoming aware on his appointment as liquidator of Iridium Holdings that, contrary to the information provided earlier, MM Prime was insolvent, Mr Bettles was inclined to believe what Mr Ramsden told him about MM Prime's business on 28 July 2016. Mr Bettles explained that he had no reason to believe that a lawyer was not telling the truth and no reason to suspect that Mr Marlborough was not instructing his lawyers properly. It was only as time went on and, as Mr Bettles described it, "by the end" that Mr Marlborough's conduct led him to suspect that he was not telling the truth.

295 On 28 July 2016 Mr Jones emailed a copy of a draft of the MM Prime Management Deed which at the time was between BPW, MM Prime, Iridium Financial Planning and Capricorn Securities to Messrs Bettles, Carey, Lavell and Ramsden.

296 On 29 July 2016 Mr Bettles had a telephone discussion with Mr Marlborough about the completion of MM Prime's work in progress. In the course of that discussion, as recorded in his file note, Mr Bettles suggested that the arrangement for Mr Young's company, BWP Services, to complete the work in progress be altered as follows:

> 1. Benchmark receiving 100% of the commissions of the 1st 10 homes. Benchmark is just starting out and has a lot of upfront costs. Whilst I wasn't interested for MM Prime to be funding his new entity, it was necessary to keep Benchmark operating so that it could assist us in converting all of the work in progress, which is somewhere around $1 million according to WMS. Consequently assisting Benchmark in the beginning was necessary.
> 2. the commissions would then be split 50/50 on the next 20 homes
> 3. MM Prime would receive 100% of the commissions on the next 10 homes
> 4. the balance of the commissions would be split 50/50
> 5. all funds would be banked to MM Prime and Benchmark would invoice MM Prime weekly
> 6. Benchmark would be responsible for all costs to manage its business, including keep the computer system going. Richard said he would chat to Liam but did not envisage a problem with that. We arranged to meet on Monday afternoon to discuss the practicalities of settlements, etc.

297 Mr Bettles was cross-examined about the proposed arrangement with BWP Services as set out in the 14 July 2016 Email in the preceding paragraph. He agreed that MM Prime was going to weight the commission first received in favour of BWP Services in order to provide it with working capital. Mr Bettles also accepted that he did not consider whether there may be an entity other than in the Benchmark Group capable of recovering the work in progress, nor did he advertise the need to recover the work in progress or speak with any business brokers about other options for its recovery. The only avenue Mr Bettles considered for recovery of MM Prime's work in progress was the Benchmark Group's proposal.

298 Mr Bettles did not approve any management arrangement between MM Prime and Mr Young's company in any capacity, including as liquidator of the sole shareholder of MM Prime. He considered that was a matter for the director of MM Prime. The only suggestions Mr Bettles made were, as recorded above, in relation of the timing of payment to BWP Services. Similarly, he did not provide any advice in relation to the proposed management deed.

Although he and his staff suggested some amendments, they did not go to the management arrangement itself.

299 Mr Bettles understood that by not winding up MM Prime and by MM Prime engaging BWP Services to manage the business activities under the management arrangement, MM Prime had the best chance of realising its assets which would benefit Iridium Holdings and other creditors.

300 On 2 September 2016 Mr Bettles had a further telephone conversation with Mr Marlborough. Mr Bettles' file note of that conversation records (as written):

> Richard Marlborough advising that he has just spoken to Simmons Builders who had been contacted by the QBCC enquiriing as to why Simmons was dealing with Benchmark on former clients of Members Alliance. Richard explained that if Benchmark doesn't do it then there is a real risk that the clients will pull out of the contracts and the work in progress won't be realised. I said I understood that. Richard seemed to want me to explain that to the QBCC and didn't seem to understand that until I was external administrator of MM Prime I didn't have any authority. He thinks of the MA group being in liquidation and doesn't distinguish the individual entities. I queried as to who has the contracts with the clients. It seems that MM Prime has an arrangement with the land owners, and the clients have land purchase contracts with the landowners. The clients have building contracts with the builders, but there is no agreement between the client and any Members Alliance company; the wip from the building contracts is run through MM Prime to be consistent with the agreement with the developers. I suggested that a letter should be sent to the QBCC from MM Prime noting their contact with Simmons and explaining why Benchmark is involved. The question became whether the letter came from the lawyer for the liquidator or the lawyer for the company. Richard doesn't want to put the company straight into liquidation, but is prepared to put it into VA. We agreed to discuss the matter with Ramsden Lawyers at our teleconference on Monday.

301 At about that time, that is early September 2016, Mr Bettles became concerned that matters with MM Prime were not progressing at a sufficient pace. Mr Bettles did not have any authority in relation to the management of its affairs prior to any appointment. Mr Bettles was initially told that MM Prime would be placed into liquidation soon after entry into of the MM Prime Management Deed but, as was apparent from his conversation referred to in the preceding paragraph, he was subsequently informed by Mr Marlborough that he did not wish to place MM Prime into liquidation but was prepared to have it placed into voluntary administration.

302 Mr Bettles raised the status of MM Prime at the Progress Meeting held on 5 September 2016. At that meeting Mr Bettles sought an update on the management of MM Prime's work in progress.

303 On 6 September 2016, Mr Bettles sent an email to the attendees of the 5 September 2016 Progress Meeting, namely Messrs Finch, Jones, Carey, Young, Ramsden and Marlborough and Braiden, which records the following action items in relation to MM Prime:

> My understanding of the action plan from yesterday was:
>
> …
>
> Benchmark Private Wealth ·
>
> - Prepare a schedule of the properties the subject of the MM Prime Investment Pty Ltd work in progress, including but not limited to the address of each property, the name of the client, the name of the land owner, the name of the builder, and the likely dates and amounts of fees to be paid to MM Prime Investment Pty Ltd from the developer and builder.
> - Attach to the above schedule each agreement (eg. call option) with the developer and builder that gives rise to the payment of fees to MM Prime Investment Pty Ltd.
> - Provide an updated list of the properties that have settled between 22 July 2016 and the date of the above schedule, including a breakdown by property of the remuneration paid to MM Prime Investment Pty Ltd by the developers and builders since 22 July 2016.
> - …
>
> Ramsden Lawyers
>
> - …
> - Amend the deed between MM Prime Investment Pty Ltd and Benchmark for:
>   - The general changes to be provided by Worrells
>   - The remuneration to be paid to Benchmark in light of the information contained in the schedule of properties above.
> - Upon receipt of the schedule of properties and supporting documentation, provide advice to the director and shareholder of MM Prime Investment Pty Ltd on the liability of the developers and builders to pay remuneration to MM Prime Investment Pty Ltd.
> - …
>
> Worrells
>
> - Forward to Ramsden suggested amendments to the deed between MM Prime Investment Pty Ltd and Benchmark.
> - Upon receipt of the MM Prime Investment Pty Ltd schedule of properties and supporting documentation, arrange a meeting between Benchmark and Ramsden to finalise the terms of the remuneration clauses.
>
> …

304 The documents provided by the Benchmark Group relating to MM Prime were the subject of discussion at the 19 September 2016 Progress Meeting. Mr Bettles' notes from the meeting include an update from BWP Services on the schedule of properties and supporting documentation for MM Prime, an update from BWP Services on the work in progress converted since 22 July 2016 and an update from Ramsden Lawyers on amendments to the draft MM Prime Management Deed.

305 On 23 September 2016 Messrs Carey and Young met to discuss "moneys to be collected and terms of the remuneration between Benchmark and [MM Prime]". Mr Carey's file note of the meeting includes that:

> 1. There is $2.5M in outstanding WIP,
> 2. At absolute worst 10% of the deals may be lost,
> 3. Of the $2.25M balance, Benchmark will receive the first $500K - down from $600K (this is needed to fund Benchmark until its own deals start to flow and without which Benchmark won't make it and therefore [MM Prime] will lose all the deals), and of which amount Benchmark has already received $288K (per the CBA statement we discussed),
> 4. Of the balance of the funds, all moneys are split 50/50 with [MM Prime's] 50% to be paid to a third party trust account (which will not be Ramsden's), and from which we may need to authorise payment of bills for which [MM Prime] are rightly liable, but that will be at our control from the third party trust account).
> 5. There will be an amendment to subsection c. to provide a clearer system to reconcile and adjust the moneys collected such that Benchmark and [MM Prime] ultimately end up receiving 50% of the total moneys.
> 6. There will be an amendment to the clause dealing with Benchmark's billing cycle as it currently allows 2 days to bill and pay which is insufficient for Liam to do what needs to be done.

306 Following that meeting, drafts of the proposed MM Prime Management Deed between MM Prime and BPW were provided to Worrells for comment. Ultimately, on 11 October 2016 MM Prime and BPW entered into the MM Prime Management Deed. The purpose of the MM Prime Management Deed was to appoint BPW to manage MM Prime's business. Although the deed was dated 11 October 2016 it provided for a "Commencement Date" of 25 July 2016. Clause 3 of the MM Prime Management Deed was titled "Remuneration" and included as cl 3.1:

> In consideration of [BPW] providing the Management Services [MM Prime] will pay [BPW] the Management Fee which is comprised of fifty percent (50%) of the work in progress collected on behalf of [MM Prime] with the division of the collected work in

progress to be tiered such that [BPW] receives

(a) one hundred percent (100%) of all work in progress for the first five hundred and fifty thousand dollars ($550,000.00) of payments received following the date of this Deed ('**First Tranche Settlements**')

(b) fifty percent (50%) of all work in progress for the next one million two hundred thousand dollars ($1,200,000.00) of payments received following the First Tranche Settlements ('**Second Trends Settlements'**); and

(c) the remainder of the revenue following the Second Tranche Settlements will be divided between [MM Prime] and [BPW] such that the overall division between [MM Prime] and [BPW] for all work in progress for [MM Prime] is fifty percent (50%) each ('**Final Settlements'**).

307 At the 26 October 2016 Progress Meeting the following items relating to MM Prime were included in the agenda: (1) an update from BPW and Mr Marlborough in relation to providing copies of agreements with the land owners and builders to substantiate MM Prime's work in progress; and (2) an update from BWP and Mr Marlborough on the latest MM Prime work in progress spreadsheet including realisations. In cross-examination Mr Jones, who was present at the meeting, agreed that by these items Mr Bettles was seeking an update in relation to agreements with landowners to substantiate MM Prime's entitlement to commissions and an update of the work in progress spreadsheet for the purpose of understanding the commissions due to MM Prime.

308 Mr Bettles said, in relation to the former, that no agreements with land owners and builders were provided to him at the meeting and that he was told, although he cannot now recall by whom, that there were no such written binding agreements for the payment of referral fees for clients introduced by MM Prime. Mr Bettles was also told that the arrangements were no more than a "handshake deal" which were dependent on future introductions being made by MM Prime. Mr Bettles sought copies of any documentation relating to the referral fees so that he could review the documents and, if necessary, seek legal advice as to what was likely to happen if MM Prime was placed into liquidation. This was because Mr Marlborough had informed Mr Bettles that the developers would use the agreements to avoid paying if the company went into liquidation.

309 On 23 December 2016 Mr Young sent an invoice to Messrs Marlborough and Bettles made out to MM Prime for commissions on property settlements as set out in the schedule attached to the invoice. The total amount claimed in the invoice was $161,095.

310 Thereafter there were numerous exchanges, principally between Messrs Bettles and Marlborough, about transactions and fees owing to and or paid to MM Prime and the amounts received by BWP Services pursuant to the MM Prime Management Deed. It is not necessary to set out those exchanges.

311 In February 2017 a new issue arose, namely BPW informed MM Prime that, of the fees received for the First Tranche Settlements in accordance with cl 3.1(a) of the MM Prime Management Deed, it had paid approximately $270,000 to employees for commissions. BPW requested MM Prime to reimburse it for payment of employee commissions. Mr Bettles was invited to outline his position in relation to the proposal for reimbursement. It seems that a response was provided, although it is not in evidence before me.

312 On 2 March 2017 Messrs Bettles and Carey had a telephone conference with Shane Grant of Grants Law about correspondence received from Ramsden Lawyers on 28 February 2017 concerning MM Prime. The file note of that discussion records:

> 1. the MM Prime Investments work in progress. The shareholder of MM Prime (Iridium Holdings; client 2524) was never going to get a return from the collection of the work in progress. The claims against MM Prime are greater than the total amount of the wip (about $2 million). We have known that all along. As the liquidators of the shareholder we just wanted to make sure that the director was acting in the interests of the company and its creditors so as to maximise the return. We recognised that Benchmark was being paid a lot of money, but there was no documentation to support [MM Prime's] entitlement to payment from developers, the company had no staff, somebody needed to ensure that the clients would not exercise their rights and pull out of purchase contracts, and somebody needed to have leverage over the developers so that they would pay. Benchmark ticked all those boxes and was the director's choice. Our option as the shareholder was to seek to have the company wound up, but it was clear that the return in the liquidation scenario would be drastically reduced, if there was any return at all. So whilst Benchmark was being paid a lot, in the context of [MM Prime] getting nothing it seemed reasonable. However it now seems that there has been a greater drop off than anticipated with no specific notification to us and Benchmark is not sharing in that loss. So now the returns are less but Benchmark is being paid the same. In effect they were getting 50% of the money on the original numbers, but now they are getting 75%. In addition they now want to be reimbursed for payments they made to employees of [MM Prime], further reducing the return to [MM Prime]. As the shareholder we think this is inequitable. Benchmark should share in the loss equally with [MM Prime], particularly since they were the ones engaged to get the contracts to completion and the fees paid by the developers. We recognised that we couldn't instruct the director to anything, and winding up [MM Prime] would be worse than the position the company is faced with now. So ultimately it was agreed that Shane would write back to [MM Prime] rejecting their offer for a meeting to discuss the matter, asking to justify why the conversion hasn't been as great as expected, and expressing our view that a more equitable outcome should be struck in the interests of [MM Prime]. We didn't feel that the meeting would achieve anything, because we can't instruct the director, didn't want to appear to be instructing anybody and felt that our concerns about the outcome could be better put by correspondence.

313 Further correspondence ensued in relation to the issues that had arisen as between MM Prime and BPW and Mr Bettles' concerns identified above, including the conversion and collection of MM Prime work in progress.

314 On 22 March 2017 Mr Bettles learned that judgment had been entered against MM Prime and Messrs MacVicar and Marlborough in the District Court of Queensland in the sum of $191,256.92.

315 On 30 March 2017 Mr Bettles sought advice from Messrs Grant and Blanchard of Grants Law as to whether, among other things, a sole shareholder can voluntarily wind up a company as a creditors' voluntary liquidation.

316 On 6 April 2017 Messrs Bettles and Carey met with Mr Young, Ms Jackson and Ms Brown about a number of things including in relation to the "MMPI [MM Prime] Dispute". In relation to that item Mr Bettles' file note records that:

> Liam said that he has not been actively involved with liaising with Ramsden on the washup of the [MM Prime] WIP collection, although he had heard there was a dispute with the liquidators, and was curious as to what was going on. I noted that as a material number of deals had fallen over the monies Benchmark were getting were skewed in their favour, when the deal was always that [MM Prime] and Benchmark would get an even split. I suggested that was inequitable and should be reviewed. Liam noted that the developer was not paying the money, so we both agreed that it might be a moot point to argue. I said my lawyers had pointed my argument out to [MM Prime's] lawyers but had not heard anything further, perhaps because there was no money.

317 On 20 April 2017, Messrs Bettles and Carey had a telephone conference with Mr Grant of Grants Law concerning, among other things, MM Prime. Mr Bettles' file note records that he noted that the ATO had issued a demand to MM Prime for about $2 million more than two weeks ago, that no payment had been received and that he understood that the ATO would issue statutory demands that week. Mr Bettles thus indicated that they had to decide whether the shareholder should wind up MM Prime. Mr Bettles instructed Mr Grant to undertake searches to see if there was an extant application to wind up MM Prime. Later that day Mr Grant informed Mr Bettles that the extant winding up application against MM Prime had been dismissed on 4 April 2017.

318 On 30 April 2017 Mr Bettles put matters concerning MM Prime on hold and took steps to appoint members of Grant Thornton as its liquidators. On 5 May 2017 MM Prime was wound up in a creditors' voluntary winding up instigated by Mr Bettles as liquidator of Iridium Holdings. Messrs McCann and McKinnon of Grant Thornton were appointed as its liquidators.

2.24 Elderton Transaction

319 On 25 February 2015 Richard Whitehead who described himself as managing director of Elderton Group, also referred to as the RILOW Group, sent an email to Braiden, copied to John Castellano, in which he wrote:

> Please find attached below summary of building cost/land cost split up. I have included $20,000 in the land portion and $40,000 in the house portion. I would be hesitant to add anymore in the land value due to potential valuation issues down the track. Im assuming that you would invoice us for the commission claim on/after land settlement, and also upon our receipt of the first progress claim during construction? Happy to discuss further if required. John will also send you a couple of other properties in different geographical locations that we can offer you to propose to your clients. No doubt he will send this email tomorrow, but for now, hopefully this will keep things moving. I believe we have also passed on our draft plan of subdivision to our conveyancer to get contracts finalised.

320 On 11 April 2016 Sandra Pepi of MM Prime sent an email to Alan Robson at the RILOW Group, copied to Braiden, attaching "land component invoices" for the lots listed in the email which she said were "due to settle shortly". Ms Pepi requested that the commission fee be banked directly into MM Prime's bank account after settlement and provided account details.

321 Between 11 and 13 April 2016 MM Prime issued eight invoices for $20,000 to Elderton totalling $160,000 (**First Tranche MM Prime Commission Invoices**). The First Tranche MM Prime Commission Invoices sought payment into a bank account held by MM Prime with the CBA.

322 On 26 September 2016 Mr Bettles in his capacity as liquidator of Astro Holdings caused a demand to be issued to Members Alliance Incorporated care of Mr Marlborough for payment of $7,809 (**Astro Demand to Members Alliance Incorporated**). Astro Holdings held 2% of the shares in Members Alliance Incorporated.

323 Between 17 October 2016 and 16 December 2016 MM Prime issued six invoices to Elderton, for $40,000 each, totalling $240,000 (**Second Tranche MM Prime Commission Invoices**). Those invoices sought payment into a bank account held by Members Alliance Incorporated with Westpac.

324 Other than what he described as "put and call option agreements" Mr Bettles was not aware that there were any binding agreements in place between MM Prime and developers for the payment of referral fees. He had not been provided with any agreement between MM Prime and Elderton or any other document which evidenced an entitlement by MM Prime to

commission payable by that company. The work in progress reports which Mr Bettles received for MM Prime in relation to the payment of commissions did not identify any properties which concerned Elderton.

325 The only evidence of which Mr Bettles is aware which might concern these payments is in the "500 Investigations – Creditor Information" file note for Astro Holdings in which Michael Thomas of Worrells recorded two telephone calls from Mr Robson on 18 October 2016. The relevant file notes provide (as written):

> MT 18/10/16 09:55 AM: PC in from Alan Robson. He is the financial controller for a company that owes Members Alliance Incorporated pty Ltd Money (now known as Astro Holdings pty Ltd).
>
> His company contracted with Astro Holdings Pty Ltd to sell 7 lots. A previous payment was paid to MM Prime Investments, but he was unsure if the debt was with Astro Holdings pty Ltd now in liquidation.
>
> He did not want to provide any further details including the company he was calling from or his phone number. I asked if he was willing to discuss the contract more with you (but he wasn't) and asked if he could send through some correspondence to our office for us to review.
>
> He will discuss this with the directors and revert back in due course.
>
> Emailed BNC, JB and LB regarding conversation.
>
> MT 18/10/16 02:37 PM: PC in from Alan Robson from Rola Group (or it could have been Bolo Group). Alan advised one of the company's director's had spoken to Mr Marlborough and John Ramsden from Ramsden Lawyers and was satisfied the monies were being paid to a company not in liquidation.

326 On 19 October 2016 Mr Bettles telephoned Mr Marlborough who was a director of Members Alliance Incorporated as well as MM Prime. Mr Bettles' file note records (as written):

> Richard said that Rolo Group had done a deal with Members Alliance Incorporated Pty Ltd … in relation to 7 properties sold to Chinese buyers that Braydon Marlborough knew. Richard said he wasn't sure why Mr Robson had thought Astro Holdings Pty Ltd was involved, because it was merely a bucket company.

Below that entry Mr Bettles recorded that "[b]ased upon the above it seems there is nothing here to recover".

327 Mr Bettles did not recall that the books and records of, or the report as to affairs for, Astro Holdings referred to any amount owing to it by Elderton.

328 As set out at [307]-[308] above, at the 26 October 2016 Progress Meeting Mr Bettles sought an update in relation to the provision of copies of agreements with landowners and builders but

no such agreements were provided. Mr Bettles was told that there were no such written binding agreements for the payment of referral fees for clients introduced by MM Prime and that the arrangements were no more than a "handshake deal" which was dependent on future introductions by MM Prime being forthcoming.

329 Mr Bettles was cross-examined about these interactions and the Elderton Transaction. He accepted that: as liquidator of Astro Holdings he could have sought Astro Holdings' records to see if there were entries for receipts from the RILOW Group, but he did not do so; he could have, but did not, Google "Alan Robson" and the "RILOW Group" (although at the time Mr Bettles understood Mr Robson to be from the "Bolo" or "Rolo" Group); and he could have asked Mr Marlborough for documents showing the arrangements between the Rolo Group (which Mr Bettles understood to be the relevant company) and Members Alliance Incorporated but he did not. Mr Bettles was also aware that Members Alliance Incorporated owed approximately $7,000 to Astro Holdings but he did not, at the time, ask Mr Marlborough to discharge that indebtedness.

2.25 Capricorn Securities and Iridium Financial Planning

330 Capricorn Securities held an AFSL and Iridium Financial Planning was its authorised representative. Those companies operated a financial services business including providing risk insurances and financial planning. The major asset of the business was referred to as the **Client Book**. Mr Bettles explained that the Client Book is a reference to the entitlement to receive income by way of trailing commissions and is also referred to as the "trail book" or "risk book".

331 On about 22 July 2016, when Mr Bettles was appointed as liquidator of Iridium Holdings, his understanding was that:

(1) Capricorn Securities and Iridium Financial Planning were solvent;

(2) Mr Marlborough, who was the sole director of Capricorn Securities and Iridium Financial Planning, wished to sell the Client Book prior to placing those companies into external administration;

(3) the Client Book was worth about $1 million and Mr Lavell was preparing a formal valuation of it;

(4) the entitlement to the trailing commissions terminated if Capricorn Securities went into external administration or lost its AFSL and, if that occurred, the value of the Client Book would be lost;

(5) the sale of the Client Book was expected to occur in a relatively short timeframe and Mr Marlborough was already in discussions with a potential buyer; and

(6) Iridium Holdings, as sole shareholder of Capricorn Securities and Iridium Financial Planning, would benefit by any gain realised in the sale of Client Book.

332 Further, Mr Bettles understood that Mr Marlborough, in his capacity as a director of each of the MA Trading Companies, and Mr Young had reached a verbal arrangement about the ongoing management of the MA Trading Companies by Mr Young. Mr Bettles' understanding was informed by:

(1) the matters told to him at the pre-appointment meetings on 8, 14 and 16 July 2016; and

(2) the 14 July 2016 Email which was forwarded to him by Mr Young on 25 July 2016.

333 Insofar as Capricorn Securities and Iridium Financial Planning were concerned, the 14 July 2016 Email relevantly provided:

> …
>
> 3. Payment of all trail income received by [Capricorn Securities] and [Iridium Financial Planning] in order to manage existing WIP while a sale to market is arranged;
>
> 4. Payment of 25% of any up-front commissions received in order for NewCo to pay relevant incentives to retained staff to complete existing WIP;
>
> 5. Any costs to maintain Capricorn or Iridium Financial Planning are to be paid from the remainder of up-front commissions received. This includes (but is not limited to) payment of the existing statutory demand, any required professional indemnity insurance and financial planning software; …

334 Mr Bettles understood from the 14 July 2016 Email that: all of the trail income was to go to NewCo, i.e. the Benchmark Group; and despite the intent of point 4, there would not be any new work written. Mr Bettles did not consider, in circumstances where no new work was to be written, how costs to maintain Capricorn Securities and Iridium Financial Planning could be met, he did not consider where the money to fund their ongoing expenses would come from and he left those matters to the director, Mr Marlborough.

335 On 28 July 2016, Mr Bettles had a telephone conference with Messrs Ramsden and Lavell. His file note titled "540 Investigations – Associated entities (Capricorn Securities Pty Ltd)" includes (as written):

> Aaron advised that Iridium Financial Planning Pty Ltd was an authorised representative of Capricorn Securities Pty Ltd which held an AFSL. Iridium Financial Planning Pty Ltd received income from providing advice to clients and trailing commissions from investment firms if the client took up an investment. Aaron and the director felt that if the company was placed into liquidation that was likely enough of a breach for the clients not to pay their fees and the insurance companies to stop paying trailing commissions. As Aaron felt that the business of Iridium Financial Planning Pty Ltd was worth around $1 million and that loss of the trails in particular was a loss of the value of that business, then liquidation was not an appropriate step to take. It was also noted that the one unsecured creditor of the company owed $70,000 was on a payment plan there was no pressing need to put the company into external administration. The director was apparently looking to sell the business; John advised that they were in discussion with a potential buyer. Aaron advised that he was preparing a formal valuation.

Immediately after recording that conversation Mr Bettles recorded in the same file note the following:

> At this time as liquidator of the sole shareholder of Iridium Financial Planning Pty Ltd I am happy to not seek to put Iridium Financial Planning Pty Ltd [into external administration] on the basis that the potential loss in value of the business could be material, and consequently will allow the director to proceed on the basis set out above.

336 On 29 July 2016 Mr Bettles:

(1) had a telephone conversation with Mr Marlborough about the sale of the Client Book. His note records that he informed Mr Marlborough that:

> [T]he liquidators did not have any objections to the proposal that Liam Young's company, Benchmark, being paid 25% of the upfront commissions to convert the work in progress, but it would be on the basis that Benchmark assists in selling the trail book and does not charge any fees/commissions for the sale, and that immediately upon the Trail Book being sold, the company was placed into liquidation.

Mr Bettles' file note also records that Mr Marlborough did not expect that Mr Young would "have any objections to the fee" and that he did not have "any problems with the liquidation"; and

(2) had a telephone discussion with Mr Ramsden to update him on his discussion with Mr Marlborough. Mr Bettles' file note of that conversation records that Mr Ramsden informed him that Crest Accountants had expressed an interest in the Client Book and was undertaking due diligence.

337 On 9 and 17 August 2016 Mr Jones had a telephone conversation with a representative of the Credit and Investments Ombudsman (**CIO**) (now the Australian Financial Complaints Authority) about, relevantly, Capricorn Securities. While Mr Jones can no longer specifically recall these conversations, he can recall that that there was a concern at about this time about the potential for the CIO to cancel Capricorn Securities' membership of the organisation. Membership of CIO was a requirement of Capricorn Securities' AFSL.

338 On 21 November 2016 Mr Bettles prepared a decision memorandum (**November Decision Memorandum**) in his capacity as liquidator of Iridium Holdings to address the following issue:

> Whether as the liquidators of the sole shareholder of [Capricorn Securities] we agree with the decision of the sole director, Mr Richard Marlborough, to accept the offer from Crest Accountants to purchase the trail book.

339 Mr Bettles explained that the November Decision Memorandum summarises the rationale for his decision in his capacity as liquidator of Iridium Holdings not to seek to intervene in Mr Marlborough's decision to continue trading Capricorn Securities and Iridium Financial Planning until the sale of the Client Book. In that regard the relevant part of the decision memorandum provides:

> On 22 July 2016 Messrs Jason Bettles & Raj Khatri were appointed liquidators of [Iridium Holdings], which is the sole shareholder of Capricorn Securities Pty Ltd ("Capricorn") and Iridium Financial Planning Pty Ltd ("Iridium FP"). Capricorn was granted an AFSL on 22 April 2014, and together with Iridium FP as the corporate authorised representative, provided financial services including risk insurances and financial planning.
>
> When we were approached by the director to act as the external administrators of [Iridium Holdings] (together with a number of other companies in the Members Alliance business) he indicated that Capricorn and Iridium FP were solvent, but should be wound up with the other companies in the business only once the trail book had been realised. It seems that the agreements with the insurance providers/platform operators that gave rise to the income earnt by Capricorn contained clauses which provide for the termination of the agreements with Capricorn should Capricorn be wound up or lose its AFSL. It was therefore inappropriate to immediately wind up Capricorn and Iridium FP and leave control of the sale with the liquidators, rather the liquidators (as liquidators of the sole shareholder) needed to work with the director to allow the sale of the trail book. …

340 Two of Capricorn Securities' key relationships in terms of the Client Book were with Macquarie Life Limited and Macquarie Bank Limited (collectively, **Macquarie**) and **TAL** Life Limited. Capricorn Securities had distribution agreements with each of Macquarie and TAL which entitled it to commissions upon distribution of financial products on their behalf to clients.

341 The agreement with Macquarie provided that it would terminate immediately in the event that the "Distributor's authorisation under its AFSL is cancelled, suspended or varied … and Macquarie Life has notified the same to the Distributor" or if any party "is or becomes insolvent" and that in the event of a termination of the agreement the "Distributor's right to receive Remuneration" is terminated.

342 The agreement with TAL provided that it could be terminated immediately by either party if, among other things: a petition was presented; a resolution passed or an order made for the winding up of the other party; the other party was placed under voluntary administration; or the "Company cease[d] to hold the necessary licence or authorisation to enable them to perform the Services".

2.25.1 Iridium Financial Planning and Capricorn Securities Management Deeds

343 Mr Bettles was not present at, nor involved in, the execution of the Iridium Financial Planning Management Deed or the Capricorn Securities Management Deed.

344 Notwithstanding that Mr Bettles was not present at the time of the execution of those deeds and was not the liquidator of either Iridium Financial Planning or Capricorn Securities in the period leading up to their execution, on 17 August 2016 Mr Jones provided Mr Bettles with a copy of a draft management deed between BPW, Capricorn Securities and Iridium Financial Planning.

345 Mr Bettles had a cursory review of the draft provided and on 20 August 2016 instructed Mr Carey to review the draft deed given, as Mr Bettles put it, "we will likely be appointed liquidators of these companies". In doing so Mr Bettles provided his comments in relation to the draft.

346 After Mr Carey undertook his review, he provided suggested amendments to the draft deed to Ramsden Lawyers. One of the general observations made by Mr Carey was that it may be prudent to create two separate management deeds: one for Iridium Financial Planning; and one for Capricorn Securities.

347 The draft Iridium Financial Planning Management Deed and the draft Capricorn Securities Management Deed were included as agenda items for the 6 September 2016, 19 September 2016 and 6 October 2016 Progress Meetings.

348 Mr Bettles was cross-examined about the Iridium Financial Planning Management Deed and the Capricorn Securities Management Deed. He was aware that, although dated 13 October 2016, they operated retrospectively.

349 However, it was apparent that, at the time of the execution of the deeds he was not aware of much of the detail they covered. For example, in relation to the Iridium Financial Planning Management Deed, he did not know if any work in progress had been collected in the period between 25 July 2016, the operative date of the deed, and 11 October 2016, nor was he aware of the costs of maintaining Iridium Financial Planning, for which that company remained liable. In relation to the Capricorn Securities Management Deed, Mr Bettles was unaware of how much was being collected in commissions, 50% of which were to be paid to BPW, nor how much was to be paid for management services to Troy Dyer, a financial adviser employed by the Benchmark Group, or to the responsible manager, Anthony Douglas. Mr Bettles left those matters to the director, Mr Marlborough.

2.25.2 Liaison with ASIC

350 From the time of his appointment to Iridium Holdings Mr Bettles took steps to liaise with ASIC and Mr Marlborough to ensure that Capricorn Securities was able to maintain its AFSL.

351 On 5 August 2016 Mr Bettles was contacted by Mr Dunn of ASIC. Mr Bettles' file note of his conversation with Mr Dunn records:

> Paul noted that we had been appointed to the number of companies that formed part of the Members Alliance business. He advised that the ASIC had investigated the affairs of [Syree Enterprises] for 2 years with the investigation only ceasing in early 2016. He said that in August 2015 the ASIC had become aware of the solvency issues on Iridium Holdings and had numerous discussions with the directors. He noted that recently WPIAS had issued an audit report expressing concerns about the financial position of the companies. I gave him the background to the appointment over 18 companies and that a decision had been made to specifically exclude Capricorn Securities Pty Ltd and Iridium Financial Planning Pty Ltd at this stage because they held AFSLs and the appointment of an external administrator would mean the immediate cancellation of their licenses which would result in the trail commissions drying up and us losing an asset worth between $1 million and $1.5 million. I said that as the liquidator of the sole shareholder of the company I was working closely with the director to try and realise the value in that trail book and then put the company into liquidation. I said that I understood that Capricorn Securities Pty Ltd and Iridium Financial Planning Pty Ltd were solvent, but as the sole shareholder was insolvent the idea was for the trail book to be realised, the funds to be distributed to the shareholder which would make them available for the creditors. I said that in respect of credtiors there appeared to be the ATO who indicated they were owed $29 million across the group including $7 million in superannuation, employee entitlements other than superannuation of $1 million, and then creditors in some building companies. He was aware of the building companies and it seemed had been speaking to the QBCC. I said I was interested in preserving the

> AFSLs until the sale of the trail book could be completed and asked if that was possible. Paul said that it was and he would talk to the relevant people in the ASIC and send me an email with details of how to apply. I suggested that when that application was ready I would try and arrange to meet with him personally and discuss the whole matter.

352 On 8 August 2016 Mr Dunn sent an email to Mr Bettles in relation to, among other things, Capricorn Securities' AFSL. On that topic Mr Dunn wrote:

> **The AFSL Number 423717 issued to Capricorn Securities.**
>
> You advised me Capricorn Securities and Iridium Financial Planning Pty Ltd were not placed into liquidation because there are significant 'trail commission' owing to the AFSL (approximately $1M to 1.5M) and the Liquidators want to continue to collect this commission for the benefit of the creditors.
>
> I remind you of the general obligations placed on an AFSL pursuant to s912A of the Corporations Act 2001, in particular subsections (1) (d) and 2 (a) and (b).
>
> Based on advice I have received I suggest the Directors should immediately lodge a Form FSO3X – "Application to vary the authorisation conditions other conditions of an AFSL" and request a variation to suspend the authorisation to provide financial product advice to wholesale and retail clients. This will give ASIC comfort that [Capricorn Securities] and it authorised representatives are not providing financial advice.

On the same day Mr Bettles forwarded Mr Dunn's email to Messrs Marlborough, Young, Ramsden, Lavell and Jones noting that Mr Marlborough should immediately instruct Ramsden Lawyers to arrange for the completion and lodgement of the relevant form for Capricorn Securities.

353 On 11 August 2016, in the course of a telephone conversation with Mr Ramsden, Mr Bettles expressed his concern that Mr Marlborough "seemed to keep delaying the administration". Mr Ramsden agreed to speak to Mr Marlborough and give him a deadline of two weeks.

354 On 12 August 2016 Messrs Jones and Young exchanged emails about whether BPW would be required to provide further financial advice to Capricorn Securities clients:

(1) by email sent at 11.10 am Mr Young provided a list highlighting those clients who "may require further advice" and noted that other clients may require "ongoing advice, including annual reviews". Mr Young said that he had not been involved in discussions between Mr Bettles and ASIC but expressed the view that "further advice will be required in order to maintain the asset for sale";

(2) by his email in response sent at 11.17 am Mr Jones informed Mr Young that he would discuss with Mr Bettles in the first instance and get back to Mr Young and queried the

"approximate dollar figure loss if [BPW] was no longer able to proceed with these clients";

(3) by email sent at 11.18 am Mr Young noted that as they did not have access to "Xplan", a financial planning software, it would be difficult to quickly assess revenue for those clients; and

(4) by email sent at 11.23 am Mr Jones informed Mr Young of his view that quantifying the loss was "key", that he would see if there was another solution but that there may be no choice other than to incur the loss and the alternative may be that the "licence is cancelled outright".

355 The Ramsden Lawyers WIP Report records entries at 11.37 am and 12.12 pm on 12 August 2016 concerning an email and a telephone call respectively with Mr Bettles to discuss the issue referred to in the preceding paragraph. Mr Jones can no longer recall what was discussed during his telephone conversation with Mr Bettles.

356 On 18 August 2016 Mr Bettles had a telephone conversation with Mr Young. Mr Bettles' file note of that conversation records (as written):

> Telephone out-Liam Young from Benchmark regarding the issues we are having with the ASIC wanting to cancel the AFSL. Liam said he wasn't aware of any provision that allowed the ASIC to cancel an AFSL merely because the shareholder went into liquidation. There may be one, but he isn't aware of it. His concern with the way Ramsden Lawyers was going to apply for the temporary license would stop them from answering questions posed by existing clients while we were in the process of collecting the wip and selling the trail book. This is obviously a problem because we would quickly lose those clients. Liam said that in addition to Anthony Douglas (the responsible manager for the Capricorn Securities AFSL) Benchmark had employed a financial planner to deal with the clients. We agreed that I would forward the email I had from the ASIC to Liam and I would talk to Olver Jones at Ramsden Lawyers to see if he had any further information / documentation. I would then raise the matter at my meeting with the ASIC and see if they could help with an explanation as to why and how we fix the problem.

357 On 23 August 2016 Messrs Khatri and Bettles met with Mr Dunn, Trevor Clark and Kaan Finney from ASIC. The meeting was instigated by Mr Bettles. Prior to the meeting he provided Mr Dunn with an agenda and a PowerPoint presentation. Mr Bettles' file note of the meeting records:

> Raj Khatri and I met with Paul Dunn, Trevor Clarke and Kaan Finney from the ASIC at which I gave them an outline of the companies subject to external administration, the operations of each company, and the future course of conduct of the administrations. Included in that discussion was the AFSL of Capricorn Securities which is not subject to external administration, but because the business of Members

> Alliance has ceased trading the ASIC has concerns about the ability of the licence holder to continue to service its clients. Paul is to email me the relevant regulatory guide. Trevor wanted a letter setting out how many clients there were, what products were being sold, the resources available to service those clients, which clients are active, and who is operating under the licence. I advised that I would pass this information on to the director to arrange a letter to the ASIC.

358 On 24 August 2016 Mr Bettles received an email from Mr Dunn attaching a link to ASIC regulatory guide "RG 104 Licensing: Meeting the general obligations". Mr Bettles subsequently sent an email to Mr Jones noting that ASIC was concerned about the licence holder's ability to meet the general obligations of a licence holder because all of the "Members Alliance staff" had been terminated and that rather than completing the "Form FS03X Application to vary the authorisation conditions and other conditions of an Australian financial services licence" ASIC had requested a letter setting out how the licence holder continues to comply with regulatory guide RG 104, and provided a copy of that letter.

359 Mr Bettles was not involved in the drafting of Capricorn Securities' letter to ASIC but took steps to ensure that it was being progressed and ASIC's queries were being addressed.

360 On 13 September 2016 Ramsden Lawyers responded to ASIC's request for further information about Capricorn Securities and the resources it had in place to ensure it met its obligations as an AFSL holder. A copy of that letter was provided to Mr Bettles at the same time. Mr Bettles was aware that Mr Dunn responded to Ramsden Lawyers' letter because he received a copy of ASIC's response from Mr Jones and because it was an agenda item at subsequent Progress Meetings.

361 In his letter dated 29 November 2016 to ASIC Mr Bettles set out some of the factors he had considered in determining whether it was in the interests of Iridium Holdings to acquiesce in Mr Marlborough's plan to allow Capricorn Securities and Iridium Financial Planning to continue to trade until a sale of the Client Book could be achieved. In doing so he noted that the liquidators were not inclined, and felt that it was inappropriate, to appoint themselves as directors of Capricorn Securities and Iridium Financial Planning. Relevantly, Mr Bettles said that he was not aware of anyone else willing to come forward to act as a director of those companies to facilitate management of their business and sale of the Client Book, other than Mr Marlborough.

362 Although Mr Bettles did not have direct control of Capricorn Securities and Iridium Financial Planning at the time and did not wish to usurp that role or act as a shadow director, he took a

number of steps to try to stay informed about the progress of the sale of the Client Book. Those steps included:

(1) insisting on regular meetings, namely the Progress Meetings, with Mr Marlborough and his advisors including Messrs Ramsden, Lavell and Young in order to obtain updates;

(2) communicating regularly with Mr Marlborough or his advisors and forwarding information or communications received from ASIC as appropriate; and

(3) insisting that a formal valuation be obtained of the Client Book.

363 Mr Bettles explained that there were two distinct sources of realisations available to Capricorn Securities and Iridium Financial Planning: first, the monthly income payable to Capricorn Securities from the insurance providers/platform operators which was applied toward the payment of costs to run the financial services business, such as management fees payable to BPW; and secondly, the proceeds of the sale of the Client Book.

364 As the liquidator of Iridium Holdings, the shareholder in Capricorn Securities, Mr Bettles took steps to keep abreast of the communications with ASIC about Capricorn Securities' AFSL but was not involved in drafting any responses to ASIC. He did not see that as his role although he was concerned to see that Capricorn Securities responded to ASIC's enquiries. As liquidator of Iridium Holdings, Mr Bettles considered that it was important that Capricorn Securities maintain its AFSL if a sale of the Client Book was to be achieved and was also concerned to ensure that appropriate steps were being undertaken to maintain the Client Book.

2.25.3 Payments to Mr Marlborough

365 On 27 October 2016, in the course of a telephone conversation with Mr Dunn, Mr Bettles became aware that Mr Marlborough had been drawing payments from Capricorn Securities. On 28 October 2016 Mr Bettles sent Mr Marlborough an email in which he wrote:

> Further to our discussion yesterday about the ASIC's investigations would you please urgently forward to me:
>
> 1. Copies of the dealer agreements Capricorn Securities Pty Ltd has with the relevant parties. (eg. TAL and Macquarie).
>
> 2. Copies of the bank statements for Capricorn Securities Pty Ltd's bank account from 22 July 2016 to current.
>
> 3. Details of all remuneration you have been paid since 22 July 2016 and an explanation of the work you have done.

Mr Marlborough responded the same day providing only the documents requested in item 1 of Mr Bettles' email, that is copies of the agreements with TAL and Macquarie.

366 By email dated 4 November 2016 Mr Lavell forwarded to Mr Bettles a spreadsheet showing the payments made from Capricorn Securities' bank account to Mr Marlborough. In the period from 22 July 2016 to 4 November 2016 Mr Marlborough had received a total of $90,220. Following receipt of that email Mr Bettles sent an email to Mr Marlborough in which he wrote:

> As discussed a week or so ago, would you please:
>
> 1. Email me the bank statements for Capricorn from 22 July 2016 to current.
> 2. Set out in writing the work you have been doing as director in respect of the operations of the companies.
> 3. Confirm that you will not draw any further remuneration without my consent.

Mr Marlborough never responded to Mr Bettles' email.

2.25.4 Sale of the Client Book

367 As set out above, as a result of the pre-appointment meetings Mr Bettles knew that Capricorn Securities and Iridium Financial Planning were not to be placed into liquidation until after realisation of those companies' assets because to do otherwise could lead to termination of Capricorn Securities' AFSL and loss of the trailing commissions.

368 That was also discussed in Mr Bettles' teleconference on 28 July 2016 with Messrs Ramsden and Lavell (see [335] above). Mr Bettles' file note of the discussion provides:

369 Mr Bettles was not directly involved in the negotiations for the sale of the Client Book. They were undertaken by Mr Marlborough, as director of Capricorn Securities and Iridium Financial Planning. However, Mr Bettles was concerned to see that the sale progressed in a timely way and that Mr Marlborough obtained a valuation of the Client Book. He took a number of steps to ensure that those things occurred including:

(1) seeking updates on the progress of the sale and the obtaining of a formal valuation of the Client Book at Progress Meetings;

(2) following up to ensure that a formal valuation was obtained which was something that Mr Bettles insisted on from his early discussions with Messrs Ramsden and Lavell; and

(3) seeking legal advice from Grants Law as to the matters arising in relation to the sale of the Client Book.

370 In cross-examination Mr Jones explained that an electronic data room was set up for potential purchasers of the Client Book, there were about six interested parties and, based on his discussions with Mr Bettles, Mr Jones understood that Mr Bettles wanted the Client Book to be marketed to as many potential purchasers as possible.

371 Two offers were received to purchase the Client Book:

(1) an offer from **Crest Wealth** Pty Ltd which was included a letter dated 3 November 2016 to Iridium Financial Planning and Capricorn Securities, care of Ramsden Lawyers, which noted that subject to due diligence it was prepared to offer:

> With No Restraint $800,000.
>
> With a restraint from Richard Marlborough and Benchmark Private Wealth Pty Ltd and its Directors and associates $1,000,000.

(**Crest Wealth Offer**); and

(2) an offer from Advice First in a range of $885,000 to $1,005,000 depending on Mr Marlborough's remuneration package (**Advice First Offer**).

372 Ultimately Mr Marlborough decided to accept the offer from Crest Wealth for purchase of the Client Book.

373 Mr Jones gave evidence that, during meetings including Progress Meetings, he observed that while there was some discussion about sale of the Client Book to other purchasers such as Andrew Stonehouse or Sid Super, the understanding was always that the Client Book would be sold to Crest Wealth but there was discussion to the effect that it could not be sold to Crest Wealth without testing the market. Mr Jones said he never had any realistic expectation that the Client Book would be sold to someone else. In cross-examination Mr Jones accepted that this was not an expectation that Mr Bettles ever expressed at those meetings.

374 Mr Jones was closely involved in the sale of the Client Book to Crest Wealth as the lawyer for the vendor. He prepared the sale contract and carried out the settlement of the transaction. He recalls seeing the Crest Wealth Offer and also recalls that at about that time he was concerned that Capricorn Securities' AFSL may be cancelled with the result that the Client Book would then be worthless. He recalls that Mr Ramsden told him that he wanted to move quickly because the longer the Client Book remained with Iridium Financial Planning the greater was the potential risk that the AFSL would be cancelled.

375 On 4 November 2016 Ramsden Lawyers provided Mr Bettles with a copy of the Crest Wealth Offer. The email under cover of which that offer was provided included:

> We note that other offers may be forthcoming noting that at this stage we have limited the interest to Advice First and Stonehouse Group. We also note however that the offer posed by Crest wealth may not be its final offer and they may be prepared to move if it felt it was at risk of losing the opportunity.

376 On 16 November 2016 Mr Ramsden informed Mr Bettles that two offers had been received for the Client Book: the Crest Wealth Offer; and Advice First Offer. Mr Bettles' file note of his conversation with Mr Ramsden states (as written):

> Telephone in-John Ramsden from Ramsden Lawyers advising:
>
> 1. that they have received two offers for the trail book:
>
> a) Crest Accountants have offered an unconditional $900,000 + a job for Richard Marlborough for two years at $200,000pa, on the basis that Richard and Benchmark are restrained from contacting the clients the subject of the trail book. Payment to be made in 7 - 14 days.
>
> b) Advice First have offered a conditional $1 million + a job for Richard for two years at $150,000pa, on the basis that Richard and Benchmark are restrained from contacting the clients the subject of the trail book. Payment to be made in 7 - 14 days.
>
> 2. Richard has instructed Ramsden to prepare a sale contract for him to sign to accept the offer from Crest Accountants
>
> 3. John believes that Richard has the authority to accept the deal, but wants my agreement as the controller of the sole shareholder.
>
> I said that I would need to see:
>
> a) an explanation of the conditions being imposed by Advice First to determine if they were worth the $100,000 less that Crest is offering
>
> b) written advice from WMS on the value of the book
>
> 4. Ramsden will send through an letter detailing the offers for me to consider.

377 On 17 November 2016 Mr Bettles had a telephone conversation with Mr Marlborough. During that conversation in relation to the sale of the Client Book Mr Bettles' file note records (as written):

> Telephone out-Richard Marlborough regarding:
>
> 1. the offers on the trail book owned by Capricorn. Richard thought that Ramsden had prepared a sale contract. I said that I had spoken to Ramsden and they were sending me through a letter setting out the offers for me to consider and provide consent on the one chosen by Richard. I noted that neither of us could make a decision until we had the sign off from WMS. Richard confirmed the

> information provided to me by Ramsden on the offers and said that the offer from Advice First contained too many conditions around the $1 million and around his consultancy fee. He said he was prepared to sign a restraint, but not if there were conditions that could see it reduced to $100,000 over 2 years. …

378 On 17 November 2016 Mr Ramsden sent an email to, among others, Mr Bettles in which he wrote:

> Further to our telephone discussion yesterday, I have received two offers from interested parties to purchase the business of Iridium Financial Planning Pty Ltd and Capricorn Securities Pty Ltd.
>
> The two interested parties are Advice First and Crest Wealth.
>
> Attached is the offer received from Advice First which is self-explanatory and presents three options for consideration. My instructions at the time to induce the offers, was to ensure that both parties understood they were to put forward their best offer to avoid lengthy negotiations, where it was explained to each interested party that the offer that was the cleanest deal, would most likely be preferred. It was also explained to each of the interested parties that restraints would not be provided by the vendors, and that any restraints would have to be by way of a consultancy agreement that the successful purchaser would enter into with Richard Marlborough and Benchmark. This being something that Richard could freely do once the business was sold, without being in breach of his directors or fiduciary duties (noting also that Capricorn Securities and Iridium Financial Planning would no doubt be placed into liquidation at some stage).
>
> Having spoken with Aaron Lavell, I understand that the value of the Iridium Financial Planning business would be within a range of between $800,000 and $1 million. I understand that both parties were made aware of this before making their respective offers. Although we do not have any valuation from Aaron, nor a report that verifies his view, the delay in obtaining a formal report has placed at risk the ability to remain licenced with the ASIC. That said, I am confident that Aaron's report will reflect the aforementioned values.
>
> Although I am yet to receive a written offer from Crest Wealth, I had a lengthy meeting with the key principal of that business, Peter Chesterton, and confirmed that the offer put forward for the purchase of the business as a going concern on an as is, on a walk in walk out basis, and is for the purchase price sum of $900,000 to be paid within 14 days from contract date. There may be a requirement for some retention monies merely to account for any monies that Capricorn Securities may receive during the transition where in the event Capricorn Securities fails to account to Chris Wealth, then those retention monies can be deducted accordingly. The purchase price however, does not vary.
>
> I also advised that Crest Wealth are prepared to enter into a consultancy agreement with Richard and Benchmark for a two-year term to assist them in the transition of the assets from Iridium Financial Planning to Crest Wealth, for a consideration sum of $400,000 plus GST.
>
> Accordingly, my instructions are to prefer the offer made by Crest Wealth and to draw contracts of sale present to Crest Wealth for them to execute and present as a formal offer for my client to thereafter sign and accept.
>
> On the basis that you are the only shareholder and member of both Capricorn Securities and Iridium Financial Planning, I am instructed to seek your approval to accept the

> Crest Wealth deal. On the basis that the proposal from Advice First does appear to offer more return to the vendors, by way of option three in particular, it still nevertheless requires Richard Marlborough to consult with Advice First, which is entirely a prerogative of Mr Marlborough and one that he cannot be compelled to be bound to by you as the shareholder, which in turn would no doubt (should Richard refuse to consult), result in Advice First paying dramatically less then what has been offered. It is also viewed from Richard, that the Crest Wealth deal will be more seamless and have less conditions (albeit they too have required that X-Plan be paid out) then the Advice First deal.
>
> If you could please provide me with your position on an urgent basis, that would be much appreciated so that we can proceed to drawing the relevant contract expeditiously. I am happy to discuss with you if you would like.

379 Mr Ramsden's email sought Mr Bettles' approval to accept the Crest Wealth Offer. However, Mr Bettles was not willing to consider approval of a proposed offer until at least he had seen a formal valuation of the Client Book, a matter which had been discussed from early on in his appointment to Iridium Holdings and subsequently raised with Mr Marlborough and his advisors on a number of occasions.

380 On 17 November 2016 Mr Lavell telephoned Mr Bettles. Mr Bettles' file note of that conversation records (as written):

> Telephone in-Aaron Lavell from WMS regarding the offers from Crest and Advice First. Aaron said that without seeing the conditions (if any) imposed by Crest it is difficult for him to provide a comparison. I said I would point that out in my email to Ramsden about not being able to consider the offer until receiving written advice from WMS. Aaron said the conditions from Advice First were not that onerous and consequently it appeared that the $1 million offered by Advice First was better than the $900,000 from Crest, albeit he hadn't seen whether Crest's offer had any conditions. I noted that both offers seemed to require Richard to sign a restraint and without his restraint the offers would be lower. Obviously Richard wanted the best deal possible for him personally and would therefore lean towards the one that paid him the most for the restraint (ie. Crest). If it was that the offers without the restraint were lower than $900,000, then despite the Advice First offer being higher, it would seem commercial to take the Crest offer because whilst it is less than Advice First's offer it is more than would be obtained if Richard was not restrained.

381 On 18 November 2016 Mr Bettles received an email from Mr Lavell attaching a WMS valuation report for the Client Book addressed to Capricorn Securities and Iridium Financial Planning (**WMS Client Book Valuation**). The primary purpose of the WMS Client Book Valuation was "to assess the reasonableness of offers received by [Crest Wealth] and Advice First for the risk insurance trailing commission ("Risk Book") and funds under advice ("FUA") Advisor Fee assets". It was prepared by Mr Lavell "on the premise of forced sale". The reasons given for why that was so included:

(1) Iridium Holdings, the sole shareholder of both Capricorn Securities and Iridium Financial Planning, was in liquidation, which had attracted adverse national press;

(2) the appointment of a liquidator to a shareholder of an AFSL holder was a "default event" under the terms of the AFSL such that Capricorn Securities required ongoing consent from ASIC in order to continue to hold the AFSL which was a week to week proposition;

(3) the director and the shareholder's representative had provided a limited period for buyers to undertake due diligence and had indicated that limited, if any, warranties or contractual conditions would be acceptable;

(4) at the commencement of 2016 several key finance staff resigned for the MA Group and the general staffing levels started to diminish;

(5) on or about 10 February 2016 a subsidiary of the MA Group sold the finance broking trail book to an arm's length party based in Sydney;

(6) during 2016 there was attrition each month in the financial planning team;

(7) in late March 2016 the landlord of the Gold Coast head office provided a notice to vacate the premises which attracted significant adverse press coverage and accelerated the attrition of staff;

(8) certain suppliers who had unpaid accounts ceased providing services and/or products, including IRESS who license the primary financial planning software Xplan, and, as at the date of the valuation, the Xplan software remained inaccessible for potential purchasers undertaking due diligence;

(9) revenue streams began to diminish following the appointment of liquidators;

(10) by 8 November 2016 there were only two interested potential buyers; and

(11) the industry was affected by reforms which shifted it from a traditional commission-based income model to a time-based model.

382 The WMS Client Book Valuation calculated that the risk trail book was worth between $850,000 and $1,000,000 and the risk advisor fees had no value. It concluded:

> We understand the Crest Wealth proposal is preferred by the Director. Based on the above, we believe the proposed terms fit within an acceptable range.

383 Once Mr Bettles had an opportunity to consider the WMS Client Book Valuation he took a number of steps including speaking with Mr Lavell and on 21 November 2016 he sent an email

in response to Mr Ramsden's email dated 17 November 2016 (see [378] above). In that email he sought a copy of the draft contract for sale and a list of creditors of Capricorn Securities and Iridium Financial Planning together with the amounts owing to each creditor.

384 On 21 November 2016 Mr Bettles prepared the November Decision Memorandum. It relevantly included:

> …
>
> Ultimately two offers have been received, and Mr Marlborough wants to accept the offer from Crest Accountants ("Crest").
>
> An important component of the sale was that it had no conditions. This is particularly important because neither the director nor the liquidator wanted the buyer to be able to withdraw from the contract and/or refuse to pay the sale price if the seller went into liquidation and/or Mr Marlborough was declared bankrupt. Mr Marlborough had also indicated that he was not prepared to sign a restraint (because with the demise of the Members Alliance business he needed to find new employment and that may be in same industry). I note that both offers require Mr Marlborough to sign a restraint, but they have offered employment to Mr Marlborough and the current responsible manager, Mr Anthoy Douglas. I understand that neither party is prepared to make an offer without Mr Marlborough's restraint. It seems Mr Marlborough is prepared to sign the restraint on the basis of the salary package he is being offered by Crest.
>
> The offer from Crest is $900,000. The offer from Advice First depends upon the remuneration package of Mr Marlborough; ranging from $855,000 to $1,005,000. Obviously the $1,005,000 offered by Advice First is better than $900,000 offered by Crest, but Advice First's offer includes remuneration to Mr Marlborough of $200,000 over 18 months whereas Crests' offer is $400,000 over two years.
>
> Obviously there is a conflict between the director and the shareholder over which offer to accept. The liquidators would prefer the Advice First offer but that means a lesser amount for the director, who would prefer the Crest offer but that means a lesser amount for [Iridium Holdings]. The liquidators cannot force the director to sign a restraint, and it seems that nobody is prepared to purchase the trail book without the restraint.
>
> Determination: The options therefore seem to be:
>
> 1. Force the director to accept the Advice First offer, or replace Mr Marlborough with a director who is prepared to accept Advice First's offer. This is not practical because Mr Marlborough would refuse to sign the restraint which is a condition of the offer.
>
> 2. Force the winding up of [Capricorn Securities] and [Iridium Financial Planning] and have the liquidators accept the Advice First offer. Again this is not practical because of point 1 above, and that the agreements with the insurance providers/platform operators that give rise to the income earnt by [Capricorn Securities] contain clauses which provide for the termination of the agreements with [Capricorn Securities] should [Capricorn Securities] be wound up. If the agreements are terminated then [Capricorn Securities] and [Iridium Financial Planning] have nothing to sell.

3. Require the director to undertake another marketing campaign in an effort to elicit an offer of the magnitude of Crest's offer and not requiring Mr Marlborough's restraint. There are a number of comments in WMS's appraisal about the delicacy of the trail book (eg. questions over compliance, diminishing client base, AFSL being a 'week to week' prospect, previous sale campaign not eliciting any offers, etc.). Consequently, it seems improbable that better offers will be achieved and one would be concerned that the current offer would be lost by delays.

4. Consent to the director accepting the offer from Crest. Whilst it seems unpalatable to be forced into a position of agreeing to accept the lower of the two offers we should bear in mind that there is no offer without Mr Marlborough signing a restraint. Obviously Crest's offer is greater than zero.

Based upon the above the liquidators have determined to agree with Mr Marlborough to accept the offer from Crest to purchase the trail book, subject to seeing and agreeing with the terms of the sale contract.

385 On 21 November 2016 Mr Bettles sent a copy of the November Decision Memorandum to Mr Grant together with other relevant material.

386 By email dated 24 November 2016 Mr Jones informed Mr Lavell that Mr Bettles had requested a list of Capricorn Securities' and Iridium Financial Planning's creditors and the amounts owed to each. Mr Jones requested that the information be provided as a matter of priority. By email of the same date Mr Lavell provided a list which set out his understanding of the unsecured creditors and the amounts owed. Mr Bettles was copied into that email.

387 On 25 November 2016 Mr Bettles received an updated version of the proposed contract for sale of the Client Book from Ramsden Lawyers which he then emailed to Grants Law together with other material which had been provided to him. Mr Bettles sought advice from Grants Law on the liquidators' view that the Crest Wealth Offer should be accepted and whether any amendments were required to the draft contract for sale. In his letter of instruction Mr Bettles set out his comments on the draft contract as well as a number of issues for consideration. Mr Bettles instructed Grants Law to contact Ramsden Lawyers in relation to the proposed sale of the Client Book, which they then proceeded to do.

388 On 25 November 2016 Grants Law provided their advice in relation to the proposed sale of the Client Book (**25 November 2016 Letter**). In their letter Grants Law noted that:

> Unfortunately, the draft contract does not provide answers to a number of issues that we need to consider in order to properly assess whether or not, and if so on what basis, you should consent to the proposed sale contract.

The author then went on to articulate those issues which included gaining an understanding of the nature of the business the subject of the sale and making enquiries of Ramsden Lawyers as to how they proposed that sale proceeds were to be distributed, particularly in circumstances where the business was said to be carried on by two entities, Capricorn Securities and Iridium Financial Planning. The letter continued:

> This becomes very relevant insofar as it appears that Ramsden Lawyers, along with other entities, have securities over [Iridium Financial Planning] but not over [Capricorn Securities].
>
> You should also seek from the director and the solicitor for the director an accounting of the creditors of [Capricorn Securities] and [Iridium Financial Planning] to ensure that you are aware that once the companies are placed into liquidation, you will be conscious of what amounts will be left following the payment of all creditors from them for the purposes of the liquidators of the sole shareholder. These enquiries should be made forthwith to both Ramsden Lawyers and Richard Marlborough in his capacity as director of the company.

And:

> In the event that we properly understand the nature of the business and have an indication on the actual part of the sale proceeds that will be distributed to [Capricorn Securities] from the sale of the business, we then need to consider the steps that would immediately be taken to ensure that you control those funds.

The 25 November 2016 Letter then set out a possible scenario as follows:

> (a) A deed should be entered which binds the director of the company and any other interested parties, whereby it is acknowledged that a certain portion of the proceeds of sale will be made available to the shareholders upon the sale of the business and that the company is to be placed into liquidation immediately upon settlement of the sale of the business;
>
> (b) The director executes a resolution appointing the liquidators to [Capricorn Securities] and be provided to us prior to settlement upon an undertaking not to use same to place the company into liquidation until settlement is completed. This would enable you to immediately place the company into liquidation following settlement;
>
> (c) We would be present at settlement of the sale of the business and collect a bank cheque made payable to our trust account on settlement. This would enable us to immediately place funds into our trust account and immediately following settlement you would then be in a position to place the company into liquidation and control those funds held in our trust account.

The 25 November 2016 Letter also recommended that once Mr Bettles had a better understanding of the issues and way forward, he should provide details to ASIC and seek their comment.

389 Between 25 November 2016 and 2 December 2016 Mr Jones negotiated the terms of the documents for sale of the Client Book with MacPherson Kelley, lawyers for Crest Wealth.

390 In the meantime, in accordance with its advice in the 25 November 2016 Letter, Grants Law raised a number of detailed queries with Ramsden Lawyers and there was an exchange of emails about those queries over several days.

391 On 1 December 2016 Mr Ramsden sent an email to Julian Blanchard of Grants Law copied to, among others, Mr Bettles which included (as written):

> I advise that the purchaser is insisting on your client consenting to the sale in the above. At this present time, your request below are somewhat arduous and without regard to the fact that both Capricorn Securities Pty Ltd ('Capricorn') and Iridium Financial Planning Pty Ltd ('IFP') are not insolvent, and any liquidation of these companies would be by a members voluntary liquidation as resolved by both the director and your client as the sole member.
>
> That said, I am prepared to offer the following in an attempt to address some of the misconceived issues your client may have with the transaction and the disbursement of the sale proceeds:
>
> 1. I believe that we have now drafted the contract with a clear outline as to who is the legal and beneficial owner of the assets to the financial planning business. Ultimately, it is the position of both Capricorn and IFP that the going concern business and all assets pertaining thereto were for the benefit of the IFP, notwithstanding the fact that Capricorn was the noted party to whom the income entitlement was in fact paid. The contract has been revised to state clearly that Capricorn was holding any interest to the business and its income as trustee, noting that in some instances as the holder of the AFSL this was required in any event. It is however clearly evidenced that the client database to which the goodwill is derived vests with IFP.
>
> 2. We are at present still calculating who will receive the net proceeds from sale. We can however advise that the secured parties will receive close to the full balance of which is not on retention, with the retention likely to remain with the company.
>
> 3. We advise that the only secured parties who will be paid out from settlement will be Crest, Members Winding UP (Downie), WMS and ourselves.
>
> 4. We have dealt with the Domingo security interest which was the one security interest that was questionably lodged without proper lawful basis. The other security interests, notably ours, is for fees we have rendered for the Iridium Group as the collective client as per our costs agreement which we sought security on a joint and several basis against each of the members to the Iridium Group, as the Iridium Group and all work we have undertaken at the outset has related to the common business of Members Alliance to which each member of the Iridium Group was responsible for. Our security is well within our rights to be secured for our fees and consistent with section 320 of the Legal Profession Act 2007 (Qld). We see no reason why we should be subjected to a form of scrutiny which is clearly unwarranted and, with respect offensive. I would also caution you from exerting that our fees are excessive when in fact you are not privy to the significant work which has been undertaken for the

Iridium Group and Members alliance business. Should your client be in a position to apply to have our fees assessed then this is the appropriate forum in which to pursue any such issue with our fees.

5. All releases are being provided at settlement and the purchaser is aware of this.

6. You will be provided copies of all settlement statement when we have them but we see no reason why this would delay your client's consent to the sale.

7. Our client will not consent to the Capricorn or [Iridium Financial Planning] to be placed into liquidation as you have requested, but will consent to doing so once the final payment has been made to both the [Iridium Financial Planning] and the consultant which will be approximately 45 days from settlement.

8. We do not have copies of the company constitutions. You are more than welcome to ask Aaron Lavell who may have copies of these.

We have been advised by the purchaser that they require either a letter from you that will release them from any conceivable claim you could have against them and consent to the foreshadowed transaction insofar as it is commercial and without risk to them of being pursued for any claim you could have against them. Given that the sale is at arm's length and at fair market value, we see no reason why this cannot be given. Alternatively, you can consent to the sale as per our original proposed condition of sale, and any action you may wish to investigate against the director is a matter for your client. **So your client appreciates the state of play at present; should the purchaser pull out of the contract because of your client's refusal to consent to the sale, when in fact the sale is arm's length and for fair market value, then each of the secured parties, including us, will seek to enforce our security against the other members of the Iridium Group, namely MM Prime Investments Pty Ltd. We would then anticipate that ASIC will most likely cancel the AFSL for Capricorn in which case the assets of the Iridium Group dissipate to a level which could place your client in a precarious position. I only say this to ensure we all understand that iridium Group is a house of cards, where it could essentially collapse to the point where only the secured parties will have something to salvage. We are hoping to avoid this, and would impress upon your client to see the commercial significance to accord with our request to give consent and to allow settlement to occur tomorrow as scheduled**.

I am therefore respectfully requesting for your client's urgent consent to the sale as per the above contract of which you have received the final revision of, or a letter that qualifies consent insofar as it gives comfort to the purchaser that there is no risk that they or the transaction could be made voidable. I require this by 9.30 am tomorrow morning.

(Emphasis added.)

392 Following receipt of Mr Ramsden's email referred to in the preceding paragraph Mr Bettles sought further advice from Grants Law and on 2 December 2016 together with Mr Carey participated in a telephone conference with Grants Law at which Mr Carey was also present. Mr Carey's file note of that telephone conference records (as written):

Attended teleconference with liquidator and Grants Law regarding the proposed sale of assets. The liquidator has elected to not oppose the sale despite Ramsden not

providing all the information requesting as to oppose the sale would create a situation where the sale will not go ahead and the asset will in all likelihood be lost or at least diminished. In the situation where the sale does settle, the significant portion of the moneys are directed to the secured creditors and a liquidator is then appointed, at least that liquidator will have powers to review the settlement disbursements, In the alternative, no (or less) funds will be realised from the asset with the result that the secured parties will then seek to enforce their securities over other companies within the group further diminishing the return to creditors.

393 On 2 December 2016 Grants Law also provided a written advice to Mr Bettles about the sale of the Client Book which included:

> Further to our discussions on the morning of Friday 2 December 2016, I confirm my advice as follows:
>
> 1. Mr Ramsden's comments concerning the true owner of the Risk Book which forms a predominant part of the business failed to settle the issue of who is the owner of the actual asset being sold, however the most recent version of the Contract now at least protects that position somewhat, insofar as both Capricorn Securities Pty Ltd and [Iridium Financial Planning] are listed as the vendors in the Sale Contract. The manner in which the sale proceeds are distributed can be dealt with on a later occasion.
>
> 2. As anticipated, it is proposed that from the sale proceeds, all secured creditors will be paid in full from the sale proceeds, leaving little if anything remaining for other unsecured creditors and ultimately the shareholder company following a liquidation.
>
>   Whilst we have not been in receipt of the necessary material to ascertain the validity or otherwise of the securities being claimed, at the very least it protects the sale asset and preserves the position of a future liquidator to investigate the claims by creditors such as Ramsden Lawyers, Members Winding Up and Crest Accounting.
>
> 3. Mr Ramsden goes into significant detail with respect to the issue of his costs, however as discussed, this is an argument better left for another day. An argument over Mr Ramsden's fees should not jeopardise the Sale Contract from settling.
>
>   In saying this, Mr Ramsden's fees are concerning and despite his comments, we are yet to consider any client agreement, disclosure as to costs, or the securities that he alleges enables his firm to take the fees from the solvent company for work provided to other companies within the Members Alliance Group.
>
> 4. Mr Marlborough, the director of Capricorn Securities and [Iridium Financial Planning], has rejected the request to immediately place the company into liquidation following the settlement of the sale. It is the belief of Mr Ramsden that doing so would jeopardise retentions which are being withheld by the purchaser as part of the Sale Contract. We are in the process of properly considering this position and will advise you in due course.
>
> 5 I strongly advise you not to provide any releases to the purchaser, or any other party for that matter, in the manner sought or at all. I note in particular that Mr Ramsden advises that the purchaser is seeking a release from "any conceivable

claim".

394 On 2 December 2016, in accordance with Mr Bettles' instructions, Grants Law sent a letter to Mr Ramsden which stated that "on basis of the information provided… the liquidators of the shareholder company do not oppose the sale contract".

395 Mr Jones attended the settlement of the sale of the Client Book and recalls that Messrs Marlborough and Young also attended. No representative of Crest Wealth attended and the settlement was effected remotely with Crest Wealth sending funds by electronic transfer. Three documents were executed by the parties to effect the transaction: a business sale contract between Capricorn Securities as seller and Crest Wealth as buyer (**Client Book Sale Agreement**); a deed of covenant of restraint executed by Mr Marlborough, Iridium Financial Planning, Capricorn Securities, BPW and Mr Young; and a consultancy agreement between Crest Wealth as trustee of the Crest Wealth Trust and BPW as consultant (**Crest Consulting Agreement**).

396 The fee payable under the Crest Consulting Agreement was $200,000 per annum. On 1 December 2016 Mr Jones requested Mr Young to provide an invoice for the consultancy fee of $200,000 plus GST made payable to Crest Wealth as trustee for the Crest Wealth Trust. The invoice was provided by BPW later that day.

397 For the purpose of preparing his affidavit Mr Bettles was shown a contract of sale between Capricorn Securities, Iridium Financial Planning and Crest Wealth for the purchase of the Client Book and a copy of the Crest Consulting Agreement. Based on his review of the file notes maintained by Worrells, Mr Bettles says that he did not receive a copy of either of these documents.

398 By reference to Ramsden Lawyers' trust account ledger Mr Jones gave the following evidence about the disbursement of the proceeds of sale from the Client Book:

(1) on 2 December 2016 the sale proceeds of $1,032,769.14 were received;

(2) on 6 December 2016 and 8 December 2016 payments totalling $547,568.40 were made to Ramsden Lawyers pursuant to the security the firm held over companies in the MA Group. Mr Jones observed that the total payments were consistent with the approximately $550,000 of work in progress notified by Mr Ramsden in his email dated 28 November 2016;

(3) on 6 December 2016 and 16 January 2017 respectively payments of $12,668.14 and $42,084.06 were made to WMS for past fees that firm claimed were owed to it;

(4) on 6 December 2016 a sum of $23,067.60 was paid to **Bunnings** Group Ltd with the narration "Settlement payment". Mr Jones said that was part of the agreement reached with Mr Domingo to release his security interest over Iridium Financial Planning. Mr Jones recalls that one of the building companies in the MA Group with which Mr Domingo was involved had a debt to Bunnings in this amount, Mr Domingo claimed to have a security interest over Iridium Financial Planning which was a potential impediment to finalising the sale of the Client Book and a settlement was reached with Mr Domingo which included payment of the debt to Bunnings from the proceeds of sale of the Client Book;

(5) on 6 December 2016 and 18 January 2017 respectively payments of $40,465 and $1,616.75 were made to **Universal Consulting** Network Pty Ltd. Mr Jones gave the following evidence about these payments:

(a) at about this time he arranged the incorporation of Universal Consulting and the creation of an associated trust, Universal Consulting Network Trust. Deborah was the sole director and shareholder of Universal Consulting, although Mr Jones received all instructions from Mr Marlborough;

(b) Mr Jones understood that Universal Consulting and the Universal Consulting Network Trust had been created, and Deborah was appointed as director, because of a concern that Mr Marlborough may soon become a bankrupt. The intent was to use the company and trust for payments to Mr Marlborough so that they would not later be available for his creditors and/or trustee in bankruptcy; and

(c) the payment on 6 December 2016 was stated to be part payment of the consultancy fee and was made under a direction from Mr Young of BPW;

(6) on 14 December 2016 payments of $84,943.64 and $85,939.41 were made respectively to Mercedes Benz Financial Services and Toyota Financial Services. These were payouts to the financiers of vehicles previously owned by Astro Holdings; and

(7) on 16 December 2016 a payment of $60,750 was made to Mr Douglas, the responsible manager listed on Capricorn Securities' AFSL, for fees owed to him.

2.25.5 Winding up of Capricorn Securities and Iridium Financial Planning

399 As set out above on 10 February 2017 Messrs Bettles and Khatri were appointed as liquidators of Capricorn Securities and Iridium Financial Planning by way of a members' voluntary liquidation. If Mr Bettles had known or reasonably suspected, prior to his appointment to those companies, that the declarations of solvency made by Mr Marlborough were not reasonably made, he would have refused to accept these appointments as liquidator in a members' voluntary winding up of each of the companies. Equally, had Mr Bettles known or reasonably suspected after his appointment to those companies that Mr Marlborough's declarations of solvency were not reasonably made, he would have taken steps to convert the administrations into creditors' voluntary liquidations.

400 On 25 March 2017 Mr Bettles recorded the following file notes:

(1) in respect of Capricorn Securities that:

> It seems that the company may be insolvent because it potentially owes MAIC Human Resources $59,825, Hunter Premium Funding $33,691, the ATO has lodged a proof of debt for $2 million for GST owing by the GST tax group, and there are a number of parties with complaints with the . Credit Ombudsman, and there are no funds in the company to pay any of these debts. As a result we needed to convene a meeting and tum the MVL into a CVL.

(2) in relation to Iridium Financial Planning that:

> It seems that the company may be insolvent because the ATO has lodged a proof of debt for $2 million for GST owing by the GST tax group and there are no funds in the company to pay any of these debts. As a result we need to convene a meeting and tum the MVL into a CVL.

401 On 3 May 2017 Mr Bettles caused a meeting of creditors of each of Capricorn Securities and Iridium Financial Planning to be convened and Messrs McCann and McKinnon of Grant Thornton were appointed as liquidators of those companies.

2.26 Books and records of the companies in the MA Group and the s 533 reports

2.26.1 Books and records

2.26.1.1 MYOB files and other financial information

402 Worrells was provided with MYOB files for the following companies in the MA Group:

(1) Syree Enterprises;

(2) Iridium Home Loans;

(3) SS Residential;

(4) Iridium Mortgage Fund;

(5) Members Alliance Rocket; and

(6) Provincial Property.

403 No MYOB records, or any equivalent records, were provided for the following companies in the MA Group:

(1) Iridium Holdings;

(2) Laver Resources;

(3) Silverback Constructions;

(4) Iridium Financial Planning;

(5) Silverback Investments;

(6) HSINIF;

(7) MAIC Human Resources;

(8) Capricorn Securities; and

(9) Image Building Group.

404 On 20 February 2017 Mr Wowk sent an email to Worrells attaching an excel spreadsheet with the February 2016 management accounts for SS Residential, Capricorn Securities and Iridium Financial Planning noting that they were "the latest financial information we have on file for [these] companies".

2.26.1.2 Hard copy books and records

405 Mr Bettles explained that hard copy books and records were located at premises at Millennium Court, Helensvale, Queensland (**Helensvale Premises**).

406 On 26 July 2016 Mr Bettles, Ms Bragg and Ms Phipps attended the Helensvale Premises to meet with accounting staff of the MA Group and arrange collection of relevant information and documentation. Mr Bettles observed that the hard copy books and records of the MA Group were not organised in any conventional way, were not separated by individual companies within the MA Group and included promotional material.

407 Mr Bettles formed the view that it was not feasible to carefully inspect all of the books and records in that form. The promotional material was excluded from the hard copy documents and a handwritten list of the resulting 761 boxes of books and records was prepared when the

documents were boxed up by Worrells staff. The handwritten list includes a broad identification of the types of documents contained in each box and in some cases specifically refers to the company to which the documents relate. In August 2016 Grace Storage collected the 761 boxes as well as two computer towers from the Helensvale Premises.

408 Mr Bettles noted that there is also a second handwritten list of additional boxes of records, which appear to relate principally to Image Building Group, obtained from the Helensvale Premises in July 2016.

409 There were also:

(1) records obtained from two storage facilities in Brisbane and the Hunter Street Premises which were believed to relate to SS Residential and Iridium Financial Planning; and

(2) a further 7 boxes of material relating to Provincial Property which contained property management files to be returned to the property owners. The contents of those boxes were listed.

2.26.1.3 Electronic Material

410 There was also 16 terabytes of electronic records. As set out at [65] above, Mr Bettles was informed at the 16 July 2016 Meeting that records were maintained on a server in the cloud and that the cost to maintain that data was $11,000 per month. During the course of the administrations Mr Bettles took steps to determine whether access to that data could be maintained. It is not necessary to set out all of communications which relate to the steps taken to obtain a copy of the data required, as opposed to all of it, given the volume and cost of copying it. Mr Bettles explained that ultimately a copy of the data held on the servers was not obtained because there were insufficient funds in the administrations to have the data copied or to pay the fees to maintain access to the data.

2.26.2 ASIC serves a notice for production of books

411 On or about 7 March 2017 ASIC served a notice (**7 March Notice**) requiring the production of books on Mr Bettles. The 7 March Notice required production of all books of the following companies in the possession of Messrs Bettles or Khatri in their capacity as liquidators:

(1) Capricorn Securities;

(2) Iridium Financial Planning;

(3) SS Residential; and

(4) Provincial Property.

412 On 14 March 2017 Mr Bettles responded to the 7 March Notice by informing ASIC that he did not hold any books in his personal capacity and that he presumed that the notice was served on him in his capacity as liquidator of the various companies listed in the 7 March Notice. Mr Bettles then provided a response in relation to each of the companies the subject of the notice which included:

> **ACN 143 933 644 Pty Ltd (In Liquidation)** *(formerly Capricorn Securities Pty Ltd)***, and Iridium Financial Planning Pty Ltd (In Liquidation).**
>
> As you are aware, we were only appointed Liquidators of these two entities, following a members voluntary winding up, on 10 February 2017.
>
> Since our appointment we have made a number of requests to various sources including the Directors to produce records of those companies. To date, no further records have been received. Therefore we have no records of those two companies to produce, unless some records of those companies are contained in the boxes referred to below.
>
> We have recently become aware of records held by two storage companies in Brisbane which we believe relate to [Capricorn Securities] and [Iridium Financial Planning]. We are in the process of arranging their collection.
>
> We currently have no funds in the liquidation to pay for any investigations.
>
> **Provincial Property Investments (Aust) Pty Ltd (In Liquidation).**
>
> The principal activity of this company was property management.
>
> We hold seven boxes of records relating to [Provincial Property]. The contents of these boxes have not been listed, however the boxes contain property management files and are being returned to homeowners whose properties were formerly managed by that company as the investors contact our office.
>
> If you would like these boxes to be produced please advise.
>
> Since our appointment we have made a number of requests to various sources including the Directors to produce records of the company. To date, no further records have been received. Therefore we have no records of this company to produce, unless some records of the company are contained in the boxes referred to below.
>
> **SS Residential NSW Pty Ltd (in Liquidation)**
>
> As you are aware, we were appointed Liquidators of [SS Residential], again as a result of a members voluntary winding up, on 11 January 2017.
>
> Again, we have made request for books of this Company, but to date have not received any to date. Therefore we have no records of this company to produce, unless some records of the company are contained in the boxes referred to below.
>
> We have been made aware of records held in the former premises leased by the company in Sydney, which we are in the process of arranging collection.
>
> We currently have no funds in the liquidation to pay for further investigations.
>
> **Records received in the Liquidations of Related Entities of the Companies.**

As you are aware, we have also been appointed as Liquidators of a number related entities of the Companies, including ACN 161 598 938 Pty Ltd (In Liquidation) (formerly Iridium Holdings Pty Ltd) (**Iridium Holdings**), which were part of the Members Alliance business group.

It is apparent from our enquiries in respect to these related entities, that the records of the companies in the Members Alliance business group were intermingled.

Attached is:

- A handwritten list of records collected from the premises in Helensvale in July 2016. There is some 761 boxes on this list. The records appear to relate to a number of entities that operated in the Members Alliance business group, but there is little to indicate which particular company the particular records relate.

  Please note that boxes, GCT00292592 – GCT002922599, GCT00292609, GCG00292610, GCT00292632, GCT00292633, GCT00292822, GCT00292823, GCT00292825 – GCT00292835 have been delivered to Crest Wealth in accordance with the sale contract with Iridium Financial Planning Pty Ltd (In Liquidation).

- A further handwritten list of records also collected from the premises in Helensvale in July 2016. The records appear to relate to a number of entities that operated in the Members Alliance business BPW.0061.0001.0096 group, but principally ACN 151 259 675 Pty Ltd (In Liquidation) (formerly Image Building Group Qld Pty Ltd).

It is possible that these boxes contain records of the Companies the subject of the Notices, though that is not apparent from reading the lists.

As you are aware the liquidations of Iridium Holdings, and other members in the Members Alliance business group, are without funds and consequently we don't have the resources to meet the costs of properly separating and listing the records in these boxes.

If you would like inspect all or some of the boxes on these lists please advise and we will make the necessary arrangements.

(Emphasis in original.)

413 Mr Bettles did not receive a direct reply from ASIC to his letter referred to in the preceding paragraph and there was no request from ASIC notifying him that it wished to inspect the boxes of records referred to in that letter.

2.26.3 Section 533 reports

414 On the dates set out in the table below Mr Bettles lodged reports pursuant to s 533 of the Corporations Act (**s 533 Reports**) with ASIC in relation to the named companies in the MA Group:

Company	**Date of lodgement of s 533 Report**
HSNIF	23 February 2017

Laver Resources	7 March 2017
Silverback Constructions	14 March 2017
Iridium Financial Planning	20 March 2017
Iridium Mortgage Fund	21 March 2017
Silverback Investments	21 March 2017
MAIC Human Resources	23 March 2017
Capricorn Securities	23 March 2017
Iridium Holdings	3 April 2017
Image Building Group	3 April 2017
Syree Enterprises	10 March 2017
Iridium Home Loans	20 March 2017
SS Residential	20 March 2017
Members Alliance Rocket	21 March 2017
Provincial Property	23 March 2017

415 The s 533 Reports included under the heading "Books and records" the following questions (which I will refer to collectively as **Question 2**):

> 2. Have you obtained or inspected the company's book and records?
>
> If yes, in your opinion are the books and records adequate?

416 In relation to the companies for which s 533 Reports were lodged Mr Bettles answered those questions as follows:

MA Group Company	**Have you obtained or inspected the company's books and records?**	**If yes, in your opinion are the books and records adequate?**
HSNIF	Yes	No
Laver Resources	Yes	No
Silverback Constructions	Yes	No
Iridium Financial Planning	Yes	No
Iridium Mortgage Fund	Yes	No
Silverback Investments	Yes	No

MAIC Human Resources	Yes	No
Capricorn Securities	Yes	No
Iridium Holdings	Yes	No
Image Building Group	Yes	No
Syree Enterprises	Yes	Yes
Iridium Home Loans	Yes	Yes
SS Residential	Yes	Yes
Members Alliance Rocket	Yes	Yes
Provincial Property	Yes	Yes

417 Mr Bettles gave the following evidence about Worrells' general practice in relation to the preparation of s 533 reports and about the preparation of the s 533 Reports referred to above.

418 Prior to the completion and lodgement of a s 533 report the usual practice at Worrells is for an internal document called "Checklist for Offence Referrals" (**Offence Checklist**) to be completed. This is an internal Worrells document kept on the file for each company which provides a contemporaneous record of the matters reported in each s 533 report at the time of lodgement, together with supporting rationale.

419 Mr Bettles caused an Offence Checklist to be completed for each company the subject of the s 533 Report was lodged with ASIC. The Offence Checklist included links to the relevant ASIC guidance, Sch D to ASIC Regulatory Guide 16 and the ASIC web page on the books and records that a company should keep. Based on those materials Mr Bettles' understanding at the time of preparation of each of the s 533 Reports was that Question 2 related to "financial records". Mr Bettles explained that this meant that where in his opinion the financial records obtained to date for the relevant company were sufficient to make a preliminary assessment, in terms of the matters to be notified to ASIC under s 533 of the Corporations Act, he would select the item in the electronic form marked "yes" to the question "in your opinion are the books and records adequate". Conversely, if in Mr Bettles' opinion the financial records obtained to date for the relevant company were insufficient to make a preliminary assessment in terms of the matters to be notified to ASIC under s 533 of the Corporations Act he would select the item marked as "no".

420 Mr Bettles also explained that the Offence Checklist stepped through each of the key considerations which would need to be reported in a s 533 report and prompted certain check box answers and an explanation for the underlying rationale in respect of each of those answers.

421 In respect of the relevant Offence Checklist for each of Syree Enterprises, Iridium Home Loans, SS Residential, Members Alliance Rocket and Provincial Property, Mr Bettles' assessment that the books and records were adequate was made in the context of the nature of the business being conducted by each of those companies, including whether it had ceased trading, the period for which it had ceased trading prior to his appointment, and the purpose of a s 533 report. In each case the assessment was based on the fact that for each of those companies: MYOB records had been obtained; those records indicated that financial records had been maintained; and, in turn, they were current, or reasonably current, as at the date of Mr Bettles' appointment.

3. Statutory framework and legal principles

3.1 The IPS

422 Section 1-1 of the IPS sets out the objects of the IPS. They include to ensure that any person registered as a liquidator: has an appropriate level of expertise; behaves ethically; and maintains sufficient insurance to cover his or her liabilities in practising as a registered liquidator: see s 1-1(1) of the IPS.

423 Part 2 of the IPS concerns the registration and disciplining of insolvency practitioners. It includes:

(1) Division 20 which concerns the registration of liquidators by ASIC;

(2) Division 40 which concerns disciplinary and other action which can be taken by ASIC. This includes the ability to suspend or cancel a liquidator's registration in the event that one of a number of specified circumstances arise in relation to the registered liquidator; and

(3) relevant to this proceeding, Div 45 which concerns court oversight of registered liquidators.

424 Section 45-1 of the IPS provides:

> **Court may make orders in relation to registered liquidators**
>
> (1) The Court may make such orders as it thinks fit in relation to a registered liquidator.

(2) The Court may exercise the power under subsection (1):

(a) on its own initiative, during proceedings before the Court; or

(b) on application under subsection (3).

(3) Each of the following persons may apply for an order under subsection (1):

(a) the registered liquidator;

(b) ASIC.

(4) Without limiting the matters which the Court may take into account when making orders, the Court may take into account:

(a) whether the registered liquidator has faithfully performed, or is faithfully performing, the registered liquidator's duties; and

(b) whether an action or failure to act by the registered liquidator is in compliance with this Act and the Insolvency Practice Rules; and

(c) whether an action or failure to act by the registered liquidator is in compliance with an order of the Court; and

(d) whether any person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the registered liquidator; and

(e) the seriousness of the consequences of any action or failure to act by the registered liquidator, including the effect of that action or failure to act on public confidence in registered liquidators as a group.

(5) This section does not limit the Court's powers under any other provision of this Act, or under any other law.

425 The scheme in s 45-1 of the IPS is relatively new. Neither the parties' nor my own research identified any case which had considered its operation. However, the case law developed in relation to the predecessor provision, s 536 of the Corporations Act, may inform the approach and principles applicable to s 45-1 of the IPS.

426 Section 536 of the Corporations Act (now repealed) was titled "Supervision of liquidators" and provided:

(1) Where:

(a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:

(i) a requirement of the Court; or

(ii) a requirement of this Act, of the regulations or of the rules; or

(b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;

the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.

(2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.

(3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

427 In *Australian Securities and Investments Commission v* ***Wily*** (2019) 137 ACSR 1; [2019] NSWSC 521 at [22] Brereton J observed that s 536 of the Corporations Act provided for the Court or ASIC to inquire into a complaint in relation to the conduct of a liquidator in connection with the performance of his or her duties. In contrast, s 45-1 of the IPS does not empower the Court to undertake an inquiry in the same way but confers a broad discretion to make such orders as it thinks fit and provides a non-exhaustive list of the matters which the Court can take into account when making orders. The Court's power to inquire is now found in s 90-5 and s 90-10 of the IPS and is a power to inquire into an external administration of a company either on its own initiative during proceedings before the Court or on the application of a person mentioned in s 90-10(2), which includes ASIC.

3.2 Common law and statutory duties

428 ASIC contends that Mr Bettles breached his common law and statutory duties.

429 *Iannuzzi* concerned an application by the Commissioner of Taxation for orders, among others, under s 536 of the Corporations Act that the name of the defendant, Mr Iannuzzi, be removed from the register of liquidators and that he be restrained for ten years from applying for registration as a liquidator. At [201]-[208] Stewart J relevantly described the standard of conduct owed by a liquidator as follows:

[201] The liquidator's essential functions are to identify, take possession of and realise the company's assets, to investigate and determine the claims against the company and to apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority: *Australian Securities and Investment Commission v Edge* (2007) 211 FLR 137; [2007] VSC 170 (*Edge*) at [40] per Dodds-Streeton J; *Macks v Viscariello* (2017) 130 SASR 1; 353 ALR 201; 126 ACSR 68; [2017] SASCFC 172 at [771]–[772] per Lovell J, Corboy and Slattery AJJ.

[202] A court-appointed liquidator is an officer of the court, through whom the court itself notionally conducts compulsory liquidations: *Edg*e at [39]. This has particular implications for the standard of conduct expected of a liquidator.

The liquidator is entrusted with the reputation of the court for impartial and proper dispatch of their duties: *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 696; (1979) 4 ACLR 259 at 286 per Marks J.

[203] Section 536 is a statutory embodiment of the court's power to supervise its officers, but extends to all liquidators, whether appointed by the court or otherwise. That is doubtless because all liquidators, however appointed, perform an important public function. The position of liquidator is a repository of public trust; the public is entitled to trust a liquidator to perform their functions to a high standard and with scrupulous attention to obligations of candour, honesty and integrity.

[204] When a liquidator falls short of the standards expected of them, the public's trust in the office of liquidator is eroded. That in turn has a corrosive effect on the administration of the body of insolvency law, and consequently on the administration of justice.

[205] A liquidator's duties include both general law and statutory duties to act with reasonable care and diligence (s 180, *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117 at [91]–[92] per Greenwood, Davies and Markovic JJ), good faith (s 181), proper use of their position (s 182), proper use of any information obtained (s 183) and not to act recklessly or dishonestly (s 184). Liquidators also have a fiduciary duty to act with complete impartiality between creditors and not to allow the liquidator's personal interests to conflict with the liquidator's duties.

…

[208] In *Pace v Antlers Pty Ltd* (1998) 80 FCR 485 at 497F–498B; 26 ACSR 490 at 501–2, Lindgren J summed up the position as follows:

> The liquidator's duty to exercise reasonable care and skill has been the subject of some debate. The following propositions, however, appear to have gained acceptance in Australia:
>
> - The court should not be quick to condemn a person in the difficult position of a liquidator, and, in particular, should not judge his or her conduct with wisdom born of hindsight: *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151; *Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith* (1989) 54 SASR 285 at 287 (Olsson J); it is not every error of judgment that will be accounted negligence: *Re George A Bond & Co Ltd* (1932) 32 SR (NSW) 301 at 306;
>
> - At the same time, 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: *Windsor Steam Coal* at 165, per Lawrence LJ; *Maelor Jones* at 288–9; McPherson, *The Law of Company Liquidation*, p 218;
>
> - A liquidator is under a duty to complete the administration of the assets within a reasonable time and not to protract the liquidation unduly: *Re House Property & Investment Co Ltd* [1954] Ch 576 at 612; [1953] 2 All ER 1525; McPherson, *The Law of Company Liquidation*, p 218; he or she must act with "due despatch": *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 691; (1979) 4 ACLR 259 at 281; *Maelor Jones* at 288;
>
> - If there is a difficulty at any stage of the administration, it is the

> liquidator's clear duty to inform the court and seek directions: *CCA v Harvey* at 691; *Windsor Steam Coal* at 159, 161; *Maelor Jones* at 288.

430 A liquidator, whether court appointed or voluntary, is an agent of the company and, as such, owes fiduciary duties to the company to which he or she is appointed. In *Pace v Antlers Pty Ltd (in Liquidation)* (1998) 80 FCR 485 at 497 Lindgren J considered whether a liquidator had, among other things, breached his fiduciary duty. As to the nature of that duty his Honour said:

> According to B M McPherson, *The Law of Company Liquidations* (3rd ed, 1987), at pp 214-15:
>
> > "From the practical point of view it does not seem to matter much whether the liquidator is treated as a trustee in the strict sense or simply as an agent, for in either capacity he occupies a fiduciary position in relation to the company, its creditors and contributories. This imposes upon him certain obligations identical with those resting upon trustees, agents, and directors, one of which is that he is bound to act honestly and to exercise his powers bona fide for the purpose for which they are conferred and not for any private or collateral purpose. In addition, two further duties of major importance follow from his fiduciary relationship: these are (a) that he must not allow his private interest to come into conflict with his duty, and (b) that in discharging his duties he must at all times act with complete impartiality as between the various persons interested in the property and liabilities of the company."
>
> This passage was approved by Olney J in *Re G K Pty Ltd (In liq)*; *Ex parte Deputy Commissioner of Taxation* (1983) 7 ACLR 633 at 639.

431 Insofar as a liquidator owes a fiduciary duty, despite some ambiguity in some of the decided cases and a suggestion that such a duty may be owed to creditors, it is clear that duty is owed to the company alone. In ***Hausmann*** *v Smith* (2006) 24 ACLC 688; [2006] NSWSC 682 at [12] Barrett J said:

> The second point is that the duties owed by administrators and liquidators are not duties owed to shareholders or to creditors. Reference was made to *Kinsela v Russell Kinsela Pty Ltd* [1983] 2 NSWLR 452. That case is part of a line of decisions the most recent authoritative element of which is, I think, *Spies v R* (2000) 201 CLR 603 in which it is recognised that directors' duties are owed to the company, even though due performance of those duties may require directors to pay attention to the interests of creditors. There is a difference between the beneficiary of a duty and the delineation of the interests to be taken account of in performing the duty. In my opinion, the same analysis holds good in relation to the duties of administrators and liquidators.

432 In ***Macks v Viscariello*** (2017) 130 SASR 1 a Full Court of the Supreme Court of South Australia (Lovell J, Corboy and Slattery AJJ) held that an administrator does not owe statutory or common law duties to creditors. At [207]-[208] their Honours referred with approval to the statement of principle in *Hausmann* (see above) and concluded that in the case before them the administrator did not owe any general law duty to an individual creditor observing that "[t]he

recognition of such a duty would be inimical to the basic principles and policies on which insolvency administration rest – in particular, the principle of equality between creditors".

433 In *Seaman v Silvia* [2018] FCA 97, in the context of an application for leave to file and serve a further amended originating application and a further amended statement of claim, Derrington J considered the question of whether the plaintiff's claims, which were based on an assumption that administrators might owe statutory duties or a duty of care to the plaintiff in his capacity as a creditor, director or shareholder, were sustainable. His Honour held (at [35]) that such a proposition is not sustainable. His Honour referred to *Macks v Viscariello* observing in relation to it (at [35]-[38]) that:

> 35 … Notably that Full Court decision overturned a number of the conclusions of law reached by Kourakis CJ, although, it must be said, not necessarily in relation to matters which are relevant to the present application. In the course of the Full Court's reasoning, it concluded that an administrator does not owe duties either under statute or at common law to individual creditors of a company. This was emphatically expressed in paragraphs [192]-[193]:
>
> > 192. It is to be noted that the passages cited above from the judgments of Gleeson JA in *Correa v Whittingham* and Barrett J in *Blundell v Macrocom* identified the fiduciary relationship as subsisting between an administrator and the company in administration. We do not think that their Honours were merely defining the relationship in a general sense. Rather, we consider that the Primary Judge was right to reject, albeit tentatively, the proposition that an administrator owes a duty to individual creditors. In our view, an administrator does not owe statutory or general law duties to individual creditors. Absent a statutory entitlement, a creditor has no personal right of action against an administrator for damages or compensation. The directors of a company, including a company that is nearly insolvent, do not owe duties to individual creditors and we are unable to discern any basis for reaching a different conclusion for administrators.
>
> > 193. There is no duty generally owed by an officer of a corporation to creditors (*Spies v The Queen* (2000) 201 CLR 603) and any action for remedies for breach of ss 180, 181 or the general law duties from which those provisions are derived is ordinarily to be commenced by the company.
>
> 36 The Full Court also identified that a liquidator's duty of care in realizing a company's assets could not be equated with the liquidator's fiduciary duty when exercising their powers in the winding up of insolvent companies. It was observed (at [200]) that the scope and the nature of those duties were entirely different. Whilst the Full Court doubted the observations of Debelle J in *Mills v Sheahan* (2007) 99 SASR 357 and the observations of Vickery J in *Perpetual Nominees Ltd v McGoldrick (No 3)* (2017) 317 FLR 227 in relation to the alleged existence of a duty of care of a liquidator when realising an insolvent company's assets, it held that no duty of care was owed by the administrator to creditors in the management of the company's business affairs, including the sale of some or all of its assets, the compromising claims for and against it

and the negotiations of a DOCA. Their Honours agreed with the observations of Kourakis CJ at first instance where the Chief Justice said (at [94]):

> However, the imposition of a duty to individual creditors in making decisions as to the re-arrangement of the company's finances, the proportionate payment of debt in accordance with a DOCA, or whether the company should go into liquidation, would compromise the statutory scheme to which I have referred. In my view, this factor alone decisively tells against the imposition of a duty to individual creditors with respect to that part of an administrator's responsibilities.

37 The Full Court further agreed with the observations of the Chief Justice where he said (at [95]):

> It is manifestly inconsistent with the statutory regime of the Corporations Act regulating the duties of voluntary administrators to superimpose upon it a common law duty of care owed by the administrator to individual creditors, directors or shareholders to protect them from financial loss by the exercise of reasonable care in discharging his or her statutory powers affecting the form in which the company will continue to operate or, alternatively, whether it will be wound up. That inconsistency is at its greatest when an administrator must form an opinion and frame a recommendation to the creditors, about whether to trade on, enter into a deed of company arrangement, sell the business and/or wind up the company.

38 It also agreed with the observations of Barrett J stated in *Hausmann v Smith* (2006) 24 ACLC 688 at [12] to the effect that duties owed by administrators (and liquidators) are not duties owed to shareholders or to creditors. The duties are owed to the company in administration even if, when performing those duties, attention must be paid to the interests of creditors.

See too *McMillan v Coolah Home Base (No 3)* [2020] NSWSC 1325 at [128] (per Ward CJ in Eq).

434 A liquidator is an officer of the corporation to which he or she is appointed: see s 9 of the Corporations Act.

435 Insofar as statutory duties are concerned, ASIC contends that Mr Bettles breached, or was knowingly concerned in a breach of, ss 180, 181 and/or 182 of the Corporations Act. Those sections relevantly provide:

> **180 Care and diligence—civil obligation only**
>
> *Care and diligence—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and

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

Note: This subsection is a civil penalty provision (see section 1317E).

…

181 Good faith—civil obligations

Good faith—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

182 Use of position—civil obligations

Use of position—directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

436 The duties specified in ss 180, 181 and 182 are owed by the liquidator to the company to which he or she has been appointed and of which he or she is an officer.

437 Sections 181 and 182 expressly provide that a person who is involved in a contravention of subs (1) of each of those provisions contravenes the section. However, the same is not true for s 180, a matter which I address in detail below.

438 Section 79 of the Corporations Act defines the phrase "involved in" and provides:

A person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

3.2.1 Section 180(1) of the Corporations Act

439 The content of the duty owed under s 180(1) of the Corporations Act and at common law is essentially the same. The applicable principles did not appear to be in dispute. In summary insofar as s 180(1) of the Corporations Act is concerned:

(1) the standard of care required by s 180(1) of the Corporations Act is objective. However, account must be taken of the circumstances of the company and of the particular director or officer involved. The Court inquire into "what an ordinary person, with the knowledge and experience of the director or officer, could be expected to have done in the circumstances if he or she was acting on their own behalf": ***Termite Resources*** *NL (in liq) v Meadows, Re Termite Resources NL (in liq) (No 2)* (2019) 370 ALR 191; [2019] FCA 354 at [181];

(2) the circumstances of the company include the type of company, the size and nature of its business, the provisions of its constitution, the composition of its board and the distribution of the work between the board and the company's other officers: *Termite Resources* at [181];

(3) the foreseeable risk of harm to be considered in relation to an alleged breach of s 180(1) is not confined to financial harm but includes harm to all interests of the company. Whether a director has exercised reasonable care and diligence is to be considered by balancing the foreseeable risk of harm against the potential benefits which could be expected to accrue to the company from the conduct in question. That balancing exercise should be carried out in a way that is similar to that described in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-8 (per Mason J). The exercise is forward looking to what a reasonable person would have done, not backward looking at what could have avoided the harm: *Termite Resources* at [183]; *Australian Securities and Investments Commission v* ***Drake (No 2)*** (2016) 340 ALR 75; [2016] FCA 1552 at [395]-[396];

(4) at the second stage of the enquiry, "the measure of the discharge of the duty is what a reasonable person would, in the circumstances, have done by way of response to a foreseeable risk": *Drake (No 2)* at [397]-[401]; and

(5) the conduct must be assessed having regard to the circumstances existing at the time, without the benefit of hindsight and bearing in mind the distinction between negligence and mistakes or errors of judgment: *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7242]; *Iannuzzi* at [208]-[209].

3.2.2 Section 181(1) of the Corporations Act

440 As is the case with s 180 of the Corporations Act, the duty in s 181(1) of the Corporations Act and in common law are of a similar character.

441 The principles applicable to consideration of the duty owed in s 181(1) of the Corporations Act can be summarised as follows:

(1) the requirements of a duty to act in good faith include that the officer must: (a) exercise their powers in the interests of the company; (b) not misuse or abuse their power; (c) avoid conflict between their personal interests and those of the company; (d) not take advantage of their position to make secret profits; and (e) not misappropriate the company's assets for themselves: *Chew v R* (1991) 4 WAR 21 at 49; ***Re Colorado Products*** *Pty Ltd (in prov liq)* (2014) 101 ACSR 233; [2014] NSWSC 789 at [419];

(2) the case law remains unsettled as to whether establishing a contravention of s 181(1)(a) of the Corporations Act requires establishing that a director engaged deliberately in conduct which he or she knew was not in the company's best interests or whether it is determined objectively, involving an assessment by the Court of what is reasonable in the circumstances: *Re Colorado Products* at [420]; *Hanwood Pastoral Co Pty Limited v Kelly (No 2)* [2022] FCA 850 at [142];

(3) nevertheless, it is well-established that an allegation of breach involves both subjective and objective elements: subjective in the enquiry as to the director's subjective purpose, and objective in the assessment of whether that purpose was improper: *Termite Resources* at [194]; ***United Petroleum*** *Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324; [2018] VSC 347 at [641]; *Australian Securities and Investments Commission v* ***Flugge*** (2016) 342 ALR 1; [2016] VSC 779 at [1976]; and

(4) in considering whether s 181(1) of the Corporations Act has been breached, the Court seeks to balance "the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question": *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 450 (per Ipp J); *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [465], [479].

3.2.3 Section 182(1) of the Corporations Act

442 Section 182(1) is similar to, but not as the same as, the "profit" rule in equity which is wider in scope. The principles applicable to s 182(1) of the Corporations Act can be summarised as follows:

(1) in order to prove a contravention of s 182(1) of the Corporations Act the following must be established: (a) that the officer "used" the position he or she held as an officer; (b) such use was improper; and (c) such conduct was for the purpose of gaining an advantage or to cause a detriment to the company: see *Hakea Holdings Pty Ltd v Neon Underwriting Limited for and on behalf of the Underwriting Members of Lloyds Syndicate 2468* (2023) 408 ALR 28; [2023] FCAFC 34 at [8] (per Colvin and Button JJ);

(2) the relevant conduct would be improper if it amounted to a breach of the standards of conduct that would be expected of a person in the officer's position by reasonable persons with knowledge of the duties, powers and authority of his or her position as an officer and the circumstances of the case, including the commercial context: *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18 at [35]; *Re Colorado Products* at [432]-[433]; *Australian Securities and Investments Commission v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1523]-[1536]; and

(3) it is not necessary that an advantage has in fact been gained by the officer or that detriment has in fact been caused to the company. In ascertaining whether the officer had one or other of the proscribed purposes in mind, it is relevant to consider the officer's particular duties and responsibilities and his or her appreciation of the circumstances at the time: *United Petroleum* at [644]; *DTM Constructions Pty Ltd (t/as QA Developments) v Poole* (2017) 123 ACSR 171; [2017] QSC 210 at [43].

3.2.4 Accessorial liability – "involved in"

443 ASIC alleges that Mr Bettles was involved in contraventions of s 181(1) and s 182(1) of the Corporations Act by Mr Marlborough and that, as well as contravening s 180(1) of the Corporations Act, he was involved in such contraventions, again by Mr Marlborough.

444 Section 79 of the Corporations Act defines the phrase "involved in": see [438] above. In particular, ASIC relies on subs 79(a) and subs (c) and alleges that Mr Bettles either aided a contravention and/or that he was directly or indirectly knowingly concerned in a contravention.

445 Both subs 79(a) and subs (c) of the Corporations Act require the person alleged to have been involved in the contravention to have been an intentional participant in that contravention. In order to form the necessary intent a person must have had knowledge of the essential matters which went to make up the contravention in question: ***Yorke v Lucas*** (1985) 158 CLR 661 at 667 and 670.

446 In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 ASIC alleged that some of the defendants were knowingly concerned in contraventions of the Corporations Act. Before considering that allegation at [398]-[405] White J set out a summary of the general principles relating to accessorial liability as follows:

> 398 In order for a person to be knowingly concerned in a statutory contravention, that person must have been an intentional participant, with knowledge of the essential elements constituting the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670. It is not, however, necessary that a person with knowledge of the essential elements making up the contravention also know that those elements do amount to a contravention: *Yorke v Lucas* at 667; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 1161; (1999) 95 FCR 302 at [186]; *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 at [8]-[13]. An accessory does not have to have appreciated that the conduct was unlawful: *Giraffe World* at [186].
>
> 399 Actual knowledge of the essential elements constituting the contravention is required. Imputed or constructive knowledge is insufficient: *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; (2012) 293 ALR 537 at [11].
>
> 400 Proof that a person had actual knowledge of each of the essential elements making up the contravention may be derived from direct evidence but more commonly will be a matter of inference from all the circumstances found to be proved. In some cases, actual knowledge can be inferred from the combination of a defendant's knowledge of suspicious circumstances and the decision by the defendant not to make enquiries to remove those suspicions. The High Court referred to knowledge in these circumstances in *Pereira v Director of Public Prosecutions (Cth)* (1988) 63 ALJR 1 at 3-4; 82 ALR 217 at 220:

> [A] combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer's shorthand, be referred to as "wilful blindness". Where that expression is used, care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt.

After referring to a difference in emphasis between, on the one hand, the reasons of Wilson, Deane and Dawson JJ and, on the other, the reasons of Gibbs CJ, in *Giorgianni v The Queen* (1985) 156 CLR 473 to the caution expressed by the High Court in the last sentence of the above passage White J continued:

> 402 Any difference in approach in *Giorgianni* in these passages appears to have been resolved by the unanimous judgment in *Pereira* in the passage quoted above. It means that only actual knowledge of the essential matters will be sufficient but that that knowledge may be able to be inferred from a defendant's knowledge of matters raising suspicion, together with a deliberate failure to make the enquiries which may have confirmed those suspicions.
>
> 403 The determination that a person has actual knowledge in this manner is not always easy. Amongst other things, it requires consideration of the defendant's knowledge of matters giving rise to suspicion, the circumstances in which the defendant did not make the obvious enquiry, and the defendant's reasons, to the extent that they are known, for not making the enquiry. It is necessary to keep in mind that it may not be every deliberate failure to make enquiry which will support the inference of actual knowledge. …
>
> 404 Although courts have held on several occasions that actual knowledge by a person of the essential elements of a contravention may be able to be inferred from proof that the person had knowledge of suspicious circumstances but deliberately refrained from making enquiry (*Richardson & Wrench* at 693-694; *Cassidy* at [71]; *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 at 5; *Australian Securities and Investments Commission v PFS* Business *Development Group Pty Ltd* at [390]; *Forge v Australian Securities and Investments Commission* [2004] NSWCA 448; (2004) 213 ALR 574 at [202], there are few instances of actual knowledge being found to exist in those circumstances. This has the consequence that there is relatively little practical analysis in the authorities of the way in which actual knowledge can be inferred on the basis of knowledge of suspicious circumstances and a failure to make enquiry.
>
> 405 The requisite actual knowledge must be present at the time of the contravention. A later acquisition of knowledge of the essential matters is not sufficient: *Australian Investors Forum* at [113]-[118].

447 Insofar as s 79(c) of the Corporations Act is concerned, in *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* (2020) 389 ALR 17; [2020] FCA 1442 at [486]-[487] Banks-Smith J said:

> [486] As noted in *Quinlivan v ACCC*, 'knowledge' means actual and not constructive

knowledge. However, actual knowledge may be inferred from wilful blindness or from dishonest or deliberate ignorance. In *Young Investments Group Pty* Ltd *v Mann* (2012) 293 ALR 537; 91 ACSR 89; [2012] FCAFC 107 the Full Court said (Emmett, Bennett and McKerracher JJ) said:

> [11] … For statutory breaches, it is well-established that, in order to be an accessory or to be knowingly involved in a contravention, a person must have intentionally participated, having knowledge of the essential matters constituting the contravention: see *Yorke v Lucas.* That is not imputed or constructive knowledge but, rather, actual knowledge. It would not usually be sufficient to establish a statutory breach to show that a person said to be an accessory to such a breach wilfully shut his or her eyes to the obvious: see *Giorgianni v R* (1985) 156 CLR 473; 58 ALR 641; 2 MVR 97. Actual knowledge of suspicious circumstances and a failure to make enquiry may be different: see *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217at 219…

[487] It therefore follows that in order to find that Mr Cruickshank was knowingly concerned in Antares' contravention, ASIC must prove that Mr Cruickshank intentionally participated having actual knowledge of the essential elements constituting the contravention.

448 Sections 181(2) and 182(2) of the Corporations Act expressly provide that a person who is involved in a contravention of, relevantly, s 181(1) or s 182(1) contravenes the relevant subsection. However, s 180 contains no equivalent provision. A question arises as to whether, that being so, a person involved in a contravention of s 180 of the Corporations Act contravenes that Act. The parties were at odds in relation to this question which I address at [495]-[507] below.

3.3 Section 545 of the Corporations Act

449 Section 545 of the Corporations Act provides:

> (1) 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.
>
> (2) The Court or ASIC may, on the application of a creditor or a contributory, direct a liquidator to incur a particular expense on condition that the creditor or contributory indemnifies the liquidator in respect of the recovery of the amount expended and, if the Court or ASIC so directs, gives such security to secure the amount of the indemnity as the Court or ASIC thinks reasonable.
>
> (3) Nothing in this section is taken to relieve a liquidator of any obligation to lodge a document (including a report) with ASIC under any provision of this Act by reason only that he or she would be required to incur expense in order to perform that obligation.

450 In *Jahani, in the matter of Ralan Group Pty Ltd (in liq)* (2022) 159 ACSR 222; [2022] FCA 107 at [122] Farrell J observed that:

> The effect of s 545 is that, apart from lodging certain documents, a liquidator is not required to do anything if s/he cannot recover expenses. It means the liquidator commits no wrong in failing to carry out any duties in those circumstances: see *Jenkins v Jonkay Pty Ltd* [2007] FCA 858 at [10] (Finkelstein J) cited with approval in *The Australian Sawmilling Company Pty Ltd (in liq) v Environment Protection Authority* (2021) 64 VR 523; [2021] VSCA 294 at [172] (Ferguson CJ, Sifris and Kennedy JJA).

451 There has been a debate in the authorities as to whether s 545 of the Corporations Act applies to relieve a liquidator from expending time for which he would otherwise not be remunerated as well as disbursements. In *Wily* at [83] Brereton J observed that authority favoured the view that what a liquidator is expected to do must be affected where there are no available assets. His Honour continued:

> … In *Clasquin SA v AAR International Pty Ltd*, Cohen J said, of a materially identical predecessor provision:
>
> > The liquidator says that he should not be required to incur expense to get in the books although normally that would be a duty under s 374 which requires a liquidator to get in all the property of a company.
> >
> > The Corporate Affairs Commission, on the other hand, submits that s 429(3) should be read down so as to include not only an obligation to lodge a document but also an obligation to get in the books which would enable that document to be lodged. In effect it is said that as there is a public interest in the lodging of reports and a requirement of the Code then the means for the preparation of the report must be sought by the liquidator notwithstanding the fact that he would incur expense.
> >
> > I do not accept that s 429(3) should be read down so as to require the liquidator to incur considerable expense in order to obtain the means of lodging a document. In my belief s 429(3) goes to the preparation and physical lodgment of the document and notwithstanding that there may be costs incurred in the use of the liquidator's staff or equipment in preparing that document, he is required to expend money for that purpose.
> >
> > I do not however consider that it requires him to incur heavy expenditure in getting in assets including the books for the purposes of the preparation of the report.
> >
> > The question of the incurring of expense under the equivalent of s 429 was dealt with by Needham J in *Re Tulloch Ltd (in liq) and the Companies Act* (1978) 3 ACLR 808. In that case the liquidator had been seeking to disclaim some real estate. It was held that where he had no funds available to him he was entitled to a direction that until he had assets available to him he would be justified in taking no action with respect to the keeping in repair of the property and the payment of rates in respect thereof.
> >
> > That principle is called in aid in this application on the basis that the getting in of the books is the equivalent of the preservation of property. For the Corporate Affairs Commission it is submitted that that is a different situation and it is said that there is a public interest in the preservation of documents, that access may be required and it is important that there be someone responsible for the upkeep of the documents.

> The first thing that I should observe in respect of this is that the liquidator does not have the documents and they have not been delivered to him. I think that in general it is the duty of the liquidator to get in the books and records and to use them for the purpose of making such reasonable investigations as he can do. I think however that the general effect of s 429 is to relieve the liquidator from expenses other than those of a comparatively small nature which are required in order that he may carry out his statutory duties to provide reports, returns and the like. I do not consider that it requires him to expend large sums of money both in the getting in and the storage of records which would permit that to be done. Each case however must depend upon its facts.

(Footnotes omitted.)

452 At [87] Brereton J acknowledged a potentially different approach noting that:

> While Black J in *Re ACN 151 726 224 Pty Ltd (in liq) (previously Ridley Capital Holdings Pty Ltd)* expressed some doubt as to whether in s 545 "expenses" included remuneration, his Honour nonetheless acknowledged that there was force in the submission that, even if s 545 of the Corporations Act does not apply to a liquidator's time costs, as distinct from expenses payable to third parties, the principle it reflects should inform an understanding of the liquidator's role.
>
> (Footnotes omitted.)

3.4 The ARITA Code of Professional Practice for Insolvency Practitioners

453 Clause 1 of the ARITA Code sets out its primary purposes which are to:

- set standards of conduct for insolvency professionals;
- inform and educate ARITA Members as to the standards of conduct required of them in the discharge of their professional responsibilities; and
- provide a reference for stakeholders and disciplinary bodies against which they can gauge the conduct of ARITA Members.

454 Clause 1.1 of the ARITA Code relevantly provides:

> The Code is not a simple restatement of Legislation, regulations and judicial pronouncements, rather it is a set of principles and guidance based on standards of conduct that are founded in established precedent. Some standards imposed on Members are higher than those existing legal requirements. Where the law is silent, or ambiguous, the Code introduces principles to clarify understanding of the desired behaviour.

455 The requirements for registration as a liquidator are set out in Div 20 of the IPS. In summary: an application to be registered by a liquidator is to be made to ASIC in the prescribed form; ASIC is required to refer an application for registration as a liquidator properly made to a committee convened under s 20-10 of the IPS; and the committee must consider the application and decide whether the applicant should be registered as a liquidator. ASIC must register the

applicant as a liquidator if the conditions set out in s 20-30(1) of the IPS are met, namely if the committee has decided that the applicant should be registered and the applicant has adequate and appropriate professional indemnity and fidelity insurance.

456 There is no requirement for an applicant for registration as a liquidator to be or become a member of ARITA. However, those persons, including registered liquidators, who choose to become members of ARITA are subject to the ARITA Code: see cl 1.6 of the ARITA Code. Relevantly Mr Bettles is a member of ARITA.

4. Consideration

457 ASIC's case against Mr Bettles arising out of the external administration of the MA Group falls into two broad categories: claims in relation to Mr Bettles' conduct arising out of the implementation of the strategy set out in part 9 of the FASOC; and more general claims in relation to Mr Bettles' conduct vis à vis his role as a liquidator set out in parts 10 to 13 of the FASOC.

458 For ease, in considering those claims I have generally adopted the headings in the FASOC.

5. ASIC's implementation case

459 I turn to consider whether ASIC has made out its claims against Mr Bettles in relation to its implementation case noting however that ASIC had not established one of the underlying premises of its implementation case, namely that Mr Bettles knew or ought to have known all of the elements that make up the strategy.

5.1 The MacVicar Deed and the MacVicar Payment (9.5 FASOC)

460 ASIC puts its case against Mr Bettles in relation to the MacVicar Deed on the following bases:

(1) Mr Bettles' conduct rendered him primarily liable for breach of s 180 of the Corporations Act as the liquidator (and therefore an officer of Iridium Holdings) for failing to investigate whether Mr MacVicar was entitled to the MacVicar Payment and to prevent that payment on 9 November 2016 using the powers at his disposal;

(2) Mr Bettles breached his common law duties (Liquidator's Duty No. 1 and Liquidator's Duty No. 2) as liquidator of Iridium Holdings;

(3) Mr Bettles failed to act with independence in breach of cl 6.1, cl 6.8 and Principle 2 of the ARITA Code which failure gave rise to a perception of lack of independence; and

(4) Mr Bettles was involved in a contravention of s 180 of the Corporations Act by Mr Marlborough.

5.1.1 Did Mr Bettles breach his duty owed to Iridium Holdings under s 180 of the Corporations Act and fail to meet Liquidator's Duty No. 1 and Liquidator's Duty No. 2?

461 ASIC submits that: Iridium Holdings owed substantial amounts to creditors, including the ATO both pursuant to a statutory demand served by the ATO and as the head company of the GST and income tax consolidated groups; Mr Bettles was aware of these matters; despite this, Mr Bettles failed to investigate whether Mr MacVicar had any entitlement to the MacVicar Payment as director's fees or otherwise; and he otherwise allowed or failed to prevent the MacVicar Payment.

462 ASIC submits that this conduct by Mr Bettles as an officer of Iridium Holdings fell below the degree of care and diligence that a reasonable person would exercise in those circumstances and accordingly was in breach of s 180 of the Corporations Act. It also contends that by the same conduct Mr Bettles failed to meet Liquidator's Duty No. 1 and Liquidator's Duty No. 2.

463 Underpinning its case that Mr Bettles breached his duty owed pursuant to s 180 of the Corporations Act in relation to the MacVicar Payment is ASIC's contention that it is to be inferred that Mr Bettles knew, or ought to have known, by 31 October 2016 that SS Residential and Mr MacVicar either had entered, or were going to enter, into the MacVicar Deed. ASIC says that knowledge is to be inferred from:

(1) Mr Bettles' knowledge from WMS PowerPoint V5 that an aspect of the strategy for the transfer of income streams and assets from the MA Group to NewCo involved Mr MacVicar's resignation as a director of companies in the MA Group;

(2) a file note made on 28 July 2016 by Mr Bettles to the effect that he was told by Mr Ramsden that SS Residential's only asset was a compensation payment from the landlord of about $400,000;

(3) an email sent by Mr Bettles on 6 September 2016 to Marlborough which included as an agenda item "arrange for signing of the SS Residential Deed";

(4) an email sent by Mr Bettles on 16 September 2016 to, among others, Mr Finch which listed as an agenda item "update from Ramsden as to the status of the SS Residential Deed";

(5) that Mr Bettles knew, or ought to have known, by 16 September 2016 that a payment of about $400,00 to $450,000 was expected to be made to SS Residential in the near future; and

(6) Mr Bettles' direction to Messrs Jones and/or Ramsden on or prior to 31 October 2016 not to disburse funds from SS Residential without his prior approval.

464 In my opinion ASIC has failed to establish that Mr Bettles knew the matters set out in the preceding paragraph. That is for the following reasons.

465 First, the strategy as pleaded by ASIC did not include as an element Mr MacVicar's resignation as a director of companies in the MA Group. Putting that to one side, WMS PowerPoint V5 included at slide 2 under the heading "Timeline":

(1) as an "Action" to "[p]repare forms to resign [Mr MacVicar]";

(2) that "Action" was to be completed by "Ramsden" by "Friday 15 July"; and

(3) under the column headed "Comments" that "[n]ot essential if [Mr MacVicar] decides to stay on. More admin convenience".

It is not open to infer from that slide nor any other aspect of WMS PowerPoint V5 that the strategy included as an element Mr MacVicar's resignation as a director of companies in the MA Group.

466 Secondly, while Mr Bettles' file note of his conversation with Messrs Ramsden and Lavell dated 28 July 2016 (see [252] above) records that he was told that SS Residential's only asset was a payment of about $400,000 from the landlord as compensation for early termination of the lease, it does not record that Mr Bettles was told at that time that Mr MacVicar was to resign as a director of MA Group companies or of the MacVicar Deed and the MacVicar Payment. The only thing Mr Bettles knew was that there was to be a payment to SS Residential and that was its only asset. In cross-examination Mr Bettles rejected the suggestion that he knew that Mr Marlborough had a plan for Mr MacVicar to resign as a director of those MA Group companies in which he still held that position.

467 Thirdly, it is not in dispute and the facts establish that Mr Bettles was aware of the SS Residential Deed and that a payment was to be made by Transport for NSW to SS Residential pursuant to it. However, that is not a fact from which it can be inferred that Mr Bettles had knowledge of the MacVicar Deed or the payment to be made pursuant to that deed.

468 Fourthly, true it is that on 31 October 2016 Mr Bettles exchanged texts with Mr Ramsden. His file note (see [267] above) records that it was agreed that Ramsden Lawyers would not disburse the moneys received from Transport for NSW, other than in repayment of Ramsden Lawyers' loan to SS Residential to finalise the settlement, without obtaining Mr Bettles' "further approval". An available inference from that file note, and the one I would draw, is that Mr Bettles had approved the repayment of Ramsden Lawyers' loan and the reference to "further approval" was in relation to any additional payment that was to be made from the settlement moneys received from Transport for NSW.

469 Fifthly, as the evidence discloses, on 8 November 2016 Mr Bettles also: obtained an assurance from Mr Marlborough that he would not authorise any payments from the settlement moneys received from Transport for NSW without seeking Mr Bettles' prior approval; and instructed Mr Carey to undertake PPSR searches in relation to securities in favour of, among others, Ramsden Lawyers and to obtain advice in relation to validity of those securities (see [269] above).

470 Those matters taken together do not give rise to an inference that by 31 October 2016 Mr Bettles knew, or ought to have known, that the MacVicar Deed had been or was to be entered into.

471 As set out at [273] above, I am satisfied that Mr Bettles first became aware of the MacVicar Deed on 9 November 2016 when it was provided to him by Mr Ramsden by email timed at 11.48 am (see [270] above). This was the same day that the MacVicar Payment was made. There was no evidence that the payment was made after despatch of the MacVicar Deed to Mr Bettles. Indeed, the available evidence as recorded in the Ramsden Lawyers WIP Report suggests the contrary (see [272] above).

472 ASIC has failed to establish a fundamental plank of its case, that is that Mr Bettles knew of the MacVicar Deed and of the MacVicar Payment before that payment was made. For that reason it cannot establish that Mr Bettles breached his duty owed pursuant to s 180 of the Corporations Act by failing to investigate the MacVicar Payment and by preventing that payment or that Mr Bettles breached Liquidator's Duty No. 1 and Liquidator's Duty No. 2.

473 Given my findings in relation to the matters underlying the alleged breaches, I am equally not satisfied that there are any matters to be taken into account for the purposes of s 45-1 of the IPS.

5.1.2 Did Mr Bettles act contrary to the ARITA Code of Conduct?

474 ASIC submits that the engagement of Mr Bettles to provide the MacVicar Advice created a relationship pursuant to which he gave professional advice in insolvency to Mr and Mrs MacVicar. ASIC notes that Mr Bettles' appointment to MA Group companies on 22 July 2016 was within two years of the professional relationship created by the provision of the MacVicar Advice and that cl 6.8 of the ARITA Code provides that subject to identified exceptions practitioners must not take an appointment if they have had a "Professional Relationship with the Insolvent during the previous two years". The stated purpose of this restriction is said to be to avoid any perception of a lack of independence on the part of the practitioner.

475 ASIC submits that the spirit of cl 6.8 of the ARITA Code, by the expression of its purpose, is to avoid any perception of a lack of independence by the practitioner and required Mr Bettles to avoid taking an appointment which would give rise to any perception of a lack of independence as that expression is explained in cl 6.1 of the ARITA Code where:

(1) a reasonable and informed third party;

(2) on the information available or which should have been available at the time;

(3) might reasonably form the opinion that the "Practitioner" might not bring an independent mind to the administration and thus may not be impartial or may in fact act with bias; and

(4) because of a lack of independence or a perception of a lack of independence.

476 ASIC submits that a reasonable and informed third party, knowing that Mr Bettles had met with Mr MacVicar, been given financial statements and instructions regarding the MA Group and Mr MacVicar's interests, advised Mr MacVicar of the areas of exposure in the structure less than 18 months before his appointment to the very group the subject of the advice, and been paid for the advice, might reasonably form the opinion that Mr Bettles might not bring an independent mind to the administration nor be impartial and may in fact act with bias.

477 ASIC further submitted that had the same third party known that Mr Bettles stood by when he could have prevented the MacVicar Payment, thereby depriving Iridium Holdings' creditors of disbursement of funds in favour of Mr MacVicar, that person would reasonably form the opinion that Mr Bettles might not in fact have brought an independent mind to the administration and was not in fact impartial.

478 ASIC submits that because of cl 6.8 of the ARITA Code, and if acting in the spirit of cl 6.1 and cl 6.8, Mr Bettles ought not to have taken an appointment to any companies in the MA Group. It said that doing so would create a significant risk of a perception of a lack of independence on Mr Bettles' part and was inconsistent with those provisions of the ARITA Code and Principle 2 thereof.

479 ASIC's case seems to be that because Mr Bettles provided the MacVicar Advice he ought not to have taken the appointment as liquidator of companies in the MA Group until at the earliest March 2018. That is because of cl 6.8 of the ARITA Code. That clause appears in Part 6 which concerns independence and sets out "Principle 2" being that "[w]hen accepting or retaining an appointment the Practitioner must at all times during the Administration be, and be seen to be, independent". Clause 6.8 which is headed "Professional Relationships within two years" provides:

> Subject to the exceptions identified below, Practitioners must not take an appointment if they have had a Professional Relationship with the Insolvent during the previous two years. The purpose of this restriction is to avoid any perception of a lack of independence of the Practitioner. This is referred to as the 'two year rule'.

480 The ARITA Code also provides for exceptions to the "two year rule":

> 6.8.1 Exceptions to the two year rule
>
> A number of narrow exceptions to the two year rule have been created because the exceptions may, in the specific circumstances, be in the interests of creditors, or the professional relationship was of such a nature as to have no material bearing on the independence of the Practitioner.
>
> The Practitioner must examine the particular circumstances carefully and document clearly the reasons why and how the decision to accept the appointment was reached.
>
> The onus of justifying how independence is preserved when relying on any of these exceptions is on the Practitioner. It is not sufficient for a Practitioner to simply include the relationship in a DIRRI. Such a declaration will not cure a real or perceived lack of independence.
>
> Practitioners must be able to explain the circumstances that give rise to the potential conflict and the reasons for believing the exception can be applied in the circumstances. This must be recorded in writing on the relevant file.
>
> If a Practitioner is relying on an exception to the two year rule to be able to accept the Appointment, the details of the exception must still be disclosed in the DIRRI.
>
> At a minimum the creditors must be fully informed so that they understand the situation. The Practitioner should also consider seeking legal advice to determine whether court approval of such appointments should be sought.
>
> A. Immaterial Professional Relationship

> Where the Practitioner has had a prior professional relationship with the Insolvent within a period of two years before the proposed appointment, the Practitioner may accept the appointment if the prior professional relationship was an immaterial professional relationship'.
>
> An immaterial professional relationship is an assignment that:
>
> - was of limited scope; and limited time and/or fees; and
> - would not normally be subject to review by the Practitioner during the course of the Administration.
>
> When determining whether the prior professional relationship was an immaterial professional relationship, the Practitioner must consider whether a fully informed reasonable person would be of the same view.

481 ASIC contends that by accepting the appointments Mr Bettles acted inconsistently with the ARITA Code. The MacVicar Advice is described at [44]-[45] above and considered in detail below in the context of its disclosure in the DIRRIs.

482 ASIC's allegation is not made out.

483 From a factual perspective:

(1) the MacVicar Advice was not provided to the "Insolvent", that is the company or companies to which Mr Bettles was appointed;

(2) the MacVicar Advice was a one-off advice of a general nature, it was not a detailed analysis of the companies in the MA Group nor of Mr MacVicar's individual affairs or conduct (see [45] above). It was based on financial records for the financial years ended 30 June 2013 and 30 June 2014. It came within the class of interaction that could have no material bearing on Mr Bettles' independence; and

(3) it was expressly disclosed in the DIRRIs, as to which see the analysis at [710]-[723] below.

484 The ARITA Code sets out principles. It is a matter for each practitioner to consider and apply those principles in his or her practice. In this case Mr Bettles considered the effect of the MacVicar Advice as is apparent from his disclosure in the DIRRIs, addressed below. Mr Bettles considered ARITA Code Principle 2 as a step in completing the DIRRIs. In doing so I infer that he considered that that his provision of the MacVicar Advice was an exception to the "two year rule". In my opinion he was justified in forming that view, having regard to all of the circumstances, and, it follows, accepting the appointment.

485 In my view a reasonable *and informed* third party, on the information available at the time would not reasonably form the opinion that Mr Bettles might not bring an independent mind to the liquidations and thus may not be impartial because of a lack of independence, or a perception of a lack of independence.

486 While a breach of a provision of the ARITA Code is a matter that the Court may take into account in considering whether an order should be made under s 45-1(4) of the IPS, ASIC has not established any such breach. Accordingly there is no matter to be taken into account for the purposes of s 45-1 of the IPS arising out of this alleged conduct.

5.1.3 Was Mr Bettles involved in Mr Marlborough's contravention of s 180 of the Corporations Act?

487 ASIC submits that by executing the MacVicar Deed as a director of SS Residential Mr Marlborough engaged in conduct in breach of s 180 of the Corporations Act as pleaded in [117] of the FASOC. ASIC observes that Mr Bettles does not admit [117] of the FASOC but Mr Bettles says that as Mr MacVicar executed the MacVicar Deed ASIC's case must fail because it was not Mr Marlborough who signed it. In answer to this criticism, ASIC submits that it is plain enough that Mr Marlborough caused the execution of the MacVicar Deed as he was a director at the time and that, in any event, it pleads its case on two alternate bases: the first being that Mr Marlborough executed the MacVicar Deed thus causing SS Residential to enter into it (**Marlborough Action 1**); and the second being that Mr Marlborough authorised the MacVicar Payment purportedly pursuant to the MacVicar Deed (**Marlborough Action 2**). ASIC submits that it need only establish one of these bases to succeed.

488 ASIC submits that, in terms of the consequences to SS Residential, and therefore Iridium Holdings, the more relevant conduct was Marlborough Action 2. ASIC contends that no director exercising his powers and discharging his duties with the degree of care and diligence that a reasonable person would exercise if they were a director of SS Residential in SS Residential's circumstances, and if they occupied the office as director and had the same responsibilities within SS Residential as Mr Marlborough, would have caused the MacVicar Deed to become fully executed.

489 ASIC submits that: Mr MacVicar was not entitled to any payment for director's fees from SS Residential, which Mr Marlborough knew; Mr MacVicar had not provided any documents evidencing an entitlement to the MacVicar Payment, or any other amount, from SS Residential for director's fees or otherwise and again Mr Marlborough knew this; SS Residential had no

assets other than the money received from Transport for NSW, which Mr Marlborough knew; in addition Mr Marlborough knew that SS Residential was a member of the GST and income tax consolidated groups, was a wholly owned subsidiary of Iridium Holdings, Iridium Holdings was indebted to the ATO, SS Residential was jointly and severally liable for the debts to the ATO of companies in the GST and income tax consolidated groups; in any event, SS Residential's assets should have been available to Iridium Holdings for payment to its creditors; and the MacVicar Payment depleted SS Residential's assets.

490 ASIC contends that Mr Bettles knew of each of the acts which amounted to contravention by Mr Marlborough of s 180 of the Corporations Act and that, in particular, he knew of the intention to make the MacVicar Payment before it was made and of the intention to cast the payment as director's remuneration when no such entitlement existed. ASIC submits that Mr Bettles was aware of these matters as a consequence of discussions in his presence at the 8 July 2016 Meeting and discussions in his presence during the Progress Meetings and the suggestion, by the language used by Mr Bettles in his text exchange with Mr Ramsden on 31 October 2016, that he had already given approval.

491 Before considering the substantive question of whether Mr Marlborough had breached s 180of the Corporations Act and, in turn, whether Mr Bettles was involved in that contravention, two threshold questions arise. The first is whether Mr Marlborough is a necessary party to the proceeding given the claim for accessorial liability; and the second is whether a person involved in a contravention of s 180 of the Corporations Act contravenes that Act. Mr Bettles say the answer to that question is no while ASIC says that the answer to question is not settled.

5.1.3.1 Is Mr Marlborough a necessary party?

492 Mr Bettles submits that accessorial liability is necessarily derivative and there can be no liability of the accessory unless the principal contravention is first established. He therefore contends that to succeed in its accessorial liability allegations against Mr Bettles ASIC first requires a court to make serious adverse findings against Mr Marlborough, who is neither a party nor a witness, although there is no evidence that he is unavailable and no explanation as to why ASIC made its forensic decision not to call him. Mr Bettles submits that the Court should not make those findings because: first, it will be singularly unfair to Mr Marlborough, who has not had an opportunity to respond to the allegations advanced; and secondly, because ASIC cannot discharge its burden of proving that Mr Marlborough committed the

contraventions alleged. That is, the Court is left guessing as to the basis for and reasons why Mr Marlborough acted as he did.

493 It is true that in order for ASIC to succeed in its accessorial liability case against Mr Bettles there must first be findings made about Mr Marlborough's conduct. However, it is not the case that Mr Marlborough is a necessary party to the proceeding: see for example *Matheson Engineers Pty Ltd v El Raghy* (1992) 37 FCR 6 at [11] in the context of the then *Trade Practices Act 1974* (Cth).

494 Here, the Court is primarily concerned with claims made against Mr Bettles. However, it is true that findings of a breach on the part of Mr Marlborough are a necessary step along the way to a finding that Mr Bettles was involved in a breach by Mr Marlborough. The more critical issue is one for ASIC. That is, the absence of Mr Marlborough must necessarily make it more difficult for ASIC to discharge its burden of proving that he committed the contraventions alleged. As will be seen that state of affairs has in fact been borne out in this proceeding. But, ultimately that is a hurdle which is faced by ASIC as part of its claim and not a reason why ASIC cannot bring its claims for accessorial liability against Mr Bettles in the absence of joining the primary contravener, Mr Marlborough, as a party to the proceeding.

5.1.3.2 Involvement in a breach of s 180 of the Corporations Act?

495 As I have already observed s 180 of the Corporations Act does not include a like provision to that found in ss 181(2), 182(2) and 183(2) that "a person who is involved in a contravention of subsection (1) contravenes this subsection". Each of ss 181, 182 and 183 are also followed by a "Note 1" informing the reader that s 79 defines "involved". Section 79 (see [438] above) is in Div 7 of Pt 1.2 of Ch 1 headed "Interpretation of other expressions".

496 This is not the first time the general issue thrown up by his question has been considered.

497 In *Australian Securities and Investments Commission v* ***Maxwell*** (2006) 59 ACSR 373; [2006] NSWSC 1052 ASIC alleged that the defendants had contravened or been involved in contraventions of the Corporations Act in the course of promoting and conducting schemes which raised money from the public. The defendants comprised two groups of companies, all of which had been placed into liquidation by the time of the hearing, officers of those companies and a consultant and an accountant to them. Agreements as to the orders to be made had been reached between ASIC and all of the individual defendants other than one of the

directors, Mr Nahed. Accordingly Brereton J considered the case against Mr Nahed, against whom the case proceeded undefended.

498 Among other things, ASIC alleged that Mr Nahed aided, abetted, counselled or procured or was knowingly concerned in or party to contraventions by some of the companies and two of the other individuals. In relation to that claim at [57] Brereton J said:

> ASIC alternatively alleges that Mr Nahed aided, abetted, counselled or procured or was knowingly concerned in or party to contraventions by ProCorp, Mr Maxwell and BEST, and Coakleys of ss 727 and 734. This allegation picks up the terminology of s 79(a) and (c) of the Corporations Act, which define when a person is "involved" in a contravention by another. However, ss 727 and 734 – unlike ss 181, 182 and 183 – do not provide that a person who is "involved in" a contravention of the section, thereby himself or herself contravenes the section. In my view, the availability of s 79 to impose accessorial liability has been carefully and deliberately marked out through the Act – see ss 181(2), 182(2), 183(2) and 1041I(1) – and it was not made available in connection with ss 727 and 734. In that way, the Act specifies when, for the purposes of the Act, consequences attach being "involved" in a contravention. No such consequences are specified for being "involved" in a contravention of ss 727 or 734. Accordingly, the accessorial liability provisions of s 79 are not available, or do not have any relevance, in respect of these sections, which are in any event not civil penalty provisions.

Brereton J concluded that he was thus unable to find that Mr Nahed was personally liable for the company, ProCorp's, contraventions of s 727 or s 734 of the Corporations Act during the relevant period.

499 In *In the matter of* ***Vault Market*** *Pty Ltd* [2014] NSWSC 1641, in considering whether Mr Amin, the sole director, secretary and shareholder of **Vault** Market Pty Ltd was involved in Vault's contraventions of ss 911A, 911C and 1041H of the Corporations Act, Brereton J said at [54]:

> Accordingly, Mr Amin was involved, in the relevant sense, in each contravention. However, s 79 is not a "stand alone" provision that operates universally in respect of every contravention of the Act: it operates in conjunction with other provisions of the Act which impose liability on a person involved in a contravention: see, for example, ss 181, 182 and 183 (directors' duties); s 209(2)-(3) (related party transactions); s 254L(2), (3) (redemption of redeemable preference shares); s 256D(3), (4) (share capital reductions); s 412(9) (explanatory statement in relation to compromise with creditors); s 1041I (civil liability for misleading or deceptive conduct). As I explained in *ASIC v Maxwell* [(at 388 [57], [76], [124] and [125]), the availability of s 79 to impose accessorial liability has been carefully and deliberately marked out through the Act and, in this way, the Act specifies when, for the purposes of the Act, consequences attach to being "involved" in a contravention. No such consequences were specified for being "involved" in a contravention of ss 727, 734, 911A and 911B, and accordingly, the accessorial liability provisions of s 79 were not available, or did not have any relevance, in respect of contraventions of those sections. The same applies in respect of s 911C.

500 *Australian Securities and Investments Commission v* ***Dover Financial*** *Advisers Pty Ltd (No 2)* (2019) 140 ACSR 635; [2019] FCA 2151 concerned an application by ASIC for declarations of breaches of s 1041H(1) of the Corporations Act and s 12DA(1) and s 12DB(1)(i) of the ASIC Act. The Court upheld ASIC's claim that **Dover** Financial Advisers Pty Ltd had contravened s 1041H(1) of the Corporations Act and s 12DA(1) and s 12DB(1)(i) of the ASIC Act. The parties were unable to agree on the form of declarations to be made consequent on the Court's findings and, in particular, whether a declaration should be made that the second defendant, Mr McMaster, was involved in or knowingly concerned in Dover's contraventions of s 12DA of the ASIC Act or s 1041H of the Corporations Act.

501 In considering whether such a declaration could be made at [18] O'Bryan J said:

> Section 1041H(1) provides that a person must not engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive. Unlike many other provisions of the Corporations Act (for example, s 181), it is not a contravention of s 1041H(1) to be "involved" in a contravention of another person within the meaning of s 79 of the Corporations Act or more generally to be knowingly concerned in a contravention of another person. I respectfully agree with the observation of Brereton J in *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052 at [57] that the availability of s 79 to impose accessorial liability has been carefully and deliberately marked out through the Corporations Act. While s 21 of the FCA Act empowers the Court to make binding declarations of right whether or not any consequential relief is or could be claimed, in my view that power does not extend to a declaration of a state of affairs that is divorced from the existence of any right, duty or liability. The declaration sought by ASIC faces that difficulty: ASIC seeks a declaration that Mr McMaster was involved in contraventions of s 1041H(1) by Dover within the meaning of s 79, or was otherwise knowingly concerned in such a contravention, when being involved or knowingly concerned in such a contravention is not itself a wrong under the Corporations Act.

502 ***English*** *v Vantage Holdings Group Pty Ltd* [2021] WASCA 47 concerned an application for leave to appeal against an order dismissing an application by the appellants to strike out certain paragraphs of a statement of claim. Leave to appeal was granted and the appeal was allowed resulting in various pleas being struck out and the first, third and fourth respondents being granted leave to amend. At [24] Murphy and Vaughan JJA observed that the claims fell into two broad categories: statutory claims in which the plaintiffs alleged that the auditors were involved in contraventions of the Corporations Act on the part of two companies and two individuals; general law claims in which the plaintiffs alleged breach of contractual and tortious duties by the auditors.

503 At [78] Murphy and Vaughan JJA observed that there was an "overreach so far as the statutory accessorial liability claim relies on primary liability in the form of a contravention of s 180(1) of the Corporations Act". At [79] their Honours explained why that was so:

> Section 181(2), s 182(2) and s 183(2) provide, in relevant effect, that a person who is involved in a contravention of s 181(1), s 182(1) and s 183(1) respectively contravenes the earlier subsection (ie s 181(2), s 182(2) or s 183(2)). Each of s 181(2), s 182(2) and s 183(2) is a corporation/scheme civil penalty provision. However, as at the material time, there was no similar provision whereby a person involved in a contravention of s 180(1) thereby contravened a provision that constituted a corporation/scheme civil penalty provision. Accordingly, the plea that the auditors were involved in Mr Donnelly's and Mr Hanson's alleged contraventions of s 181(1), s 182(1) and s 183(1) of the Corporations Act could ground a claim for a compensation order pursuant to s 1317H. But that is not the case with the plea that the auditors were involved in Mr Donnelly's and Mr Hanson's alleged contravention of s 180(1) of the Corporations Act. There is no reasonable cause of action in this respect.

504 ASIC's submission that the question is not settled was, it seems, made by reference to the decision in *English*, which was the only authority referred to in Mr Bettles' written submissions. That submission seems to rest on the contention that *English* is an appeal from an interlocutory decision in which the primary judge did not consider the issue and for that reason has no force. But that fact does not mean that the issue is not settled nor does it make the judgment any less authoritative. The Western Australia Court of Appeal in *English* came to the same conclusion as Brereton J in *Maxwell* and *Vault Market* and O'Bryan J in *Dover Financial*, albeit each of those cases considered the issue in the context of different sections of the Corporations Act. It is a decision of an intermediary Court of Appeal in relation to national scheme legislation.

505 ASIC did not take me to any contrary authority nor did it contend that the decisions in *Maxwell* or *English*, the two authorities I was taken to in argument, were plainly wrong. There is nothing to suggest that the question is not settled. Plainly, it has been carefully considered on a number of occasions. I agree with the conclusion reached in the authorities set out above. As they make plain, the legislature has carefully and deliberately marked out in the Corporations Act the availability of s 79 to impose accessorial liability. It was not made available in connection with s 180.

506 For completeness I note that since the events the subject of this proceeding subs 1317E(3) and subs (4) were introduced into the Corporations Act by s 116 of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) with effect from 13 March 2019 (**2019 Amendments**). Relevantly s 1317E(3), among other things, sets out

those sections of the Corporations Act which are civil penalty provisions and includes s 180(1). Section 1317E(4) provides:

> A person who:
>
> (a) attempts to contravene a civil penalty provision; or
>
> (b) is involved in a contravention of a civil penalty provision;
>
> is taken to have ***contravened*** the provision

As was the case in *English*, the 2019 Amendments do not apply to the alleged conduct in this case because it took place prior to 13 March 2019 when the amendment took effect: see s 1657 of the Corporations Act.

507 ASIC submits that the 2019 Amendments do away with the argument put by Mr Bettles that he cannot be involved in a contravention of s 180(1) of the Corporations Act by Mr Marlborough. ASIC seemed to submit that prior to the amendments the inclusion of subs (2) in ss 181, 182 and 183 was to denote those sections as civil penalty provisions and thus the consequence of s 180 not having an equivalent paragraph to subs (2) was that one could still be involved in a contravention of s 180, without that involvement amounting to breach of a civil penalty provision. I do not accept that argument. It does not grapple with the reasoning in cases such as *Maxwell*, the fact that s 79 is definitional, appears in that part of the Corporations Act that addresses "interpretation of other expressions" and is not a "standalone" provision but operates in conjunction with other provisions and that the legislature has carefully considered the sections of the Corporations Act to which s 79 applies.

508 Given this conclusion, namely that at the time of the alleged conduct the accessorial liability provisions in s 79 were not available in relation to an alleged breach of s 180, it is not necessary for me to consider the substantive questions, namely whether Mr Marlborough was in breach of s 180(1) of the Corporations Act in relation to the MacVicar Deed and the MacVicar Payment and, if so, whether Mr Bettles was involved in that breach.

5.2 Entry into the Management Deeds (9.6-9.15 FASOC)

509 As set out at [166] above, each of MM Prime, Capricorn Securities and Iridium Financial Planning entered into a management deed with BPW and Airlie Beach entered into a management deed with BWP Services. While there were negotiations between Provincial Property and BPW, the Provincial property Management Deed was never executed.

510 ASIC contends that Mr Bettles was involved in contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act by Mr Marlborough in connection with the entry into of the Management Deeds and the redirection of income from the MA Trading Companies to the Benchmark Group and/or that as an officer of Iridium Holdings his conduct in relation to the Management Deeds did not meet the standard of care and diligence that ought reasonably to have been exercised by him in breach s 180(1) of that Act.

511 There was no dispute between the parties that: on or about 11 October 2016 BPW and MM Prime entered into the MM Prime Management Deed; on or about 13 October 2016 BPW and Capricorn Securities, on the one hand, and BPW and Iridium Financial Planning, on the other, entered into the Capricorn Securities Management Deed and the Iridium Financial Planning Management Deed respectively; and on or about 20 October 2016 BWP Services and Airlie Beach entered into the Airlie Beach Management Deed. Nor was there any dispute that each of those deeds was executed by Mr Marlborough on behalf of the relevant MA Trading Company and by Mr Young on behalf of BPW and BWP Services as applicable.

512 Each of the MM Prime Management Deed, Capricorn Securities Management Deed, Iridium Financial Planning Management Deed and the Airlie Beach Management Deed provided in cl 1.1 for a "Commencement Date" of 25 July 2016. In cross-examination Mr Bettles accepted that, despite the Capricorn Securities Management Deed, Iridium Financial Planning Management Deed and Airlie Beach Management Deed being executed on the dates which they bore in October 2016, in each case their operation was back dated to 25 July 2016 (see [231] and [348] above).

513 Mr Bettles' evidence about his involvement with the:

(1) MM Prime Management Deed is set out at [295]-[306] above;

(2) Capricorn Securities Management Deed and Iridium Financial Planning Management Deed is set out at [343]-[349] above;

(3) Airlie Beach Management Deed is set out at [230]-[231] above; and

(4) draft Provincial Property Management Deed is set out at [171]-[192] above. However, given that this deed was not executed it cannot have any relevance to this aspect of ASIC's case.

5.2.1 The pleaded case

514 An issue arose between the parties about the effect of an aspect of ASIC's pleaded case in relation to the entry into of the Management Deeds. In particular, ASIC alleges as part of its pleaded case that Mr Marlborough breached his duties owed to each of the MA Trading Companies that entered into a Management Deed pursuant to ss 180(1), 181(1) and 182(1) includes that:

(1) Mr Marlborough knew (among other things) that:

> the Management Deeds were each a pretence, entered into to attempt to clothe the diversion of income streams from the MA Trading Companies to the [Benchmark Group] with superficial legitimacy;

(2) by causing, permitting or enabling the payments to the relevant company in the Benchmark Group as director of each of the MA Trading Companies that entered into a Management Deed Mr Marlborough engaged in conduct in breach of s 180(1), 181(1) and/ s 182(1) as applicable because (among other things):

> the Management Deeds were each a pretence, entered into to attempt to clothe the diversion of income streams from the MA Trading Companies to the [Benchmark Group] with superficial legitimacy.

515 In addition, in the case of the alleged breaches by Mr Marlborough of s 180(1) and s 181(1) ASIC pleads that:

(1) the execution of the Management Deeds was not an exercise of power and a discharge of duties by Mr Marlborough:

> (i) in good faith in the best interests of the MA Trading Companies respectively, because:
>
> …
>
> (3) the redirection of the income streams was to personally benefit [Mr Marlborough] and/or members of his family and the entry into the Management Deeds was a pretence, designed to clothe that fact with superficial legitimacy;
>
> (ii) for a proper purpose because:
>
> (1) the entry into the Management Deeds was to attempt to clothe the diversion of income streams from the MA Trading Companies to the Benchmark Companies with superficial legitimacy in order to benefit [Mr Marlborough] and/or members of his family;
>
> ...

516 Mr Bettles contends that this aspect of the FASOC:

(1) is that the deeds were a "pretence" designed "to clothe the diversion of income streams from the MA Trading Companies to the [Benchmark Group] with superficial legitimacy";

(2) is the gravamen of the two limbs of ASIC's case about the Management Deeds that: Mr Bettles was an accessory to contraventions by Mr Marlborough of ss 180, 181 and 182 of the Corporations Act; and Mr Bettles himself contravened s 180 of the Corporations Act and his common law duties; and

(3) is, in substance, an allegation that the Management Deeds were a "sham" which is akin to an allegation of fraud and must be "firmly alleged and cogently proved".

517 ASIC submits that it is not, nor has it ever been, part of its case that the Management Deeds were a sham. It is not ASIC's case that there was an intention for the Management Deeds not to have the legal effect created by them. Rather, it is ASIC's case that the Management Deeds created a contractual arrangement as part of a strategy to mask improper conduct. That is, there was a "pretence", "veil" or "mask" of the efforts to deprive companies in the MA Group, Iridium Holdings and creditors of assets and income streams from which distributions could have been made.

518 I make two observations about this aspect of ASIC's pleading and ASIC's characterisation of it.

519 First, it is not ASIC's pleaded case that, as it contends, the Management Deeds created a contractual arrangement as part of a strategy to mask improper conduct. ASIC expressly pleads that the Management Deeds were a "pretence" and that they were entered into to attempt to "clothe the diversion of income streams" from the MA Trading Companies with "superficial legitimacy". That pleading suggests that the Management Deeds were entered into with the intention that they should not have the apparent legal consequence that was intended by them.

520 Secondly, ASIC's contention, addressed below, that the "Management Services" pursuant to the Management Deeds were not provided supports Mr Bettles' interpretation of this aspect of ASIC's pleaded case. That is, that the Management Deeds were a sham.

521 In *Coshott v Prentice* (2014) 221 FCR 450 at [63]-[64] a Full Court of this Court (Siopis, Katzmann and Perry JJ) relevantly said:

> 63 While the term "sham" may be ambiguous and its meaning and application uncertain, it has a clear and well-understood legal meaning: *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 (*Raftland*) at [35] (Gleeson CJ, Gummow and Crennan JJ). As Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ explained in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 (*Equuscorp*) at [46] in a passage cited by the primary judge at [88], when employed as a legal term, the word "refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences". In other words, as Leeming JA (with whose reasons McColl JA and Sackville AJA agreed) recently explained in *Lewis* at [59]:
>
> > … it is essential that there be an intention that the true transaction is different from that which would ordinarily be attributed to the transaction on the face of the documents. As Lord Wilberforce put it, "to say that a document or transaction is a 'sham' means that while professing to be one thing, it is in fact something different": *WT Ramsay v Inland Revenue Commissioners* [1982] AC 300 at 323.
>
> 64 Thus, the element of deliberate deception lies at the heart of the legal concept of a sham. The seriousness of the allegation of a sham thus mandates that the Court act with much care and caution before finding that it is established, as the appellants contend. …

522 Given the nature of pleading and the seriousness of the allegation, it is to that standard that ASIC must prove this aspect of its case.

523 I turn then to consider the elements of ASIC's pleaded case and whether it has established the alleged breaches.

5.2.2 Absence of Management Services and redirection of income streams

524 ASIC contends that the effect of the MM Prime Management Deed, the Capricorn Securities Management Deed, the Iridium Financial Planning Management Deed and the Airlie Beach Management Deed was to redirect income from the relevant MA Trading Company to the Benchmark Group and that the services which the relevant companies in the Benchmark Group, that is BPW and BWP Services, were to provide pursuant to the terms of those deeds were not provided.

5.2.2.1 Were management services provided by the Benchmark Group?

525 ASIC submits that the relevant Benchmark Group companies did not provide services to manage the business of each of MM Prime, Capricorn Securities, Iridium Financial Planning or Airlie Beach from 25 July 2016 or any other date. ASIC contends that, while Mr Bettles denies this is so, collecting work in progress and other tasks referred to by Mr Bettles, if they were performed, did not constitute management of the business. ASIC also submits that the

Benchmark Group did not provide any tax invoices identifying and seeking payment for any services for managing the business of those companies and contends that, while Mr Bettles also denies this, he could only point to invoices directed to MM Prime which did not relate to management services but, as explained by Mr Dunn, were commissions for employees of BPW.

526 Mr Bettles submits that ASIC's contention that no management services were provided pursuant to the Management Deeds is not made out on the evidence.

527 It is convenient to start with the terms of the Management Deeds. By way of example, the MM Prime Management Deed includes the following clauses:

(1) clause 1.1 which defines:

(a) "Business" to mean "the business carried on by [MM Prime] prior to the appointment of [BPW] as Manager, known as 'Members Alliance'";

(b) "Company" to mean MM Prime;

(c) "Manage" or "Management of the Business" as:

> … includes, but is not limited to:
>
> (i) Managing the Business as a going concern;
>
> (ii) ensuring that the Business is carried on in its usual way (having regard to the nature of the Business and past practice); and
>
> (iii) employing such staff as reasonably necessary to provide the Management Services to meet its obligations under this Deed;

(d) "Management Fee" to mean "the remuneration paid to [BPW] for providing the Management Services as detailed at clause 3.1";

(e) "Management Services" to mean:

> Management of the Business including, but not limited to:
>
> (i) collecting all work in progress in respect of the Business carried on by the Company;
>
> (ii) managing the proper maintenance of all equipment and assets of the Business;
>
> (iii) arranging the payment of all licence fees necessary to operate the Business;
>
> (iv) arranging the sale of certain assets; and
>
> (v) reporting to the Company on each Business as required;

(f) "Termination Date" to mean the date that the deed is terminated by a party or comes to an end by virtue of clause 8;

(2) clause 2.1 which provides for the appointment of BPW to "Manage the Business" on behalf of MM Prime from the "Commencement Date", i.e. 25 July 2016, to the "Termination Date";

(3) clause 3 which sets out the remuneration to which BPW is entitled in consideration for providing the "Management Services", i.e. the Management Fee;

(4) clauses 4 and 5 which set out respectively BPW's and MM Prime's obligations. Relevantly cl 5 provides:

> 5.1 During the term of this Deed, [MM Prime] agrees to make all reasonable endeavours to:
>
> …
>
> (d) pay all employee commissions that were incurred by [MM Prime] while it operated the Business. For the avoidance of doubt, employee commissions were incurred when an employee of a related body corporate of [MM Prime] acted in relation to the sale of property to a client of [MM Prime] or its related bodies corporate. Employee commissions required to be paid per sale of each settled property are as follows,
>
> (i) In-home consultant – one thousand dollars ($1.000.00);
>
> (ii) In-office consultant – one thousand five hundred dollars ($1,500.00);
>
> (iii) Property strategist – seven hundred and fifty dollars ($750.00);
>
> (iv) Lead strategist – two hundred dollars ($200.00);
>
> (v) State Manager – seven hundred and fifty dollars ($750.00);
>
> (vi) National General Sales Manager – seven hundred and fifty dollars ($750.00); and
>
> (vii) National Finance Manager – one hundred dollars ($100.00).

(5) clause 8 which concerns termination of the deed and provides:

> 8.1 This Deed may be terminated by either party by giving of seven (7) days' written notice to the other.
>
> 8.2 This Deed will automatically terminate upon the collection of all of [MM Prime's] outstanding work in progress by [BPW].
>
> 8.3 In the event that this Deed is terminated pursuant to clause 8.1 above,

> [BPW] will do all things reasonably necessary to assist [MM Prime] prepare a final accounting of [MM Prime's] outstanding work in progress.

528 The key terms of the Capricorn Securities Management Deed, Iridium Financial Planning Management Deed and Airlie Beach Management Deed are in similar terms. In each case the relevant MA Trading Company appoints BPW or BWP Services as relevant to "Manage the Business" on its behalf for a "Management Fee" (save for the Iridium Financial Planning Deed as I set out below). Those terms and the "Management Services" are defined in the same way as in the MM Prime Management Deed save that:

(1) in the Airlie Beach Management Deed:

(a) the term "Management Services" is extended to include "arranging the sale of certain assets, including [Airlie Beach's] Management Rights"; and

(b) the term "Management Rights" is defined in cl 1.1 of that deed to mean "the rights owned by [Airlie Beach] to fulfil the role of caretaker and operate a letting business (of units within the complex) on behalf of non-resident owners for Summit Apartments, 15 Flame Tree Court, Airlie Beach in the State of Queensland"; and

(c) the remuneration to which BPW or BWP Services as relevant is entitled in each case differs and is more fully described in cl 3 of that deed; and

(2) in the Iridium Financial Planning Management Deed:

(a) the term "Manage" or "Management of the Business" is defined in cl 1.1 of that deed as:

> including, but not limited to:
>
> (i) Collecting all work in progress in respect of the Business carried on by [Iridium Financial Planning];
>
> (ii) Managing the proper maintenance of all equipment and assets of the Business;
>
> (iii) Arranging the payment of all licence fees necessary to operate the Business;
>
> (iv) Arranging the sale of [Iridium Financial Planning's] assets; and
>
> (v) Reporting to [Iridium Financial Planning] on the Business as required; and

(b) there is no provision for a "Management Fee" nor is there a direct remuneration clause in the nature of cl 3.1 of the MM Prime Management Deed. However by cl 4.1(c) provides that Iridium Financial Planning is required to pay all the costs "required to maintain [Iridium Financial Planning]".

529 ASIC relies on Mr Dunn's evidence to establish that no management services were provided by the Benchmark Group pursuant to the Management Deeds. Relevantly Mr Dunn states that he has "reviewed the books and records of BPW and records obtained from Worrells" and that he has "been unable to locate any invoices issued by the Benchmark Group to MM Prime, [Capricorn Securities] or Airlie Beach for 'Management Fees' pursuant to terms of the respective Management Deeds". In giving that evidence Mr Dunn does not identify the extent of his review and which of the books and records obtained from BPW and Worrells he reviewed. Nor on his own evidence did Mr Dunn review any MA Group records.

530 ASIC did not call any other witness to establish its contention that no "Management Services" were provided by BPW.

531 At its highest the evidence relied on by ASIC is that, based on its searches, there are no invoices to establish that Management Services as defined in the MM Prime Management Deed, Capricorn Securities Management Deed and the Airlie Beach Management Deed were provided. But an absence of invoices does not establish that to be so. Nor does that evidence establish that no Management Services were provided under the Iridium Financial Planning Management Deed.

532 There was however evidence that each of MM Prime, Capricorn Securities, Iridium Financial Planning and Airlie Beach continued to trade and, as they did not have their own staff, I would infer that BPW (or the relevant Benchmark Group company) was providing the "Management Services" to enable that to happen.

533 In relation to MM Prime Mr Bettles gave evidence that:

(1) on 23 December 2016 Mr Young sent an email to him and Mr Marlborough attaching an invoice for commissions relating to MM Prime's work in progress up to 31 December 2016. The email stated:

> Pursuant to the agreement between [MM Prime] and [BPW] please see attached our invoice for commissions.
>
> This invoice covers the settlement of all [MM Prime] properties up to 31 December 2016, except for those properties at Lutwyche. I will invoice for

Lutwyche settlements separately once that project is complete.

The attached invoice which was dated 6 December 2016 was for a total of $161,095 for:

> Commissions paid by Benchmark Private Wealth on property sold by Property Services for the period covering – 25.7.16 to 31.12.16 29 – sales (as per attached schedule) @ $5,050.00 per sale

(2) on 25 January 2017 he was copied into an email from Mr Young to Mr Marlborough attaching an invoice as at 23 January 2017 "for commissions as per the Management Agreement". The attached invoice which was dated 23 January 2017 was for a total of $122,210 for:

> Commission on Lutwyche settlements 22; properties @ $5,050.00 per property (as per attached schedule)

534 In cross-examination Mr Dunn said that he had seen the documents identified by Mr Bettles and that they related to commissions for BPW's employees and not to management services. True it is that the invoices are for commissions but: first, they were each issued pursuant to the MM Prime Management Deed; secondly, the MM Prime Management Deed has a broad definition of "Management Services" which includes "arranging the sale of certain assets"; and thirdly, cl 5 of the deed expressly required MM Prime to pay employee commissions on settlements. These matters together with the documents referred to by Mr Bettles tend to a conclusion that "Management Services" were provided in relation to MM Prime.

535 There was also the following additional evidence:

(1) on 19 September 2016, 26 October 2016 and 1 December 2016 Mr Marlborough provided Mr Bettles with work in progress schedules for MM Prime and transaction listings which showed the progress of sales; and

(2) on 28 February 2017 Ramsdens Lawyers sent a letter to Grants Law which, among other things, described the work being undertaken by BPW pursuant to the MM Prime Management Deed as follows:

> 2. **Commerciality of services provided by Benchmark**: For the avoidance of any doubt, our clients instruct that they are satisfied that to date Benchmark has performed its obligations and provided the necessary services in accordance with the management deed. In support of our client's position, our client provided copies of bank statements and updated WIP reports to your client at regular intervals since at least 22 July 2016 which demonstrate the results of the work carried out by Benchmark. We attach copies of the relevant WIP

> spreadsheets, including the most recent spreadsheet, for your reference.
>
> 3. Our clients instruct that Benchmark has carried out a significant amount of work to collect the WIP received to date and, in all likelihood has done so to its detriment. Among other things, our clients instruct that while initial work on the relevant sales was carried out by [MM Prime], due to the time lapse between that work and Benchmark's appointment, Benchmark in effect had to carry out an entire rebuild of the book, such as arranging refinancing of investors loans, allocating significant time and resources to following up with investors to ensure sales proceeded to settlement and did not fall over wherever possible and so on. Our client has requested that Benchmark provide a written outline of the significant work it has undertaken to date and we will provide a copy of the outline to you once we receive it;
>
> (Emphasis in original.)

Mr Bettles had no reason to believe that the work had not been undertaken as described.

536 In relation to Capricorn Securities and Iridium Financial Planning:

(1) Mr Jones gave evidence that these companies had a financial planning aspect to their businesses and that financial advisers were employed to give the relevant advice. An exchange of emails between Messrs Jones and Young on 12 August 2016 identifies "those clients that may require further advice at this stage" and refers to an attempt to quantify potential loss of revenue if those clients were lost;

(2) on 2 September 2016 Mr Jones met with Mr Douglas, the responsible manager of Capricorn Securities' AFSL. His notes of the meeting record, among other things, that: there were approximately 60 clients with work in progress; Mr Dyer was the only other person working in the business and was giving advice under Mr Douglas' supervision; and Mr Young was overseeing the work in progress;

(3) in addressing correspondence received from ASIC in September 2016 in relation to these companies, Mr Jones consulted with Mr Young who provided his response to matters raised by ASIC; and

(4) in a letter dated 9 November 2016 from Worrells to ASIC about Capricorn Securities, Mr Bettles explained, among other things, that:

> … noting I said that I obviously did not know the whole of Benchmark Private Wealth Pty Ltd's ("Benchmark") business activities, but my understanding in relation to Benchmark's involvement with Capricorn was that Benchmark employed staff (some or all of whom formerly worked in the Members Alliance business), who worked with the responsible manager, Anthony

> Douglas, to service the existing business of clients who came under [Capricorn Securities'] AFSL.

And:

> … I have subsequently spoken to Mr Marlborough and Mr Young who both advise me that Mr Douglas regularly attends Benchmark's offices. I also note that WMS Chartered Accountants have informed me that Mr Douglas recently spent considerable time meeting with them to assist in the preparation of the due diligence material to present to prospective purchasers of [Capricorn Securities'] business.

537 In relation to Airlie Beach:

(1) the sale of the "Management Rights" was completed in December 2017. In his report to creditors dated 28 May 2018 Mr McCann, who was appointed as liquidator of Airlie Beach on 5 May 2107, included:

> On appointment the day-to-day operations of the Business was being operated by a company called Benchmark Private Wealth Pty Ltd ("Benchmark") through an agency agreement that was in place prior to my appointment.
>
> Immediately on appointment my staff and I undertook the following actions to preserve the value and potential sale of the Business:
>
> • Engaged with Benchmark regarding the ongoing management of the Business to ensure operations continued as normal;
>
> …

(2) as set out at [232] above, the steps taken by Mr Young to facilitate the sale of the management rights for the Summit Apartments were regularly discussed at Progress Meetings; and

(3) on 21 October 2016 Mr Young sent an email to, among others, Messrs Carey and Jones which included:

> I do not see any commercial reason why Benchmark should not be entitled to the 10% sales commission for the Summit Apartments. Our staff have facilitated that deal over the last three months and have made the commercial arrangement to that sale. Without the involvement of Benchmark the property would have had to be referred to a broker who would have also retained commissions and would have taken longer to facilitate a sale.

538 ASIC has not established that no Management Services were provided pursuant to the Management Deeds. Rather, given the above evidence, coupled with the fact that the MA Trading Companies no longer had any staff, I would conclude that Management Services

were provided by BPW or the relevant company in the Benchmark Group pursuant to those deeds.

5.2.2.2 Redirection of income streams

539 ASIC submits that notwithstanding the absence of invoices or the provision of Management Services the following amounts were transferred to BPW:

(1) $171,690 from MM Prime;

(2) $760,296 from Capricorn Securities; and

(3) $125,816.98 from Airlie Beach.

540 These payments are said by ASIC to be a redirection of income from MM Prime and Capricorn Securities to BPW and Airlie Beach to BWP Services.

541 However, given that ASIC has not established that no Management Services were provided pursuant to the Management Deeds and my findings about the provision of Management Services set out above, the allegation that these payments were a "redirection" of income otherwise available to the MA Trading Companies in question cannot be made out.

542 Even if that were not so there is a difficulty with the evidence relied on by ASIC to prove this aspect of its case.

543 ASIC relies on Mr Dunn's evidence. Mr Dunn's evidence is that:

(1) ASIC issued notices pursuant to s 30 of the ASIC Act to the Commonwealth Bank of Australia (**CBA**), the National Australia Bank and **Westpac** Banking Corporation for production of the bank statements of companies in the MA Group and the Benchmark Group including MM Prime, Capricorn Securities and Airlie Beach; and

(2) he conducted an analysis of the bank statements produced, which run to many hundreds of pages, and determined that the amounts set out at [539] above were transferred from the bank accounts of MM Prime, Capricorn Securities and Airlie Beach to BPW between July 2016 and September 2017.

544 There is a disconnect between ASIC's pleaded case and Mr Dunn's evidence in three respects. First, ASIC pleads that the payments set out at [539] above were made between July 2016 and March 2017 but Mr Dunn's evidence is that those payments were made between July 2016 and September 2017. ASIC has not amended the FASOC either to identify those payments made

in the period as pleaded or to amend the period. Secondly and relatedly, in any event ASIC could not make a claim in relation to payments made for the whole of the longer period because Messrs McCann and McKinnon of Grant Thornton were appointed as liquidators of Capricorn Securities and Iridium Financial Planning on 3 May 2017 and as liquidators of MM Prime and Airlie Beach on 5 May 2017. Any payments beyond those dates cannot form part of a claim against Mr Bettles. Third, ASIC has not adduced any evidence of the alleged payment by Airlie Beach to BWP Services as pleaded in the FASOC. Mr Dunn's evidence refers only to payments to BPW.

5.2.3 Did Mr Marlborough control the Benchmark Group

545 ASIC alleges that Mr Marlborough controlled the Benchmark Group and that the alleged payments to BPW and other companies in the Benchmark Group were for his and his family's benefit. But the evidence does not establish that is so.

546 The structure of the Benchmark Group is set out at [99] above. Mr Marlborough was not a director or shareholder of any of the companies in the Benchmark Group. The highest the evidence goes is to establish that Mr Marlborough was involved in some of its day to day operations (see [202]-[203] above) but it does not establish that he *controlled* those companies.

547 There are two connections to Mr Marlborough in the Benchmark Group: first, Ms Brown was a director of BWP Services from November 2016; and secondly, the Structured Finance Trust held 95% of the shares in BPW Holdings. The appointors of that trust are Braiden and Deborah and Braiden is a beneficiary. However, the trust deed for the Structured Finance Trust shows that the trustee, Young Corporation, controls the trust and has the sole power to determine the net income for each year and to distribute it to any of the beneficiaries. The trustee also has the power to distribute the capital. The appointors have no power in relation to the administration of the trust and there is no evidence that Braiden, Deborah or, indeed, Mr Marlborough exerted any influence over Young Corporation or its sole director, Mr Young, in that regard.

548 There is no evidence that the payments which ASIC says were made by BPW pursuant to the Management Deeds were in fact received by Mr Marlborough or any of his family members nor that any of those payments were made to the trustee of the Structured Finance Trust. Similarly there is no evidence that any distributions were made by the trustee to the beneficiaries of the Structured Finance Trust.

549 ASIC also contends Mr Bettles knew that Mr Marlborough controlled the Benchmark Group. It is convenient to address that contention.

550 Mr Bettles does not give any evidence that he was so aware. In fact Mr Bettles only became aware of the Structured Finance Trust as a result of this proceeding. Mr Bettles did not agree that he had any knowledge that Mr Marlborough was the ultimate controller of the Benchmark Group.

551 ASIC's case that Mr Bettles' knowledge that Mr Marlborough was the "force behind" the Benchmark Group and that the Benchmark Group was not dealing with the MA Trading Companies and Provincial Property at commercial arm's length is inferential. It contends that Mr Bettles' awareness should be inferred from his knowledge of the following:

(1) slide 2 of WMS PowerPoint V5. That slide is headed "Timeline" (see [83] above). The third action item in slide 2 refers to the establishment of NewCo and nominates the people responsible for that action as Messrs Young and Marlborough. Mr Bettles submits that this says nothing about who would ultimately control NewCo or receive any profits earned. That is so. There is nothing in slide 2 which describes the structure of NewCo, its ownership or its intended officers. The highest the slide goes is to identify that Mr Marlborough would be involved with Mr Young in establishing NewCo and therefore the Benchmark Group;

(2) Mr Young's former role as general counsel of the MA Group. It is difficult to see how I would infer any knowledge on the part of Mr Bettles in relation to Mr Marlborough's control of the Benchmark Group from this fact. Certainly, when viewed with other facts it is apparent that NewCo was not a company that was entirely independent of the MA Group in terms of its management but no other inference can be drawn;

(3) slide 3 of WMS PowerPoint V5 (see [83] above), which is a list of proposed staff for NewCo and includes Messrs Young and Marlborough and Braiden. Once again, that Mr Marlborough was to be included in NewCo's staff goes no higher than to signal his involvement in the Benchmark Group;

(4) that Mr Marlborough decided which Benchmark Group entities entered into which management deeds with the MA Trading Companies and Provincial Property. ASIC relies on a letter dated 29 July 2016 from Mr Bettles in his capacity as voluntary administrator of Provincial Property to Mr Ramsden in support of this inference (see [182] above) which included:

> On a separate note, the voluntary administrators have struck an arrangement with an entity associated with Ms Brown, for that entity to manage the properties currently under the company's control on behalf of the voluntary administrators, and negotiate the sale of the company's rent roll, all in exchange for the commission that the company would have been entitled to receive under the management agreements with each owner (7.5% of the rent collected).
>
> The entity will be responsible for appropriate staffing, premises, etc., all rental and other collections will be deposited into the company's trust account, and the entity is not authorized to withdrawn any funds from the trust account without the administrators' specific written authority. In that regard, I ask that you please prepare the relevant agreement. You will need to contact Mr Richard Marlborough to obtain details of the entity which is entering into the agreement.

However this letter does not establish either that Mr Marlborough decided which entities entered into which management deeds with the MA Trading Companies or Mr Bettles' knowledge that Mr Marlborough was "the force" behind the Benchmark Group. Mr Marlborough was the sole director of Provincial Property and Mr Bettles liaised with Mr Marlborough and Ms Brown in relation to the operation of Provincial Property's business before the Rent Roll was disclaimed. It is hardly surprising that Mr Marlborough in his capacity as director of Provincial Property would know the details of the entity which proposed to enter into the agreement with Provincial Property;

(5) Ms Brown's transfer, under Mr Marlborough's direction, of $20,937 from Provincial Property's general account to the Benchmark Group. However, as Mr Bettles' file note dated 14 September 2016 records (see [197] above), upon discovering the unauthorised withdrawals he telephoned Mr Young and followed up with Mr Young, both by email and at a subsequent meeting. That is, Mr Bettles did not contact Mr Marlborough about the unauthorised withdrawals but dealt with the director of the Benchmark Group companies, Mr Young;

(6) that Mr Marlborough was copied into emails because he was involved in the Benchmark Group. One of the emails relied on by ASIC is Mr Bettles' email dated 2 September 2016 to Mr Young, copied to Mr Marlborough and Ms Brown, in relation to the unauthorised withdrawals referred to in the preceding subparagraph. The mere fact that Mr Marlborough was copied into this email, together with Ms Brown, does not support the inference contended for by ASIC;

(7) Mr Bettles' email to Mr Marlborough dated 8 August 2016 (see [203(2)] above). As I have already found to be the case this email, along with others, demonstrates that Mr Bettles would have been aware that Mr Marlborough was involved in the Benchmark Group. However, it does not go so far as to establish that Mr Bettles was aware that Mr Marlborough was "the force behind" that group; and

(8) the office of Ramsden Lawyers was the registered office for the Benchmark Group companies. This fact does not support an inference that Mr Bettles knew that Mr Marlborough was "the force behind" the Benchmark Group and was its alleged controller. Mr Bettles' evidence was that he did not give that fact any consideration at the time.

552 I would not infer, based on the evidence relied on by ASIC, that Mr Bettles knew that Mr Marlborough was the "force behind" the Benchmark Group and that the Benchmark Group was not dealing with the MA Trading Companies and Provincial Property at commercial arm's length. Rather based on the evidence before me I would infer that Mr Bettles was only aware that Mr Marlborough had an involvement in the Benchmark Group.

5.2.4 Did Mr Marlborough breach ss 180(1), 181(1) and/or 182(1) of the Corporations Act?

553 The next question that arises is whether Mr Bettles was involved in breaches of the Corporations Act by Mr Marlborough. The anterior question is whether by his conduct Mr Marlborough was in breach of ss 180(1), 181(1) and/or 182(1) of that Act.

5.2.4.1 Section 180(1)

554 Insofar as ASIC contends that Mr Bettles was involved in a contravention of s 180(1) of the Corporations Act by Mr Marlborough by reason of his entry into or other conduct related to the MM Prime Management Deed, my reasons at [495]-[507] above apply such that this aspect of ASIC's case against Mr Bettles cannot succeed. Accordingly, I do not propose to address the question of whether Mr Marlborough breached s 180(1) and, in turn, whether Mr Bettles was involved in any such breach.

5.2.4.2 Section 181(1)

555 In relation to the alleged breach by Mr Marlborough of s 181(1) of the Corporations Act, ASIC submits that Mr Marlborough knew that none of the Benchmark Group companies had provided any services for the "management of the business" of the MA Trading Companies

nor had he caused the Benchmark Group companies to provide those services. This was in circumstances where Mr Marlborough knew that:

(1) the MA Trading Companies were liable, with Iridium Holdings, as part of the income tax consolidated groups for a significant indebtedness to the ATO;

(2) the payment of money under the Management Deeds would deplete the resources available to pay that indebtedness;

(3) the Management Deeds were not arm's length commercial agreements because they provided for payments to companies for which he or his family members were the effective controllers and they were merely a pretence to provide the diversion of income streams with superficial legitimacy; and

(4) BPW had not issued any invoice or demand for payment and was not entitled to any payment from the MA Trading Companies.

556 ASIC contends that Mr Marlborough's conduct in entering into the Management Deeds in the circumstances described above was not an exercise of power or a discharge of duties by him as a director of the MA Trading Companies in good faith and for a proper purpose because: it was not in the best interests of the MA Trading Companies for their income streams to be redirected; and that redirection was to benefit Mr Marlborough personally and/or members of his family. ASIC submits that the entry into the Management Deeds was a pretence, designed to clothe that fact with superficial legitimacy. In these circumstances ASIC contends that Mr Marlborough contravened s 181(1) of the Corporations Act.

557 ASIC also submits that Mr Marlborough's conduct in causing, permitting or enabling the payments described in [539] above was not an exercise of power or a discharge of duty in good faith and for a proper purpose and that in those circumstances Mr Marlborough also contravened s 181(1) of the Corporations Act.

558 Section 181(1) of the Corporations Act (see [435] above) relevantly provides that a director of a corporation must exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation and for a proper purpose. Mr Marlborough is alleged to have breached that duty owed to each of the MA Trading Companies that entered into a Management Deed.

559 There are difficulties with ASIC's case.

560 First, Mr Marlborough was not called to give evidence. There is no direct evidence of his state of mind and what he in fact knew. That being so, although an inferential case is not expressly pleaded, I am left to infer that Mr Marlborough had the knowledge alleged.

561 However, the central facts that would support an inference that Mr Marlborough had the alleged knowledge have not been established. That is because:

(1) the relevant Benchmark Group companies did provide Management Services pursuant to the Management Deeds; and

(2) it follows that any payments made pursuant to the Management Deeds were not a redirection of income from the MA Trading Companies.

562 Secondly, ASIC contends that the Management Deeds were not arm's length commercial agreements because they provided for payments to companies of which Mr Marlborough or his family members were the effective controllers. That is, ASIC in effect contends that Mr Marlborough controlled the Benchmark Group. However, as I have already found to be the case ASIC has not established that to be so. The evidence does not establish that Mr Marlborough or his family controlled the Benchmark Group or that any payments made pursuant to the Management Deeds ultimately flowed to entities in which he or his family had an interest.

563 Thirdly, ASIC has not established the quantum of payments, if any, made to BPW or BWP Services pursuant to the Management Deeds in the period July 2016 to March 2017 as pleaded. In any event, as ASIC has failed to establish that no Management Services were provided and as I have found that Management Services were provided as set out above, any payments made for those services could not be said to be made in breach of any duty owed by Marlborough to the MA Trading Companies.

564 ASIC has not established that Mr Marlborough breached his duties owed to the MA Trading Companies pursuant to s 181(1) of the Corporations Act.

5.2.4.3 Section 182(1)

565 ASIC submits that Mr Marlborough's conduct in entering into the Management Deeds in the circumstances described at [555]-[556 above was also an improper use by him of his position as a director of the MA Trading Companies to gain an advantage for himself and his family and to cause detriment to those companies. ASIC contends that the entry into of the Management Deeds gained an advantage for Mr Marlborough and his family because of his

effective control of the Benchmark Group and because those companies would be the recipient of income streams from the MA Trading Companies. ASIC submits that the entry into of the Management Deeds also caused detriment to the MA Trading Companies by the diversion of income streams and assets. ASIC contends that accordingly Mr Marlborough contravened s 182(1) of the Corporations Act.

566 ASIC submits that Mr Marlborough's conduct in causing, permitting or enabling the payments described in [539] above was also an improper use by him of his position as a director of the MA Trading Companies to gain an advantage for himself and his family and to cause detriment to those companies. ASIC contends that, in those circumstances, Mr Marlborough contravened s 182(1) of the Corporations Act.

567 Section 182(1) of the Corporations Act (see [435] above) relevantly provides that a director of a corporation must not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation. Mr Marlborough is similarly alleged to have breached that duty owed to each of the MA Trading Companies that entered into a Management Deed.

568 For the same reasons as set out at [555]-[563] above in relation to s 181(1) of the Corporations Act ASIC's claim that Mr Marlborough breached s 182(1) must fail.

5.2.5 Mr Bettles' alleged involvement in Mr Marlborough's contraventions of s 181(1) and s 182(1) of the Corporations Act

569 ASIC has failed to establish that Mr Marlborough breached s 181(1) or s 182(1) of the Corporations Act. Thus it cannot establish that Mr Bettles was involved in a contravention of either of those subsections by Marlborough and it follows, that there are no matters for the Court to take into account under s 45-1 of the IPS in relation to these alleged contraventions.

5.2.6 Did Mr Bettles breach s 180(1) of the Corporations Act

570 ASIC alleges that Mr Bettles' conduct with respect to the Management Deeds did not meet the standard of care and diligence that ought to have been exercised by him as an officer of Iridium Holdings in breach of s 180(1) of the Corporations Act. ASIC submits that in circumstances where Iridium Holdings owed substantial amount to creditors, including the ATO, Mr Bettles' conduct fell below the required degree of care and diligence by assisting and allowing the entry into of the Management Deeds by the MA Trading Companies and by permitting or not

preventing the diversion of substantial amounts of income from those companies to the Benchmark Group.

571 ASIC submits that this conduct was also in breach of Liquidator's Duty No. 1 and Liquidator's Duty No. 2.

572 ASIC's claim that Mr Bettles breached his duty owed to Iridium Holdings under s 180(1) of the Corporations Act is premised on the factual contention that the Management Deeds were not in the MA Trading Companies' interests because no Management Services were provided pursuant to them and hence he should have taken steps to prevent the entry into by the MA Trading Companies of those deeds and any subsequent payments made pursuant to them. However, for the reasons set out at [525]-[538] above, that factual premise is not made out and there was a basis for payments to be made pursuant to those deeds. It cannot therefore be said that a reasonable person in Mr Bettles' position, as liquidator of Iridium Holdings, would have foreseen that their conduct in not preventing the entry into of the Management Deeds and preventing payments being made pursuant to those deeds involved a risk of injury to Iridium Holdings.

573 Assuming contrary to the conclusion that a reasonable person in Mr Bettles' position as liquidator of Iridium Holdings would have foreseen that their conduct involved a risk of injury to Iridium Holdings, at the second stage of the inquiry into whether there has been a breach of s 180(1) of the Corporations Act, it is necessary to prove what a reasonable person would have done in the circumstances by way of response to the foreseeable risk of injury. This is a forward looking inquiry (see [439(3)] above).

574 ASIC has not made any submissions or otherwise identified what a reasonable liquidator in Mr Bettles' circumstances would have done. As Mr Bettles submits the relevant circumstances would include the information known to him at the time about the risk to the assets of the MA Trading Companies if those companies went into liquidation prior to their realisation. At the time, Mr Bettles had been told that the MA Trading Companies were solvent and that the intention was to realise their assets before they went into liquidation otherwise the value in those assets would be lost (see [53(3)] and [67] above).

575 ASIC contends that Mr Bettles breached s 180(1) of the Corporations Act in relation to the Management Deeds by, among other things, failing to prevent entry into those deeds. This allegation of breach presupposes that, in his capacity as liquidator of Iridium Holdings,

Mr Bettles had the power to prevent the MA Trading Companies from entering into those deeds.

576 Iridium Holdings was the shareholder of the MA Trading Companies. The management of those companies rested with their director and not with their shareholder.

577 ASIC sets out steps that is says that Mr Bettles could have taken (see [101(c)(i)] of the FASOC) to prevent the MA Trading Companies from entering into the Management Deeds. Putting to one side that Mr Bettles in his capacity as liquidator of Iridium Holdings owed his duty to that company and not to any other, I am not satisfied that there was a particular action that Mr Bettles could take in that capacity to prevent entry into of the Management Deeds.

578 ASIC contends that Mr Bettles could require those companies to call a general meeting and as a shareholder "move and pass motions protecting the assets and income streams of those companies". The types of motions which ASIC says should have been moved and passed are not identified. But, in any event, a director is not bound by a direction given by a member at a general meeting. A director is required to act in accordance with his or her statutory duties: see *Capricornia Credit Union Ltd v Australian Securities and Investments Commission* (2007) 159 FCR 69 at [59]-[61].

579 Alternatively ASIC contends that Mr Bettles in his capacity as a liquidator of Iridium Holdings could have required the MA Trading Companies to convene a general meeting in order to move a resolution to remove the current director and appoint another person as a director instead: see s 203C of the Corporations Act. However, s 203C is a replaceable rule and, in the absence of the constitutions for the MA Trading Companies, which were not in evidence before me, ASIC has not established whether this rule applies to them. Nor is there any evidence that there was someone available and willing to accept an appointment as director of the MA Trading Companies, assuming a meeting could be convened and such resolutions put.

580 ASIC also contends that Mr Bettles in his capacity as liquidator of Iridium Holdings could request information about the assets and liabilities of the relevant companies and cause the requests to be answered by calling a general meeting and removing and replacing directors. Mr Bettles may have been able to request information and to do so at a general meeting. As to Mr Bettles' ability to remove and replace the director in the event that the information was not forthcoming, I refer to the preceding paragraph.

581 Finally, Mr Bettles relies on s 545(1) of the Corporations Act and submits that he was not required to undertake detailed investigations of otherwise incur expenses in relation to the Management Deeds. There is force to this submission, particularly in the face of ASIC's contention that Mr Bettles ought to have taken particular steps to prevent the MA Trading Companies from entering into the Management Deeds.

582 As set out above, s 545(1) of the Corporations Act excuses a liquidator from incurring any expense in relation to the winding up of a company unless there is sufficient available property, other than the lodging of statutory reports. While there is a suggestion that s 545(1) may not relate to time spent by a liquidator and his staff, as opposed to third party disbursements, that view is tempered by an acknowledgment that the principle the section reflects should inform an understanding of the liquidator's role: see *Wily* at [87].

583 Mr Bettles' evidence is that there was not sufficient available property to undertake investigations or actions of the nature ASIC says ought to have been undertaken. Those actions would have involved Mr Bettles undertaking a number of steps, would likely be time consuming and may have required the expenditure on third party disbursements, such as legal advice. They were not straightforward and a far cry from time spent on compiling a statutory report. In my opinion a liquidator in Mr Bettles' position could rely on s 545(1) of the Corporations Act to be excused from incurring the expense associated with the types of actions which ASIC says ought to have been taken.

584 For those reasons ASIC has not established that Mr Bettles breached his duty owed pursuant to s 180(1) of the Corporations Act to Iridium Holdings by agreeing to, and/or allowing or failing to prevent entry into, the Management Deeds and/or failing to prevent payment to be made pursuant to those deeds.

585 For the same reasons and, in particular, the reasons set out at [572] above, ASIC has not established that Mr Bettles breached Liquidator's Duty No. 1 or Liquidator's Duty No. 2.

586 That being so, there are no matters for the Court to take into account for the purposes of s 45-1 of the IPS in relation to this claim.

5.3 The Elderton Transaction and MM Prime (9.16 FASOC)

587 ASIC contends that by failing to investigate whether MM Prime was entitled to the payments pursuant to the First and Second Tranche MM Prime Commission Invoices and by permitting the payment pursuant to the Second Tranche MM Prime Commission Invoices to be made to

Members Alliance Incorporated, rather than MM Prime, Mr Bettles as an officer of Iridium Holdings was in breach of s 180(1) of the Corporations Act because:

(1) Iridium Holdings owed moneys to creditors both pursuant to the ATO statutory demand dated 23 June 2016 (see [46] above) and as the head company of the GST and income tax consolidated groups and Mr Bettles was aware of this fact;

(2) Mr Bettles had the power to control the conduct of MM Prime and he knew he had those powers;

(3) no liquidator, exercising their powers and discharging their duties with the degree of care and diligence that a reasonable person would exercise if they were the liquidator of a company in the circumstances of Iridium Holdings and if they occupied the office of, and had the same responsibilities as, the liquidator of Iridium Holdings would:

    (a) fail to take any, or any adequate, action to ascertain the true arrangement between Elderton and MM Prime; and/or

    (b) fail to take any, or any adequate, action to ensure that payments of the Second Tranche MM Prime Commission Invoices were made to MM Prime in circumstances where he was the liquidator of Iridium Holdings, the sole shareholder of MM Prime; and/or

    (c) fail to take any action to secure payment by Members Alliance Incorporated of the Astro Demand to Members Alliance Incorporated or a redirection of part of the money paid by Elderton to Members Alliance Incorporated in satisfaction of that demand.

588 ASIC also submits that Mr Bettles was in breach of:

(1) Liquidator's Duty No. 1 because he failed to take any adequate action to ascertain the true arrangement between Elderton and MM Prime;

(2) Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 4 by failing to take any action to ensure that payments of the Second Tranche MM Prime Commission Invoices were made to MM Prime in circumstances where he was the liquidator of Iridium Holdings, the sole shareholder of MM Prime; and

(3) Liquidator's Duty No. 1 and Liquidator's Duty No. 2 because he failed to take any action to secure payment by Members Alliance Incorporated of the Astro Demand to

Members Alliance Incorporated or a redirection of part of the money paid by Elderton to Members Alliance Incorporated in satisfaction of the demand.

5.3.1 Mr Bettles' knowledge

589 In support of those claims, ASIC invites the Court to infer, having regard to the communications referred to at [593] and [594] above, the Astro Demand to Members Alliance Incorporated and Mr Bettles' involvement in the drafting of the MM Prime Management Deed that, as at 19 October 2019, Mr Bettles knew that:

(1) the RILOW Group had an arrangement in relation to the sale of properties under which it had previously paid money to MM Prime;

(2) MM Prime's remaining business was collecting commissions payable on the sale of properties;

(3) Mr Robson thought the RILOW Group owed money to Members Alliance Incorporated but was unsure if it may have been owed to Astro Holdings; and

(4) Members Alliance Incorporated owed money to Astro Holdings.

590 I turn to consider whether having regard to the circumstances relied on by ASIC I can infer that Mr Bettles had the knowledge set out in the preceding paragraph.

591 It was not in dispute that Mr Bettles in his capacity as liquidator of Astro Holdings had issued the Astro Demand to Members Alliance Incorporated. Thus I would infer that Mr Bettles knew that Members Alliance Incorporated owed money to Astro Holdings. It was also not in dispute that Mr Bettles was aware that MM Prime was collecting commissions. But that knowledge on the part of Mr Bettles does not assist in establishing an inference that he knew that money was owing by the RILOW Group for commissions to MM Prime.

592 The evidence before me about the relationship between the RILOW Group and MM Prime is scant and would not lead me to infer that Mr Bettles knew either: that the RILOW Group had an arrangement in relation to the sale of properties under which it had previously paid money to MM Prime; or that Mr Robson thought the RILOW Group owed money to Members Alliance Incorporated but was unsure if it may have been owed to Astro Holdings. That is for the following reasons.

593 First, on 18 October 2016 Mr Thomas of Worrells had two telephone conversations with Mr Robson, his files notes of which are reproduced at [325] above. As to those conversations:

(1) in the first Mr Robson did not identify the company he was calling from and, indeed, he did not wish to identify the company for which he worked or even to provide his phone number. He simply said that he was the financial controller for a company that owed money to Members Alliance Incorporated. It is not clear why Mr Thomas recorded in his file note that Members Alliance Incorporated was "now known as Astro Holdings". By way of some explanation Mr Robson said his company had contracted with Astro Holdings to sell seven lots and that a previous payment had been made to MM Prime, but he was unsure if the debt was now with Astro Holdings;

(2) in the second conversation Mr Robson identified his company which Mr Thomas recorded as "Rola Group (or it could have been Bolo Group)". Mr Robson informed Mr Thomas that "one of the directors"' had spoken with Messrs Marlborough and Ramsden and was satisfied the moneys were being paid to a company which was not in liquidation; and

(3) in these exchanges, Mr Robson did not refer to Elderton and Mr Thomas did not understand that Mr Robson was from the RILOW Group and, in any event, Mr Robson did not explain that there was any connection between his company, which Mr Thomas understood as Rolo Group or Bolo Group, and Elderton.

594 Secondly, following Mr Thomas' conversations with Mr Robson, on 19 October 2016 Mr Bettles telephoned Mr Marlborough. The file note of Mr Bettles' conversation is set out at [326] above. Mr Marlborough explained to Mr Bettles that "Rolo Group had done a deal with Members Alliance Incorporated" in relation to seven properties and that he was not sure why Mr Robson thought Astro Holdings was involved "because it was merely a bucket company". Based on the information provided by Mr Marlborough the money was owed to Members Alliance Incorporated, a company of which Mr Bettles was not a liquidator.

595 Thirdly, there is no evidence that Mr Bettles had a basis to question what he was told by Mr Marlborough. To the contrary:

(1) there was no evidence to establish that the Second Tranche MM Prime Commission Invoices were payable to MM Prime rather than Members Alliance Incorporated;

(2) Mr Bettles requested copies of each agreement that gave rise to MM Prime's commission entitlements. As Mr Jones explained in cross-examination Mr Bettles wanted to get an understanding of those properties that were the subject of payment of commissions to MM Prime and those which had not yet completed and were works in

progress. As to the former, Mr Bettles called for copies of the agreements so he could ascertain whether MM Prime had a legal entitlement to commissions. None of the agreements provided to him concerned Elderton;

(3) Mr Bettles sought work in progress schedules for MM Prime. Those provided to him did not record any entitlement to commission payable by Elderton (or RILOW Group); and

(4) at the 26 October 2016 Progress Meeting Mr Bettles was told that the referral fees (commission) payable to MM Prime were not the subject of any binding written agreements and entitlement was on the basis of a "handshake deal" only.

596 Fourthly, ASIC's suggestion, and Mr Bettles' concession in cross-examination that, at the time, Mr Bettles could have undertaken a Google search of "Alan Robson" and "RILOW Group" does not assist. First, Mr Bettles understood the relevant company to be Rolo Group or Bolo Group. Secondly, there is no evidence before me of what result a Google search of "Alan Robson" would have returned and whether it would have assisted.

597 Finally, Mr Bettles frankly accepted that he could have sought and reviewed Astro Holdings' records but had he done so he would have searched for entries for the Rolo Group and, given that the relevant companies were those in the RILOW Group or Elderton, such searches would have been unlikely to render any information. He also accepted that he could have asked Mr Marlborough for documents showing arrangements between the Rolo Group and Members Alliance Incorporated. However, Members Alliance Incorporated was not in liquidation and was under the control of Mr Marlborough. Whether Mr Marlborough would have acceded to such a request, and what would have been produced, is not known.

5.3.2 Did Mr Bettles breach s 180(1) of the Corporations Act and/or Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 4?

598 In the circumstances and given Mr Bettles' state of knowledge at the time I am not satisfied that Mr Bettles breached his duty owed to Iridium Holdings pursuant to s 180(1) of the Corporations Act.

599 As set out above, ASIC has not established that Mr Bettles knew that MM Prime had any entitlement to commissions from the RILOW Group or Elderton. Mr Bettles actively sought information about the commissions payable to MM Prime and the value of work in progress at the Progress Meetings. The information that was provided to Mr Bettles as a result of those

enquiries did not disclose that any commissions were payable by the RILOW Group or Elderton or that there were any pending projects with those entities.

600 Further, the First Tranche MM Prime Commission Invoices were rendered and paid prior to 22 July 2016 when Mr Bettles was first appointed as voluntary administrator or liquidator of companies in the MA Group including, relevantly, Iridium Holdings.

601 In the circumstances and given the information available to Mr Bettles at the time, there was no reason for Mr Bettles, in his capacity as liquidator of Iridium Holdings, to take further steps to ascertain the true arrangement between Elderton and MM Prime, and/or to take action to ensure that payments of the Second Tranche MM Prime Commission Invoices were made to MM Prime. Given the steps Mr Bettles had taken and his knowledge at the time, Mr Bettles' conduct was reasonable.

602 The only question that arises is whether Mr Bettles ought to have taken any action to secure payment by Members Alliance Incorporated of the Astro Demand to Members Alliance Incorporated, given he knew of the indebtedness and, based on Mr Robson's conversations with Mr Thompson and his own conversation with Mr Marlborough, I would infer that he knew that moneys were to be paid to Members Alliance Incorporated. The question is what he should have done given that the amount of the Astro Demand to Members Alliance Incorporated was relatively small and both the Astro Holdings and Iridium Holdings liquidations were without funds.

603 Mr Bettles could have renewed the demand and again sought payment. However, failure to do so cannot be said to be a breach by Mr Bettles of his duty owed to Iridium Holdings. Iridium Holdings was not a shareholder in Astro Holdings and thus Mr Bettles in his capacity as liquidator of Iridium Holdings could not be expected to take any steps vis à vis Astro Holdings. ASIC does not make any claim against Mr Bettles for breach of s 180(1) of the Corporations Act in his capacity as liquidator of Astro Holdings.

604 For the same reasons Mr Bettles did not breach Liquidator's Duty No. 1, Liquidator's Duty No. 2 and/or Liquidator's Duty No. 4.

605 Given my findings in relation to those matters underlying the alleged breaches, I am equally not satisfied that there are any matters to be taken into account for the purposes of s 45-1 of the IPS.

5.4 Sale of the Client Book (9.17 FASOC)

606 ASIC alleges that Mr Bettles as an officer of Iridium Holdings breached s 180(1) of the Corporations Act by failing to obtain a valuation of the Client Book and by allowing, or failing to prevent, the sale of the Client Book to Crest Wealth.

607 ASIC also alleges that Mr Bettles breached:

(1) Liquidator's Duty No. 1 by failing to identify the value of the Client Book, failing to determine whether the Client Book was the asset of Iridium Financial Planning or Capricorn Securities and failing to prevent the entry into of the Client Book Sale Agreement; and

(2) Liquidator's Duty No. 2 because being acquainted with the affairs of Iridium Holdings included being acquainted with the affairs of its wholly owned subsidiaries, Capricorn Securities and Iridium Financial Planning, and Mr Bettles failed to ascertain whether entry into the Client Book Sale Agreement was in the interests of Iridium Holdings.

608 ASIC submits that Mr Bettles ought not to have consented to the sale of the Client Book because:

(1) he had not obtained an independent valuation of the Client Book nor asked Mr Lavell why there was such a significant difference between the various valuations;

(2) he knew that the Crest Wealth Offer involved a lucrative ($440,000 (including GST)) "consultancy fee" to Mr Marlborough (effectively, a "kick back") and was not on a commercial arm's length basis. This was because the purchaser Crest Wealth, through its related entity Crest Accountants, was a secured creditor of the vendor;

(3) it was not in the interests of Iridium Holdings to have the Crest Wealth Offer accepted rather than the Advice First Offer;

(4) he knew that the sale proceeds would be consumed almost entirely by the "secured creditors" (including Ramsden Lawyers and WMS) and that neither Iridium Holdings nor its creditors (such as the ATO) would receive any amount from the sale; and

(5) despite advice from Grants Law, Mr Bettles did not take steps to secure a portion of the sale proceeds nor to inform ASIC about the sale. This was so despite Mr Bettles having been in communication with ASIC since late October 2016 and ASIC having raised numerous concerns about the arrangement with the Benchmark Group and the transfer

of assets from the MA Group. ASIC said that it must have been apparent that it had substantial interest in these matters.

609 ASIC submits that Mr Bettles could have prevented the Client Book sale by:

(1) simply having refused to provide his consent until he had carried out proper investigations. ASIC contends that Mr Bettles was under no obligation to provide that consent and the result of its provision was to compromise Mr Bettles' position in respect to any future investigations into the sale as the proposed future liquidator of Capricorn Securities and Iridium Financial Planning;

(2) exercising the powers available to him as liquidator of the sole shareholder of the vendor companies, which he did not do; and

(3) informing ASIC about the circumstances surrounding the Client Book sale and seeking ASIC's comments about it. ASIC says that Mr Bettles' lawyer advised him to take that step but he did not do so.

610 The facts relating to the sale of the Client Book are set out at [367]-[398] above.

611 Relevantly, Mr Bettles recalled that at the pre-appointment meetings he was told a number of things about Capricorn Securities and Iridium Financial Planning including that those companies would not be placed into liquidation until after realisation of those companies' assets, the funds from the sale would be available for distribution to their shareholder, Iridium Holdings, and that to do otherwise could lead to termination of Capricorn Securities' AFSL and loss of the trailing commissions. That was reinforced after his appointment as liquidator of among others, Iridium Holdings (see [67(11)] and [331] above).

612 On 28 July 2016 Mr Bettles was informed by Mr Lavell that Iridium Financial Planning's business was worth about $1 million, the director was looking to sell the business, they were in discussion with a potential buyer and that he was preparing a formal valuation (see [335] above).

613 The negotiations for sale of the Client Book were undertaken by Mr Marlborough. Mr Bettles was not directly involved in them but stayed abreast of developments via the Progress Meetings. An electronic data room was set up and there were about six interested parties although only two offers were received. Each of those offers (see [371] above) included a consultancy arrangement for Mr Marlborough. On 16 November 2016 Mr Ramsden informed Mr Bettles of the offers.

614 On 18 November 2016 Mr Bettles received the WMS Client Book Valuation (see [381] above). ASIC contends that Mr Bettles failed to obtain an independent valuation of the Client Book. It submits that the WMS Client Book Valuation was not independent because WMS had previously provided taxation and business services to Capricorn Securities and Iridium Financial Planning and because, importantly, WMS was a secured creditor of Iridium Financial Planning and ultimately received a substantial payment for past fees following completion of the Client Book sale.

615 Mr Bettles submits the fact that Mr Lavell had previously provided taxation and business services to Capricorn Securities and Iridium Financial Planning does not establish that the WMS Client Book Valuation was not independent or, more importantly, that the opinions expressed were not reasonably held.

616 Similarly to the WMS Rent Roll Valuation (see [204] above), the WMS Client Book Valuation was provided by WMS Corporate Finance. Mr Bettles makes the point that this is not WMS which was the entity that provided business and taxation services to Capricorn Securities and Iridium Financial Planning. However, while it was WMS Corporate Finance that provided the valuation, it was undertaken and signed by Mr Lavell who was also the person who provided the business and taxation services. But that fact of itself does not mean that the WMS Client Book Valuation was not independent. On the contrary, assuming he had the appropriate qualifications to give the advice, Mr Lavell likely had an understanding and knowledge of the business the subject of the WMS Client Book Valuation which may have assisted in undertaking it.

617 The only other matter ASIC relies on to establish a lack of independence is that WMS was a secured creditor of Iridium Financial Planning. That fact may in some circumstances cause a conflict for a professional advisor but it is difficult to see how it can do so in the context of providing this valuation. WMS Corporate Finance was not providing advice about whether to accept the Crest Wealth Offer: it provided an opinion on the value of the Client Book and then noted that the Crest Wealth Offer favoured by the director was within "an acceptable range".

618 ASIC does not contend that opinions expressed in the WMS Client Book Valuation were based on inaccurate information or an inadequate methodology or that they were not reasonably held. Nor has it led evidence to establish that as at 18 November 2016 the Client Book had a different value to that assessed in the WMS Client Book Valuation.

619 In the circumstances I am not satisfied that ASIC has established that the WMS Client Book Valuation was not independent.

620 To the extent that ASIC contends that Mr Bettles failed to obtain an independent valuation, I accept Mr Bettles' submission that it was Mr Marlborough, as the director of Capricorn Securities and Iridium Financial Planning, who had a duty to take reasonable steps to achieve a fair market price for the Client Book. Mr Bettles was not an officer of either of those companies. Mr Bettles insisted that a valuation be obtained but he did not have a duty to obtain one himself.

621 In any event, even if Mr Bettles had such a duty, the Iridium Holdings liquidation was without funds. In those circumstances and in light of s 545(1) of the Corporations Act, Mr Bettles would not be liable to incur the cost of obtaining a valuation report unless there were sufficient funds to enable him to meet that liability: see [582] above.

622 Insofar as the substance of the WMS Client Book Valuation is concerned, ASIC submits that at no time did Mr Bettles query why it was substantially less than the value set out in the July 2016 WMS PowerPoints or the ATO proposal dated 8 April 2016. ASIC contends that difference in valuation ought to have raised the concern that the Client Book was to be sold at an undervalue.

623 The ATO proposal dated 8 April 2016 is a reference to a letter dated 8 April 2016 from WMS to the ATO (**8 April 2016 ATO Proposal**) in relation to the "Iridium Holdings Group of Companies" which set out "the taxpayer's proposal to enter into a Deed of Compromise and meet ongoing compliance commitments" and gave a "current assessed value" of the Client Book of $3.75m (see [47] above). Mr Bettles said that he did not receive a full copy of the 8 April 2016 ATO Proposal until 14 March 2017, at which time it was provided by the ATO under cover of an email which included:

> As discussed this morning, I have attached some financial information that was provided by the Iridium Group's lawyer which was requested as part of their compromise application/payment arrangements.
>
> This may take a number of emails due to the size.
>
> Please advise if there is further information in relation to any of the other companies within the group.

624 For completeness I note that Mr Bettles received a copy of a letter dated 15 June 2016 from the ATO to WMS responding to the 8 April 2016 ATO Proposal (without attachments) from the

ATO on or about 29 September 2016 in response to a request made by Worrells pursuant to the *Freedom of Information Act 1982* (Cth).

625 ASIC submits that I would not accept that Mr Bettles was not aware of the 8 April 2016 ATO Proposal at the time it was sent and that he only received a copy of it on 14 March 2017. It contends that I should not accept the later date of receipt because the letter became part of the record of correspondence of Iridium Holdings at least as at 15 April 2016 by an email from Mr Lavell to Geoffrey Thomson, accountant and former MA Group employee, to his @iridiumcapital.com.au email address. It was therefore available to Mr Bettles when he became the liquidator of Iridium Holdings on 22 July 2016 and of the other companies in the MA Group on the dates he became liquidator of those companies.

626 It may be that the 8 April 2016 ATO Proposal became a part of the record of correspondence of Iridium Holdings as early as 15 April 2016 and was available to Mr Bettles as part of the records of that company upon his appointment as liquidator. But it does not follow that Mr Bettles became aware of the 8 April 2016 ATO Proposal as a result and I would not infer that to be the case particularly given the evidence below as to the volume of the books and records of the MA Group.

627 ASIC also submits that on or about 10 August 2016 Mr Lavell responded to an email sent by Mr Bettles on 8 August 2016 and referred to the 8 April 2016 ATO Proposal as "the fourth compromise deed with respect to this company and the broader group of companies" when advising when certain companies became insolvent. ASIC says that it can be inferred from the absence of any subsequent query regarding the reference that Mr Bettles was aware of the same. ASIC contends that Mr Bettles gave a qualified acceptance of the proposition that one of the first things he would want to know as a liquidator was the most recent payment plan proposed to the ATO and notes that the 8 April 2016 ATO Proposal was that document.

628 The email relied on by ASIC was an exchange between, among other, Messrs Bettles and Lavell. In particular, on 8 August 2016 following his and Mr Khatri's appointment as liquidators, relevantly of HSINIF, Mr Bettles sent an email to Mr Lavell seeking his "assistance in conducting investigation (sic) into the affairs of the company" and raising a number of issues and queries including requesting copies of documents. Mr Lavell responded on 10 August 2016, recording his responses in red. The email exchange included:

> 7. Estimating the date the company became insolvent. We believe the company became insolvent on 15 June 2016 when the Australian Taxation Office

> refused the fourth compromise deed with respect to this company and the broader group of companies. As part of those negotiations and supported by an ATO generated draft deed of compromise, the company's ATO debts were to be forgiven.

629 In cross-examination Mr Bettles said that he did not know that the payment plan that Mr Lavell was referring to in his response was the 8 April 2016 ATO Proposal. He was aware only that a repayment plan had been rejected by the ATO. In addition Mr Bettles did not accept that the most recent payment plan rejected by the ATO is usually a relevant document that a liquidator would want but said it would depend on the circumstances.

630 None of this evidence would lead me to infer that Mr Bettles saw the 8 April 2016 ATO Proposal prior to 14 March 2017 when, as demonstrated by the contemporaneous records, it was provided by the ATO.

631 ASIC also refers to and relies on the WMS PowerPoints. Mr Bettles only received WMS PowerPoint V5 which included slide 1 headed "Indicative Asset Values" which, in turn, included: low and high values for "Risk Trail" of $800,000 and $1.2 million respectively; low and high values for "Risk Advisor Fees" of $200,000 and $600,000 respectively; and low and high values for "Work in Progress Risk" of $100,000 and $400,000 respectively. These values are "indicative" only and, unlike the WMS Client Book Valuation, the methodology and assumptions adopted for arriving at them is unknown. It is unsurprising that the WMS Client Book Valuation arrives at a different figure given the evidently more reasoned approach to it. I make the following further observations: first, Mr Bettles might have raised a query with Mr Lavell about why there were differences in the "Indicative Asset Values" for the component parts of the Client Book and the WMS Client Book Valuation. It is apparent he did not. That said, the WMS Client Book Valuation explains in some detail the factors which had affected the deterioration in values of the Client Book since July 2016 (see [381]) which may explain why Mr Bettles raised no query. Secondly, ASIC does not suggest that the offer received from Advice First Offer was not at arm's length. In any event it was in the range of the Crest Wealth Offer.

632 As the facts set out above in relation to the sale of the Client Book demonstrate, after receipt of the WMS Client Book Valuation Mr Bettles took a number of steps in relation to sale of the Client Book including obtaining a copy of the draft contract, reviewing it, preparing a November Decision Memorandum and seeking advice from Grants Law. ASIC contends that Mr Bettles did not take any of the steps advised to him by Grants Law in the 25 November

2016 Letter (see [388] above) to secure a portion of the sale proceeds or to inform ASIC of the matters raised.

633 The subsequent exchange of correspondence between Grants Law and Ramsden Lawyers, which is set out in part below, demonstrates that Mr Bettles attempted to obtain the information which Grants Law advised he should prior to giving his consent to the sale and also to have the proceeds of sale secured:

(1) in the 25 November 2016 Letter Grants Law advised Mr Bettles that they needed to better understand the business being sold and how it was said to be carried on by both Capricorn Securities and Iridium Financial Planning. By email dated 28 November 2016 to Mr Ramsden, Mr Blanchard of Grants Law raised the following queries (as written):

> In order for the Liquidators to properly assess whether to give that consent, they have asked us to ask you the following questions:
>
> 1. What is being sold? A business, or selected assets?
>
> 2. The Risk Book and/or the FUA Book?
>
> 3. Does [Iridium Financial Planning] have any assets to sell?;
>
> 4. Is there a sale of a going concern?;
>
> 5. [Iridium Financial Planning] is just an authorised representative of [Capricorn Securities] so what is it selling (if anything) and does it need to be a party? An authorised representative is simply a person authorised to provide some of the financial services "on behalf of" the holder of the AFSL (Corporations Act s916A) and is responsible for that representative's actions (Corporations Act s917B). So the financial services are provided by the licensee (i.e. Capricorn) not the representative (i.e. [Iridium Financial Planning]), so hard to see why [Iridium Financial Planning] should be a party.
>
> 6. Is there a dealer agreement between [Capricorn Securities] and [Iridium Financial Planning]? If yes, please provide to us a copy;
>
> 7. What happens to the purchase price? If [Iridium Financial Planning] is properly a party because it holds assets, how is the purchase price apportioned (particularly in light of the valuation report by WMS)? What is the amount owed to secured creditors of [Capricorn Securities] (only Domingo and his super fund) and [Iridium Financial Planning] (various, including the Buyer)?
>
> 8. What amount of the proceeds of sale will be quarantined for the Liquidators/unsecured creditors?
>
> 9. What are the pay out figures for the PPSR registrations?
>
> 10. How is it proposed to deal with Crest's PPSR registrations immediately prior to settlement. Should the removal of those

registrations be dealt with as a special condition.

11. How can sellers obtain a non-compete covenant from Benchmark and Liam Young?;

12. Why is the Liquidators' consent being sought?

13. Please provide a copy of the constitutions of [Capricorn Securities] and [Iridium Financial Planning];

14. Can the warranty be given that the Seller must operate the business as a going concern (clause 3.3(d));

15. Should it be an REIQ business sale contract or a very basic sale of asset contract with no warranties;

16. Does [Capricorn Securities] have any contracts with its clients, or the providers of financial products to those clients, entitling it to the fee income, that should be assigned? Are those contracts expressed to be assignable without consent of such clients? If yes, should all of purchase price be attributable to goodwill?

Mr Blanchard's email then went on to provide specific comments in relation to the draft contract for sale. However, it is clear that, in accordance with the advice in the 25 November 2016 Letter, the queries set out above were directed towards gaining a better understanding of the business being carried on by Capricorn Securities and Iridium Financial Planning which was to be the subject of the sale, as advised by Grants Law;

(2) in the 25 November 2016 Letter Grants Law provided a "possible scenario" to ensure that Mr Bettles controlled the sale proceeds which included Grants Law being present at settlement of the sale and collecting a bank cheque made payable to their trust account (see [388] above). Mr Blanchard's 28 November 2016 email concluded with a request that the sale proceeds be paid into Grants Law's trust account on settlement;

(3) by email of the same date Mr Ramsden responded to Mr Blanchard's email dated 28 November 2016. In particular he responded to the queries about the nature of the business the subject of the sale as follows (as written):

1. The business is selling all assets of the business as owned by the vendors;

2. The risk book and income rights from the FUA are included;

3. It is unsure what assets [Iridium Financial Planning] and [Capricorn Securities] own in their own right. We will hold monies on trust and call for a copy of the authorized representative / dealer agreement between the parties. Absent of one, it would follow that we account to [Capricorn Securities] as the AFSL holder.

4. Yes, as noted on the contract. We are satisfied that the sale meets the requirements for it to be sold as a going concern.

5. Although I agree with your comments on the face, most authorized representatives own the goodwill created by the client book. This is normally established and made clear in the authorized representative agreement.

6. We have made enquires and the client is unsure whether one exists. Liam Young who was employed by the [MA Group] is away ill today, who would be the best person to advise on this. In any event, we would say that absent such an agreement we would account to [Capricorn Securities].

7. The value of the business is what it is. I have not viewed the report so cannot comment on it. The secured parties would be those noted on the PPSR but I note the Domingo security interest is questionable given timing of its registration and may something the liquidator could scrutinise. Please note that we are endeavouring to register a security interest for our fees that we have been granted the rights to an ALL PAPS security interest for our fees as a third party payer for work we have done on this matter and the [MA Group]. Our invoice has not been rendered yet, but we intend to register accordingly, notwithstanding that it is our view that unsecured parties would be entitled to be paid in any event as the [Capricorn Securities] is not insolvent. I am happy to expand on this should you request details on this and any other queries you may have in relation to our securities we have over the [MA Group] generally.

8. We note that the sale price is $900,000 of which $200,000 will be held on retention on account of income that may be received by [Capricorn Securities] for advance cover. I understand this will apply to all insurance premiums but that the FUA income will be arrears income of which [Capricorn Securities] will be entitled to. Our WIP across the [MA Group] is approximately $550,000. Our agreement with the client was that we would take $330,000 from the sale of this business of which our balance of fee would come from other entities we hold valid security over. Crest has a security interest for his fees of $25,000 that were for his services provided to the group, and in particular Colin MacVicker as director. The balance would therefore be paid to the liquidator once the company was placed into liquidation, or as a dividend. My client is happy to instruct that we hold these monies on trust until either event was to arise to ensure that these monies are protected funds.

9. I am unsure what the final amount will be at this stage, noting we are unsure as to the position of Domingo.

10. Crest would be paid from the sale proceeds I would have thought in exchange for his release. We have yet to conclude what position to take with the other security interests but are intently reviewing this at present and will revert to you accordingly.

11. Benchmark have agreed to be a covenator and Indemnifier of the consultancy agreement with Richard. I am happy to provide you a copy of this on request.

12. On the basis that the liquidator is the shareholder and is likely to place the company into liquidation.

13. Noted.

14. We can make this clear despite what we believe is made clear by the standard conditions.

15. We considered this and were of the view that it would have been easier to sell the business as a going concern and adopt the REIQ standard conditions.

16. The contracts for assignment are a matter for the buyer, noting the business is sold on a walk in walk out basis. All proceeds then would be for the goodwill in my view.

(4) on 29 November 2016 Mr Blanchard sent another email to Mr Ramsden which included:

> The Liquidators are only in a position to consider providing their consent if the transaction is plainly in the net interests of the holding company and, given the sellers will shortly go into liquidation, unsecured creditors. In order to be satisfied of this, we need to understand:
>
> 1. Precisely what assets are being sold and who owns them. Including if contracts need to be assigned (a stranger to a contract cannot unilaterally assign them and we note you have deleted REIQ standard condition 15 re assignment). The dealer agreement needs to be identified or satisfied there isn't one. We disagree that authorised representatives who are employees or intra-group necessarily derive the goodwill. The Liquidators need better understand the actual assets being sold and the ownership of each asset to enable them to ascertain the proposed distribution of sale proceeds as between the two selling entities.;
>
> 2. What will be the net proceeds from the sale transaction;
>
> 3. What the payout for each relevant secured creditor is? Who the secured creditors are depends on who the sellers are/is, which depends on the answer to question 1;
>
> 4. Re your fees, we need to see all relevant client agreements and security agreements, and a list of WIP and invoices per matter and per client. We fail to see how one entity can agree to pay the fees incurred by a separate entity, or secure its assets to secure those other fees, consistently with fiduciary and statutory duty. Your fees seem excessive. We believe your fees should be dealt with in the usual course, by rendering an invoice post-settlement;
>
> 5. The registrations on the PPSR will need to be dealt with at completion. Pursuant to the REIQ standard terms (Clause 6.1(d) & (da)), you have to release, or obtain a consent to release, of the security interests at completion. Any buyer would expect this too, as it will not want the assets it has just paid good money for to be the subject of a security interest. Capricorn and IFP have different security holders, but both have ALLPAAP registered against their assets;

6. We need to see a net settlement statement, we need to be satisfied with the net amount to be paid to the Liquidators, and we are instructed that the Liquidators' consent will be subject to us attending settlement and being provided with a bank cheque for this amount at settlement payable to our trust account;

7. The Liquidators' consent will also be subject to the Director signing the appropriate documents to enable both [Capricorn Securities] and [Iridium Financial Planning] to immediately be placed into liquidation post settlement. Given the solvency of these entities, I anticipate that this will be in the form of a Declaration of Solvency, but again we need to see the list of secured and unsecured creditors of each entity and better understand the distribution of sale proceeds before settling on the manner in which the entities will be placed into liquidation. The Liquidators' will require this signed document prior to settlement which will be held in escrow pending settlement;

8. Please send to us a scan of each company's constitution.

Again these queries were an ongoing attempt to obtain the information the subject of the advice in the 25 November 2016 Letter;

(5) by email dated 30 November 2016 Mr Jones provided Mr Blanchard with a further draft of the contract for sale of the Client Book and the special conditions. The seller had been changed to Iridium Financial Planning alone. Mr Blanchard forwarded the draft to Mr Bettles noting that:

> [Iridium Financial Planning] is now the sole seller. According to them, [Iridium Financial Planning] solely owns the business, and pays [Capricorn Securities] a licence fee to use their AFSL (see clause 4.1 of the attached).
>
> They haven't responded to any questions, including about what amount will be left for unsecured creditors.
>
> I have alerted [Mr Grant] and we are analysing.

(6) later on 30 November 2016 Mr Blanchard responded to Mr Jones in the following terms:

> Thanks for your marked up special conditions.
>
> Re clause 4.1, can you please provide evidence of what is said to be the arrangement.
>
> We have now had a chance to review the contracts with Macquarie and TAL, which appear to be the contracts giving rise to the two sets of income stream. Both of those contracts are with [Capricorn Securities]. If [Capricorn Securities] is not a party to the sale contract, how do you say that the income stream is transferred to the Buyer. Regardless of the arrangements between intra-group companies, Macquarie and TAL agree to pay [Capricorn Securities], not its authorised rep, who is a stranger to the contract and has no rights thereunder.

> We look forward to a response to our earlier set of questions.
>
> The proposed amendment to remove Capricorn Securities as a seller was not maintained.

634 On 1 December 2016 Mr Ramsden sent the email set out at [391] above to Mr Blanchard, copied to Mr Bettles, which, among other things, in effect, sought Mr Bettles' urgent consent to the sale of the Client Book and which noted that if Crest Wealth pulled out of the sale because of Mr Bettles' refusal to provide consent, the secured parties, including Ramsden Lawyers, would seek to enforce their securities against other members of the MA Group including MM Prime.

635 ASIC submits that the implication from the email referred to above could not be more clear – follow Messrs Ramsden's and Marlborough's instructions or be placed in the "precarious" position where there would be no assets left to salvage from the MA Group (such as from MM Prime). That is so. Mr Bettles was placed in a difficult and, to adopt ASIC's characterisation, "precarious" position to either: not oppose the sale, notwithstanding that Ramsden Lawyers had not provided all of the information that Mr Bettles had requested, through Grants Law; or not provide his consent to the sale and risk that it collapsed.

636 Mr Bettles sought advice from Grants Law and on 2 December 2016 participated in a telephone conference with Messrs Carey and Grant and received a letter of advice from Grants Law (see [392] and [393] above). Thereafter he determined not to oppose the sale and instructed Grants Law to send a letter to Ramsden Lawyers informing them of his position.

637 ASIC submits that Mr Bettles ought not to have consented to the Client Book sale for the following reasons.

638 First, it contends that he had not obtained an independent valuation of the Client Book nor asked Mr Lavell why there was such a significant difference between the various valuations. I have addressed those matters at [614]-[619] and [622]-[631] above.

639 Secondly, ASIC contends that Mr Bettles knew that the Crest Offer involved a lucrative "consultancy fee" for Mr Marlborough (effectively, a "kick back") and was not on a commercial arm's length basis because the purchaser Crest Wealth, through its related entity Crest Accountants, was a secured creditor of the vendor. It submits that it was not in the interests of Iridium Holdings to have the Crest Wealth Offer accepted rather than one of the

offers in the Advice First Offer. ASIC says that Mr Bettles knew that the sale proceeds would be consumed almost entirely by the "secured creditors" (including Ramsden Lawyers and WMS) and that neither Iridium Holdings nor its creditors (such as the ATO) would receive any amount from the sale.

640 Thirdly, ASIC contends that, despite advice from Grants Law, Mr Bettles did not take steps to secure a portion of the sale proceeds nor to inform ASIC about the sale. Indeed, Mr Bettles had been in communication with ASIC since late October 2016 and it had raised numerous concerns about the arrangement with the Benchmark Group and the transfer of assets from the MA Group. ASIC says that it must have been apparent that it had substantial interest in these matters.

641 ASIC submits that Mr Bettles could have prevented the Client Book sale by refusing to provide his consent until he had carried out proper investigations. It says that Mr Bettles was under no obligation to provide that consent and the result of its provision was to compromise his position in respect of any future investigations into the sale as the proposed future liquidator of Capricorn Securities and Iridium Financial Planning. ASIC also submits that Mr Bettles could have prevented the sale by exercising the powers available to him as liquidator of the sole shareholder of the vendor companies but did not do so and that he was also able to inform ASIC about the circumstances surrounding the Client Book sale and seek its comments regarding the same but, again, he did not do so.

642 Mr Bettles was aware of the terms of the Crest Offer and that it included a consultancy fee for Mr Marlborough. However, Mr Marlborough, as the director of Capricorn Securities and Iridium Financial Planning, preferred the Crest Wealth Offer. Notably, both the Crest Wealth Offer and the Advice First Offer were conditional on Mr Marlborough agreeing to be bound by ongoing consultancy arrangements.

643 Insofar as ASIC contends that it was not in Iridium Holdings' interest to accept the Crest Wealth Offer over one of the offers in the Advice First Offer, relevantly:

(1) on 17 November 2016, at the time of providing the three alternative offers in the Advice First Offer (see [371(2)] above), Mr Ramsden informed Mr Bettles that "the proposal from Advice First does appear to offer more return to the vendors, by way of option three in particular, it still nevertheless requires [Mr Marlborough] to consult with Advice First, which is entirely a prerogative of Mr Marlborough and one that he cannot

be compelled to be bound to by you as the shareholder, which in turn would no doubt (should [Mr Marlborough] refuse to consult), result in Advice First paying dramatically less then (sic) what has been offered";

(2) Mr Bettles could not compel Mr Marlborough to accept one of the offers in the Advice First Offer; and

(3) the WMS Client Book Valuation was prepared to "assess the reasonableness of the offers received by [Crest Wealth] and Advice First for the risk insurance trailing commission ("Risk Book") and funds under advice ("FUA") Advisor fee assets". The valuation concluded that the Crest Wealth Offer was "within an acceptable range". As I have already observed there is no evidence before me that the WMS Client Book Valuation was flawed in some way and that a different valuation range to that arrived at in that valuation was more appropriate.

644 In the FASOC ASIC contends that the Client Book sale to Crest Wealth "converted" the consultancy fee payable to Mr Marlborough to a consultancy fee to the Benchmark Group which was under the effective control of Mr Marlborough. However, Mr Bettles did not receive a copy of the Crest Consultancy Agreement at the time of the Client Book sale and had no involvement with it. In any event, ASIC has not established that the Benchmark Group was under Mr Marlborough's control or, if it was, that Mr Bettles was aware of that fact (see [551]-[552] above).

645 At some point Mr Bettles must have become aware that Crest Accountants was a secured creditor of the vendor although he: had never met Mr Chesterton (who was associated with Crest Accountants); was not aware prior to or at the time of the sale that Mr Chesterton had been the accountant for the MA Group; and prior to his appointments on 22 July 2016 had no professional or personal involvement with Mr Chesterton or Crest Accountants. However, it does not follow from the knowledge Mr Bettles did have that the Crest Wealth Offer was not arm's length. The WMS Client Book Valuation which concluded that the Crest Wealth Offer was in the acceptable range and the Advice First Offer which was in similar terms and quantum suggest otherwise.

646 It is true that Mr Bettles did not secure the sale proceeds although he attempted, through his lawyers, to do so. Nor did he communicate with ASIC about the sale, despite Grants Law's advice to do so and his ongoing communications about other aspects of the MA Group liquidation. It was at best imprudent for Mr Bettles not to do so given the issues that had arisen

in the liquidation of some of the companies in the MA Group, the issues that had arisen and ASIC's interest in aspects of the liquidation. But Mr Bettles did not have an obligation to communicate about the Client Book sale with ASIC, he was not the liquidator of either vendor company and, in any event, from as early as 5 August 2016 following Mr Bettles' conversation with Mr Dunn, ASIC was aware of the intention to sell the Client Book but, it seems, made no further enquiries.

647 Mr Bettles prepared the November Decision Memorandum and obtained advice from Grants Law before determining not to oppose the sale of the Client Book to Crest Wealth. It is evident from the November Decision Memorandum that Mr Bettles considered carefully the alternative scenarios at the time and set out his rationale for his position that he should at the time consent to the Crest Wealth Offer. But he did not simply proceed at that point. He then obtained independent legal advice from Grants Law. Upon obtaining advice he instructed Grants Law to obtain the information they identified in the 25 November 2016 Letter. Ultimately not all of the information was forthcoming. When faced with Mr Ramsden's email of 1 December 2016 Mr Bettles sought further advice from Grants Law. Ultimately, based on the information that was available, Grants Law advised that a liquidator subsequently appointed to Capricorn Securities and Iridium Financial Planning would be able to investigate the question of apportionment of sale proceeds and the validity of the securities held by the secured creditors.

648 As noted above, Mr Bettles did not consent to the sale of the Client Book to Crest Wealth, rather he did not oppose the sale. In line with the advice he received from Grants Law he did not provide any releases to Crest Wealth.

649 I am satisfied that, in the circumstances, Mr Bettles acted prudently and was justified in his approach and in determining not to oppose the Client Book sale to Crest Wealth. He assessed the alternative scenarios and their risks and, in doing so, obtained legal advice and acted on that advice.

650 ASIC suggests that Mr Bettles could have prevented the sale of the Client Book.

651 Assuming he did so and no sale could be achieved to Advice First, because Mr Marlborough could not be compelled to meet Advice First's requirements, there was a risk that Capricorn Securities would not have been able to maintain its AFSL. The WMS Client Book Valuation noted that Capricorn Securities required consent from ASIC to continue to hold its AFSL and that was "a week to week proposition". Without the AFSL, the entitlement to future trailing

commissions would have ceased under Capricorn Securities' distribution agreements with Macquarie and TAL (except where the right to such commission had already accrued), which would adversely affect the value of the Client Book.

652 Putting that to one side, it is not clear what action Mr Bettles in his capacity as liquidator of Iridium Holdings could have taken to prevent the sale of the Client Book to Crest Wealth. As Mr Bettles submits:

(1) ASIC did not adduce any evidence as to the source of Mr Bettles' alleged power as the liquidator of the shareholder to compel Mr Marlborough not to enter into a Client Book sale or to accept one of the alternatives in the Advice First Offer and provide the restraint requested. There is no evidence as to the terms of the constitutions of either Capricorn Securities or Iridium Financial Planning;

(2) ASIC did not adduce any evidence to establish that there was an available independent director appropriately qualified and willing to replace Mr Marlborough. Mr Bettles' evidence is that the liquidators were not willing to undertake the director role;

(3) by the time Mr Bettles became aware that most of the sale proceeds would be distributed to the secured creditors on 1 December 2016 there was a very limited timeframe before the settlement of the sale on 2 December 2016; and

(4) there were insufficient funds in the Iridium Holdings liquidation to take the action alleged, and accordingly, Mr Bettles was not obliged to do so: see s 545(1) of the Corporations Act and [581]-[583] above.

653 Having regard to the above, ASIC has failed to establish that Mr Bettles' conduct in respect of the Client Book sale did not meet the standard of care and diligence that ought reasonably have been exercised by him as an officer of Iridium Holdings in breach of s 180 of the Corporations Act or that he breached Liquidator's Duty No. 1 and Liquidator's Duty No. 2.

654 Given my findings in relation to those matters underlying the alleged breaches, I am equally not satisfied that there are any matters to be taken into account for the purposes of s 45-1 of the IPS.

5.5 Provincial Property Rent Roll – disclaimer of onerous property (9.18 FASOC)

655 ASIC contends that Mr Bettles allowed BWP Services to take over the whole of the income of Provincial Property and then take over the Rent Roll, for no consideration. ASIC submits that this occurred as a consequence of Mr Bettles' failure to exercise a high (or any) degree of

diligence and care as a liquidator and/or because his willing participation in the conduct of BWP Services manifested either as conduct which enabled the usurpation of the management rights and income, or a willing suspension of disbelief.

656 More particularly, ASIC contends that Mr Bettles breached s 180 of the Corporations Act as liquidator and, therefore, officer of Provincial Property and as liquidator and, therefore, officer of Iridium Holdings by: failing to investigate the value of the Rent Roll; failing to market properly the Rent Roll; disclaiming 108 property management agreements on the Rent Roll; and permitting BWP Services to continue to receive 7.5% commission for the New South Wales and Victorian properties on the Rent Roll.

657 ASIC submits that: Provincial Property was a member of both the income tax and GST consolidated groups; to Mr Bettles' knowledge, its assets could be called on and used to pay Iridium Holdings' debts, and the joint and several debts to the ATO as a member of those tax consolidated groups; and he knew that disclaiming the Rent Roll would deprive the creditors of both Iridium Holdings and Provincial Property of the distribution of the asset value on sale of the Rent Roll.

658 ASIC also alleges that Mr Bettles breached Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 4.

659 The facts relating to Provincial Property are set out at [167]-[229] above. In summary:

(1) the Rent Roll comprised some 237 rental properties in 29 regional areas across Queensland, New South Wales and Victoria;

(2) prior to Mr Bettles' appointment, Provincial Property used local agents to assist in managing the properties on the Rent Roll;

(3) Mr Bettles had been appointed to a business that operated the Rent Roll and had a trust account but had no staff to manage the business. He thus needed to act quickly to retain suitably qualified people to operate the business; and

(4) in the interests of keeping the Provincial Property business operating Mr Bettles negotiated an arrangement with Ms Brown, the real estate licence nominee, by which BWP Services would manage the Rent Roll in return for 7.5% commission and at no cost would negotiate the sale of parcels of the Rent Roll at a price suitable to the liquidators. The rate of commission was subsequently amended to 10%.

660 ASIC contends that Mr Bettles failed to investigate the value of the Rent Roll. However, Mr Bettles obtained the WMS Rent Roll Valuation from WMS Corporate Finance (see [204] above). ASIC submits that the valuation was not independent given WMS' relationship with the MA Group and that it was a secured creditor of Provincial Property.

661 The WMS Rent Roll Valuation was prepared by Mr Hayes of WMS Corporate Finance, a separate entity from WMS. The fact that WMS had undertaken taxation and business services work for the MA Group was disclosed in the valuation. Mr Bettles believed that Mr Hayes and WMS Corporate Finance were independent and it was appropriate for them to be retained to prepare the valuation because Mr Hayes could obtain necessary information from Mr Lavell and because WMS was the premier accounting firm on the Gold Coast at the time with a good reputation and the necessary specialist skills to provide the valuation.

662 Upon receiving the WMS Rent Roll Valuation Mr Bettles reviewed it and recorded the outcome of his review (see [206] above) thereby applying his mind and his judgment to it.

663 There is no evidence before me to suggest that the WMS Rent Roll Valuation makes incorrect assumptions, relies on incorrect information, adopts an inapt methodology or that Mr Hayes' opinions were not reasonably held or are incorrect. Nor has ASIC relied on any expert evidence to establish that the purported lack of independence resulted in a valuation which was unreliable or deficient. In those circumstances it is difficult to see, and I would not find, that it was unreasonable in the circumstances for Mr Bettles to have regard to the WMS Rent Roll Valuation or that, as pleaded, Mr Bettles failed to investigate the value of the Rent Roll.

664 Next ASIC contends that Mr Bettles failed to properly market the Rent Roll.

665 Mr Bettles' rationale for selling the Rent Roll in parcels is set out at [222] above. Some of these issues were also identified as affecting the value in the WMS Rent Roll Valuation i.e. the geographic spread of the properties and regional (non-metropolitan areas), non-marketable parcel sizes and the "outsourced' nature of the management of the properties, in engaging local agents.

666 Despite the draft Provincial Property Management Deed including, among other things, a warranty that BWP Services held "all licences necessary (if any) to carry out the Management Services", which included managing and selling the Rent Roll, from about 25 August 2016 Mr Bettles became aware that neither Provincial Property nor BWP Services held a real estate licence in Victoria and from about 9 September 2016 he became aware that Provincial Property

did not hold a real estate licence in New South Wales but that Ms Brown held a current licence (see [218] and [219] above).

667 Practically that presented a difficulty for managing and selling the Rent Roll in Victoria and New South Wales.

668 In the meantime, although some sales had been achieved Mr Bettles was becoming frustrated with the progress of the sale of the Rent Roll parcels. He made enquiries of Mr Lavell and Mr Downie to ascertain if they could assist in selling the Rent Roll. His file notes of his telephone conversations with each of those gentlemen are set out at [225] above. No further steps were taken consequent on these enquiries.

669 ASIC is critical of these limited attempts to obtain further assistance in the sale of the Rent Roll. It relies on file notes of Mr Thomas on the Provincial Property file made:

(1) on 14 September 2016 which refers to an email received from Roger Miles at Real Estate Dynamics and records that "Roger advised he specialises in selling rent rolls". Mr Bettles accepted that he never reverted to Mr Miles to seek assistance in the sale of the Rent Roll; and

(2) on 31 October 2016 which refers to a telephone conversation with Neville East and a subsequent message to Mr Bettles as follows:

> MT 31/10/16 06:11 PM: PC in from Neville East regarding purchasing other parcels.
>
> Neville's company purchased the Fernvale Rent Roll through his solicitor Stockley Furlong Lawyers.
>
> Neville advised he is interested in purchasing other parcels from the company.
>
> Jason, can you please call Neville tomorrow (1 November 2016) regarding any other parcels that may still be for sale. Thanks.

The file notes for Provincial Property demonstrate that there was subsequent engagement with Mr East.

670 ASIC submits that Mr Bettles made no attempt to explain why he did not pursue assistance from Mr Miles in selling the Rent Roll. That is so but it does not lead to a conclusion that Mr Bettles did not make proper and sufficient attempts to sell the Rent Roll. True it is that Mr Bettles agreed that over the course of the liquidation of Provincial Property, before the liquidators disclaimed the Rent Roll, he did not seek any assistance in selling it from anyone who might be described as not connected with Provincial Property, the MA Group or the

Benchmark Group. But again, in light of other factors that does not lead me to conclude that Mr Bettles did not act appropriately. Further, he had no reason to believe that the advice he received from Messrs Lavell and, in particular, Downie was other than based on their respective knowledge.

671 As for the contact from Mr East, that was followed up and Mr East was provided with the available properties in the areas of interest to him. That there is no record of sales to Mr East prior to the liquidators' disclaimer of the remaining parcels in the Rent Roll is not conclusive of anything.

672 Following his enquiries on 27 October 2016 of Messrs Lavell and Downie and a meeting with Mr Young and Ms Brown in relation to the progress of sales, Mr Bettles proposed to terminate the management agreements for the remaining parcels of the Rent Roll (see [226] above)

673 Mr Bettles sought advice from Grants Law about this proposal. In summary, Grants Law's advice was that: there were risks in terminating the remaining agreements; the management agreements for the remaining properties on the Rent Roll were unprofitable contracts for the purposes of the liquidation; and they could be disclaimed as onerous property pursuant to s 568(1A) of the Corporations Act (see [227] above). In accordance with that advice Mr Bettles disclaimed the management agreements for the remaining parcels of the Rent Roll.

674 ASIC alleges that Mr Bettles ought to have obtained the leave of the Court before proceeding to disclaim those management agreements but does not make any particular submission as to why that is so. It simply submits that he may have done so. Section 568 of the Corporations Act relevantly provides:

> (1) Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of:
>
> (a) land burdened with onerous covenants; or
>
> (b) shares; or
>
> (c) property that is unsaleable or is not readily saleable; or
>
> (d) property that may give rise to a liability to pay money or some other onerous obligation; or
>
> (e) property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property; or
>
> (f) a contract;

whether or not:

(g) except in the case of a contract--the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it; or

(h) in the case of a contract--the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract or any property to which it relates.

…

(1A) A liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court.

675 There was, given the advice he received that the remaining management agreements were "unprofitable contracts", no requirement for Mr Bettles to obtain leave of the Court before disclaiming them.

676 ASIC submits that Mr Bettles made no proper attempt to sell the remaining properties on the Rent Roll before disclaiming the management agreements relating to those properties, notwithstanding the fact that he held a valuation that the Rent Roll was worth between $178,000 and $390,000. However, as Mr Bettles submits, the evidence before me demonstrates that characteristics of the remaining parcels made them difficult, if not impossible, to sell at the time. ASIC does not tell the Court what further steps Mr Bettles should have taken nor has it led any evidence to demonstrate that the particular parcels remaining on the Rent Roll were readily realisable at the time. On the other hand Mr Bettles formed a view that he should disclaim the remaining agreements based on the information available to him at the time as to the saleability of the remaining parcels in the Rent Roll and the legal advice he received. As to the latter the advice was to the effect that maintaining those agreements, in circumstances where the liquidators received no management fee while they were on foot but were exposed to potential liability, made it more prudent to deem them unprofitable contracts and disclaim them as onerous property.

677 For those reasons ASIC has not established that Mr Bettles breached his duty in his capacity as liquidator of Provincial Property owed pursuant to s 180(1) of the Corporations Act or Liquidator's Duty No. 1, Liquidator's Duty No. 2 or Liquidator's Duty No. 4.

678 I note that ASIC also alleges that as liquidator of Iridium Holdings, Mr Bettles had, through the shareholding in Provincial Property power to control the conduct of the external administration of Provincial Property. However, the liquidator of Provincial Property controls the administration of that company. ASIC also alleges that Mr Bettles in his capacity as

liquidator of Iridium Holdings, by the same conduct it seems, contravened s 180 and Liquidator's Duty No. 1, Liquidator's Duty No. 2 or Liquidator's Duty No. 4. But again the duty alleged could only be owed by Mr Bettles in his capacity as liquidator of Provincial Property. ASIC does not explain how it is said that Mr Bettles owes such a duty in his capacity as liquidator of the shareholder of Provincial Property.

679 Finally, given my findings in relation to those matters underlying the alleged breaches, I am equally not satisfied that there are any matters to be taken into account for the purposes of s 45-1 of the IPS.

6. Other alleged breaches

6.1 Members' voluntary windings up (10 FASOC)

680 This part of ASIC's case concerns the winding up and appointment of Mr Bettles as one of the liquidators of SS Residential, Capricorn Securities and Iridium Financial Planning. Each of those companies was wound up by way of a members' voluntary liquidation.

681 The sole shareholder of each of SS Residential, Capricorn Securities and Iridium Financial Planning was Iridium Holdings which, by the date of the winding up of each of these companies, was in liquidation and under the control of its liquidators, Messrs Bettles and Khatri.

682 Mr Marlborough was the sole director of each of SS Residential from 22 November 2016, Capricorn Securities from 23 July 2015 and Iridium Financial Planning from 22 November 2016 and provided a declaration of solvency dated 22 December 2016 for SS Residential and declarations of solvency dated 7 February 2017 for each of Capricorn Securities and Iridium Financial Planning for the purposes of their respective windings up.

683 The following facts were not in contention:

(1) on 3 December 2016 Mr Bettles prepared members' voluntary liquidation appointment packages for each of SS Residential, Capricorn Securities and Iridium Financial Planning;

(2) on 22 December 2016 Mr Bettles attended a meeting concerning SS Residential with Messrs Marlborough and Young at which Mr Marlborough signed a resolution that SS Residential be wound up by way of a members' voluntary winding up and a

declaration of solvency. On the same date, Messrs Bettles and Khatri signed a consent to act as liquidators of SS Residential;

(3) on 11 January 2017 at a general meeting of SS Residential Mr Bettles, in his capacity as liquidator of Iridium Holdings, the sole shareholder of SS Residential, supported a resolution that SS Residential be wound up voluntarily and that he and Mr Khatri be appointed liquidators;

(4) on 30 January 2017 Mr Bettles, in his capacity as liquidator of Iridium Holdings, the sole shareholder of Capricorn Securities, sent a letter to Mr Marlborough requesting that he immediately call a meeting of members of the company to consider resolutions that Capricorn Securities be wound up voluntarily and that he and Mr Khatri be appointed liquidators;

(5) on 6 February 2017, Messrs Bettles and Khatri signed consents to act as liquidators of Capricorn Securities and Iridium Financial Planning;

(6) on 7 February 2017 Mr Marlborough signed declarations of solvency for Capricorn Securities and Iridium Financial Planning; and

(7) on 10 February 2017 at general meetings of Capricorn Securities and Iridium Financial Planning Mr Bettles, in his capacity as liquidator of Iridium Holdings, the sole shareholder of Capricorn Securities and Iridium Financial Planning, supported resolutions that each of those companies be wound up voluntarily and that he and Mr Khatri be appointed liquidators.

684 ASIC contends that the declarations of solvency signed by Mr Marlborough were not made on reasonable grounds as each one states that the relevant company had no tax liability when there was no reasonable basis for that statement given those companies were members of the GST and income tax consolidated groups.

685 ASIC contends that Mr Bettles knew or ought to have known that:

(1) SS Residential, Capricorn Securities and Iridium Financial Planning were insolvent and, therefore, could not be wound up via members' voluntary liquidations;

(2) as a registered liquidator, he could not, and should not, either initiate or implement any process by which those companies were placed in liquidation via members' voluntary liquidations;

(3) Mr Marlborough could not, and should not, swear a declaration of solvency because he could not form the opinion required by s 494(1) of the Corporations Act and therefore any declarations of solvency would not be made on reasonable grounds in contravention of s 494(4) of the Corporations Act;

(4) in the circumstances he was unable to sign, and ought not to have signed, a consent to act as liquidator in respect of those companies; and

(5) if SS Residential, Capricorn Securities and Iridium Financial Planning were to be placed in liquidation, then the process should have been initiated by creditors' voluntary liquidations in each instance.

686 ASIC contends that Mr Bettles knew or ought to have known the matters set out in the preceding paragraph having regard to his knowledge of the matters set out in [258] of the FASOC. In turn, at [258] of the FASOC ASIC sets out a number of matters which it says Mr Bettles knew or ought to have known as at 30 November 2016. It is necessary to consider whether that was so.

687 First, it was not controversial that Mr Bettles knew that:

(1) Iridium Holdings was the sole shareholder of SS Residential, Capricorn Securities and Iridium Financial Planning;

(2) he had been appointed liquidator of Iridium Holdings on 22 July 2016; and

(3) as at 30 November 2016 Mr Marlborough was the sole director of SS Residential, Capricorn Securities and Iridium Financial Planning,

(see [258(a)-(c)] FASOC).

688 Secondly, Mr Bettles knew as at 1 September 2016 and, it seems earlier, given the file notes dated August 2016 (see [130] above) which referred to the consolidated groups and the evidence set out below, of the existence of the GST and income tax consolidated groups and as at 1 September 2016 he knew that Iridium Holdings was the representative member of the GST and income tax consolidated groups and that 18 of the MA Group companies were members including SS Residential, Capricorn Securities and Iridium Financial Planning (see [258(d)-(f)] FASOC).

689 ASIC contends that Mr Bettles would have known of the existence of the income tax and GST consolidated groups as early as 5 February 2015 because Mr Wowk provided a document titled

"Structure Notes and Dealings Summary" to Mr Bettles to assist him in preparing the MacVicar Advice which included:

- An income tax consolidated group was formed with an effective date of 1 July 2013;
- A GST group was formed with an effective date of 1 July 2014;

690 Mr Bettles was cross-examined about this entry in the document provided by Mr Wowk. He accepted as correct that he was aware of the two tax consolidated groups before he provided the MacVicar Advice. That is, he was aware of the existence of the two tax consolidated groups for the MA Group at that time. But it could not be said, and ASIC does not suggest, that he was aware of the consequences of a tax consolidated group at that time.

691 ASIC also submits that the tax consolidated groups and the joint and several labilities of the companies in those groups were discussed at the 8 July 2016 Meeting in Mr Bettles' presence. It relies on Mr Jones' file note of that meeting which includes the following entries:

> Grouping, are all jointly and severally liable. Using a tax sharing agreement in consolidated group however not done in this case. Payroll tax is joint and several but PAYG and SUPER will not get grouped.

And:

> Jason thinks consolidated group only pays income tax as a whole.

692 However, Mr Jones accepted that the effect of the discussion in relation to the first item was that payroll tax would likely be consolidated but that it was not known at that time whether other taxation liabilities would be consolidated by the ATO (see [59(j)] above). He also accepted the second item recorded above suggests that Mr Bettles understood that a "consolidated group pays income tax as a whole". It does not reflect any discussion about joint and several liability of the members of the group to pay income tax.

693 I am not satisfied that as at the 8 July 2016 Meeting Mr Bettles was aware of the joint and several labilities of the companies in the tax consolidated group. On Mr Bettles' evidence he was not aware of the consequences of being a member of such a group at any time until about 13 February 2017 when Mr Lavell explained the consequences for companies in the group where there are tax sharing agreements in place.

694 ASIC relies on correspondence sent by the ATO including proofs of debt lodged during August 2016 by the ATO in the liquidations of Provincial Property, Iridium Home Loans,

Iridium Mortgage Fund, MAIC Human Resources, Silverback Constructions as trustee for the Silverback Construction Trust and Syree Enterprises. Other than the proof of debt lodged in relation to Provincial Property, those proofs of debt referred to "joint and several liabilities as a member of the GST consolidated group" for the amount of $2,194,232.30. The proof of debt lodged in relation to Provincial Property also stated an amount of $2,194,232.30 in relation to a "Running Balance Account deficit debt … AS GST Group Member to Group Representative [Iridium Holdings]". These proofs of debt were not put to Mr Bettles in cross-examination and there is no evidence of what steps he took in relation to them or what understanding he had of them. Indeed Mr Bettles' evidence in relation to the proof of debt lodged by the ATO in the liquidation of SS Residential further supports my finding that, as late as February 2017, Mr Bettles did not have an understanding of the liability consequences of being a member of a tax consolidated group and was making ongoing enquiries to ascertain the basis for the liability. In any event, as set out at [132] above, Mr Bettles took steps to ascertain the position with the tax consolidated groups from about late August 2016. That there was no indirect tax sharing agreement did not become apparent until March 2017.

695 It follows from the above that Mr Bettles did not know as at 30 November 2016 that each of SS Residential, Capricorn Securities and Iridium Financial Planning was jointly and several liable for the income tax group liability and the GST group liability (see [258(g)-(h)] FASOC).

696 I pause to observe that in the absence of having an pre-existing understanding of tax consolidated groups, it is somewhat surprising that Mr Bettles did not make or think to make enquiries of a specialist accountant about the purpose of a tax consolidated group and the effect of being a member of such a group. That reflects poorly on Mr Bettles as a professional and his experience as a liquidator. But there is no claim against Mr Bettles arising from that fact.

697 Thirdly, it is alleged that as at 30 November 2016 Mr Bettles knew or ought to have known that the ATO had served statutory demands on 16 companies in the MA Group including Iridium Holdings, Silverback Constructions, Members Alliance Rocket, Provincial Property and Image Building. That that is so is evident from WMS PowerPoint V5. However, for the reasons set out above Mr Bettles did not know as at 30 November 2016 that SS Residential and Capricorn Securities were jointly and severally liable for the income tax debts identified in the statutory demands or that SS Residential, Capricorn Securities or Iridium Financial Planning were jointly and severally liable for the GST debts identified in the statutory demands (see [258(i)-(k)] FASOC).

698 Finally, Mr Bettles knew as at 30 November 2016 that the statutory demands had not been met and that he had been appointed as one of the liquidators of each of the companies on which they had been served (see [258(l)-(m)] FASOC).

699 ASIC submits that the declaration of solvency signed by Mr Marlborough for each of SS Residential, Capricorn Securities and Iridium Financial Planning were not made on reasonable grounds because each states that the relevant company had no tax liability when in fact it did given its membership of the consolidated groups. That may be so insofar as Mr Marlborough is concerned. But ASIC must demonstrate that Mr Bettles knew that each of SS Residential, Capricorn Securities and Iridium Financial Planning were insolvent at the time they were wound up such that he could not initiate or implement a members' voluntary winding up. The evidence does not establish that to be the case:

(1) Mr Bettles was told at the 16 July 2016 Meeting that the MA Trading Companies and, more particularly, each of Capricorn Securities and Iridium Financial Planning were solvent (see [67(11)] above);

(2) none of the statutory demands (see [46] above) referred to a joint and several liability for the debt claimed nor made any reference to the recipient of the demand being part of a consolidated group;

(3) as set out above, Mr Bettles only became aware of the members of the GST and income tax consolidated groups on 1 September 2016 but was unaware at the time of the joint and several tax liability implications in respect of each group. Further, it was not until mid February 2017 that the implications became apparent and then only in March 2017, when he first received a tax sharing agreement for the income tax group that it became apparent that there was joint and several liability among the members of the GST group for any tax payable;

(4) following the receipt of the letters dated 1 September 2016 from the ATO informing Mr Bettles of the members of each of the tax consolidated groups, he took the steps to ascertain the tax position; and

(5) on 10 November 2016 the ATO informed Mr Carey that there were no outstanding debts for any of the MA Trading Companies.

700 In those circumstances Mr Bettles had no basis to question the declarations as to solvency made by Mr Marlborough. Further and notably, as Mr Bettles points out, upon becoming aware of the joint and several liability of the companies in the GST consolidated group in March 2017

and of other debts they owed, Mr Bettles convened a meeting of creditors of each of SS Residential, Capricorn Securities and Iridium Financial Planning and Messrs McCann and McKinnon were appointed as liquidators of those companies.

701 In those circumstances ASIC has not made out the conduct which it alleges on the part of Mr Bettles. Given that, I am equally not satisfied that there are any matters to be taken into account for the purposes of s 45-1 of the IPS.

6.2 Accepting appointments for SS Residential, Capricorn Securities and Iridium Financial Planning (11 FASOC)

702 ASIC submits that Mr Bettles consented to appointments as liquidator of SS Residential, Capricorn Securities and Iridium Financial Planning and as liquidator of those companies he was required, and had the power, to investigate transactions which occurred prior to the liquidation involving the redirection or disposition of assets and income streams. This included the disposition of assets and redirection of income including those concerning the MacVicar Deed and MacVicar Payment and the entry into and payments made pursuant to the Capricorn Securities Management Deed and the Iridium Financial Planning Management Deed.

703 ASIC submits that by accepting the appointments as liquidator of SS Residential, Capricorn Securities and Iridium Financial Planning he placed himself in a position of conflict because he would be required to investigate his own conduct and that these are matters that Mr Bettles knew, or ought to have known. ASIC contends that in that way Mr Bettles breached Principles 1 and 2 of the ARITA Code and Liquidator's Duty No. 6 and that these are matters that the Court may take into account under s 45-1 of the IPS.

704 Mr Bettles submits that this allegation cannot be sustained for reasons he has already set out earlier in his submissions in relation to the MacVicar Deed and MacVicar Payment and the entry into and payments made pursuant to the Capricorn Securities Management Deed and the Iridium Financial Planning Management Deed.

705 As best I can understand this claim ASIC contends that because of conduct which it alleges was improper and in breach of duty that took place prior to Mr Bettles' appointment, Mr Bettles ought not to have accepted the appointments to act as liquidator of SS Residential, Capricorn Securities and Iridium Financial Planning. This is a curious claim.

706 First, ASIC has not established any breach or improper conduct on Mr Bettles' part with respect to any of the alleged conduct in relation to the MacVicar Deed and MacVicar Payment or the

entry into and payments made pursuant to the Capricorn Securities Management Deed or the Iridium Financial Planning Management Deed.

707 To the extent that there was alleged improper conduct on the part of the director or others in relation to those transactions, subject to having sufficient funds to do so, Mr Bettles could investigate them. At the very least Mr Bettles was required to bring the issues to the attention of ASIC, via statutory reports, and of the creditors. If, in the course of undertaking an investigation, a liquidator determines that he or she may be perceived to have, or may have, a conflict it is incumbent on the liquidator to raise that with the creditors. At that point a replacement or special purpose liquidator can be appointed: see for example *Markey (Liquidator), in the matter of Bestjet Travel Pty Ltd (in liq) v Bestjet Travel Pty Ltd (in liq)* [2020] FCA 1881 at [4], [19].

708 However, there is nothing in the facts of this case that would allow me to conclude that Mr Bettles could not accept the appointments as liquidator of SS Residential, Capricorn Securities and Iridium Financial Planning. There was no identifiable conflict at the time nor did Mr Bettles place himself in a position of conflict by doing so.

709 ASIC's allegations are not made out and, it follows, that there are no matters to be taken into account for the purposes of s 45-1 of the IPS.

6.3 DIRRIs, relevant relationships and indemnities (12 FASOC)

710 ASIC submits that on or about 22 July 2016 Mr Bettles signed a DIRRI as required by s 506A(2) of the Corporations Act for each of Iridium Holdings, Iridium Home Loans, Iridium Mortgage Fund, Laver Resources, MAIC Human Resources, Provincial Property, Members Alliance Rocket, Silverback Investments, Silverback Constructions and Syree Enterprises (collectively **DIRRIs**).

711 ASIC refers to the contents of each of the DIRRIs noting each contained the statement set out at [108] above in relation to the MacVicar Advice. ASIC submits that having regard to the content of the MacVicar Advice, Mr Bettles failed to adequately disclose in the DIRRIs the nature of his relationship with Mr MacVicar and the nature of the MacVicar Advice contrary to cl 6.10.3 of the ARITA Code and/or the spirit of cl 6.8.1 of the ARITA Code. ASIC contends that these are matters which the Court can take into account under s 45-1 of the IPS.

712 Part 6 of the ARITA Code concerns independence. Clause 6.10.3 is headed "Information to be provided" and provides:

> Where the Practitioner has a relationship with an Associate of the Insolvent in the two year period prior to the Appointment, the following details about the relationship with the Associate must be included in the DIRRI:
>
> - the name of the Associate;
> - the relationship of the Associate to the Insolvent;
> - nature of the Practitioner's relationship with the Associate;
> - if the relationship between the Practitioner and Associate is professional:
>   - the type of work performed;
>   - the scope of the engagement;
>   - frequency of contact;
>   - period over which the work was performed; and
>   - if the engagement has been completed, when it was completed;
> - if the relationship is not a professional relationship:
>   - the nature and period of the relationship (Noting the strict prohibitions on non-professional relationships set down in the Code – refer 6.12); and
> - the Appointee's reasons for believing that the relationship does not result in a conflict of interest or duty.
>
> …

713 Clause 4 of the ARITA Code defines, among other terms:

(1) "Appointment" to include the "formal legal appointment of a Practitioner" as a liquidator or provisional liquidator under Pt 5.3A of the Corporations Act. The word "Appointee" has a parallel meaning;

(2) "Associate" in relation to administrations under the Corporations Act to have the same meaning as in that Act;

(3) "Insolvent" as "[t]he entity, either an individual or corporation, who is insolvent, whether they are yet subject to an Administration or not"; and

(4) "Practitioner" as a member of ARITA who acts "acts under an Appointment, or is considering accepting an Appointment as an Appointee".

714 The circumstances in which Mr Bettles gave the MacVicar Advice in 2015 and a summary of it are set out at [42]-[45] above.

715 In the DIRRIs Mr Bettles notes that on 11 March 2015 Worrells provided a written advice to WMS in respect of Mr MacVicar's affairs. Mr MacVicar is described as one of the directors

and/or shareholders of a number of the companies to which Messrs Bettles and Khatri were appointed as liquidators or voluntary administrators listed in the DIRRIs. Mr Bettles had no other relationship with Mr MacVicar – he provided a one-off advice at the request of WMS and, on the evidence, had no ongoing relationship with Mr MacVicar after doing so.

716 In the DIRRIs the MacVicar advice was described in the manner set out at [108] above. That description disclosed: the advice provided a general overview of the voidable disposition provisions of the Act, the ATO director penalty regime, a director's duty to prevent insolvent trading, and court decisions in respect of payments of dividends; in some cases the general overviews on the nominated topics were related to a particular company's affairs; and the liquidators' belief that the provision of the advice did not result in a conflict of interest in taking the relevant appointments and the reasons why that was so. The description included in the DIRRIs also set out what Worrells did not advise on, namely that the MacVicar Advice did not address how to restructure Mr MacVicar's affairs or how Mr MacVicar should deal with his affairs in light of the general areas advised on nor did it instruct WMS on how to record any transactions that Mr MacVicar or the companies had undertaken.

717 Mr MacVicar was an "Associate" of seven of the "Insolvents", namely Iridium Holdings, Iridium Mortgage Fund, Laver Resources, MAIC Human Resources, Members Alliance Rocket and Provincial Property and Silverback Investments. I infer that is why the MacVicar Advice was disclosed in the DIRRIs.

718 In terms of the requirements of cl 6.10.3 of the ARITA Code, the disclosure in relation to the MacVicar Advice included:

(1) the name of the Associate – Mr MacVicar;

(2) the relationship of the Associate to the Insolvent – as a director or secretary of some of the listed companies. While the liquidators could have more precisely described of which companies Mr MacVicar was either a director or shareholder, in my view the more expansive disclosure was adequate;

(3) nature of the Practitioner's relationship with the Associate – as an advisor;

(4) if the relationship between the Practitioner and the Associate is professional – this question is not expressly answered but it is implicit in the description of the advice that it was a professional relationship;

(a) the type of work performed – it is clear that Mr Bettles provided a one-off advice;

(b) the scope of the engagement – this is evident from the description of the nature of the advice included in the DIRRIs;

(c) frequency of contact – this is not addressed in the DIRRIs;

(d) period over which the work was performed – the DIRRIs do not include a date on which Worrells was first retained to provide the advice, only the date on which the advice was delivered and hence do not address this requirement; and

(e) if the engagement has been completed, when it was completed – this is addressed. It is clear that the work provided was a one-off advice which was delivered by letter dated 11 March 2015 and is thus complete.

719 Having regard to the requirements of cl 6.10.3 of the ARITA Code the DIRRIs are defective in two respects. They fail to disclose: the frequency of Mr Bettles' contact with Mr MacVicar; and the period over which the work was performed.

720 ASIC also contends that the DIRRIs were contrary to the spirit of cl 6.8.1 of the ARITA Code which is in part 6.8 of the Code headed "Professional Relationships within two years". While it is set out above, it is convenient to reproduce the relevant parts of the clause here:

> Subject to the exceptions identified below, Practitioners must not take an appointment if they have had a Professional Relationship with the Insolvent during the previous two years. The purpose of this restriction is to avoid any perception of a lack of independence of the Practitioner. This is referred to as the 'two year rule'.
>
> 6.8.1 Exceptions to the two year rule
>
> A number of narrow exceptions to the two year rule have been created because the exceptions may, in the specific circumstances, be in the interests of creditors, or the professional relationship was of such a nature as to have no material bearing on the independence of the Practitioner.
>
> The Practitioner must examine the particular circumstances carefully and document clearly the reasons why and how the decision to accept the appointment was reached.
>
> The onus of justifying how independence is preserved when relying on any of these exceptions is on the Practitioner. It is not sufficient for a Practitioner to simply include the relationship in a DIRRI. Such a declaration will not cure a real or perceived lack of independence.
>
> Practitioners must be able to explain the circumstances that give rise to the potential conflict and the reasons for believing the exception can be applied in the circumstances. This must be recorded in writing on the relevant file.
>
> If a Practitioner is relying on an exception to the two year rule to be able to accept the Appointment, the details of the exception must still be disclosed in the DIRRI.

At a minimum the creditors must be fully informed so that they understand the situation. The Practitioner should also consider seeking legal advice to determine whether court approval of such appointments should be sought.

A. Immaterial Professional Relationship

Where the Practitioner has had a prior professional relationship with the Insolvent within a period of two years before the proposed appointment, the Practitioner may accept the appointment if the prior professional relationship was an immaterial professional relationship'.

An immaterial professional relationship is an assignment that:

- was of limited scope; and limited time and/or fees; and
- would not normally be subject to review by the Practitioner during the course of the Administration.

When determining whether the prior professional relationship was an immaterial professional relationship, the Practitioner must consider whether a fully informed reasonable person would be of the same view.

A Practitioner must disclose to creditors in the DIRRI:

the nature of the services provided in the prior professional relationship;

- the period or periods over which the services were provided;
- the fees received for those services, the unbilled time costs and outlays, and any amounts written off; and
- the Appointee's reasons for believing that the services provided do not result in a conflict of interest or duty

…

B. Pre-appointment communications and meetings

…

If the Insolvent is a company, a Practitioner must exercise care when meeting with directors to determine whether he or she is being asked to advise (a) one of more of its directors in relation to the Insolvent company itself, (b) one or more of its directors in respect of their obligations/ liabilities as directors of the Insolvent company or (c) one or more of the directors of the Insolvent company in relation to their personal financial affairs.

The provision of advice to the directors in either capacity (b) or (c) creates a risk to independence that will prevent the Practitioner being appointed to the Insolvent company unless information provided is of a general nature about the insolvency process and the consequences of insolvency.

Any advice which involves the Practitioner obtaining a detailed understanding of the director's financial position or access to their personal documents with a view to addressing the director's own personal solvency, will create a risk to independence in connection with any appointment to the Insolvent company.

In any such meetings, the Practitioner should be mindful of these issues:

- The Practitioner must not give any assurance to the Insolvent, or other parties,

about the outcome of the insolvency;

- The Practitioner must explain to the Insolvent that information provided by them to the Practitioner at the meeting may be used by the Practitioner for the purpose of the Administration, unless otherwise stated; and
- The Practitioner should explain to the Insolvent that the Insolvent itself will have obligations to, or become subject to claims of the, or any, Practitioner in any Appointment.

If it becomes apparent that the director is seeking anything other than general information in either their capacity as a director or their own personal capacity, then if the Practitioner wishes to leave open the prospect of an appointment to the company, the Practitioner should recommend that the director obtain that advice from another Practitioner.

721 Clause 4.2 of the ARITA Code defines "Professional Relationship" as "[a]ny Professional Service under which the Appointee or a partner in his or her Firm, has given professional advice in accounting, insolvency, financial advice, tax or other such areas for the Insolvent and includes an Appointment".

722 Clause 6.8 prohibits Practitioners from taking an appointment if they have had a Professional Relationship with the Insolvent during the previous two years. Mr Bettles did not have any relationship with the "Insolvent" namely the companies to which the DIRRIs were directed in the two years prior to his appointment. He did not provide any advice to those companies but only to Mr MacVicar. Furthermore the MacVicar Advice was of a general nature about the insolvency process and did not involve Mr Bettles undertaking a detailed analysis of Mr MacVicar's financial position. The advice was "designed to broadly identify the areas that may have a material effect on Mr and Mrs MacVicar and their associated entities". For those reasons Mr Bettles' disclosure in the DIRRIs was not contrary to cl 6.8 of the ARITA Code or, it follows, the spirit of cl 6.8.1.

723 ASIC has established that Mr Bettles failed to provide adequate disclosure in the DIRRIs in relation to the MacVicar Advice contrary to cl 6.10.3 of the ARITA Code. ASIC submits that this is a matter which may be taken into account under subss 45-1(4)(a) and (e) of the IPS, a matter which I consider at [883]-[884] below.

6.4 Failure to obtain books and records (13 FASOC)

724 This part of ASIC's case concerns the s 533 Reports. It was not in dispute that in each of the s 533 Reports Mr Bettles declared that he had obtained or inspected the company's books.

ASIC contends that in each of the s 533 Reports Mr Bettles made a declaration as to the adequacy of the company's books and records.

725 ASIC submits that from about July 2016 Mr Bettles had in his possession or control approximately 761 boxes of records related to companies forming the MA Group and as at about 14 March 2017 and right up to 20 April 2017 Mr Bettles: had not reviewed all of the 761 boxes of records; was of the belief that the records of the companies comprising the MA Group were intermingled; and was not able to identify which records related to which company in the MA Group.

726 ASIC submits that it follows that Mr Bettles could not have properly formed an opinion as to whether each of the companies in relation to which he lodged the s 533 Reports maintained adequate books and records and he knew that he could not have properly formed such an opinion. ASIC contends that accordingly, by lodging the s 533 Reports containing a declaration as to the adequacy of each of the company's books and records, Mr Bettles made statements that he knew were false or misleading in a material particular, contrary to s 1308(2) of the Corporations Act. ASIC notes that Mr Bettles points to other physical records obtained by him but submits that, as none of them were reviewed by him, they could not have assisted him in forming an opinion on whether the books and records were adequate.

727 ASIC observes that the s 533 Reports were submitted electronically using ASIC's EX01 form and that form is not used for the exclusive purpose of making a report under s 533 of the Corporations Act, it is also used to make a report under s 422 and s 438D of the Corporations Act and "for statistical purposes". ASIC submits that the terms of Question 2 are plain and not directed to whether the books and records are adequate "for the purposes of reporting under s 533". ASIC contends that, while Mr Bettles refers to considering sufficient books and records that are available to him to give a report under s 533 of the Corporations Act (which may be relevant to his compliance with s 533), it provides no answer to the allegation that he gave a false and misleading answer to whether the books and records were adequate, in circumstances where he had not obtained and inspected hundreds of boxes containing them.

728 ASIC notes that in addition to the physical records, there were approximately 16 terabytes of computer records of the MA Group companies held on servers (**MA Group Computer Records**) which Mr Bettles became aware of in or about August 2016 and which he did not obtain or inspect. ASIC submits that accordingly Mr Bettles' declarations in each of the s 533 Reports that he had obtained or inspected the relevant company's books and records were false.

ASIC contends that s 545(1) of the Corporations Act provides no excuse for Mr Bettles' failure in this regard.

729 ASIC submits that by failing to obtain the MA Group Computer Records, Mr Bettles failed to discharge his obligations as a registered liquidator to obtain relevant books and records of the companies in relation to which he lodged the s 533 Reports and that Mr Bettles' failure may be taken into account under subss 45-1(4)(a), (b) and (e) of the IPS.

730 The allegations made by ASIC as pleaded in the FASOC in each case concern the s 533 Reports and allegations that: by lodging those reports which contain a declaration as to the adequacy of each of the company's books and records Mr Bettles made statements that he knew were false or misleading in a material particular, contrary to s 1308(2) of the Corporations Act; and/or that his declarations in the s 533 Reports that he had obtained or inspected the company's books and records in each case were false; and/or that by failing to obtain the MA Group Computer Records Mr Bettles failed to discharge his obligations as a registered liquidator to obtain relevant books and records of the companies in relation to which he lodged the s 533 Reports.

731 It is convenient to commence with a consideration of s 533 of the Corporations Act. That section relevantly provides:

> (1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:
>
> (a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or
>
> (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
>
> (i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or
>
> (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or
>
> (c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;
>
> the liquidator must:
>
> (d) as soon as practicable, and in any event within 6 months, after it so appears to him or her, lodge a report with respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597; and
>
> (e) give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.

732 In ***Murdaca*** *v Australian Securities and Investments Commission* (2009) 178 FCR 119 at [103]-[105] a Full Court of this Court (North, Kenny and Foster JJ) said the following about the obligations imposed by s 533(1) of the Corporations Act:

> 103 It must also be remembered that s 533 itself does not contemplate that concrete facts be presented to the liquidator before he is obliged to report. Nor does it require that the liquidator form a concrete opinion in relation to the topics addressed by the section.
>
> 104 What is required is that it "… appears …" to the liquidator that certain things "… may …" have occurred or "… may …" be the fact. Once one or more of the matters referred to in subs (1)(a), (b) or (c) appear to be the case in the mind of the liquidator, he or she must lodge a report. The report must be "… with respect to the matter …". The report does not have to be "correct" in every respect, either at the time when it was lodged or subsequently when looked at with the benefit of hindsight.
>
> 105 In our judgment, the liquidator is not required to express any particular views or conclusions in a s 533 report. If opinions or views on the part of the liquidator are expressed in the report, the liquidator is not required to set out the basis for such opinions or views. Nor is the liquidator obliged to have reasonable grounds for holding such opinions or views before articulating them. The function of the report is to alert ASIC to potential problems with particular corporations and to do so promptly after the potential problems have been identified by the liquidator. All that the liquidator is required to do is comply with subpars (d) and (e) of s 533(1).

733 I turn to consider the s 533 Reports which were completed and lodged by Mr Bettles for the MA Group. Mr Bettles lodged the s 533 Reports for 15 of the MA Group companies. As set out at [414] above, he answered the first part of Question 2, that he had inspected the company's books and records, in the affirmative in all of the s 533 Reports and he answered the second part of Question 2, in relation to the adequacy of the books and records, in the affirmative for only five of the s 533 Reports.

734 The first question that arises is whether, as ASIC alleges, in the absence of having inspected the 761 boxes of hard copy material, Mr Bettles could not have properly formed an opinion as to whether each of the companies in relation to which he lodged the s 533 Reports maintained adequate books and records. Mr Bettles submits that ASIC's allegation must fail. I accept that is so for the following reasons:

(a) the form EX01 to be completed for the purposes of lodging, relevantly, a report under s 533 of the Corporations Act does not inquire as to whether a company "maintained" adequate books and records. Rather it inquires, by Question 2, whether in the liquidator's opinion the books and records of the relevant company are adequate. In

answering that question the liquidator does not express any view or make any representation about whether the company maintained adequate books and records;

(b) in responding to Question 2, Mr Bettles was expressing an opinion. As to the expressions of an opinion, as opposed to a statement of fact, in *Ireland v WG Riverview Pty Ltd* (2019) 101 NSWLR 658, which concerned a claim under s 18 of the *Australian Consumer Law*, being Sch 2 to the *Competition and Consumer Act 2010* (Cth) in relation to disclaimers, at [22]-[24] Bell ACJ (with whom Barrett AJA agreed) set out the following principles:

> 22 So it is with many statements made in everyday life and commerce, that is to say, matters will often be expressed as objectively the case whereas, in reality, they will (and can only) be statements as to a belief or a judgment. In the context of the jurisprudence relating to the statutory prohibition on misleading or deceptive conduct, the distinction drawn between objective truth and a person's reasonable belief in or judgment as to the truth of a particular matter or state of affairs has always assumed importance, although the distinction has traditionally been drawn between an expression of *opinion*, on the one hand, and a statement of fact, on the other hand: see, for example, the cases referred to and the discussion in JD Heydon, Thomson Reuters, *Competition and Consumer Law* (at Service 216) at par 160.330; C Lockhart, The Law of *Misleading or Deceptive Conduct* (5th ed, 2019, LexisNexis Butterworths) at par 4.39ff; RV Miller, *Miller's Australian Competition and Consumer Law Annotated* (41st ed, 2019) at par ACL 18.400; cf *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486; [2012] HCA 39 at [33] and [38].
>
> 23 In *Bateman v Slatyer* (1987) 71 ALR 553 at 559, Burchett J said:
>
> > "It is of course clear law that a statement of opinion cannot be regarded as false or misleading, or as misleading or deceptive, simply because it turns out to be incorrect: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88; 55 ALR 25. But such an opinion may convey that there is a basis for it, that it is honestly held, and when it is expressed as the opinion of an expert, that it is honestly held upon rational grounds involving an application of the relevant expertise: see *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347 at 372; *Geale v Glenhoun Holdings Pty Ltd* (1985) 7 ATPR 46,970 at 46,978–9."
>
> 24 In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88, the Full Court of the Federal Court had said that:
>
> > "The applicants argued that, nevertheless, the statement of an incorrect opinion is misleading or deceptive or likely to mislead or deceive merely because it misinforms or is likely to misinform. An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing."

ASIC does not contend in its FASOC that Mr Bettles' opinion that the books and records were adequate conveyed or implied any representations, for example that he had reviewed all of the 761 boxes of hard copy material;

(c) as set out above, a statement of opinion will usually contain an implied representation that the opinion is genuinely held. Mr Bettles explained the basis for his opinions in responding to Question 2 in the s 533 Reports and in relation to the adequacy of the books and records of each of the companies. It was not put to Mr Bettles that he did not genuinely hold those opinions. The focus of Mr Bettles' cross-examination was in relation to whether Question 2 was confined to financial records and the failure to review the 761 boxes of hard copy documents and to access the electronic records;

(d) a statement of opinion may also carry with it one or more implied representations, for example, as set out above, that the person expressing the opinion actually holds it or that the opinion is based upon reasonable grounds which, in turn, may include a representation that it was formed on reasonable inquiries. Each case will turn on its own facts: see *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [31]-[32] (per French CJ). However, that could not be so for the s 533 Reports given that s 533 of the Corporations Act does not require a liquidator to have reasonable grounds for the views expressed (see [732] above);

(e) in any event I accept that Mr Bettles' opinions were formed on reasonable grounds. Mr Bettles understood Question 2 to ask whether the relevant companies' financial records obtained to date were sufficient to make a preliminary determination about the matters to be notified under s 533 of the Corporations Act. He held that understanding based on the context in which Question 2 was posed and having regard to ASIC's Regulatory Guide 16 and ASIC's web page which direct attention to the financial records which a company is required to keep. As Mr Bettles submits, an inquiry as to "adequacy" raises the question "adequate for what purpose?". In circumstances where the reports were for the purpose of s 533 of the Corporations Act Question 2 was properly understood as directed to whether the books and records are adequate to assess the matters under s 533(1)(a)-(c) of the Corporations Act;

(f) given his understanding Mr Bettles answered that part of Question 2 about the adequacy of each of the company's books and records having regard to the availability of MYOB records and in the context of his knowledge of the relevant company's business and circumstances. For those companies for which he had MYOB records indicating that

financial records had been maintained and were current or reasonably current, he answered "Yes" and for those he did not he answered "No". In those circumstances, Mr Bettles' opinions were based on reasonable grounds; and

(g) finally, as Mr Bettles submits there could be no misunderstanding on ASIC's part about whether he had inspected the 761 boxes of hard copy material at the time of lodging the s 533 Reports. In Mr Bettles' letter dated 14 March 2017 to ASIC in response to the 7 March Notice it was made plain that Worrells had collected the 761 boxes but that it did not have the resources to "meet the costs of properly separating and listing the records in these boxes".

735 The next question that arises concerns the MA Group Computer Records. ASIC alleges that in each of the s 533 Reports in answering "Yes" to the question "[h]ave you obtained or inspected the company's books and records?" Mr Bettles made a false declaration because he had not obtained or inspected 16 terabytes of computer records.

736 Mr Bettles submits that this claim fails because ASIC has not established that the 16 terabytes of computer records contained any "books and records" in relation to any of the 15 MA Group companies the subject of the s 533 Reports. That is so. There is no evidence about the content of the MA Group Computer Records. It is variously described as "records … saved on a server in the cloud" and "data from the old servers maintained by Members Alliance and Iridium Capital". In those circumstances I cannot be satisfied that it contained any "books and records" for the 15 MA Group companies the subject of the s 533 Reports and that therefore Mr Bettles made a false declaration as alleged.

737 In the event I am wrong about that and the MA Group Computer Records included "books and records" for the 15 MA Group companies I turn to consider whether, having not obtained or inspected those computer records, Mr Bettles made false declarations as alleged.

738 Mr Bettles submits that at the time of the s 533 Reports he and his staff had undertaken significant efforts to obtain books and records of the companies including:

(1) obtaining two computer towers from the Helensvale Premises;

(2) collecting some 800 boxes of physical records comprising the 761 boxes of intermingled books and records from the Helensvale Premises and additional boxes of records relating principally to Image Building Group, all of which were reviewed and

catalogued in a handwritten list, records from two storage facilities in Brisbane and Sydney and a further seven boxes of records relating to Provincial Property;

(3) obtaining MYOB records for six of the 15 companies the subject of the s 533 Reports;

(4) obtaining February 2016 management accounts for SS Residential, Capricorn Securities and Iridium Financial Planning; and

(5) obtaining bank statements for at least one of the companies.

739 Mr Bettles submits that in addition he and his staff made significant efforts to locate and take possession of the MA Group Computer Records but ultimately did not extract a copy of the data because there were insufficient funds to do so.

740 Mr Bettles submits that, on any sensible view, he obtained the books and records of the companies. He contends that while he had not extracted a copy of the computer records he had identified and located those records, ensured they would be preserved and had the ability to access them subject to meeting the costs of doing so.

741 Mr Bettles submits that an answer "Yes" to the question "Have you obtained or inspected the company's books and records?" could not reasonably be understood as conveying that a liquidator had taken physical possession of all of a company's books and records. Otherwise, a liquidator's answer would be false if there was even a single document of a company that had not been physically obtained.

742 It is true that Mr Bettles had taken steps to attempt to access the MA Group Computer Records but was unable to do so given the associated costs and having located those records he had ensured that they would be preserved. His letter dated 27 February 2017 to Levit8 Business IT Solutions, the company that seemed to hold the data, requested that "[i]f for whatever reason, your costs associated with the data storage cease to be met, we ask that you please ensure that the data is not archived or removed without providing the liquidators of [Iridium Holdings] with reasonable notice to preserve the data". While Mr Bettles knew where the data was and, at least for the time being, where it was stored and that the costs of that storage were being met, he had not obtained or inspected that data. To that end, on the assumption that the MA Group Computer Records contained books and records in relation to the 15 MA Group Companies for which the s 533 Reports were lodged, Mr Bettles' declaration in each s 533 Report that he had obtained or inspected the books and records for those companies was false.

743 Mr Bettles' submission about physical possession is not to the point. The point here is that Mr Bettles knew of the existence of the MA Group Computer Records and knew that he had not obtained them, in the sense of taking possession of them, nor had he inspected them. In those circumstances he should have answered "No" to the relevant question. A liquidator can only obtain or inspect those books and records of a company which he is aware in fact exist.

744 The final question to be resolved is whether by failing to obtain the MA Group Computer Records Mr Bettles, in turn, failed to discharge his obligations to obtain the relevant books and records of the companies in relation to which he lodged the s 533 Reports.

745 This allegation assumes that there is a duty on a liquidator to obtain relevant books and records of the companies in relation to which he or she lodges a s 533 report. But as is made plain in *Murdaca* (see [732] above) the duty to report under s 533 of the Corporations Act is limited: a report under s 533 of the Corporations Act must be genuine but it does not need to be correct or based on reasonable grounds. The report is to be made "as soon as practicable" after it appears that one of the relevant matters in subss 533(1)(a), (b) or (c) of the Corporations Act has arisen. A liquidator may form such a view before he or she has obtained all of the books and records of a company.

746 A liquidator is required to investigate the affairs of the company in liquidation but the extent of the investigations to be undertaken will be constrained by the available resources. Mr Bettles submitted that the extent to which a liquidator will be able to undertake investigations is also constrained by s 545(1) of the Corporations Act. He relies on s 545(1) of the Corporations Act in relation to the MA Group Computer Records noting that he did not extract a copy of those records because there were insufficient funds in the administration to do so. That is so:

(1) contrary to ASIC's submission that Mr Bettles never obtained a quote for how much it would cost to extract the computer records, the evidence before me established that Mr Bettles had made enquiries as to such costs which revealed it would cost approximately $2,000 to get a quote to determine the process and cost to extract the data (i.e. 2 hours to be spent by two people at approximately $450 plus GST per hour to "review the IT structure to ascertain – what it looks like – how old and/or regularly the data is backed up – how much space much (sic) each type of data takes (sic) up"). Mr Bettles' evidence was that the next stage of data collection would be to "build a server capable of holding the data" and "to then transport the server to the data centre and wire it into the current SAN (which they will treat as effectively one unit and copy

it as a whole) – to establish a remote access system for the new server within the data centre to ensure the data copying runs correctly – to then copy the SAN and NAS to the new server – return to the data centre to strip out and remove the new server and deliver it to [Worrells]". I would assume that the cost of this second phase, which involved extracting the data, would have been significantly greater;

(2) the external administrations were, as Mr Bettles explained, without funds. ASIC's contentions about Mr Bettles permitting funds to be redirected from the administrations are not made out;

(3) no funding was obtained from third parties, there is no evidence that third parties would have provided funding and, in any event, the operation of s 545(1) of the Corporations Act is not subject to an obligation on the liquidator to attempt to obtain funding; and

(4) ASIC relies on a file note of a meeting attended by Messrs Bettles and Carey with Adrian Edwards and Mr Super on 17 February 2017 in which Mr Edwards informed Messrs Bettles and Carey, among other things, that as recorded in Mr Carey's file note (as written):

> at the time a Mr Karl Mittsmangruber (now with MTAP) was the internal IT head. Mr Edwards advised that there were servers at the Rocket Building in Robina and those servers were ghosted by a second set in Helensvale (the second servers were not at Helensvale when our staff insepcted those premises). Mr Edwards suggested that Mr Karl Mittsmangruber may have a ghosted copy of the servers in his possession.

ASIC contends that Mr Bettles may have been able to obtain the computer records simply and inexpensively but he made no enquiries. Mr Bettles could not recall if enquiries were made of Mr Mittsmangruber after this meeting. In any event Mr Edwards said that Mr Mittsmangruber may have had a copy of the server, whether he did or not was not known nor, if he did, was the ease and the cost at which it could be obtained known.

747 Finally, a liquidator is not required to incur significant expenditure in getting in assets including books for the purpose of preparing a report: see *Wily* at [83] (at [451] above).

748 Having regard to those matters I am satisfied that Mr Bettles can rely on s 545(1) of the Corporations Act in relation to the incurring of a liability to obtain the MA Group Computer Records.

749 ASIC has not made out this aspect of its claim. It has not established that Mr Bettles failed to discharge his obligations as a registered liquidator to obtain relevant books and records of the companies in relation to which he lodged the s 533 Reports. Accordingly there are no matters arising from this claim and Mr Bettles' conduct to be taken into account for the purposes of subss 45-1(a), (b) or (e) of the IPS.

7. The Bradford Marine Liquidation (Sch D to the FASOC)

750 This part of ASIC's pleaded case concerns Mr Bettles' conduct as liquidator of Bradford Marine. The events, which are pleaded in Schedule D to the FASOC, occurred after the commencement of this proceeding and do not relate to the MA Group.

751 There are two aspects to ASIC's case:

(1) Mr Bettles' conduct in relation to the sale of Bradford Marine's business, as set out in [15]-[28] of Sch D to the FASOC (**Bradford Marine Conduct**); and

(2) Mr Bettles' contesting of an originating application seeking his removal as liquidator, as set out in [29]-[33] of Sch D to the FASOC (**Originating Application Conduct**).

752 In respect of the Bradford Marine Conduct and the Originating Application Conduct ASIC contends that:

(1) the conduct may be taken into account under s 45-1(4) of the IPS in determining the appropriate orders to be made under s 45-1(1) of the IPS. These are matters which the Court may take into account under subs 45(4)(a) as they indicate that Mr Bettles has failed to faithfully perform his duties and subs 45(4)(e) as Mr Bettles' alleged failure to act independently when agreeing to sell the Chose in Action (see [820] below), prefer the interests of creditors over his own interest and undertake any investigations, obtain legal advice as to the value of the Chose in Action and to inform creditors prior to accepting the offer is an omission likely to diminish public confidence in registered liquidators as a group; and

(2) the conduct may be taken into account either cumulatively with the matters referred to at [11]-[12] above or as an individual item of conduct.

753 Further, in Sch D to the FASOC ASIC contends that Mr Bettles breached:

(1) Liquidator's Duty No. 1 by agreeing to sell the Chose in Action without undertaking any investigations and without obtaining legal advice as to whether it was of value; and/or

(2) Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 5 by accepting the offer from Mr Clark for the purchase of the Chose in Action and by favouring the interests of having his own fees paid rather than placing the interests of the creditors first;

(3) Liquidator's Duty No. 4, Liquidator's Duty No. 5 and Liquidator's Duty No. 6 by failing to agree that he should be removed as liquidator in the circumstances evidenced in the originating application and/or failing to resign as liquidator; and

(4) Liquidator's Duty No. 7 by failing to consent to his removal as liquidator in the circumstances evidenced in the originating application.

7.1 Facts

754 Only Mr Bettles gave evidence in relation to the Bradford Marine liquidation.

755 The relevant facts are set out below.

756 Bradford Marine was incorporated on 3 October 2006. From about 31 October 2011, its sole director and shareholder was Martin Clark. Bradford Marine acted as the trustee of the Bradford Marine Unit Trust which was established on or about 5 October 2006.

757 Until around December 2020, Bradford Marine carried on a business of marine repair services from premises at Coomera, Queensland (**Bradford Marine Business**).

758 **Bradford Marine Services** Pty Ltd was incorporated on or about 14 April 2020. Mr Clark is its sole director and shareholder. On 2 December 2020 Bradford Marine Services activated its Australian Business Number (**ABN**).

759 On 10 December 2020 Bradford Marine Services registered the business name "Bradford Marine Services", with a principal place of business at G41, 76-84 Waterways Drive, Coomera, Queensland (**Coomera Premises**).

7.1.1 Sale of Bradford Marine to Bradford Marine Services

760 On 8 December 2020 Bradford Marine's plant and equipment was valued by All Asset Appraisals at $28,390 (see [785] below).

761 On 22 December 2020 Bradford Marine entered into a written agreement for the sale of the Bradford Marine Business to Bradford Marine Services as trustee of the Bradford Marine Business on a "walk in walk out" basis for the sum of $25,809.09.

762 From around 23 December 2020 Bradford Marine Services carried on the Bradford Marine Business from the Coomera Premises.

7.1.2 The liquidation of Bradford Marine

7.1.2.1 Pre-appointment

763 On 15 January 2021 Mr Bettles and James Robba were appointed as joint and several liquidators of Bradford Marine by resolution of the company's member, Mr Clark.

764 Mr Bettles recalls that, prior to his and Mr Robba's appointment to Bradford Marine, he had a number of pre-appointment discussions with Mr Clark and Craig Baker of Craig Baker & Associates, Bradford Marine's external accountant, and with representatives of Bradford Marine.

765 On 26 November 2020 Mr Bettles met with Messrs Clark and Baker to discuss the financial affairs of Bradford Marine and the nature and consequences of liquidation. During that meeting Messrs Clark and Baker discussed the structure of Bradford Marine, that it was a trustee company and the company's financial affairs, including the amount of cash at bank and its debtors and creditors. Mr Bettles recalls that he was also told that the company was being sued by Barry Jones for $550,000 and judgment was yet to be delivered, the company's business had been wound down and that Mr Clark wanted to wind up the company as it would have an amount owing to the ATO which it would not be able to pay.

766 Mr Bettles outlined in broad terms the nature and consequences of liquidation, including the nature of a preference, and informed Messrs Clark and Baker that the amount required for the company to be placed into a creditors' voluntary liquidation was $10,500.

767 Later that day Mr Bettles sent an email to Mr Baker attaching a director's questionnaire for completion.

768 On 23 December 2020 at around 10.40 am Mr Bettles had a telephone conversation with Mr Baker about the timing of the commencement of the liquidation of Bradford Marine and the sale of the Bradford Marine Business. During that telephone conversation, Mr Bettles asked Mr Baker whether Mr Clark was proceeding with the winding up of Bradford Marine, to

which Mr Baker responded that Bradford Marine had a day earlier sold its plant, equipment and stock to an entity associated with Mr Clark, that no money had changed hands but that the buyer had taken over Bradford Marine's employees and their entitlements, the value of which exceeded the value of its assets and that he would forward Mr Bettles a copy of the contract of sale. Mr Baker also informed Mr Bettles that there was no urgency for the liquidation to start before Christmas and that he would send the director's questionnaire in the new year.

769 By emails sent at 11.14 am that day Mr Baker provided Mr Bettles with a copy of the contract for sale of business dated 22 December 2020 (**Business Sale Contract**) between Bradford Marine as trustee for the Bradford Marine Unit Trust as seller and Bradford Marine Services as trustee for the Bradford Trust as buyer and scanned pages containing the contract date and signed execution blocks. Relevantly, the Business Sale Contract provided:

(1) at item J of the Items Schedule that the business was marine repair services located at the Coomera Premises;

(2) at item L(a) of the Items Schedule that the price was $25,809.09 (exclusive of GST);

(3) at item L(d) of the Items Schedule that the business is sold on a "walk in, walk out" basis; and

(4) at item P of the Items Schedule that the completion date was 23 December 2020.

770 By email sent at 11.42 am that day David Hanton, business manager of Bradford Marine, provided Mr Bettles with a completed director's questionnaire dated 17 December 2020.

771 By email dated 14 January 2021 Mr Hanton provided Mr Bettles with a bundle of documents for Bradford Marine which included, among others:

(1) a completed "Form 507 – report on company activities and property" (**ROCAP**);

(2) a members' resolution dated 15 January 2021;

(3) a completed "Form 509 – Presentation of summary of affairs of a company";

(4) a deed of variation of trust deed dated 15 January 2021;

(5) a directors' resolution dated 15 January 2021;

(6) a signed acknowledgement of the liquidators' proposed basis of remuneration; and

(7) a signed pre-appointment conflict check questionnaire.

772 The ROCAP recorded the following creditors under the heading "Amounts the Company owes to its creditors":

(1) Helicopter Aerial Surveys for the sum of $410,000.00, comprising $260,000 and $150,000;

(2) Australia and New Zealand Banking Group for the sum of $9,545.56;

(3) WorkCover Queensland for the sum of $6,101.51; and

(4) ATO for the sum of $55,534.71.

7.1.2.2 Reports to Creditors

773 On 15 January 2021 Bradford Marine was placed into liquidation with Messrs Bettles and Robba appointed as liquidators.

774 On 22 January 2021 Messrs Bettles and Robba issued a report to creditors in respect of the liquidation of Bradford Marine for the purposes of voting on proposals without a meeting (**First Report to Creditors**).

775 The First Report to Creditors:

(1) under the heading "Summary of the Company's affairs" noted that Messrs Bettles and Robba had received the ROCAP and a Form 509 – Presentation of summary of affairs of a company from Mr Clark;

(2) in Schedule 6 set out a summary of a list of known creditors as recorded in the ROCAP; and

(3) under the heading "Indemnities and up-front payments" noted that the liquidators had been provided with an upfront payment of $10,500 by Mr Clark as follows:

> We have been provided an upfront payment of $10,500 to cover our initial remuneration and expenses associated with the creditors' voluntary liquidation of the company. The money is currently held in our firm's trust account and will not be drawn to meet my remuneration until such time that it is approved by creditors. …

776 On 14 April 2021 Messrs Bettles and Robba issued a statutory report to creditors of Bradford Marine (**Second Report to Creditors**).

777 The Second Report to Creditors provided, among other things, that:

(1) Bradford Marine as trustee for Bradford Marine Unit Trust entered into an agreement with Bradford Marine Services as trustee for the Bradford Trust to sell the Bradford Marine Business and its remaining assets. It included:

> As part of the sale contract, the company sold the following:

- Business known as "Bradford Marine" located at 'G41' 76-84 Waterway Drive, Coomera Qld 4209 (including telephone numbers, email addresses and website addresses), sold on a "walk in/ walk out" basis,
- The following items of plant & equipment (noting that the company paid All Asset Appraisals, an independent valuer to provide them with a report detailing the auction value of the assets held by the company in its capacity as trustee for the Bradford Marine Unit Trust as at 9 December 2020, a copy of which has been provided to our office):

…

The purchase price under the sale contract was $25,809.09. Whilst a valuation report was obtained on the physical assets (as noted above), no valuations were obtained in respect to the company's business and/or other intellectual property.

According to the company director, the purchase price was not remitted to the company, rather the purchaser took over the company's outstanding employee entitlements in full and final consideration for the purchase price. A summary of the company's outstanding employee entitlements (as provided to our office by the company's external accountant) is as follows:

Leave Type	**Amount Owed**
Annual Leave	24,175.15
Long Service Leave	44,701.74
Personal/ Carer's Leave	75,577.45
TOTAL	**$144,454.34**

(2) the pre-appointment sale of the Bradford Marine Business to Bradford Marine Services may be a transaction which is voidable under the Corporations Act;

(3) the liquidators had written to an independent marine industry consultant, seeking a quote to review the sale agreement, asset valuations and company financials in order to provide advice on whether the business was sold for an appropriate value;

(4) there were insufficient funds in the liquidation to indemnify the liquidators for the cost of investigating the pre-appointment sale of the Bradford Marine Business and, if warranted, pursuing potential recovery action; and

(5) if any creditor would like further investigations to be conducted and was interested in contributing to such costs, they were requested to contact the liquidators within one month of the date of the Second Report to Creditors to discuss the purpose and extent of that funding.

778 The Second Report to Creditors further provided under the heading "Assignment of potential claims" that if creditors were not interested in funding the liquidators to continue investigations but would like to pursue a matter themselves, then they may wish to purchase the rights to the action from the liquidators.

7.1.2.3 Investigations

779 A summary of the investigations undertaken by Messrs Bettles and Robba into the winding up and affairs of Bradford Marine was reported to Bradford Marine's creditors in the Second Report to Creditors and an advice to creditors dated 19 July 2021 (**Advice to Creditors**).

780 On 15 January 2021 Mr Bettles instructed his staff to undertake the following steps as was standard practice for liquidations:

(1) conduct a general search of the director;

(2) conduct an ownership search of www.bradfordmarine.com.au;

(3) write to power and telephone suppliers to advise of the liquidators' appointment;

(4) conduct a PPSR search and send a notice to any creditors that appear on the search and in the ROCAP;

(5) conduct a motor vehicle search; and

(6) search for any unclaimed moneys belonging to the company via the Moneysmart government website.

781 Mr Bettles also instructed Worrells staff to undertake a number of tasks including:

(1) telephoning Mr Hanton to ascertain whether they could obtain a backup of Bradford Marine's computer accounting system;

(2) telephoning Craig Baker & Associates to ascertain whether they could obtain a computing accounting backup and the last two sets of financials and tax returns which had been prepared. Mr Bettles' file note records "[w]e want to check that what the director provides us with is the same as what the accountant has";

(3) telephoning Lili Bulyk, who acted for Bradford Marine on the Business Sale Contract to ascertain whether they had any company records and whether they had done any other work for the company;

(4) logging into the ATO portal to send a form regarding the appointment or cessation of a representative of an incapacitated entity and requesting direct access; and

(5) sending a freedom of information request to the ATO.

There was evidence before me of the searches and tasks referred to in the preceding paragraph being undertaken by Mr Bettles and his staff between January 2021 and July 2021. It is not necessary to set them out.

782 Later that day Mr Bettles instructed his staff to investigate the pre-appointment sale of the Bradford Marine Business. Mr Bettles' file note records:

> The accountants notes that the company sold its business on or about 22 December 2020.
>
> Please establish whether the sale was at market value, whether the sale price was paid, and how the sale price was disbursed. Start by obtaining:
>
> 1. Fully signed contract. What we have above seems to only be parts of the sale contract and doesn't include any list of what was sold
> 2. How the sale price was determined. eg. valuation, agent appraisal.
> 3. How the employee entitlements were calculated
> 4. How the sale price, including any surplus, was disbursed. I don't think any money changed hands but please check.

783 On 18 January 2021 Ms Moore of Worrells sent an email to Mr Baker referring to the appointment of Messrs Bettles and Robba and requesting that he provide a number of records in relation to Bradford Marine. The email states:

> … I ask that you kindly provide the following records in respect of the company:
>
> 1. Access to the company's accounting records/software (eg. Xero, MYOB etc.)
> 2. Last two years financial statements
> 3. Last two years taxation returns
>
> Further, I understand that the business was sold prior to our appointment. In that regarding would you please provide the following:
>
> 1. Copy of the complete, signed sale contract;
> 2. Details of how the sale price was determined. (eg. valuation, agent appraisal);
> 3. Particulars of the employee entitlements and how they were calculated;
> 4. Confirmation if the sale price was paid to the company and if relevant, how any surplus funds were disbursed.

784 By email dated 20 January 2021 Heidi Hoy, accountant at Craig Baker & Associates, responded to Ms Moore's email attaching, among others, a valuation report dated 9 December 2020 prepared by All Assets Appraisals (**Valuation**).

785 The Valuation provided that as at 8 December 2020 All Asset Appraisal's estimate of the auction value, that is the "value which is the minimum price one would expect to obtain at a properly advertised and conducted auction sale held either on the site or in the Auctioneer's rooms for each of the items listed on the basis that substantially the whole of those items are offered for sale at the one time", of Bradford Marine's plant and equipment was $28,390.

786 On 30 March 2021 Mr Robba sent a letter to Mr Hanton and Craig Baker & Associates requesting further information in relation to:

(1) the sale of the Bradford Marine Business to Bradford Marine Services as trustee for Bradford Trust. Noting that the purchase price "wasn't actually remitted to the company" and that the purchaser took over the company's outstanding employee entitlements in consideration for the purchase price, Mr Robba requested Mr Hanton to respond to the following queries:

> 1. Please confirm that the above information noted in respect to the sale contract are correct (i.e. the assets listed above were all that were included in the sale, the purchaser took over the above mentioned entitlements owing to employees in consideration for the sale).
>
> 2. The sale contract refers to certain plant & equipment sold as (Unencumbered – Refer to Schedule "A", Leased – Refer to Schedule "B" and Rental Agreements – Refer to Schedule "C"), given our office doesn't appear to hold copies of those schedules (only a copy of the assets valuation report undertaken by All Asset Appraisals), can you please forward copies to our office.
>
> 3. The above mentioned outstanding employee entitlements don't include any superannuation. According to the company MYOB records, $19,481 was owed in superannuation upon the liquidators' appointment. Please confirm as to whether all superannuation was paid to former employees prior to the liquidators' appointment.
>
> 4. Did the purchaser take over the company's lease at G41' 76-84 Waterway Drive, Coomera Qld 4209? If not, did the company recover its rental deposit (as noted in the Bradford Marine Unit Trust financials for the period ending 30 June 2020) prior to the liquidator's appointment.

(2) the sale of motor vehicles prior to the liquidators' appointment that were identified in Worrells' review of the company's records; and

(3) the sale of other assets prior to the liquidators' appointment that were identified in Worrells' review of the company's records.

787 By email dated 6 April 2021 Ms Moore sent a letter on behalf of Mr Bettles to Ms Hoy which stated:

As part of our investigations into the affairs of the company we have reviewed the company's both internally and externally produced financials and in that regard, we note:

- according to the company's balance sheet prepared by your office, as at 30 June 2020, the Clark Discretionary Trust was indebted to the company in order of $206,572. Enclosed is a copy of the balance sheet for your ease of reference.
- on 15 February 2021, we issued a demand upon Ultimate Marine Interiors Pty Ltd ATF The Clark Discretionary Trust for the outstanding amount. In response, Mr David Hanton provided a more contemporary set of company financials. Relevantly, we note the Clark Discretionary Trust loan account was reduced to $51,703.16.
- we have now reviewed the company's bank statements and advise that we did not identify any payment received by the company from the Clark Discretionary Trust, during the relevant period.

In light of the above, we ask that you please provide your working papers to show how the loan account was accounted for and any explanations as to the loan account balance and its apparent reduction.

788 A file note dated 9 April 2021 on Worrells' file in relation to "610 Recoveries – 588FA Preferential Payments (Martin Clark – Director)" prepared by Ms Moore included (as written):

It could be alleged that the director improperly used his position as officer of the company, to gain an advantage for himself to the detriment of the company as:

- As officer of [Bradford Marine], he sold the business to [Bradford Marine Services] of which he is the sole director and shareholder.
- He caused the company to not receive any payment for the sale of business, due to the new entity instead taking over the company's employee entitlements. Of those entitlements his personal entitlements totalled $62,108 (for annual leave, long service leave and personal leave)
- If the company had gone into liquidation Mr Clark's entitlements would have a priority amount of $1,500. And $32,506.98 f or "personal leave" would not be admitted in the liquidation.

Accordingly, as officer of the company he caused the company to sell it's business to a company that he is the sole director and shareholer, f or no exchange of funds, caused the company to become assetless owing creditors a total amount of $336,755 and allowed his employee entitlements to be retained in the new entity in the amount of $62,108, which in the liquidation would be no value as a dividend is not likely.

Creditors are advised that pursuant to section 556 of the Corporations Act 2001 ("the Act"), claims for outstanding employee entitlements are given priority over debts owing to non-priority unsecured creditors. However debts owed to excluded employees are capped at a priority payment of $2,000 in respect to outstanding w ages and superannuation, $1,500 in respect to leave and redundancy entitlements. Excluded employees are defined as a person who has been a director of the company at any time during the tweelve month period before the company is wound up.

789 By emails dated 11 May 2021 and 9 August 2021 Art Wannasri, senior file accountant at Worrells, followed up the requests in Mr Robba's letter dated 30 March 2021. However, Mr Bettles said that no substantial response was ever received.

790 Mr Bettles' evidence was that there were insufficient funds in the liquidation of Bradford Marine to undertake investigations and to obtain the legal advice that he required, including as to the value of the Bradford Marine Business in relation to its sale to Bradford Marine Services.

7.1.2.4 Valuation of the Bradford Marine Business

791 By email dated 6 April 2021 Mr Robba sent a letter to Martin Lewis of Lewis Marine seeking a fee estimate to provide an opinion of the value of the Bradford Marine Business, including goodwill and other intangible assets, at the time that business was sold. The letter enclosed, among other documents, the Valuation and the Business Sale Contract.

792 There was no evidence before me as to Mr Lewis' qualifications other than Mr Bettles' description of Mr Lewis as an "independent expert" with "some experience" in the marine business. In cross-examination, Mr Bettles said he did not know whether Mr Lewis was an accountant nor whether he had any qualifications in business valuation.

793 On 8 April 2021 Mr Robba had a telephone conversation with Mr Lewis. Mr Robba's file note of that conversation records (as written):

> Call in from Martin Lewis, who has had a preliminary review of the documents:
>
> - Notices that the financials had no provision for potential losses from the litigation
> - Marine industry has boomed during COV D as people can't travel, so spending money on their boats and travelling around Australia
> - Margain company had on its everyday sales/ works they did for customers was approx 7.5%, whislt he suggest industry normally aims at 20%
> - Based on documents, it appears company had no real value above what it was sold for Martin asked for my details and stated he would send me an email shortly.

794 On 14 April 2021 Mr Lewis sent an email to Mr Robba which included:

> Going to Gold Coast City Marina today to take a quiet look at the subject. Spoken to a friend who is the original developer of the complex and has an opinion.
>
> I had a similar business in Sydney with 34 staff and sub-contractors which I sold in 1988. Even with over a thousand boats on my books the good will was worth little. Like Bradford I was a tenant. The main value was in the favourable lease I had negotiated.

795 Later that day Mr Lewis sent a further email to Mr Robba advising that he had visited the premises of the Bradford Marine Business, made enquiries and was of the opinion that the value of the Bradford Marine Business did not exceed its assets. The email included:

> Whilst the business has existed at the Gold Coast City Marina for 26 years it is in a highly competitive environment with similar and much larger businesses operating in the same precinct.
>
> The Bradford premises, workshop and adjacent hard stand are not in what I would call a neat and tidy state, which is generally not a good sign. Furthermore the range of services including boat sales and brokerage indicates to me a business that would be difficult to manage.
>
> I note in the most recent financials that the business has made a small loss despite the jobkeeper payment of over $50K. Whilst the Covid period has been difficult for some businesses, this has not been the case for the marine industry. My partner has a business up at that end of the coast selling fuel to boats. She had her second highest sales on record during that period. Similarly a good friend owns a large boat building company at Coomera and he has never been busier. Travel restrictions have been a blessing for the industry.
>
> Earlier results are showing $150K before tax profits but these are not very inspiring considering the turnover.
>
> I note a loan of some $206K to a trust which I assume is controlled by the proprietor is not mentioned in the All Assets Appraisals valuation but the writer was probably unaware of it. Otherwise I do not disagree with the valuation.

796 On 15 April 2021 Mr Bettles lodged a report pursuant to s 533 of the Corporations Act with ASIC. On the same day ASIC sent an email to Mr Bettles which referred to the s 533 report filed that day and stated:

> After considering your report, ASIC has decided not to commence an investigation into the matters raised.
>
> Accordingly, ASIC does not require you to submit a supplementary report. It is now a matter for you to determine how you should proceed with your administration.
>
> If, however, during your administration you find further evidence of offences, you should submit a supplementary report identifying the specific issues or concerns you wish to bring to ASIC's attention.

797 Although the Second Report to Creditors noted that as at 14 April 2021 there was approximately $10,500 in available funds, by reference to Worrells' trial balance report dated 17 May 2022, which details the total debits and credits for the liquidation, and general ledger report dated 17 May 2022, which details the cash at bank and payments for consultancy fees, legal fees and remuneration, Mr Bettles' evidence was that such funds were expended in the course of the administration.

798 According to Mr Bettles, the funds available in the liquidation were not sufficient to undertake in depth investigations, including for example:

(1) conducting a full business valuation and examination of parties to clarify any aspects that required more explanation;

(2) obtaining legal advice on whether the liquidators had a claim and to determine whether the potential defendants could satisfy any claim against them; and

(3) investigations as to the financial standing of Mr Clark and the purchaser of the Bradford Marine Business to ascertain whether there would be a financial benefit in pursuing recovery action against them.

799 The funds available in the liquidation were therefore expended on other matters, namely the standard preliminary investigations (see [780]-[781] above) including obtaining commentary from a marine expert on the purchase price.

800 As set out at [777] above, by the Second Report to Creditors Mr Bettles notified creditors of the issue with funding and invited them to indemnify him and Mr Robba for, or to contribute to, the costs of investigating the pre-appointment sale by Bradford Marine and, if warranted, pursuing recovery action. Mr Bettles said that at no time did a creditor offer to either indemnify him and Mr Robba or to contribute to the costs of undertaking further investigations or pursue any recovery action.

7.1.2.5 Helicopter Aerial Surveys

801 In about 2019 **Helicopter Aerial Surveys** Pty Ltd, commenced a proceeding in the **Federal Circuit Court** of Australia (now the Federal Circuit and Family Court of Australia) against Bradford Marine claiming the sum of $240,846.85 with interest as damages in tort for negligence and/or breach of contract.

802 On 30 November 2020 the Federal Circuit Court delivered judgment in that proceeding and Bradford Marine was ordered to pay to Helicopter Aerial Surveys the sum of $260,000, with costs to be taxed unless otherwise agreed: see *Helicopter Aerial Surveys Pty Ltd v Bradford Marine Pty Ltd* [2020] FCCA 3238.

803 On 11 December 2020 Dr Anthony Marinac of **Pacific Maritime** Lawyers & Consultants, the solicitors for Helicopter Aerial Surveys, wrote to Turks Legal, Bradford Marine's solicitors at the time. The letter demanded, among other things, payment of the judgment sum of $260,000

(**Judgment Debt**) within seven days and an offer to settle Helicopter Aerial Surveys' costs with a payment of $150,000.

804 On 11 December 2020 at 2.18 pm Mr Baker sent an email to Mr Bettles requesting that he call him and attached the letter referred to in the preceding paragraph.

805 Later that day Mr Bettles had a telephone conversation with Mr Baker who informed him that Mr Clark was aiming to place Bradford Marine into liquidation prior to going on the Christmas break because it was not in a position to pay the Judgment Debt.

806 By email dated 28 January 2021 to Mr Wannasri, Dr Marinac requested that he be provided with a copy of the ROCAP.

807 By email dated 29 January 2021 Mr Wannasri provided Dr Marinac with a copy of the ROCAP. Later that day Dr Marinac sent an email response which included:

> Thank you for this. I had understood that this form would indicate assets which were moved from Bradford Marine to associated entities in the period prior to liquidation. Is there another document available which will enable us to see this? Our client is very concerned that Mr Clark has simply liquidated the company in order to avoid the consequences of the judgment against him, and we are very keen to identify assets which might potentially be used to satisfy the judgment.
>
> Finally, we note that Bradford Marine's Facebook page continues to be frequently updated as though the company is an ongoing enterprise. This leads us to speculate that a phoenixing operation may be underway, with the social media accounts to be transferred to the new entity. We urge you to the greatest caution.

808 By email dated 19 February 2021 to Mr Wannasri, Dr Marinac sent a letter and completed voting forms for the creditors' meeting to be held on 22 February 2021 on behalf of Helicopter Aerial Surveys. The letter included:

> You may appreciate that the maritime industry in the Brisbane/Gold Coast area is a very small industry, and for those within the industry it can be easy to acquire information. Based on the observations made by various industry participants and reported back to our client, Bradford Marine has not missed a day's trading in consequence of this liquidation.
>
> We are instructed:
>
> a. that Bradford Marine's Facebook page continues to operate, with postings made as recently as 17 February; and
>
> b. that Bradford Marine's website remains in operation; and
>
> c. that Mr Benjamin McIntosh of GT-Mac, also a marine coatings business, has observed Bradford Marine's premises to be in full operation.
>
> Indeed Mr McIntosh has informed our client that he has recently lost a potential

contract to Bradford Marine.

We trust this information will assist you.

Our client respectfully seeks, in relation to this matter:

1. To be informed what the sole price was when the business was disposed from from the liquidated entity to another entity; and

2. To obtain a copy of the contract for sole; and

3. To obtain a copy of any valuation of the business undertaken in the course of the sole; and

4. To obtain a copy of any materials supplied by the liquidated entity to the purchasing entity in the course of that entity conducting due diligence on the sale; and

5. To obtain Profit and loss statements for the business for the past three years; and

6. To obtain details of any applications made by or on behalf of the business for assistance by way of Jobkeeper, or any similar grant or loan scheme operated by the Commonwealth or Queensland governments in relation to COVID-19, together with any responses to such applications.

809 By letter dated 3 March 2021 Mr Robba wrote to Pacific Maritime informing them that: the liquidators' investigations into the pre-appointment sale of the Bradford Marine Business were continuing and that they intended to advise all creditors of the results of those investigations in their upcoming report due to be issued in April 2021, i.e. the Second Report to Creditors; and as at the date of the letter, the liquidators did not hold copies of any applications made by Bradford Marine seeking financial assistance from the Commonwealth or Queensland Governments in relation to the COVID-19 pandemic but noted that the company's financial statement for the financial year ended 30 June 2020 suggested that the company received JobKeeper payments and cash boost payments from the Commonwealth government. The letter enclosed a copy of the Business Sale Contract, the Valuation, a copy of the company's leave balances as at 16 December 2020 detailing the employee entitlements which the purchaser agreed to take over as part of the sale and a copy of the company's financial statements for the financial years ended 30 June 2019 and 30 June 2020.

810 By letter dated 9 March 2021 to Mr Wannasri, Dr Marinac sought further information. The letter sought responses to the following questions:

1. Have you obtained trust deeds for the Bradford Unit Trust and the Bradford Trust? Are we able to see those?

2. Have you obtained the loan document, and any discharge paperwork relating to the loan, to the Clark Discretionary Trust? Are we able to see those?

3. As a practical matter, if the entire sale price of the business was basically the transfer of employee entitlements (much of which went to the Clarks anyway), how was this transfer accomplished? If no money changed hands, how was the transfer affected? Was the transfer consistent with both trust deeds? Can we please see any relevant instruments?

4. What steps are intended in order to audit the financials, noting that the litigation with our client does not appear in the financials, not even as a contingent liability, and that there is no evidence of the legal fees having been paid, or any liability incurred in relation to those legal fees?

5. What information can you supply us in relation to depreciation in 2020? If the value of the chattels is only $28,000, plus two motor vehicles and $10,000 in stock, which we would assume is mostly paint and therefore not subject to depreciation, then how do they end up with $45,000 in depreciation?

6. Was a valuation of the business performed prior to the sale, noting that the current valuation is simply a valuation of plant and equipment?

7. In relation to goodwill and business reputation, are you able to confirm the statements on the Bradford Marine website to the effect that the company has been operating since 1995 and that "our bespoke marine repairs and maintenance services have gained a reputation within the industry with marine craft arriving from all over the world."? What, if any, value was attached to this?

8. In relation to goodwill and business reputation, are you able to confirm whether any value has been attached to the fact that Bradford Marine in Australia has been named (we assume deliberately) with the same name as Bradford Marine in Fort Lauderdale in the United States of America, being one of the largest yacht, superyacht and large vessel refitters in the world?

9. Can you provide us with any information which was available and utilised during assessment of the business value regarding an assessment of the market, potential market growth, and position in the market of this company, to the extent that these things affect value and to the extent that they affected valuation of the business?

Finally, can you please give us any information about the appropriate trigger for you to make a report of potential illegal phoenixing to ASIC? Regardless of the final numbers, it seems clear at this point that the business was sold only for the value of its assets, regardless of the fact that it carried with it a quarter of a century's worth of goodwill. It seems to us that the position and prospects of the business must have had value because if the Clark family (howsoever constituted) was really intending to divest itself of a failing business, the sale would have been to an arm's-length third party. We would appreciate more clarity about when you are likely to consider placing this issue before ASIC.

811 Later that day Mr Bettles responded to Dr Marinac's letter. Mr Bettles informed Dr Marinac, among other things, that:

(1) a liquidation and an audit were different processes and that liquidators do not ordinarily have the financials of the insolvent company audited but that if Helicopter Aerial Surveys would like for the financials to be audited then the liquidators would attempt

to obtain a fee estimate for Helicopter Aerial Surveys' consideration. As there were insufficient funds in the liquidation to meet the costs of an audit Helicopter Aerial Surveys would need to pay the audit costs;

(2) the liquidators had not located any further information with respect to depreciation;

(3) the liquidators were not aware of any current valuations other than those provided to Pacific Maritime;

(4) any goodwill attached to the Bradford Marine Business was reflected in the Business Sale Contract and Valuation; and

(5) the liquidators were not involved in the Business Sale Contract and Valuation.

812 On 25 March 2021 Mr Bettles met with Dr Marinac and Mr Jones. Mr Bettles' file note of that meeting includes (as written):

> Meeting with Anthony Marinac from Pacific Maritime Lawyers and Barry Jones from Helicopter Surveys regarding:
>
> 1. from where they sit the sale of the company's assets looks suspicious
>
> 2. throughout the proceedings the director was antagonistic towards Barry, but Barry never had any personal animosity towards the director
>
> 3. I clarified that prior to meeting with the director and accountant I had no previous involvement with the company and therefore I was trying to find out what happened in respect of the sale just as much as them
>
> 4. I outlined the investigations generally undertaken by liquidators and what appears in the statutory report, including that if funding was required we would seek funding and/or offer an actions for sale
>
> 5. as far as Barry could see nothing has changed in respect of the business; trading was as normal
>
> 6. we discussed that ASIC was more likely to pay attention to the matter if they lodged a complaint
>
> 7. Barry is interested in pushing the matter because of the principal not because he needs the money. He had intended to donate the recoveries to a charity run by his wife providing education to kids in Asia
>
> 8. they don't understand why insurance has not paid, because they suspected insurance was paying the costs of Turks to defend the matter. They will email me the contact details at Turks so that I can try and get their file, and also see if they can dig up the details on the insurer
>
> 9. they noticed that the amount of depreciation claimed in the balance sheet is greater than the value of the assets.
>
> 10. the evidence put on by the director at trial was that the company did 100 anti-foul treatments a month, so that don't believe the business wasn't worth much. They think it was a good business that took on a job that they shouldn't have.

11. they will provide us with what details they can about the lawyer and insurer, and then wait for our report and possbily meet us after that.

7.1.3 The Bradford Marine Conduct

813 On 25 May 2021 Mr Bettles as liquidator of Bradford Marine sent a letter to Dr Marinac. The letter included (as written):

> By way of update, I have now received an opinion from an independent marine industry consultant regarding the sale of the company's business and remaining assets. Based upon that advice the liquidators are of the opinion the value of the business didn't exceed the value of its remaining assets and have no objections to the prior valuation given in respect to the company's remaining assets by All Asset Appraisals.
>
> As such, as there are only limited funds are held in the administration, the liquidators will be finalising their investigations in respect to the sale.
>
> I note however that your client has expressed an interest in acquiring the right to an action from the liquidators.
>
> As part of that process, the liquidators need to make a determination in respect to the value of the assignment, as well as the potential costs and/or benefits to the administration. In doing so, the liquidators also have an obligation to consult creditors pursuant to division 100-5 of the *Insolvency Practice Schedule (Corporations) 2016* which states that before assigning a right to sue, the liquidators must give written notice to the creditors of the proposed assignment.
>
> In the circumstances, to enable the liquidators to further consider your client's proposal, would you please provide our office with:
>
> 1. A copy of a proposed deed or agreement setting out the terms of the assignment.
>
> 2. A letter setting out why it is in creditors interest to accept the deal and the likelihood of success (There may be benefit in that letter being in a format which I can annexe to the report to creditors).
>
> 3. A non-refundable contribution of $5,500 to cover the costs issuing a report to creditors, responding to creditor enquries and for the liquidators' independent legal costs in considering the proposed assignment (For the aviodance of doubt, the amount herein requested is in addition to and is distinct from any amount your client may wish to offer for the assignment).

814 By letter dated 5 July 2021 Dr Marinac responded to Mr Bettles proposing that the "right to pursue Bradford Marine for creditor-defeating dispositions" be assigned to Helicopter Aerial Surveys for the sum of $5,500 (inclusive of GST) and enclosed a draft deed between Worrells and Helicopter Aerial Surveys in respect of that assignment.

815 Relevantly the draft deed included the following provisions:

(1) by cl 6 that Worrells agrees to unconditionally assign to Helicopter Aerial Surveys the exclusive right to:

a. commence and maintain any action against [Bradford Marine] or any other associated person or entity in relation to any matter which [Helicopter Aerial Surveys] might alleged to be a Creditor-Defeating Disposition under s.588FDB of the Corporations Act 2001: and/or

b. commence and maintain any other action against [Bradford Marine] or any other associated person or entity under any provision of statute, common law, or equity intended to recover any assets which [Helicopter Aerial Surveys] says order properly to have been considered assets of [Bradford Marine] at the time it entered administration; and/or

c. commence and maintain any other action against [Bradford Marine] or any other associated person or entity under any provision of statute, common law, or equity intended to recover damages for any unlawful activity associated with activities generally described as "phoenixing"; and

d. commence and maintain any interlocutory, cognate, or other action related to any of the causes of action above

(2) by cl 9 the payment by Helicopter Aerial Surveys of the non-refundable sum of $5,500 in consideration for Worrells' undertakings in the deed;

(3) by cl 11 an unconditional and irrevocable indemnity by Helicopter Aerial Surveys against any and all demands, claims, suits, actions, damages, liabilities or losses suffered or incurred by Worrells in respect of any action commenced by Helicopter Aerial Surveys; and

(4) by cl 14 that Helicopter Aerial Surveys has the right to unconditionally assign any or all of the choses in action assigned under the deed, subject only to a requirement to inform Worrells in writing of the assignment.

816 Mr Bettles observed that the proposal and the proposed deed of assignment did not provide for:

(1) any return to the liquidation of Bradford Marine from any fruits or proceeds of any proceedings commenced by Helicopter Aerial Surveys or any subsequent assignee;

(2) the provable claim of Helicopter Aerial Surveys in the liquidation of Bradford Marine being reduced in whole or in part by the fruits or proceeds received by Helicopter Aerial Surveys or any subsequent assignee from successfully prosecuting the chose in action assigned under the proposed deed;

(3) any further assignee of any chose in action assigned under the proposed deed to be conditional upon the assignee providing an indemnity to him and Mr Robba.

817 Accordingly, the proposal did not appear to Mr Bettles to be in the interests of creditors generally and was solely in the interests of Helicopter Aerial Surveys or any subsequent

assignee and it did not provide for any funds to be paid by Helicopter Aerial Surveys for the liquidators to seek legal advice in advance of execution of the proposed assignment or in payment of the other costs that would be incurred as identified to Mr Marinac. Obtaining legal advice regarding the assignment and the terms thereof before it was entered into was important to Mr Bettles in making a decision to proceed with entering into a deed of assignment with Helicopter Aerial Surveys.

818 On 19 July 2021 Messrs Bettles and Robba circulated the Advice to Creditors. The Advice to Creditors was sent to Mr Clark as a stakeholder, being the sole director and shareholder of Bradford Marine. Mr Bettles explained that it has been the practice of Worrells for many years to send to current shareholders a copy of any report issued to creditors to ensure that they are kept informed of matters relevant to the insolvent administration of the company.

819 By the Advice to Creditors Messrs Bettles and Robba notified Bradford Marine's creditors of the proposed assignment of the chose in action to Helicopter Aerial Surveys pursuant to s 100-05 of the IPS. It provided as follows:

> The liquidators have received correspondence from solicitors acting for Helicopter Aerial Surveys Pty Ltd (being the largest known creditor of Bradford Marine Pty Ltd ("the company")), seeking to acquire a chose in action from the liquidators.
>
> Division 100-5 of the *Insolvency Practice Schedule (Corporations) 2016* states that the liquidators may assign any right to sue subject to giving written notice to creditors of the proposed assignment.
>
> Accordingly, the liquidators now give written notice that an offer to purchase a chose in action has been received, the details of which are outlined below, and stakeholders have until **5pm on 10 August 2021** to submit an expression of interest (ie. a competing bid) to purchase the chose in action. Please note that in addition to any amount you may wish to offer for the assignment, a further non-refundable upfront contribution of $5,500 would be required to cover the liquidators' independent legal costs in considering the proposed assignment and associated deed.
>
> The draft deed from Helicopter Aerial Surveys Pty Ltd sets out that the liquidators agree to unconditionally assign the exclusive rights to commence and maintain any:
>
> - action against the company or any other associated person or entity in relation to any matter under section 588FB, 588FDA and 588FDB of the Corporations Act 2001
> - other action against the company or any other associated person or entity under any provision of statute, common law, or equity intended to recover any assets which the assignee says ought properly to have been considered assets of the company at the time it was placed into liquidation
> - other action against the company or any other associated person or entity under any provision of statute, common law, or equity intended to recover damages for any unlawful activity associated with activities generally described as

"phoenixing", and

- interlocutory, cognate, or other action related to any of the causes of action above.

…

820 The Advice to Creditors then set out a summary of the basis for the chose in action (**Chose in Action**), noting that according to documentation provided to Worrells by Bradford Marine's director and former external accountant, on 22 December 2020 the company in its capacity as trustee for the Bradford Marine Unit Trust entered into an agreement with Bradford Marine Services as trustee for the Bradford Trust to sell the company's business and its remaining assets. Under the heading "What Happens Next?" the Advice to Creditors:

(1) requested creditors who were interested in submitting an offer to acquire the Chose in Action to submit their offer in writing before 5.00 pm on 10 August 2021;

(2) advised that the liquidators would review all offers received and contact the creditor who has submitted an offer which "in the liquidators' opinion will result in best commercial return to creditors" and that the successful creditor's offer would be accepted on a conditional basis, subject to payment of an upfront non-refundable contribution of $5,500 to cover the costs of assessing the offer, the liquidators' final assessment of the offer following receipt of legal advice and payment of the total amount due under the offer; and

(3) noted that the liquidators would obtain independent legal advice in respect of the offer and, based on the advice, Worrells would either accept or reject the terms of the offer.

7.1.3.1 Offer by Mr Clark

821 By email dated 26 July 2021 Shane Grant of Behlau Murakami Grant (**BMG Legal**) advised Mr Wannasri that he acted on behalf of an "interested party". The email provided as follows:

> I advise that I act on behalf of an interested party with respect to the liquidation of Bradford Marine Pty Ltd (In Liq).
>
> I refer to the Advice to Creditors issued by the liquidators on 19 July 2021, and in particular the call for offers to purchase the chose in action described therein by 5pm on 10 August 2021.
>
> In so far as you advise that the submissions of interest should be "in writing" and "submitted" to the liquidator, please confirm:
>
> 1. Whether an email containing the expression of interest is sufficient writing for the purposes of submitting the interest to purchase; and

2. The email address that the submission of the expression of interest should be sent to.

822 Later that day Mr Wannasri emailed Mr Grant advising as follows:

> At this stage, an email outlining the terms of the offer is sufficient (noting that if the offer is conditionally accepted, it will need to be set out in the form of deed for all parties to sign).

823 By email dated 10 August 2021 at 8.48 am Mr Bettles sent a letter to Dr Marinac advising that "another party has advised [Worrells] that they intend to submit an offer prior to the deadline". The letter continued:

> Given your request for additional information is predicated on your client's offer being accepted, which if there are other offers may not occur, then it seems inappropriate to address your latest queries.
>
> In the interim, I note however:
>
> - the liquidators have made a number of enquiries with the company's director, and Mr David Hanton (who I understand was the former business manager of the company), as well as the company's former external accountant.
>
> - since issuing the report dated 14 April 2021, my office has followed up the parties and to date, my office has not received a response to our outstanding queries.
>
> - as you may recall, my report to creditors dated 14 April 2021 requested that if any creditors were prepared to provide funding to meet the cost of further investigations and tasks outlined in the report to contact my office regarding the purpose and extent of the funding (noting that to date, no creditors have expressed an interest in providing indemnity funding to the liquidators).
>
> - I confirm that a report pursuant to section 533 of the Corporations Act 2001 was submitted to ASIC on 15 April 2021 (noting that these reports are submitted to ASIC by way of an online regulatory portal operated by ASIC and thus there are no contact details for an ASIC representative that I can provide).

824 On the same day at 9.40 am Dr Marinac sent Mr Bettles an email in which he wrote:

> Thank you for your letter. We note that in your letter to creditors of 19 July you identified Helicopter Aerial as the entity which had made an offer to purchase the assignment. This suggests that where such an offer is made, the offer is not made confidentially as among the creditors.
>
> We also note that in your letter this morning you stated that a "party" had made an offer, rather than stating that a creditor had done so.
>
> Our client is concerned that if another offer is made, it may be made by a person or party connected with Clark, or acting in the interests of Clark rather than in the interests

of creditors.

Our client therefore requires you to identify to all creditors the party to whom the assignment is made, in the event that the assignment is not made to Helicopter Aerial.

In the event that the assignment is made to a party connected to Clark, we expect instructions to make an application setting the assignment aside, on the basis that the assignment was not the assignment with the best prospects of securing a commercial return for creditors.

In the event that no other offer is made, our client stands ready to execute the assignment immediately.

(Emphasis in original.)

825 Later that morning, at around 11.30 am, Mr Bettles had a telephone conversation with Mr Grant who advised that his client would be interested in making an offer to settle the proposed action rather than to buy the action. Mr Bettles' file note records:

> Telephone in-Shane Grant from BMG Legal advising that his client may be interested in making an offer to settle the proposed action rather than making an offer to buy the action and Shane wanted to know my thoughts. Shane felt that settling the action may get rid of any rights creditors may have to pursue the action, which may still exist if he only buys the action. He didn't know what actions those might be and therefore couldn't convince me of his argument. After lengthy discussions I left it with Shane to decide what his client would do, but noted that I would probably need to tell creditors.

826 By email sent at 2.11 pm Mr Grant informed Mr Bettles that he acted on behalf of Mr Clark. Attached to the email was a letter which contained Mr Clark's offer to purchase the Chose in Action as follows:

> In response to your call for expressions of interest (ie a competing bid) to purchase the 'chose of action' as outlined by you in the Advice to Creditors with reference to the draft Deed received from Helicopter Aerial Surveys Pty Ltd, I am instructed to communicate an offer by my client to purchase the chose in action for a payment in the sum of:
>
> 1. Twenty-five thousand dollars ($25,000.00) for the purchase of the chose in action; and
>
> 2. Five thousand, five hundred dollars ($5,500.00) to cover the liquidators' costs of assessing the offer, as required by you at page 4 of your offer.

827 On 11 August 2021 Mr Bettles and Michael Murray of Murrays Legal exchanged emails in relation to the Chose in Action. Mr Bettles had met Mr Murray when he was the legal director of ARITA and personally knew that he had worked in insolvency law for many years and had published extensively in that area. Mr Bettles explained that neither he nor the liquidators formally retained Mr Murray and that he had simply contacted Mr Murray as a knowledgeable

acquaintance who might give him some guidance in respect of the assignment of the Chose in Action. In particular, Mr Bettles was interested in ascertaining whether Mr Murray was aware of any authorities dealing with the assignment of choses in action to the person who may be the defendant. Relevantly:

(1) by email sent at 10.45 am Mr Bettles said as follows:

> I need some help.
>
> I have a liquidation where two parties have bid to buy a possible action the liquidator/company has against the director.
>
> One party was the major creditor and the other party was the director. The creditor has already threatened that if we accept the director's offer they would apply to court to have the assignment overturned.
>
> I'm pretty sure I've read a case/commentary where it was suggested that the law does not prohibit the liquidator selling the action to the party who is likely to be a respondent to the action even if the buyer's intention is to quash the action, but I now can't find that case/commentary.
>
> As the expert in all things insolvency, do you recall a case/commentary?

(2) in his email sent at 11.21 am Mr Murray responded that he "[doesn't] think there is any case law" on point though he had seen some commentary in support and summarised some guidance from Dye & Co and from the United Kingdom Technical Guidance for Official Receivers. Mr Murray went on to say:

> I think the main thing is to get the proper price, or be seen to be getting it. It might look more problematic to sell to a director? On the other hand the director might be willing to pay a premium? The UK OR says that an IP should always try to settle first before assignment? I don't think we have that here but that also makes sense? Say if you sell a bankrupt's commercial right of action for misrepresentation in a contract, as an asset, would you as trustee try to settle first? In other words, the difference between an assignment to a director defendant and a settlement with a director possible defendant is not much different; in the latter case, s 100-5 does not come into it at all?

828 After considering Mr Murray's email, Mr Bettles formed the preliminary view that there was no reason why he should refuse to consider an assignment of the Chose in Action to Mr Clark. He considered Mr Clark's offer to be the best monetary offer and that it provided a contribution to enable legal advice to be obtained. Mr Bettles believed that obtaining legal advice was an important factor in making a final decision regarding any assignment.

829 By email dated 11 August 2021 Mr Bettles sent a letter to BMG Legal confirming that Mr Clark's offer had been accepted subject to:

(1) Mr Clark's payment within five business days of the non-refundable upfront contribution of $5,500 to Worrells; and

(2) execution by all of the parties of satisfactory documents, the liquidators confirming the assignment and payment of the assignment sum.

Mr Bettles requested BMG Legal to provide a draft of the document in respect of the proposed assignment within ten business days and advised that, upon receipt of the payment and the draft document, he would seek legal advice on Mr Clark's offer and revert to BMG Legal once that advice had been received.

830 Mr Bettles believed that Mr Clark's offer was significantly greater than that made by Helicopter Aerial Surveys. In circumstances where the liquidation was unfunded, the recoverability of further funds was uncertain and where, if Helicopter Aerial Surveys recovered an amount pursuant an assignment entered into with that company, that would benefit only Helicopter Aerial Surveys. If the Chose in Action, as defined under the deed proposed by Helicopter Aerial Surveys, was further assigned as contemplated by the terms of the deed, then the benefit would flow to that assignee. These circumstances reinforced to Mr Bettles the need to obtain legal advice before he and Mr Robba made a decision. If the legal advice was to the effect that an assignment with Mr Clark should not be entered into, then Mr Bettles would not have done so. Further, if the legal advice recommended that directions be sought from the Court as to whether the liquidators were justified in entering into an assignment with Mr Clark or, alternatively, were justified in entering into an assignment with Helicopter Aerial Surveys Mr Bettles would have instructed lawyers to apply to seek such directions.

831 Mr Bettles believed that the fact that all realisations from the sale of the Chose in Action would be consumed by the liquidation remuneration and costs was merely a consequence, and not the purpose, of accepting Mr Clark's offer on a conditional basis. He believed the same consequence would have resulted from acceptance of Helicopter Aerial Surveys' proposal (see [815] above).

7.1.3.2 Notification to Helicopter Aerial Surveys of conditional acceptance of offer

832 By email sent on 11 August 2021 at 12.03 pm Dr Marinac sought confirmation, among other things, from Mr Bettles as to whether another offer was received prior to 5.00 pm the previous day and that Mr Bettles will still provide notice under s 100-5(3) of the IPS if the assignment is proposed to be made in favour of someone other than Helicopter Aerial Surveys. Dr Marinac's email noted that, should Mr Bettles propose an assignment in favour of anyone

connected to Mr Clark or Bradford Marine "even tangentially", his client required that connection to be made explicit in Mr Bettles' notice.

833 By email sent on 11 August 2021 at 2.28 pm Mr Bettles sent a letter to Dr Marinac notifying Helicopter Aerial Surveys that Mr Clark had made a competing offer and that his offer had been conditionally accepted on the basis that it was more beneficial to the company's creditors. The letter stated:

> I refer to your recent correspondence in respect to your client, Helicopter Aerial Surveys Pty Ltd, and its offer to purchase the chose in action.
>
> I advise that Mr Martin Clark has submitted a competing offer to purchase the chose in action which is more beneficial than the offer submitted by your client. Mr Clark's offer has been accepted subject to:
>
> 1. remittance of the non-refundable upfront contribution of $5,500 to my office (required to cover the costs of the liquidators' independent legal costs in considering the proposed assignment and associated deed).
> 2. the outcome of independent legal advice sought in respect to the proposed assignment and deed.
> 3. execution of a mutually acceptable deed of assignment.
>
> Once the matter has been finalised creditors will updated by way of a report.

834 By his email response dated 11 August 2021 at 2.42 pm Dr Marinac informed Mr Bettles that BMG Legal was expecting instructions to take immediate steps and that Worrells made a decision that was "self-evidently calculated to defeat, rather than advance, the interest of creditors", failed to make proper enquiries as to debts owed to the business and failed to have the business properly valued by an appropriate expert.

835 By email dated 11 August 2021 at 6.00 pm Dr Marinac sent a letter to Mr Bettles informing him of Helicopter Aerial Surveys' view that there was no way in which an assignment to Mr Clark of the right to sue entities controlled by Mr Clark could possibly be in the interests of the creditors to whom Worrells had a fiduciary duty. Helicopter Aerial Surveys demanded that Mr Bettles take no steps in relation to the assignment and that he advise immediately that the assignment to Mr Clark would not proceed noting that, failing this, an urgent application may be made for Mr Bettles' removal as liquidator and for injunctive relief against the assignment.

836 On 13 August 2021 Mr Bettles had a telephone conversation with Dr Marinac to explain why he had decided to accept Mr Clark's offer on a conditional basis. Mr Bettles said that

Dr Marinac asked for the quantum of Mr Clark's offer which he refused to give on the basis that there were still a number of conditions to fulfil and if they were not fulfilled, then the sale would not proceed. During the course of their conversation they had an exchange to the following effect:

> Dr Marinac: You did not set a deadline tor final offers and my client is entitled to counter-bid.
>
> Mr Bettles: I was trying to avoid a "Dutch Auction" style by setting a deadline in the Advice given on 19 July 2021.
>
> Dr Marinac: There was nothing that prohibited a "Dutch Auction" style scenario.
>
> Mr Bettles: In this case I had preferred to set a final date for parties to submit the best offer. If Helicopter Aerial was assigned the chose in action, ran it, and made recoveries then those recoveries were for the benefit of Helicopter Aerial only and not for the benefit of the whole body of creditors. I can only consider the funds that would be received by Mr Robba and I on the sale, not the possible funds that would be received by one creditor being your client. My acceptance of Mr Clark's offer was conditional. If I receive legal advice to say that I cannot assign the chose in action, the assignment will not be made.

837 Later that day Dr Marinac sent an email to Mr Bettles referring to their telephone conversation that morning. The email stated:

> I would like to confirm my understanding of the content of that conversation please. As I understand it, the following represents a reasonable summary of your view.
>
> 1. The letter of 19 July was intended as an invitation to creditors to provide their best and final offer.
>
> 2. You have not spoken directly with Clark but you have had discussions with his accountant and his solicitor.
>
> 3. Whilst there is no caselaw on whether an assignment can be purchased by the defendant with a view to extinguishing it, there is regulatory guidance from the UK which seems to suggest this is allowable, and therefore any allegation that the assignment would merely protect a prior creditor-defeating disposition is irrelevant
>
> 4. Your view is that any offer which provides a higher amount to creditors is automatically more favourable to creditors, even if only by $100 (noting that the $100 figure was raised by me, not by you)
>
> 5. You are not prepared to disclose what offer has been made by Clark
>
> 6. You are not prepared to take into account the potential benefit to our client because that benefit would accrue just to our client, and not to creditors generally
>
> 7. You are now obtaining legal advice in relation to the proposed assignment, which you expect to receive in about 4 weeks

8. You will not be acceding to our client's demand that the proposed assignment not proceed

9. You are prepared to put all of this advice in writing, but not for some weeks until you have received legal advice regarding the assignment

If any of this is mistaken, I would be grateful for your most urgent written advice to that effect.

838 Mr Bettles explained the reason he adopted the best and final offer process was based on the following relevant considerations:

(1) upon receiving the offer and terms from Helicopter Aerial Surveys, he needed to assess the potential value of the assignment and notify Bradford Marine's creditors of the proposed assignment pursuant to s 100-5 of the IPS;

(2) the advice from Lewis Marine noted that the value of the business was not more than the amount for which it was sold;

(3) to date no creditors had advised any interest in funding further investigations into the pre-appointment sale of the Bradford Marine Business and/or any other matters outlined in the Second Report to Creditors (including an insolvent trading claim);

(4) the amount offered by Helicopter Aerial Surveys was not going to result in a dividend to Bradford Marine's creditors;

(5) as limited funds were available, a first and final offer process was the most time efficient and commercial way to allow potentially interested parties to put forward an offer and for that offer to be quickly assessed and finalised, again noting that it was likely there would be no return to Bradford Marine's creditors;

(6) in order to sell the Chose in Action at auction, he would have needed to come to a conclusion about what the liquidators were selling and prepare an agreement setting out the terms of the sale. In order to do so, Messrs Robba and Bettles would have needed additional funding to conduct further investigations, seek legal advice, prepare a contract of sale and engage an agent; and

(7) subject to the legal advice that was to be obtained, there appeared to be nothing precluding Messrs Robba and Bettles from entering into an assignment with Mr Clark.

7.1.3.3 Engagement of CML

839 On about 13 August 2021 Mr Clark provided $5,500 to Worrells to obtain legal advice.

840 On 13 August 2021 at around 10.07 am Mr Bettles had a telephone conversation with Derek Cronin of Cronin Miller Litigation (**CML**) for the purposes of engaging that firm to provide legal advice in relation to the assignment of the Chose in Action. Mr Bettles' file note records:

> Telephone out-Derek Cronin to give him the heads up about what has happened and what I need him to do. After much discussion we agreed that we would ask Derek for:
>
> 1. advice on whether the process we had gone through to offer the action was okay.
> 2. advice on whether we could complete a sale to Mr Clark and any changes to the draft deed
> 3. a draft letter to Pacific Maritime responding to their queries.

841 Mr Bettles instructed his staff to prepare a brief to CML enclosing relevant documents. His file note records:

> Art/Lee, as James requested please prepare the brief to [CML]. You will need to enclose at least all the advices to creditors, correspondence with Pacific Maritime (including recent emails & letters with threats) and [BMG Legal] about the assignment, references to AFSA, UK OR, and Dye & Co, my file note of the discussion with Mr Marinac today and his email about our conversation, Pacific Maritime's letter to the ATO Phoenix Taskforce, and note our WIP so that [CML] understands that creditors won't actually get a return.

7.1.4 The Originating Application Conduct

842 On 16 August 2021 Helicopter Aerial Surveys filed an originating application in the Supreme Court of Queensland seeking an order under s 90-15 of the IPS removing Messrs Bettles and Robba as joint and several liquidators of Bradford Marine and for an independent liquidator to be appointed.

843 On 23 August 2021 Mr Bettles had a telephone conversation with Kara James of CML in which he said to Ms James that CML was to appear at the hearing of the originating application on 25 August 2022 on behalf of Messrs Bettles and Robba and set out "all that had happened in the winding up". Mr Bettles' file note of that telephone conversation records:

> Telephone in-Kara James from [CML] who advised that counsel had spoken to Helicopter Aerial's counsel who had indicated that we are the meat in the sandwich of a personal issue between two guys who don't like each other. It seems Helicopter Aerial are anxious to have the matter head on Wednesday without a meeting of creditors, and so we agreed that we would appear, set out all that had happened, note that we didn't understand what we had done wrong to require replacement but in any event would abide by the orders of the court. It was agreed that we would prepare a draft of the affidavit and [CML] would investigate what the cases say on this point.

844 On 24 August 2021 Mr Bettles had a telephone conversation with Mr Grant in advance of the hearing of Helicopter Aerial Surveys' application. Mr Bettles' file note of that conversation records:

> Telephone in-Shane Grant from BMG Legal following up on the deed because with the court hearing tomorrow his client wanted to sure up his position. I said that given we are on notice of the application to have us removed, the applicant wants to proceed to have the matter heard tomorrow, and one of the grounds of the application seems to be that the applicant doesn't want the action sold to Shane's client, it is inappropriate for us to issue a draft deed in relation to the sale. I said that we would explain to the court what had happened, that Shane had put us on notice that his client reserved their rights to sue us if we don't complete, and that whilst we aren't fighthing the application we don't understand what we have done wrong to deserve being removed. I said I would let him know the outcome of the hearing.

845 Mr Bettles' evidence is that he now knows that the originating application was opposed on his and Mr Robba's behalf. He said that such opposition was contrary to instructions he gave to CML in his telephone discussion with Ms James on 23 August 2021. While Mr Bettles accepted in cross-examination that it is unusual that a lawyer would appear on an application and oppose removal when he had given instructions to the contrary, he was not challenged about his contemporary record of his instructions to CML.

846 On 25 August 2021 the originating application was heard by Boddice J in the Supreme Court of Queensland. The Court made orders removing Messrs Bettles and Robba as liquidators of Bradford Marine, appointing a new liquidator and that Helicopter Aerial Surveys' costs be costs in the winding up of Bradford Marine. Christopher Baskerville of Jirsch Sutherland was appointed as replacement liquidator.

847 Mr Bettles said that, as at the date of the hearing of the originating application, he had not received a request from any of Bradford Marine's creditors to call a meeting for the purpose of passing a resolution to remove him and Mr Robba as liquidators.

7.2 Consideration

848 As ASIC observes, the events the subject of this aspect of the claim against Mr Bettles arose after commencement of this proceeding in relation to the Bradford Marine liquidation. Despite that ASIC submits that this conduct may be taken into account cumulatively with the other conduct alleged in the proceeding under subs 45(1) and subs (4) of the IPS.

849 There are two aspects to the claim against Mr Bettles arising out of the Bradford Marine liquidation.

850 The first arises out of the proposed assignment by the liquidators of the Chose in Action to Mr Clark, the director of Bradford Marine. The Chose in Action was a claim for the alleged uncommercial sale of the Bradford Marine Business. The putative defendant to that claim was Mr Clark.

851 The facts relating to the process undertaken by Mr Bettles in relation to the sale of the Chose in Action and ultimately the assignment to Mr Clark are set out at [763]-[838] above.

852 ASIC contends that in selling the Chose in Action to Mr Clark, Mr Bettles breached:

(1) Liquidator's Duty No. 1 being to identify, take possession of and realise the company's assets, to investigate and determine the claims against the company and to apply the assets to the satisfaction of those claims in accordance with the statutory duty of priority because he agreed to sell the Chose in Action without undertaking investigations and without obtaining legal advice as to whether it was of value; and/or

(2) Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 5 by failing to act independently when accepting the offer from Mr Clark for the purchase of the Chose in Action and by favouring the interests of having his own fees paid rather than placing the interests of the creditors first.

853 In relation to these alleged breaches of duty ASIC notes that Mr Bettles' evidence is that he conditionally accepted that offer because it was more beneficial to Bradford Marine's creditors. ASIC submits that is not so because, regardless of which offer was accepted, all realisations from the sale of the Chose in Action would be consumed by the liquidation remuneration. ASIC observes that Mr Bettles also stated that if Helicopter Aerial Surveys had been assigned the Chose in Action it would be only to the benefit of Helicopter Aerial Surveys rather than creditors as a whole. ASIC submits that while Helicopter Aerial Surveys may have benefited (noting it was by far the largest creditor) there was no benefit to creditors with either offer. ASIC contends that the only beneficiary of the offer from Mr Clark was Mr Bettles' remuneration as liquidator and thus the inference arises that Mr Bettles was motivated by his own interests in having his remuneration paid when proposing to accept the offer from Mr Clark.

854 I turn first to the alleged breach of Liquidator's Duty No. 1 arising out of the sale of the Chose in Action. That duty as articulated by ASIC has a number of aspects to it. Mr Bettles submits that ASIC's claim is legally misconceived because Liquidator's Duty No. 1 does not exist.

855 ASIC relies on *Australian Securities and Investments Commission v* ***Edge*** (2007) 211 FLR 137; [2007] VSC 170 at [40] in support of its articulation of Liquidator's Duty No 1. In that case at [40] Dodds-Streeton J said:

> The liquidator's essential functions are to identify, take possession of and realise the company's assets, to investigate and determine the claims against the company and to apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority.

There Dodds-Streeton J was, to adopt her Honour's description, summarising the *functions* of a liquidator. Her Honour was not setting out the duties of a liquidator. I accept Mr Bettles' submission that Liquidator's Duty No. 1 as expressed by ASIC is not in fact a duty that is owed by liquidators.

856 But even assuming there was such a duty, ASIC has not established that Mr Bettles breached it. This is for two reasons. First, Mr Bettles identified the asset, i.e. the Chose in Action, took possession of it and was intending to realise it by effecting the assignment. Secondly, ASIC does not identify what investigations Mr Bettles should have undertaken in relation to the Chose in Action or more generally but, in any event, he did undertake investigations as summarised at [781]-[782] above. This included investigations into the sale of the Bradford Marine Business. As for legal advice, the sale to Mr Clark was conditional on Mr Bettles first obtaining legal advice and Mr Clark paying a non-refundable deposit to enable Mr Bettles to obtain that advice.

857 That leaves the alleged breach of Liquidator's Duty No. 1, Liquidator's Duty No. 2 and Liquidator's Duty No. 5 which ASIC alleges were breached by Mr Bettles' failure to act independently in accepting the offer from Mr Clark and by favouring the interests of having his own fees paid rather than placing the interests of creditors first.

858 Mr Bettles again submits that the claim is legally misconceived because it assumes duties which do not exist.

859 In relation to Liquidator's Duty No. 1 my comments at [854]-[855] above apply equally here.

860 Liquidator's Duty No. 2 is expressed as follows:

> Liquidators are required to become thoroughly acquainted with the affairs of the company and must not suppress and conceal anything that arises in the course of the investigation into the company …

861 In support of this duty ASIC relies on *Re Contract Corporation (Gooch's Case)* (1871) LR 7 Ch App 207 at 211. There the Court said in relation to the role of an official liquidator that:

> It is his duty to the whole body of shareholders, and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court.

862 As set out above, the functions of a liquidator include investigating the company's affairs but the extent of those investigations will depend on the nature of the company and the resources available to the liquidator to carry out those investigations.

863 Liquidator's Duty No. 5 is that liquidators are obligated to perform their duties in accordance with high standards of honesty, impartiality and probity. In support of that proposition ASIC relies on *Edge* at [44] and *Re Owston Nominees No 2 Pty Ltd (in liq) (rec and mgrs apptd)* (2013) 94 ACSR 500; [2013] NSWSC 538 at [24]. In *Edge* at [44] Dodds-Streeton J said:

> The extensive powers vested exclusively in the liquidator entail a corresponding vulnerability in the creditors, members and the public. The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith.

864 So much may be accepted. Insofar as a liquidator is a fiduciary, he or she is required to act bona fide in the best interests of the company and impartially between competing stakeholders.

865 Accepting that the duties as framed by ASIC exist, I turn to consider whether Mr Bettles has breached those duties in the manner alleged.

866 Liquidator's Duty No. 1 and Liquidator's Duty No. 2 are duties to identify and gather in assets and to investigate. The alleged breach here is a failure to act independently in accepting Mr Clark's offer and by Mr Bettles putting his own interests above those of the creditors. I cannot see how any aspect of that alleged conduct could amount to a breach of Liquidator's Duty No. 1 or Liquidator's Duty No. 2 as articulated by ASIC.

867 That leaves Liquidator's Duty No. 5.

868 Relevantly Messrs Bettles and Robba advised creditors that there were insufficient funds to further investigate the sale of the Bradford Marine Business or to pursue recovery action. They had invited creditors to contribute to those costs but no creditor took up that invitation (see

[777] and[800] above). That being so, the liquidators were not in a position to investigate further and pursue recovery action in relation to the sale of the Bradford Marine Business.

869 An available alternative was to assign the right to pursue a recovery action. The liquidators received two offers to acquire the Chose in Action: one from Helicopter Aerial Surveys and one from Mr Clark. Mr Bettles believed that Mr Clark's proposal was preferable because:

(1) it was for a significantly higher amount compared to Helicopter Aerial Surveys' proposal; and

(2) the Helicopter Aerial Surveys proposal did not provide any return to the liquidation of any proceeds of the proceeding or for Helicopter Aerial Surveys' provable claim in the liquidation to be reduced by any proceeds from the proceedings,

(see [828] and [830] above).

870 In those circumstances, and given that Mr Clark's proposal was made by a potential defendant to any proceedings concerning the sale of the Bradford Marine Business, it was appropriate that legal advice and, if so advised, directions from the Court, be obtained before making a final decision. Despite Mr Bettles' request, the Helicopter Aerial Services proposal did not provide for any funds to be paid for the liquidators to seek legal advice in advance of the execution of the proposed assignment with it. By contrast, Mr Clark's proposal did.

871 Mr Bettles' belief that Mr Clark's proposal was better than that received from Helicopter Aerial Services was genuinely held and, in the circumstances, reasonable. There is no evidence that Mr Bettles did not act independently in accepting it on the conditional basis that he did. Nor is there any evidence to support the contention that Mr Bettles acted in his own interests by preferring payment of his own fees over the interests of creditors. Mr Bettles explained that the fact that the $25,000 offered by Mr Clark would have been consumed by the liquidators' remuneration and costs was merely a consequence, not the purpose, of conditionally accepting Mr Clark's proposal. The same consequence would have resulted from acceptance of the proposal from Helicopter Aerial Surveys (see [831] above). There is no reason not to accept Mr Bettles' evidence in this regard, it is inherently plausible. Further, that Mr Clark's offer would, given its quantum, cover more of the liquidators' remuneration does not lead me to infer that Mr Bettles preferred his own interest over that of the creditors.

872 The second aspect of the claim arises out of Mr Bettles' failure to consent to Helicopter Aerial Surveys' application to remove him as liquidator. The relevant facts are set out at [842]-[847] above.

873 In relation to this aspect of its claim ASIC contends that Mr Bettles breached:

(1) Liquidator's Duty No. 4, Liquidator's Duty No. 5 and Liquidator's Duty No. 6, to exercise a particular professional skill and a high standard of care and diligence, to perform his duties with high standards of honesty, impartiality and probity, and to be seen to be independent of the company, by failing to agree that he should be removed as liquidator in the circumstances evidenced in the originating application and/or failing to resign as liquidator; and

(2) Liquidator's Duty No. 7, to complete the administration within a reasonable time and not to protract the liquidation unduly, by failing to consent to his removal as liquidator in the circumstances evidenced in the originating application.

874 ASIC submits that Mr Bettles' evidence is that he now knows the application to remove him as liquidator was opposed by his lawyers and that this was contrary to his instructions. ASIC contends that Mr Bettles provides no adequate explanation as to how the defence of the application was carried out contrary to his instructions and that, in any event, the effect of that opposition was to prolong the conduct of the liquidation.

875 Liquidator's Duty No. 5 is set out above. Liquidator's Duty No. 4, Liquidator's Duty No. 6 and Liquidator's Duty No. 7 are set out in Annexure A to these reasons. In summary, they concern the need for liquidators to exercise a particular professional skill and a high standard of care and diligence in the performance of their duties, the need for independence and the need to complete the administration of assets within a reasonable time and not to protract the liquidation.

876 Central to ASIC's claims that Mr Bettles failed to discharge his obligations in relation to this aspect of the Bradford Marine liquidation is the contention that Mr Bettles opposed the application to have him removed.

877 Mr Bettles submits that this contention is not made out and must fail because he instructed his solicitors not to oppose the application.

878 As set out at [843] above, Mr Bettles had a telephone conversation with his solicitors on 23 August 2021 during which, as recorded in his contemporaneous file note, he instructed his solicitor to appear on the application for removal of the liquidators and to "set out all that had happened, note that we didn't understand what we had done wrong to require replacement but in any event would abide by the orders of the court". Further, as set out at [844] above, on 24 August 2021 Mr Bettles had a telephone conversation with Mr Clark's solicitor, Mr Grant, in which, again as recorded in his contemporaneous file note, Mr Bettles informed Mr Grant that they would "explain to the court what had happened … and that whilst we aren't fighting the application we don't understand what we have done wrong to deserve being removed".

879 Notwithstanding the instructions Mr Bettles gave to his solicitor the removal application was opposed by the solicitor. Mr Bettles accepted in cross-examination that it was unusual for a lawyer to appear on an application and oppose it when he had given instructions to the contrary. However, it was not put to Mr Bettles that his evidence of his conversations recorded at [843]-[844] above and the contemporaneous file notes of those conversations were false. That being so I would accept Mr Bettles' evidence that he gave instructions to his solicitor to explain the position to the Court and to indicate that the liquidators would abide by the orders of the Court. It is implicit in those instructions that the liquidators did not intend to oppose the application for their removal.

880 The allegations of breach of duty are not made out.

881 In any event, there would have been nothing improper in opposing the application for removal given the circumstances described at [828]-[830] above. Accordingly, there could be no breach of any of the duties alleged arising out of a decision to oppose the application. Nor is there any evidence that, by failing to consent to the removal of the liquidators, Mr Bettles protracted the liquidation. The evidence is that the originating application was filed on 16 August 2021 and was determined on 25 August 2021. That is, it was dealt with in a period of just over one week.

882 For those reasons ASIC has not established that Mr Bettles breached any of the specified Liquidator's Duties in relation to the conduct complained of and it follows that there are no matters arising out of his alleged conduct in relation to the Bradford Marine liquidation that may be taken into account under s 45-1 of the IPS.

8. Relief sought by ASIC

883 ASIC submits that the Court can take into account the cumulative nature and effect of Mr Bettles' conduct under s 45-1(4) of the IPS and can also take into account each individual item of Mr Bettles' conduct, or any one or more item of the same taken in combination, for the purposes of s 45-1(4) the IPS.

884 ASIC has only established one of its many claims against Mr Bettles. That is Mr Bettles' failure to provide adequate disclosure in the DIRRIs in relation to the MacVicar Advice contrary to cl 6.10.3 of the ARITA Code. That failure was limited to two aspects of the DIRRIs: the frequency of contact with Mr MacVicar; and the period over which the work was performed. While there was non-compliance with a clause of the ARITA Code, a matter which I may take into account for the purposes of s 45-1(4) of the IPS, I am not satisfied that such conduct is to be taken into account having regard to the non-exhaustive matters that can be taken into account for the purposes of that subsection. While I accept that there should be full disclosure in a DIRRI, including meeting the requirements of cl 6.10.3 of the ARITA Code, the infractions here were, in the circumstances, minor, even taking into account that they were repeated in more than one DIRRI.

885 It follows that I am not satisfied that there are any matters to be taken into account for the purposes of s 45-1 of the IPS. Therefore there will be no requirement for the matter to proceed to a hearing for remedies and sanctions.

9. Conclusion

886 Given my findings, the proceeding should be dismissed with costs.

887 If either party wishes to make any application in relation to the costs of the proceeding, they should do so by filing submissions, not exceeding five pages in length, within 14 days. If submissions are filed then the other party has leave to file any submissions in reply, not exceeding five pages in length, within 14 days thereafter. Unless the parties request an oral hearing, any application made in relation to costs of the proceeding will be determined on the papers.

888 I will make orders accordingly.

I certify that the preceding eight hundred and eighty-eight (888)

numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Markovic.

Associate:

Dated: 18 August 2023

ANNEXURE A

SCHEDULE C to the FURTHER AMENDED STATEMENT OF CLAIM

Liquidators' Duties

1. Liquidators are required to identify, take possession of and realise the company's assets, to investigate and determine the claims against the company and to apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority: *ASIC v Edge* (2007) 211 FLR 137 at [40].

2. Liquidators are required to become thoroughly acquainted with the affairs of the company and must not suppress and conceal anything that arises in the course of the investigation into the company: *Re Contract Corporation (Gooch's Case)* (1871) LR 7 Ch App 207 at 211.

3. Liquidators are subject to the same statutory duties as directors: *ASIC v Dunner* (2013) 303 ALR 98; [2013] FCA 872 at [28].

4. Liquidators are 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, 499.

5. Liquidators are obligated to perform their duties in accordance with high standards of honesty, impartiality and probity: *ASIC v Edge* (2007) 211 FLR 137 at [44]; *Re Owston Nominees No 2 Pty Ltd (in liq) (rec and mgrs apptd)* (2013) 94 ACSR 500; [2013] NSWSC 538 at [24].

6. Liquidators must not only be independent of the company but must also be seen to be independent of the company: *Re National Safety Council of Australia, Victorian Div* [1990] VR 29; (1989) 15 ACLR 602; *Bovic Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612; 21 ACLC 1737; [2003] NSWSC 467 at [123].
7. Liquidators are under a duty to complete the administration of the assets within a reasonable time and not to protract the liquidation unduly: *Re House Property & Investment Co* [1954] Ch 576 at 612.

8. Liquidators are required to pay close attention to their obligations under the Code of Practice for Insolvency Practitioners: *Re Monarch Gold Mining Co Ltd; Ex parte Hughes* (2008) WASC 201 at [37]-[40].